Final Order Number DCA09-GM-324

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

SAVE BOCA RATON GREEN SPACE LLC, and ROBERT DUKATE, Petitioners, vs. CITY OF BOCA RATON and DEPARTMENT OF COMMUNITY AFFAIRS, Respondents, and MCZ / CENTRUM FLORIDA V OWNER, LLC,	)	**Case No. 08-1212GM**

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 December 11, 2007, the City of Boca Raton adopted two amendments to its comprehensive plan by Ordinance Nos. 4987 and 4991 (collectively, "Amendments"). Ordinance No. 4987 amended the Future Land Use Map of the City's Comprehensive Plan ("Plan") by changing the future land use designation on approximately 29.58 acres from Recreation and Open Space to Residential Medium ("FLUM Amendment"). Ordinance No. 4991 amended the

Transportation Element of the Plan by amending one existing policy and creating a new goal, a new objective, and four new policies ("Text Amendment"). The effect of the Text Amendment was to establish a new level of service ("LOS") for Northwest Second Avenue from Yamato Road to Jeffrey Street within the City. The land which is the subject of the Map Amendment is owned by the Intervenor, MCZ / Centrum Florida V Owner, LLC ("MCZ"), and makes up a part of the Ocean Breeze Golf and Country Club ("Club") in Boca Raton, Florida.

The Department reviewed the Amendments and published a Notice of Intent to find them "in compliance." On February 25, 2008, Petitioners, Save Boca Raton Green Space, LLC ("Save Boca"), an association of property owners, some of whom own property and live at the Club, and Robert Dukate, who also owns property and resides at the Club, filed a Petition for Formal Administrative Hearing ("Petition") alleging that the Amendments were not "consistent with the requirements of Sections 163.3177, Florida Statutes, and 163.3180, Florida Statutes the state comprehensive plan" in several respects. At the time the Petition was filed, the Petitioners were not represented by counsel. Counsel for the Petitioners filed her Notice of Appearance on May 15, 2008. The matter was referred by the Department to the Division of Administrative Hearings on March 11, 2008, and on this same date, the Intervenor filed a Petition to Intervene into Comprehensive Plan Challenge Proceeding. Intervention was authorized by an Order dated March 12, 2008.

By Order dated March 27, 2008, a final hearing was scheduled on August 19 and 20, 2008. On April 24, 2008, Intervenor filed a Notice of Demand for Expedited Hearing under Section 163.3189(3)(b), Florida Statutes. The next day, Intervenor filed a Motion for Expedited Discovery. Notices of Opposition to Expedited Hearing and Discovery were filed by Robert

Dukate on May 1, 2008. Despite Mr. Dukate's objection, an Amended Notice of Hearing was issued rescheduling the final hearing to May 15 and 16, 2008. The Motion for Expedited Discovery was denied by Order dated May 7, 2008. On May 2, 2008, the Department filed an Unopposed Motion to Reschedule the Hearing Date, and the matter was continued to May 22 and 23, 2008. On May 19, 2008, the proceeding was transferred from Administrative Law Judge J. Lawrence Johnston to Administrative Law Judge Donald R. Alexander.

Prior to the hearing, numerous procedural and discovery disputes arose. Between May 12 and 15, 2008, four Motions to Quash Subpoenas Duces Tecum and a Supplement thereto were filed by the City. Only one Motion to Quash ultimately required resolution and such motion was granted at the outset of the hearing, quashing the subpoena issued to Steve Utrecht, the sole member of the City's Planning and Zoning Board who voted against the recommended approval of the Amendments. On May 15, 2008, the Petitioners filed a Motion for Protective Order, which was resolved by the parties prior to the hearing. On May 19, 2008, the Intervenor filed a Motion in Limine to Prohibit Testimony and Evidence Regarding Alleged "Environmental" or "Golf Course Safety" Issues. Petitioners acknowledged that environmental matters were no longer in issue, and a ruling was reserved on the golf course safety issue until testimony on the subject was presented. That issue was later determined not to be a relevant consideration in a compliance proceeding and would more appropriately be addressed during the site plan phase of the process. On May 20, 2008, the Intervenor filed a Motion in Limine to Bar Testimony and Evidence Regarding the City's MMTD (Multi-Modal Transportation District). Because the City and the Department had not considered the MMTD during the adoption and review process, limited evidence on this issue was allowed for the purpose of determining whether the MMTD was a

