Final Order Number DCA09-GM-302

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

BELLE MER OWNERS ASSOCIATION, INC.,

Petitioner,

v.

SANTA ROSA COUNTY and DEPARTMENT OF COMMUNITY AFFAIRS,

DOAH Case No. 08-4753GM

Respondents,

and

PAUL A. KAVANAUGH and BHR PELICAN PALACE, LLC,

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 May 22, 2008, Santa Rosa County adopted several amendments to its comprehensive plan by Ordinance No. 2008-16. One of these amendments changed the future land use designation of 1.89 acres from Navarre Beach Low Density Residential to Navarre Beach High Density Residential (Amendment). The

Department reviewed all of the amendments and, on August 27, 2008, caused to be published a Notice of Intent to find them "in compliance."

On or by September 12, 2008, Petitioner filed a Petition for an Administrative Hearing regarding the Amendment. None of the other amendments adopted by Ordinance No. 2008-16 were challenged and they are not a part of this proceeding.

A Petition to Intervene was filed on behalf of Paul A. Kavanaugh and BHR Pelican Palace, LLC, who are the applicants for the Amendment. The Petition was granted and they appear as intervenors in this proceeding.

The final hearing was scheduled for and held on January 28, 2009. Upon consideration of the evidence and post-hearing filings, the Administrative Law Judge 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 twenty exceptions, to which the Department filed a 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 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.

RULING ON EXCEPTIONS

1. Findings of Fact 7 and 8

Petitioner takes exception to the portions of Findings 7 and 8 that recount the zoning classification of the property that is the subject of the Amendment (Property). Petitioner admits that both Findings are "factually accurate," but contends they are not

relevant because the zoning is inconsistent with the future land use designation of the Property.

The Department may reject a finding of fact only if it is not based upon competent substantial evidence or if the proceeding on which the finding is based did not comply with the essential requirements of law. **Fla. Stat.** § 120.57(1)(l). The Department has no authority to reject findings on the basis that they are alleged to be irrelevant.

Petitioner is correct that future land use designations supersede any inconsistent underlying zoning. See **Fla. Stat.** § 163.3194(1)(a). However, the Administrative Law Judge did not find otherwise and this argument does not provide any legal basis upon which to grant this Exception and strike Findings that are admittedly supported by competent, substantial evidence.

Exception One is DENIED.

2. Finding of Fact 18

Petitioner next argues that Finding 18 should be stricken because, although "accurate," it is "misleading because it is incomplete." The Department may reject a finding of fact only if it is not based upon competent substantial evidence or if the proceeding on which the finding is based did not comply with the essential requirements of law. **Fla. Stat.** § 120.57(1)(l). The Department has no authority to reject findings on the basis that

they are alleged to be misleading or incomplete.

Petitioner specifically asserts that the Finding is incomplete because it does not note that the building footprint would have to be located landward of the coastal construction control line. To the contrary, the finding notes that the building footprint would have to comply with all provisions of the land development regulations, "including setback requirements." Recommended Order at 9; see Tr. at 229-30.

Exception Two is DENIED.

3. Finding of Fact 24

Petitioner notes that "[t]his finding [24] is a correct recitation of the record" but argues that the inclusion of Endnote 3 gives rise to an erroneous implication regarding the application of Objective 7.1.B. The Department may reject a finding of fact only if it is not based upon competent substantial evidence or if the proceeding on which the finding is based did not comply with the essential requirements of law. **Fla. Stat.** § 120.57(1)(l). The Department has no authority to reject findings on the basis that they give rise to some erroneous implication.

Moreover, there is no such finding or implication in Finding of Fact 24 or Endnote 3, both of which are supported by competent, substantial evidence. The argument regarding the

correction application of Objective 7.1.B was addressed in other Findings and Conclusions and is disposed of in the rulings on Exceptions below.

Exception Three is DENIED.

4. Finding of Fact 31

Petitioner next takes exception to the second sentence of Finding of Fact 31, which provides as follows:

> The intent [of Objective 7.1.B] appears to 'reflect the requirement of the state to direct populations away from the' CHHA and was not intended to apply to areas of Navarre Beach outside of the CHHA.

Recommended Order at 12. Petitioner contends that there is no record evidence to support this Finding and that the plain language of the Objective compels the conclusion that population concentrations must be directed away from Navarre Beach in the same manner that they are directed away from the coastal high hazard area.

It is true, as admitted by the Department in its Response to this Exception, that there is no direct evidence as to the intent of the Board of County Commissioners who voted to adopt Objective 7.1.B. The question, then, is whether this finding is based on a proceeding that complied with the essential requirements of law from which the finding could be "reasonably inferred." Bush v.

