Final Order Number DCA10-GM-004

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

IZAAK WALTON INVESTORS, LLC,

Petitioner,

v.

DOAH Case Nos. 08-2451GM
08-2473GM

TOWN OF YANKEETOWN and
DEPARTMENT OF COMMUNITY
AFFAIRS,

Respondents,
_____/

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 February 28, 2008, the Town of Yankeetown (Town) adopted plan amendment 08-CIE1 by Ordinance 08-03, modifying the Capital Improvements Element (CIE) of the Town's Comprehensive Plan. On March 10, 2008, the Town adopted plan amendment 08-01 by Ordinance 2007-10, modifying various elements of the Town's Comprehensive Plan.

The Department of Community Affairs (DCA or Department) reviewed all of the amendments, and on April 28, 2008, issued a

Notice of Intent to find plan amendment 08-CIE1 not "in compliance," and on May 1, 2008, issued a separate Notice of Intent to find plan amendment 08-01 not "in compliance."

The two Notices of Intent were referred to the Division of Administrative Hearings (DOAH) and consolidated. Izaak Walton Investors, LLC (IWI or Petitioner), was granted leave to intervene, and the case was placed in abeyance while the parties attempted to settle.

DCA and the Town entered into a Compliance Agreement, which was filed with DOAH on January 27, 2009.

On March 23, 2009, the Town adopted remedial amendment 09-R1 by Ordinance 2009-02.

On April 27, 2009, DCA published a Cumulative Notice of Intent to find amendments 08-CIE1 and 08-01, as remediated by amendment 09-R1, "in compliance."

The Cumulative Notice of Intent was filed with DOAH on May 29, 2009, and the parties were realigned.

The final hearing was held on July 6-7, 2009, in Yankeetown. Upon consideration of the evidence and post-hearing filings, the Administrative Law Judge (ALJ) entered a Recommended Order rejecting all of the allegations raised in the Petition. The Order recommends that the Department find the Amendment "in compliance."

Petitioner filed eight exceptions, to which the Department and the Town filed a joint response.

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 ALJ as the finder of fact. See Heifetz v. Department of Bus. Reg., 475 So. 2d 1277, 1281-83 (Fla. 1st DCA 1985). Additionally, it is the function of the ALJ, not the Department, to draw permissible inferences from the evidence and to reach ultimate findings of fact based on competent substantial evidence. Id.

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, 323 (Fla. 2d 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 129, 131 (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.

RULING ON EXCEPTIONS

Petitioner's Exception 1: Finding of Fact 12, Page 8.

Petitioner takes exception to a phrase on page 8 of the Recommended Order found in the last sentence of paragraph 12. The entire paragraph, with the challenged portion underlined, states:

> 12. These standards and criteria reflect the existing, built environment of the Town and the Town's vision of itself. Existing commercial buildings run from 960 square feet to 3,600 square feet. Although the existing Comprehensive Plan did not have an FAR ratio, other standards - such as setbacks, square footage required for on-site septic tanks, drainfields, and parking, a 50 percent open space ratio, and a building height restriction of 35 feet - restricted commercial development in a manner similar to the Revised Comprehensive Plan.

Petitioner contends that the underlined portion of Finding of Fact 12 is "[n]ot supported by record testimony." The challenged finding of fact in paragraph 12 is supported by the testimony of Yankeetown Zoning Official, Chris Fineout. Transcript ("Tr.") 309-314.

Petitioner cites the transcript at p. 54, "[t]he calculation showing that commercial use within Yankeetown was reduced from the old plan down to 10 percent under the new plan is a simple

arithmetic calculation" as evidence supporting a different finding. The Finding of Fact refers, however, to standards restricting commercial development, not to the amount of land available for commercial development. Moreover, by citing evidence Petitioner believes would support contrary findings, Petitioner improperly asks the Department to engage in fact-finding by reweighing and resolving conflicts in the evidence.

Competent substantial evidence supports the finding that other standards "restricted commercial development in a manner similar to the Revised Comprehensive Plan."

Petitioner's Exception 1 is DENIED.

Petitioner's Exception 2: Finding of Fact 14, Page 8.

Petitioner takes exception to a finding on page 8 that has been identified as paragraph 14:

> 14. The character of the Town, its limited projected population growth, and the availability of commercial development nearby in Inglis and in Levy County all support the Town's decision to limit the intensity of commercial land use, and to maintain the existing amount of land available for commercial and light industrial uses.

Petitioner emphasized the phrases "limited projected population growth" and "maintain the existing amount of land available for commercial and light industrial areas." Petitioner contends these findings are "[n]ot supported by record testimony."