relevant consideration for the City when it adopted the Amendments and by the Department when it performed its compliance review. On May 20, 2008, Petitioners filed a Motion to Place Case in Abeyance on the ground that there was a substantial likelihood that the issues in this case would become moot as result of a pending case in Circuit Court. That Motion was opposed by all the other parties and was denied at the hearing. On May 21, 2008, the Intervenor filed a Motion to Strike "Expert" Report and Proposed Testimony of Gary Nash. The Motion was rendered moot after Petitioners stated at hearing that Mr. Nash would not testify. On May 21, 2008, the Intervenor filed a Motion in Limine to Exclude the Introduction of the Archive Items from the City of Boca Raton by the Petitioners. The requested relief was granted during the course of the hearing on the ground that the documents sought to be introduced, which were prepared between 1973 and 1980, were too remote and dated to be relevant to the challenged Amendments. On May 21, 2008, Petitioners filed a Request for Leave to Amend, together with an Amended Petition for Administrative Hearing, which was opposed by all of the other parties. Because the Request for Leave to Amend the pleadings was not filed until the afternoon before the hearing, the Request was denied by the ALJ on the ground that if granted, the Request would cause prejudice and/or delay to the other parties. Intervenor filed Requests for Official Recognition on May 7, 13, and 14, 2008, respectively. The first Request was granted by Order dated May 20, 2008, and the other two requests were granted by oral ruling at the hearing. By those rulings, official recognition has been taken of City Ordinance Nos. 4487, 4488, 4489, and 4491, adopted by the City on December 11, 2007; the Plan dated February 25, 2005; and the City's 2005 Evaluation and Appraisal Report ("EAR"). A pre-hearing stipulation was not filed, so various

disputes among the parties regarding the timely disclosure of witnesses, exhibits, and expert opinions were resolved as they arose during the course of the hearing.

A Joint Proposed Recommended Order was timely filed by the Department, the Intervenor, and the City. On July 14, 2008, the Intervenor filed Motions for Sanctions, Fees, and Costs under Section 163.3184(12), Florida Statutes, directed to each Petitioner. On July 22, 2008, Petitioners filed a Response to Intervenor's Motions for Sanctions and Fees (and Costs). On July 17, 2008, Petitioners filed a Motion for Enlargement of Time to File Proposed Recommended Order and asked for an additional twenty-one days in which to make their filing. The Motion was opposed by all the other parties and was denied by Order dated July 18, 2008.

The final hearing was held on May 22 and 23, 2008 in Boca Raton, Florida. Upon consideration of the evidence and post-hearing filings, the ALJ entered a Recommended Order rejecting all of the allegations raised by the Petitioners, except the allegations regarding the Petitioners' standing to bring their claims. The ALJ, in the Recommended Order, retained jurisdiction in the proceeding for the purpose of the issuance of a separate final order if the Intervenor's Motions for Sanctions, Fees, and Costs under Section 163.3184(12), Florida Statutes, are renewed by the Intervenor within thirty (30) days after a final order is entered in this matter. The Petitioners and the Intervenors filed exceptions to the Recommended Order. The City and the Intervenor filed a Joint Response to Petitioners' Exceptions.

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 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.

Petitioners' Exception One: Findings of Fact 34

The Petitioners contend that the Administrative Law Judge ("ALJ") ignored evidence that the Amendments were contingent or dependent on the implementation of the MMTD. There is competent substantial evidence in the record that the Amendments are neither contingent nor dependent on the implementation of the MMTD. Such evidence consists of the following: 1) the traffic analysis supporting the Amendments did not assume that any trips would be removed from the roadway by the implementation of the MMTD (Tr. Vol. II, pgs. 133&196); 2) the Department did not consider the MMTD in its review of the Amendments, nor deem it necessary (Tr. Vol. II, pgs. 221-222); and 3) if the City were to implement the MMTD at a future date, this will require a separate amendment to its Plan (Tr. Vol. II, pg. 222 and Vol. I, pg. 94). Therefore, there is competent substantial evidence in the record that the Amendments were not contingent or dependent upon the implementation of the MMTD.

Petitioners' Exception One is DENIED.