Brogan, 795 So.2d 237, 1239 (Fla. 2nd DCA 1999).[1]

Objective 7.1.B provides in full as follows:

> The County shall direct population concentrations away from Navarre Beach and the entire coastal high hazard area.

Ex. 1 at 7-4. Three Policies implement this Objective, the following two of which are directly relevant to this Exception.

> Policy 7.1.B.1 * At least 45% of the developable land within the Navarre Beach Zoning Overlay District shall remain within the Low Density Residential and Conservation/Recreation Future Land Use Map Designations.
>
> Policy 7.1.B.2 * The County shall limit the densities and intensities of land use as defined within this Plan. Such limitation will assure generalized low density use of land within the majority of the Coastal High Hazard Areas of Santa Rosa County.

Id.

Petitioner asserts that the plain language of Objective 7.1.B must be read as prohibiting any density increases on Navarre Beach. The County and Department argue that the portion of Objective 7.1.B regarding Navarre Beach is satisfied if planning actions comply with Policy 7.1.B.1.

The only statute or rule that addresses population concentrations is Rule 9J-5.012(3)(b)6, Florida Administrative

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[1] Petitioner does not contend that the proceeding below did not comply with the essential requirements of law.

Code, which provides that local comprehensive plans must include provisions to "[d]irect population concentrations away from known or predicted coastal high-hazard areas." The Administrative Law Judge inferred from this provision that Objective 7.1.B was intended to apply the stringent "direct population concentrations away" requirement only to coastal high hazard areas. This is a fair and reasonable inference from the record.

This conclusion is bolstered by Policy 7.1.B.1. This Policy sets forth the specific manner in which density is to be addressed on Navarre Beach; that is, to mandate low density development on approximately half of the land area.

Exception Four is DENIED.

5. Finding of Fact 32

Petitioner next asserts that Finding of Fact 32 is actually a Conclusion of Law, and must be rejected to the extent it concludes "that non-violation of Policy 7.1.B.1 equates to non-violation of Objective 7.1.B . . . ." Finding of Fact 32 does not equate the non-violation of a policy with the non-violation of the objective under which that policy resides. Rather, the Finding correctly notes that it is "appropriate to consider" the policies that implement an objective when determining whether a plan amendment is inconsistent with the objective. This Finding is supported by the testimony of the Department's expert witness.

See Finding of Fact 38 (to which no exception was filed).

Exception Five is DENIED.

6. Finding of Fact 35

Petitioner next takes exception to Finding of Fact 35 on the ground that it is irrelevant to this proceeding and inconsistent with testimony at the final hearing. The subject finding merely quotes portions of a staff report that was admitted as Joint Exhibit 5. The Joint Exhibit is competent, substantial evidence to support the Finding. To the extent there is conflicting evidence, it is the role of the Administrative Law Judge to weigh that evidence.

Exception Six is DENIED.

7. Finding of Fact 37

In Finding of Fact 36, the Administrative Law Judge summarizes the record evidence regarding the Department's historic approach to density increases in the coastal high hazard area. Referring back to this summary of the Department's approach, Finding of Fact 37 reads in full as follows:

> The Department's position is credible, but not applicable to the Property, which is not in the CHHA, and in light of Policy 7.1.B.1.

The finding that the Department's position is credible is supported by the record. There is no dispute that the Property is not in the coastal high hazard area; thus, the Department's

position would not apply to the Property. The issue of whether Objective 7.1.B should be interpreted in light of Policy 7.1.B.1 was addressed above in the ruling on Exception Five.

Exception Seven is DENIED.

8. Finding of Fact 39

Finding of Fact 39 reads in full as follows:

> Each relevant Plan objective and policy must be considered. However, they are not considered as stand alone requirements as suggested by Belle Mer. See Petitioner's PRO at 27, ¶ 97.

Petitioner takes exception to the second sentence of this Finding, alleging that it actually is a conclusion of law and is erroneous. Petitioner is correct on both points.

While plan provisions must be read together to determine their meaning and application (as the Administrative Law Judge did in this proceeding), a single provision in a comprehensive plan may form the basis for a finding of non-compliance. See Woods v. Marion County, DOAH Case No. 08-1576GM; Department of Community Affairs v. Miami-Dade County, DOAH Case No. 08-3614GM. This is in contrast to strategic regional policy plans and the state comprehensive plan: "[T]he state or regional plan shall be construed as a whole and no specific goal and policy shall be construed or applied in isolation from the other goals and policies in the plan." This conclusion is as or more reasonable

than the one reached by the Administrative Law Judge.