There is record evidence that Yankeetown has a history of

limited population growth and a projected future population growth similar to its historical growth. Joint Exhibit ("JT") 2, Tab "Data & Analysis," Water Facilities Plan pp. 11-13 and Tab "CPA 08-1," pp 50-52; JT 3; Testimony of Conaway, Tr. 201-202, 210-213; Testimony of Fineout, Tr. 290-292, 298-301, 317-318; Testimony of Nicholas, Tr. 412-414; Testimony of Jetton, Tr. 251-254; Testimony of Gauthier, Tr. 445-447.

By suggesting evidence Petitioner believes would support contrary findings, "[t]here's no data or analysis to show the population, the land area, or that there's any relationship between the land and the population growth," Tr. 58, Petitioner improperly asks the Department to engage in fact-finding by reweighing and resolving conflicts in the evidence.

The evidence in the record also demonstrates that the Town has maintained the existing amount of land available for commercial and light industrial uses by simply subdividing the existing commercial land use into Commercial Neighborhood, Commercial Waterfront, and Light Industrial. JT 1, Existing FLUM; JT 2, Tab "CPA 08-1" Revised FLUM Map 2008-05; Testimony of Conaway, Tr. 153-155.

By suggesting evidence Petitioner believes would support contrary findings, "[t]he calculation showing that commercial use within Yankeetown was reduced from the old plan down to 10

percent under the new plan . . . ," Tr. 54, Petitioner improperly asks the Department to engage in fact-finding by reweighing and resolving conflicts in the evidence. By arguing that commercial use in Yankeetown was reduced 10 percent, Petitioner ignores the subdivision of commercial land use to include light industrial. Finding of Fact 14 collectively refers to both commercial and light industrial land uses.

Competent substantial evidence supports the finding that Yankeetown has "limited projected population growth," and that Yankeetown has "maintain[ed] the existing amount of land available for commercial and light industrial areas."

Petitioner's Exception 2 is DENIED.

Petitioner's Exception 3: Finding of Fact 21, Page 11.

Exception 3 challenges the last sentence of Finding of Fact 21. The complete paragraph, with the challenged sentence underlined, states:

> 21. IWI's expert, Dr. Henry Fishkind, testified that he ran his Fiscal Impact Analysis Model for the Town and concluded that the Revised Comprehensive Plan is not financially feasible because the Town cannot generate sufficient operating revenue to cover its operating costs without increasing property tax rates. Dr. Fishkind was not asked to explain how his computer model works, give any specific modeling results, or explain how he reached his conclusion.

Petitioner contends that Finding of Fact 21 is "[n]ot supported by record testimony."

A review of Dr. Fishkind's entire testimony, Tr. 17-34, supports the ALJ's finding that Dr. Fishkind's testimony contained conclusions from his Fiscal Impact Analysis Model, but did not explain how the model works, the results of the model, or how he reached his conclusions from the model.

Petitioner cites Dr. Fishkind's testimony, Tr. 28, to refute the ALJ's finding:

> The financial feasibility of the proposed Yankeetown Comprehensive Plan was analyzed using a Fiscal Impact Analysis Model, or FIAM and found to be infeasible. This analystic method was originally developed under contract to the Florida Department of Community Affairs to serve as a prototype model.

The testimony cited by Petitioner does not explain how the computer model works, give any specific modeling results, or explain how Dr. Fishkind reached his conclusion.

The finding of fact that "Dr. Fishkind was not asked to explain how his computer model works, give any specific modeling results, or explain how he reached his conclusion" is supported by competent substantial evidence in the record.

Petitioner's Exception 3 is DENIED.

Petitioners Exception 4: Findings of Fact 22 and 25, Pages 11 and 12.

Petitioners take exception to two phrases in Finding of Fact 22 and an additional phrase in Finding of Fact 25. The complete

paragraphs, with the challenged portions underlined, are as follows:

> 22. The Town's expert, Dr. James Nicholas, refuted his University of Florida colleague's testimony on this point as well. Essentially, Dr. Nicholas testified that a small and unique community like Yankeetown can choose to limit its operating costs by relying on volunteers and part-time employees. In this way, it can operate on a bare-bones budget that would starve a more typical and larger community. It also could choose to increase property tax rates, if necessary.

And,

> 25. The Town's CIS five-year lists projects to achieve and maintain the adopted level of service (LOS) standards and identifies funding sources to pay for those projects. It describes the projects and conservatively projects costs and revenue sources. The CIS identifies revenue sources and capital projects for which there are committed funds in the first three years and identifies capital projects for which funds have not yet been committed in year four or year five. CIS is adequate to achieve and maintain the adopted level of service and is financially feasible.