Petitioners' Exception Two: Finding of Fact 50

The Petitioners allege that the ALJ incorrectly found that the Petitioners have failed to show beyond fair debate that the Text Amendment is not supported by adequate data and analysis, is inconsistent with other Plan provisions, violates the concurrency statute, or is otherwise not in compliance. The focus of the Petitioners' Exception is their allegation that the Text Amendment fails to include standards to ensure the availability of public facilities and the adequacy of those facilities to serve existing and future land uses. There is competent substantial evidence in the record to support Finding of Fact 50. The Department does not review proposed comprehensive plan amendments for concurrency, but instead looks at whether the local government is properly planning for its public facilities. Tr. Vol. II, pgs. 224&225 and R.O., F.O.F. 49.When evaluating a comprehensive plan amendment for compliance, the Department looks at whether the local government has or plans to have facilities available to meet the needs of the proposed development. Id. Pursuant to Section 163.3180(2)(c), Florida Statutes, the traffic concurrency standard is an applicable consideration at the development order stage of a project, it is not a required element of review at the comprehensive plan approval stage. According to the testimony of the City's Traffic Engineer, various improvements which are required by the City under the text of the Amendments, will add significant additional traffic capacity and will improve the LOS from the existing condition in 2007 along the roadway segment at issue, NW 2nd Avenue between Jeffrey Street and Yamato Road. Tr. Vol. I pgs. 78; 112&129-134 and Intervenor's Exhibit 18. There is evidence in the record to show that the Amendment ensures that adequate facility capacity is or will be present to meet the needs of the proposed development. Therefore, there is competent substantial evidence in the record to

support Finding of Fact Fifty which provides that the Petitioners have failed to show beyond fair debate that the Text Amendment is not supported by adequate date and analysis, is inconsistent with other Plan provisions, violates the concurrency statute, or is otherwise not in compliance. Additionally, because Finding of Fact Fifty summarizes and flows from the ALJ's Findings of Fact One through Forty-Nine, and this Final Order accepts all of the Findings of Fact in the Recommended Order, it follows that Finding of Fact Fifty must also be upheld.

Petitioners' Exception Two is DENIED.

Petitioners' Exception Three

The Petitioners have not identified Exception Three as being associated with a particular Finding of Fact or Conclusion of Law in the Recommended Order. Instead, the Petitioners' take exception to the ALJ's evidentiary ruling precluding the Petitioners from entering evidence into the record regarding the MMTD. In response to the Intervenor's Motion in Limine to Bar Testimony and Evidence Regarding the City's MMTD, the ALJ allowed limited evidence to be presented on the MMTD for the purpose of determining whether the MMTD was a relevant consideration by the City when it adopted the Amendments and by the Department in its compliance review. After evidence on the transportation issues associated with the Amendments was presented at hearing, the Judge weighed the evidence and determined that the MMTD was not relevant to determining whether the Amendments were in compliance. An agency may only reject or modify a conclusion of law over which it has substantive jurisdiction. See Section 120.57(1)(l), Florida Statutes. "Evidentiary rulings of the ALJ that deal with factual issues susceptible of ordinary methods of proof that are not infused with [agency] policy considerations are not matters over which the agency has substantive jurisdiction." McDonald v. Department of

Banking and Finance, 346 So. 2d 569 (Fla. 1st DCA 1977). "Evidentiary rulings are matters within the ALJ's sound prerogative as the finder of fact and may not be reversed on agency review." Earthmark Southwest Florida Mitigation, LLC v. Resource Conservation Holding, Inc. and Department of Environmental Protection, 2009 WL 360980 citing Martuccio v. Dep't of Prof'l Regulation, 622 So. 2d 607, 609 (Fla. 1st DCA 1993). The ALJ's evidentiary ruling precluding the Petitioners from entering evidence regarding the MMTD into the record is a matter within the ALJ's sound prerogative as the finder of fact and may not be reversed on agency review. Additionally, the evidentiary ruling at issue is a factual issue susceptible of ordinary methods of proof that is not infused with agency policy considerations because there is competent substantial evidence in the record that the MMTD was not adopted or effective at the time of the hearing and it was not considered in the City's adoption or the Department's compliance review of the Amendments. Therefore, the Department has no substantive jurisdiction over the ALJ's evidentiary ruling regarding the MMTD[1] and the Department cannot grant Petitioners' Exception Three.

Petitioners' Exception Three is DENIED.

Petitioners' Exception Four

The Petitioners have not identified Exception Four as being directed at a Finding of Fact or Conclusion of Law in the Recommended Order. This Exception is an objection to the ALJ's procedural ruling denying the Petitioners' Request for Leave to Amend Petition which was filed on the afternoon prior to the hearing. R.O. at pg. 7. The ALJ stated that the Request, if granted,

[1] See Barfield v. Department of Health, 805 So. 2d 1008, (1st DCA Fla. 2002). In Barfield, the court found that the Board of Dentistry could not reject the administrative law judge's evidentiary ruling that grading sheets of a clinical examination were inadmissible as hearsay because the Board did not not have substantive jurisdiction over the ALJ's evidentiary ruling as its substantive jurisdiction was limited to matters pertaining to dentistry alone.

would cause prejudice and/or delay to the other parties. Id. This procedural ruling by the ALJ occurred prior to the hearing and is neither a Finding of Fact nor a Conclusion of Law which the agency may review under Section 120.57(1)(l), Florida Statutes. Therefore, review of the ALJ's procedural Order is not properly the subject of an exception.