Exception Eight is GRANTED.

9. Finding of Fact 40

Petitioner asserts that Finding of Fact 40 should be rejected because it "is misleading, and not relevant." The Department may reject a finding of fact only if it is not based upon competent substantial evidence or if the proceeding on which the finding is based did not comply with the essential requirements of law. **Fla. Stat.** § 120.57(1)(l). Petitioner does not allege that this Finding is not supported in the record.[2] The Department has no authority to reject findings on the basis that they are alleged to be irrelevant or misleading.

Exception Nine is DENIED.

10. Finding of Fact 42

Petitioner alleges that Finding of Fact 42 is actually a Conclusion of Law and is inconsistent with Florida law concerning the interpretation of ordinances. Petitioner does not specify how this Finding violates Florida law; does not specify what alternative Conclusion should be reached; and does not aver that this alternative Conclusion would be as or more reasonable than

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[2] To the contrary, in Exception Eleven Petitioner asserts that "[t]he evidence supports the finding of the ALJ in paragraph 40 of the Recommended Order that at the same time the County adopted the comprehensive plan and FLUM (approximately 2003), densities allowed on Navarre beach [sic] were reduced."

the one reached by the Administrative Law Judge. The Department need not rule on this Exception as it does not identify a legal basis upon which it could be granted. See **Fla. Stat.** § 120.57(1)(k).

To the extent this Exception is relying upon and incorporating the arguments raised in Exceptions Three through Seven, the above rulings on those Exceptions are incorporated by this reference.

Exception Ten is DENIED.

11. Finding of Fact 45

Petitioner takes exception to the following portion of Finding of Fact 45: "The persuasive evidence indicates that the over-all reduction in densities on Navarre Beach since the Plan was adopted is adequate mitigation." Petitioner asserts that this sentence "is not supported by the record and is erroneous as a matter of law."

As set forth in Finding of Fact 40, the only reduction in densities on Navarre Beach occurred when the County adopted its comprehensive plan in 2003. There is no evidence that there have been any reductions since that time. Thus, there is no evidence to support the finding that there have been density reduction "since the Plan was adopted."

Policy 7.1.F.8 requires mitigation only of an "adverse

impact to evacuation times." Because there "is no persuasive evidence that the Plan Amendment is likely to adversely impact (increase) hurricane evacuation times beyond 12 hours," there is no requirement for mitigation under Policy 7.1.F.8. Accordingly, granting this Exception regarding density reductions and mitigation does not change the conclusion that the Plan Amendment is not inconsistent with this Policy.

Exception Eleven is GRANTED.

12. Finding of Fact 47

Finding of Fact 47 contains Footnote 9, which reads in full as follows: "Policies 7.1.F.3 and 7.1.F.8 are not mutually exclusive." Petitioner argues that this Footnote must be rejected because "[a]s a matter of law, Policy 7.1.F.8 is clear, simple and unambiguous." As a matter of law and logic, a comprehensive plan provision can be clear, simple and unambiguous and not mutually exclusive of another plan provision. Petitioner has not presented a legal ground upon which to grant this Exception.

Exception Twelve is DENIED.

13. Finding of Fact 51

Petitioner next argues that the second sentence of Finding of Fact 51 is not supported by the citation provided at the end of the Finding, and that "undersigned is not presently aware

whether this statement of fact is supported elsewhere in the record." The second sentence of this Finding is supported by competent, substantial evidence. Tr. at 149, lines 19-24.

Exception Thirteen is DENIED.

14. Finding of Fact 58

Regarding Finding of Fact 58, "Petitioner submits that the application of the appropriate law to the facts render [sic] this conclusion erroneous." Because this statement does not identify the legal basis for the exception, the Department need not rule upon it. See **Fla. Stat.** § 120.57(1)(l).

Finding of Fact 58 is a summary of the preceding findings regarding alleged adverse impacts to hurricane evacuation times, inconsistencies with the County comprehensive plan and insufficient data and analysis. Petitioner did not file exceptions to most of these findings. To the extent exceptions were filed to relevant findings, they have been addressed above.

Exception Fourteen is DENIED.

15. Conclusion of Law 67

Regarding Conclusion of Law 67, "Petitioner submits that the application of the appropriate law to the facts render [sic] this conclusion erroneous." Because this statement does not identify the legal basis for the exception, the Department need not rule upon it. See **Fla. Stat.** § 120.57(1)(l).