Petitioner contends that the cited findings are "[n]ot supported by record testimony," and argues that the Capital Improvements Schedule (CIS) does not identify either a volunteer-based Town operation or a specific intent to raise taxes. The CIS is not required to rely on volunteers and part-time employees, or to indicate the intent to increase property tax rates. See §163.3177(3) **Fla. Stat.**; Rule 9J-5.016, **Fla. Admin. Code.**

Finding of Fact 22 does not directly quote Dr. Nicholas, but

rather draws the permissible inference, from the evidence testimony of Dr. Nicholas and other witnesses, that a small and unique community like Yankeetown can choose to limit its operating costs in ways that larger communities might not be able to manage. See Testimony of Nicholas, 412-420, 425-440; Testimony of Jetton, 284.

There is competent substantial evidence that the CIS includes projects to achieve and maintain LOS standards as well as the funding sources to pay for those projects. The Town's expert economist/planner, Dr. James Nicholas, testified that the Yankeetown Plan was financially feasible. Testimony of Dr. Nicholas, Tr. 417, 428-439; see also, Testimony of Shannahan, Tr. 218-239; JT 2, Tab "CPA 08-1," CIE, pp.107-121; and Tab "Remedial Amendments," Exhibit B, Additional Data and Analysis pp. 31-37, 48-79.

Findings of Fact 22 and 25 are supported by competent substantial evidence in the record.

Petitioner's Exception 4 is DENIED.

Petitioner's Exception 5: Findings of Fact 58 and 59, Page 24.

Petitioners take exception to Finding of Fact 58 and the underlined portion of Finding of Fact 59 (erroneously labeled by Petitioner as Finding of Fact 29), which state:

58. Although the policies for Environmentally

> Sensitive Residential and Conservation Lands are slightly different, the minor differences do not fail to protect natural or coastal resources or fail to meet the minimum criteria set forth in Rule Chapter 9J-5 and Chapter 163, Florida Statutes.

And,

> 59. Numerous policies in the Plan Amendments establish standards and criteria to protect natural and coastal resources, including: Policy 1.1.2.1.7(i), restricting dredging; Policies 1.1.1.2.10, 5.1.5.7, and 5.1.6.10, restricting the filling of wetlands; Policy 5.1.6.7, establishing wetlands setback buffers; Policy 5.1.6.4, establishing nutrient buffers; Policy 5.1.5.1, limiting dredge and fill; Policies 1.1.3.4 and 5.1.5.5, establishing standards and criteria for docks and walkways; Policy 5.1.16.1, protecting certain native habitats as open space; Policy 1.1.1.3 establishing low-impact development practices for enhanced water quality protection; and Policy 5.1.5.1, protecting listed species, including manatees. <u>These provisions are more protective than the provisions of the existing Comprehensive [Plan] and are supported by data and analysis.</u>

Petitioner contends these findings of fact are "[n]ot supported by record testimony."

Finding of Fact 58 is a permissible inference drawn from the same comprehensive plan provisions cited in, and the same data and analysis supporting, Finding of Fact 59.

A comparison of the current policies and the amendments demonstrates that the proposed land use policies for Environmentally Sensitive Residential and Conservation Lands are in many ways more restrictive than similar policies in the current Comprehensive Plan. <u>See</u> JT 1; JT 2 Tab "CPA 08-1A". These

comprehensive plan provisions themselves are competent substantial evidence in support of Findings of Fact 58 and 59. The policies cited in Paragraph 59 are also supported by the Testimony of Conaway, Tr. 138-153, 182-185, 207-209.

Joint Exhibit 2, Tab "Data & Analysis," EPA Riparian Buffer Width, Vegetative Cover, and Nitrogen Removal Effectiveness: A Review of Current Science and Regulations, USEPA, October 2005 (EPA/600/R=05/118), 27pp; Data and Analysis in Support of Wetland Buffers, 5pp; Levey County Manatee Protection Plan with Manatee Mortality Database Search Results - Withlacoochee, Florida Fish and Wildlife Conservation Commission and Fish and Wildlife Research Institute, 10pp, all constitute record data and analyses supporting findings of fact 58 and 59. These data and analyses are competent substantial evidence.

The findings of fact that the cited provisions are more protective than the provisions of the existing Comprehensive Plan, and are supported by data and analysis, are supported by competent substantial evidence in the record.

Petitioner's Exception 5 is DENIED.

Petitioner's Exception 6: Finding of Fact 61, Page 25.