Petitioners' Exception Four is DENIED.

Petitioners' Exception Five

The Petitioners have not identified Exception Five as being directed at a Finding of Fact or Conclusion of Law in the Recommended Order. In this Exception, the Petitioners allege that the ALJ erred in requiring that the Petitioner Robert Dukate reveal whether he had made financial contributions to Petitioner Save Boca. ""Evidentiary rulings of the ALJ that deal with factual issues susceptible of ordinary methods of proof that are not infused with [agency] policy considerations are not matters over which the agency has substantive jurisdiction." McDonald v. Department of Banking and Finance, 346 So. 2d 569 (Fla. 1st DCA 1977). The issue of whether Petitioner Dukate made financial contributions to Petitioner Save Boca is not a matter infused with agency policy considerations and is susceptible to ordinary methods of proof, thus the agency does not have substantive jurisdiction over this evidentiary ruling of the ALJ. Therefore, the agency may not grant Petitioner's Exception Five.

Petitioners' Exception Five is DENIED.

Petitioners' Exception Six

The Petitioners, in Exception Six, appear to allege that the ALJ's Recommended Order fails to comply with Section 120.57(1)(j), Florida Statutes, which provides that "findings of fact shall be based upon a preponderance of the evidence." Exception Six is extremely vague in that

it does not identify any particular findings of fact that the Petitioners believe are inconsistent with Section 120.57(1)(j), Florida Statutes. Pursuant to Section 120.57(1)(k), Florida Statutes, the "Agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number of paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." Therefore, the Department need not rule on this exception.

Petitioners' Exception Six is DENIED.

Intervenor's Exception 1: Conclusion of Law 52

The basis of the Intervenor's exception is that the ALJ did not make a specific conclusion of law that MCZ was an affected party under Section 163.3184(1)(a), Florida Statutes. The ALJ made specific findings of fact that MCZ owns property which was the subject of the FLUM Amendment and such property is located in Boca Raton, Florida, which is the local government whose Plan is the subject of review in regard to the Text Amendment. R.O., pgs. 3&10. Additionally, MCZ timely submitted comments to the City during the adoption of the Amendments. R.O. at Pg. 10. Therefore, with regard to the Amendments, MCZ is an "affected person" under Section 163.3184(1)(a), Florida Statutes.

Intervenor's Exception One is GRANTED.

ORDER

Accordingly, it is hereby ordered as follows:

1. All of the Petitioners' Exceptions are DENIED.

2. Intervenor's Exception One is GRANTED, and Conclusion of Law 52 is modified in pertinent part to add, at the end of the existing text of Conclusion of Law 52, the following: MCZ owns property which is the subject of the FLUM Amendment and such property is located within the City. MCZ submitted oral or written comments to the City during the adoption process of the Amendments. Therefore, in regard to the Amendments, MCZ is an "affected person" and has standing to participate in this proceeding.

3. Except as modified above, all Findings of Fact and Conclusions of Law are adopted.

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

5. The amendment to the City of Boca Raton's Comprehensive Plan adopted by Ordinance No. 4987 (FLUM Amendment) is determined to be "in compliance."

6. The amendment to the City of Boca Raton's Comprehensive Plan adopted by Ordinance No. 4991 (Text Amendment) is determined 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 12th day of October, 2009.

Paula Ford, Agency Clerk

U.S. Mail:

Maureen McCarthy Daughton, Esq.
Broad and Cassel
215 South Monroe Street, Suite 400
Tallahassee, Florida 32301

Patricia M. Baloyra, Esq.
Broad and Cassel
One Biscayne Tower
Two Biscayne Boulevard
21st Floor
Miami, Florida 33131

Daniel L. Abbott, Esq.
Weiss, Serota, Helfman, Pastoriza, Cole & Boniske, P.L.
200 East Broward Boulevard, Suite 1900
Fort Lauderdale, Florida 33301

Diane Grub Freiser, Esq.
City Attorney
201 West Palmetto Park Road
Boca Raton, Florida 33432

Hand Delivery:

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

Interagency Mail:

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