Conclusion of Law 67 provides in full as follows: "As found herein, Petitioner failed to prove to the exclusion of fair debate that the Plan Amendment is inconsistent or not coordinate with several objectives and policies of the County's Plan." Petitioner did not file exceptions to many of the findings upon which this Conclusion is based. To the extent exceptions were filed to relevant findings, they have been addressed above.

Exception Fifteen is DENIED.

16. Conclusion of Law 72

Petitioner first contends that Conclusion of Law 72 "is a statement of law, not fact." This contention is true, and the contested provision of the Recommended Order is correctly labeled as a Conclusion of Law.

The arguments posited in support of this exception do not identify the legal basis for granting it and, accordingly, the Department need not rule upon the exception. See **Fla. Stat.** § 120.57(1)(l). Moreover, Conclusion of Law 72 is an accurate statement of existing law.

Exception Sixteen is DENIED.

17. Conclusion of Law 73

Conclusion of Law 73 provides, in pertinent part, that "Petitioner did not prove the precise nature of the existing and available data . . . ." In this Exception, Petitioner alleges

that it "did prove the precise nature and existence of the data . . . ." However, Petitioner fails to identify any record support for this statement or the others in this Exception, but merely states disagreement with this Conclusion. The Department need not rule on any exception that does not "include appropriate and specific citations to the record." **Fla. Stat.** § 120.57(1)(l).

Exception Seventeen is DENIED.

18. Conclusion of Law 74

In this Exception, Petitioner again fails to provide any record citations in support of its disagreement with the Administrative Law Judge, but instead forwards the bare assertion the "[t]he totality of the evidence does not support this conclusion." Accordingly, the Department need not rule on this Exception. **Fla. Stat.** § 120.57(1)(l). To the extent Petitioner is attacking this provision of the Recommended Order on legal grounds, Petitioner has not demonstrated that a contrary conclusion would be as or more reasonable than the one reached in Conclusion of Law 74.

Exception Eighteen is DENIED.

19. Conclusion of Law 75

Petitioner objects to the portion of this Conclusion that notes that certain "issues were not expressly raised in the Petition." As support for this Exception, Petitioner refers to

and relies upon Finding of Fact 60 which, in turn, provides as follows: "These issues were raised in the JPS [Joint Prehearing Stipulation] at pages 2-3, but not expressly raised in the Petition." The cited Finding and Conclusion are consistent in observing that several issues were not expressly raised in the Petition. No other ground has been alleged in support of this Exception.

Exception Nineteen is DENIED.

20. Conclusion of Law 78

Conclusion of Law 78 reads in full as follows: "The issues raised by Petitioner are premature and speculative." Petitioner argues that "the undisputed testimony" proves otherwise. Again, however, Petitioner does not specify any record support for this statement and, accordingly, the Department need not rule on this Exception. **Fla. Stat.** § 120.57(1)(l).

Petitioner goes on to state that "it is agreed that this is not the correct forum for determination of damages," seemingly agreeing with the Administrative Law Judge's conclusion that the issues are "premature."

Exception Twenty 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 Exception Eight is GRANTED. Finding of Fact 39 is amended as follows:

> Each relevant Plan objective and policy must be considered. ~~However, they are not considered as stand alone requirements as suggested by Belle Mer. See Petitioner's PRO at 27, ¶ 97.~~

Granting this Exception and striking the above sentence from Finding of Fact 39 does not alter the ultimate conclusion regarding compliance.

2. Petitioner's Exception Eleven is GRANTED. Finding of Fact 45 is amended as follows:

> Policy 7.1.F.8 states: "Amendments to the [Plan] on Navarre Beach shall not be approved which will result in an increase in hurricane evacuation times without mitigation of the adverse impact to evacuation times." ~~The persuasive evidence indicates that the overall reduction in densities on Navarre Beach since the Plan was adopted is adequate mitigation.~~ There is no persuasive evidence that the Plan Amendment is likely to adversely impact [increase] hurricane evacuation times beyond 12 hours.

Granting this Exception and striking the above phrase from Finding of Fact 45 does not alter the ultimate conclusion regarding compliance.

3. All other Exceptions are DENIED.

4. In all other respects, the findings of fact and conclusions of law in the Recommended Order are ADOPTED.

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

6. Plan Amendment 2007-R-047, adopted by Santa Rosa County in Ordinance No. 2008-16, section 2, attachment A, on May 22, 2008, 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, 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 15th day of October, 2009.

for Paula Ford
Agency Clerk

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