Petitioners take exception to paragraph 61, which states:

> 61. Taken as a whole, the Plan Amendments protect natural and coastal resources within the Town.

Petitioners contend Finding of Fact 61 is "[n]ot supported by record testimony."

Paragraph 61 is supported by the Testimony of Conaway, Tr. 138-153, 182-185, 207-209, and data and analysis contained in JT 2, Tab "Data & Analysis," EPA Riparian Buffer Width, Vegetative Cover, and Nitrogen Removal Effectiveness: A Review of Current Science and Regulations, USEPA, October 2005 (EPA/600/R-05/118) 27pp; Data and Analysis in Support of Wetland Buffers, 5pp; Levy County Manatee Protection Plan with Manatee Mortality Database Search Results - Withlacoochee, Florida Fish Wildlife Conservation Commission and Fish and Wildlife Research Institute, 10pp.

Furthermore, Paragraph 61 is a permissible inference drawn by the ALJ based upon the facts found in paragraphs 52 through 60. Findings of Fact 52 through 57 and 60 have not been challenged by Exceptions, and the Exception to Findings of Fact 58 and 59 has been denied.

The finding of fact that, "[t]aken as a whole, the Plan Amendments protect natural and coastal resources within the Town" is supported by competent substantial evidence in the record.

Petitioner's Exception 6 is DENIED.

Petitioner's Exception 7: Finding of Fact 80, Page 31.

Petitioners take exception to the underlined sentence of

paragraph 80, which in its entirety states:

> 80. The policies addressing setbacks can be read together and reconciled. The Plan Amendments include two types of setback buffers adopted for different purposes: (1) for structures, a 50-foot setback from the river and wetlands in Policies 1.1.1.2.7 and 5.1.6.7; (2) for sources of nutrient pollution other than septic systems (such as fertilized and landscaped areas and livestock sources), a 150-foot nutrient buffer setback from the river in Policies 1.1.1.2.11 (which is referred to in the nutrient buffer setback policies). These different setback policies were adopted for different purposes and are not internally inconsistent. Data and analysis supporting the establishment of these different setbacks further explains the different purposes of the different types of setbacks adopted in the Revised Comprehensive Plan.

Petitioners contend that this finding is "[n]ot supported by record testimony," because there is no data and analysis.

The finding of fact in the last sentence of paragraph 80 is supported by the Testimony of Jetton, Tr. 269-273; Testimony of Conaway, 207-208; and JT 2, Tab "CPA 08-1" pp. 75, 77, and is supported by the following data and analysis: EPA Riparian Buffer Width, Vegetative Cover, and Nitrogen Removal Effectiveness: A Review of Current Science and Regulations, USEPA, October 2005 (EPA/600/R-05/118) 27pp, and Data and Analysis in Support of Wetland Buffers, 5pp.

The finding of fact that data and analysis supporting the establishment of these different setbacks further explains the different purposes of the different types of setbacks adopted in

the Revised Comprehensive Plan is supported by competent substantial evidence.

Petitioner's Exception 7 is DENIED.

Petitioner's Exception 8: Finding of Fact 87, Page 32.

Petitioners take exception to paragraph 87, which states:

> 87. IWI did not prove beyond fair debate that the Town's data and analyses were insufficient under Chapter 163, Florida Statutes, and Rule Chapter 9J-5.

Petitioners contend that this finding is "[n]ot supported by record testimony," and that repeated examples of no data or analysis is sufficient to establish that the Town's data analysis is insufficient. Petitioners state only that there is "a complete absence of data on a variety of areas."

This exception is premised on the other seven Exceptions. All exceptions based on allegations of no data and analysis, as well as those alleged to be "[n]ot supported by record testimony," have been addressed supra and are incorporated here by this reference.

Competent substantial evidence exists in the record to support the finding of fact that IWI did not prove beyond fair debate that the Town's data and analyses were insufficient.

Petitioner's Exception 8 is DENIED.

ORDER

Upon review and consideration of the entire record of this proceeding, including the Recommended Order, it is hereby ordered as follows:

1. Petitioner's Exceptions one through eight are DENIED.

2. The findings of fact and conclusions of law in the Recommended Order are ADOPTED.

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

4. Plan Amendment 08-CIE1, adopted by the Town of Yankeetown on February 28, 2008, by Ordinance 08-03, Plan Amendment 08-1, adopted by the Town of Yankeetown on March 10, 2008, by Ordinance 2007-10, and Remedial Plan Amendment 09-R1, adopted by the Town of Yankeetown on March 23, 2009, by Ordinance 2009-02 are 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

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)(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 5th day of March, 2010.

for Paula Ford
Agency Clerk

U.S. Mail

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