Final Order Number DCA09-GM-027

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

KATHLEEN BURSON,

Petitioner,

vs.

CITY OF TITUSVILLE,

Respondent,

and

RAVI SHAH,

Intervenor.
_____/

DOAH Case No. 08-0208GM

FINAL ORDER

This matter was considered by the Secretary of the Department of Community Affairs following receipt of a Recommended Order Following Remand 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 December 11, 2007, the City of Titusville adopted an amendment to its comprehensive plan by Ordinance 72-2007 (Amendment). The Amendment changed the future land use designation of approximately 9.76 acres of land. Because the Amendment was adopted under the "small scale" process in Section 163.3187, Florida Statutes, the Department did not conduct a

compliance review and did not publish a Notice of Intent.[1]

On January 10, 2008, Kathleen Burson filed a Petition for administrative hearing regarding the Amendment. Ravi Shah filed for and was granted leave to intervene in support of the Amendment.

The final hearing was held on March 24 and 25 and April 4, 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 Petitioner. The Order recommended that the Department find the Amendment "in compliance."

On or about September 5, 2008, the Department entered an Order of Remand because it determined that Paragraph 52 of the Recommended Order contained an incorrect conclusion of law. The Administrative Law Judge subsequently entered a Recommended Order

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[1] The Amendment was processed by the City as a small scale because it changed the land use designation of a parcel totaling less than ten acres. See **Fla. Stat.** § 163.3187(1)(c)1. However, as found by the Administrative Law Judge, the subject land is "a portion of a 18.17-acre parcel of land." Recommended Order ¶ 4. The rezoning that was adopted at the same public hearing as the Amendment is for the entire 18.17-acre parcel, which indicates that the Amendment itself is part of a development that exceeds ten acres. Accordingly, the Amendment does not appear to meet the compliance criteria for a small scale. See Cochran v. City of Crestview, DOAH Case No. 07-5779GM (Final Order No. AC-08-002). Because this compliance issue was not raised by Petitioner, however, it is not properly before the Department and may not be considered in this Final Order.

Following Remand in which he again recommends that the Amendment be found "in compliance."

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 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

Petitioner did not file any exceptions to the original Recommended Order, but did file two exceptions to the Recommended Order Following Remand. These exceptions are directed at findings of fact that were not modified in any manner on remand. The City argues in response to the exceptions that the failure to file exceptions to the original Recommended Order constitutes a waiver of any right to file exceptions to unchanged findings of fact in the Recommended Order Following Remand.

The cases cited by the City hold that the complete failure to file exceptions constitutes a waiver of any right to contest findings of fact before the agency issuing the final order and any district court hearing a subsequent appeal. See Couch v. Commission on Ethics, 617 So. 2d 1119, 1124 (Fla. 5th DCA 1993); Environmental Coalition of Florida, Inc. v. Broward County, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991). These cases do not answer the question of whether Petitioner waived her right to file exceptions to the Recommended Order Following Remand by not filing exceptions to the original Recommended Order.

When it issued the Order of Remand, the Department did not adopt or reject any of the findings of fact in the original Recommended Order. The Department only rejected three

conclusions of law regarding the applicable standard of proof. The Administrative Law Judge's Recommended Order Following Remand amends the relevant conclusions of law to be consistent with the Order of Remand but otherwise contains the same findings of fact and conclusions of law as the original Recommended Order. At the end of the Recommended Order Following Remand, the Administrative Law Judge included a "Notice of Right to Submit Exceptions" in which he advised the parties that they "have the right to submit written exceptions within 15 days from the date of this Recommended Order."

The facts of this proceeding as set forth immediately above do not support a conclusion that Petitioner waived her right to file exceptions to the Recommended Order Following Remand. By including the "Notice of Right to Submit Exceptions" in that Order, the Administrative Law Judge clearly provided Petitioner with a new opportunity to file exceptions. Accordingly, the two exceptions are addressed below.

Exception One: Findings of Fact 23-27

Read very broadly, Petitioner's first exception seems to be directed at whether the record evidence supports the challenged findings. On this issue, Petitioner sums up her first exception as follows:

> The question that needs to be resolved is whether Petitioner introduced evidence at the

> hearing to show that the proposed small scale amendment was internally inconsistent with elements of the existing comprehensive plan.

Exceptions to Recommended Order at 1. In reviewing a Recommended Order, the question is not whether Petitioner submitted evidence at the final hearing: rather, the question is whether there is any competent, substantial evidence in the record to support the Administrative Law Judge's findings. See **Fla. Stat.** § 120.57(1)(l). Thus, Petitioner has not identified a legal basis upon which this exception could be granted, and the Department need not rule on this exception. See **Fla. Stat.** § 120.57(1)(k).

To the extent it may be read as alleging that the challenged findings are not based on any competent, substantial evidence, this exception is not supported by the record. As set forth in detail in the City's Response to Exceptions, each of the challenged findings is supported by competent, substantial evidence. Finding of Fact 23 notes that Petitioner presented no competent, substantial evidence regarding the functional values of the subject wetlands, which is supported by the record. Findings 24 and 25 accurately recite provisions of the City's comprehensive plan and the Florida Administrative Code. Findings 26 and 27 regarding the analysis of the functional value of the subject wetlands and the City's interpretation of its plan that wetlands are protected if they are completely avoided are

supported by the record. See Tr. II, pp.35-41, 79-81, 87-89 & 187-89.

Exception One is DENIED.

Exception Two: Findings of Fact 42 & 43

Petitioner next avers that Findings of Fact 42 and 43 must be rejected because the Amendment is inconsistent with Future Land Use Element Policy 1.6.1.I. Specifically, Petitioner argues that the Amendment was not "accompanied by an adequate market analysis" as required by that Policy.

The record clearly demonstrates that City staff did conduct a market analysis and did conclude that the area surrounding the Amendment was underserved by retail. See Tr. II at 180-83. Petitioner did not present any competent, substantial evidence to the contrary. There is also no evidence in the record, nor any provision in the comprehensive plan, to support Petitioner's contention that this analysis must be performed by an applicant, not the City.

Exception Two is DENIED.

ORDER

IT IS THEREFORE ORDERED as follows:

1. Petitioner's exceptions are DENIED.

2. The findings of fact and conclusions of law are ACCEPTED.

3. The Administrative Law Judge's recommendation is ACCEPTED.

4. The City of Titusville Amendment to its comprehensive plan, adopted by Ordinance 72-2007, is determined to be "in compliance" as defined in Section 163.3184(1)(b), Florida Statutes.

DONE AND ORDERED in Tallahassee, Florida.

Thomas G. Pelham

Thomas G. Pelham, Secretary
DEPARTMENT OF COMMUNITY AFFAIRS
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

NOTICE OF RIGHTS

ANY PARTY TO THIS 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.

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 30th day of January, 2009.

Paula Ford
Agency Clerk

U.S. Mail

Dwight W. Severs, Esquire
City of Titusville
Post Office Box 2806
Titusville, Florida 32781-2806

John H. Evans, Esquire
John H. Evans, P.A.
1702 South Washington Avenue
Titusville, Florida 32780

Kathleen Burson
2950 Knox McRae Drive
Titusville Florida 32780

Interagency Mail

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