DCA Order No. DCA11-GM-001

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

MARTIN COUNTY CONSERVATION ALLIANCE, INC.; DONNA MELZER; ELIZA ACKERLY; GROVES HOLDINGS, LLC; GROVES 12, LLC; and GROVES 14, LLC,

Petitioners,

DOAH Case No. 10-0913GM

v.

MARTIN COUNTY and DEPARTMENT OF COMMUNITY AFFAIRS,

Respondents.

GROVES HOLDINGS, LLC; GROVES 12, LLC; and GROVES 14, LLC,

Petitioners,

DOAH Case No. 10-1142

v.

MARTIN COUNTY and DEPARTMENT OF COMMUNITY AFFAIRS,

Respondents.

MARTIN COUNTY CONSERVATION ALLIANCE, INC. and DONNA MELZER,

Petitioners,

DOAH Case Nos. 10-1161GM
10-1162GM
10-1163GM
10-1164GM

v.

MARTIN COUNTY and DEPARTMENT OF COMMUNITY AFFAIRS,

Respondents.

Filed January 3, 2011 4:12 PM 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 December 16, 2009, Martin County adopted amendments to every element of its comprehensive plan by Ordinance Nos. 843 through 856 (Plan Amendments). On February 10, 2010, the Department issued its Notice of Intent to find all of the Plan Amendments "in compliance" with the exception of one amendment adopted by Ordinance No. 845, which was determined to be not "in compliance."

The Department filed a petition for formal administrative hearing with respect to Ordinance No. 845. Martin County Conservation Alliance, Inc. (MCCA), Donna Melzer, and Eliza Ackerly filed a joint petition to intervene in support of the Department. Groves Holdings, LLC, Groves 12, LLC,[1] and Groves

[1] On August 20, 2010, Groves 12, LLC conveyed its interest in its real property in Martin County to Becker B-14, Grove, Ltd. by Special Warranty Deed. Groves 12 also executed an Assignment of Claims and Rights in favor of Becker B-14, specifically assigning all claims and rights in this administrative proceeding. Pursuant to the Notice of

14, LLC (collectively "The Groves") also petitioned to intervene in support of the Department.

The Groves filed a separate petition challenging the Department's compliance determination regarding Ordinance Nos. 843, 847, 851 and 854. MCCA and Donna Melzer filed four separate petitions challenging the Department's compliance determination regarding Ordinance Nos. 843, 847, 851 and 854.

On March 16, 2010, the County adopted Ordinance No. 857, repealing the amendment in Ordinance No. 845 which was the subject of the Department's not "in compliance" determination.

This consolidated matter proceeded to final hearing on six petitions challenging seven of the fourteen Ordinances. Upon consideration of the evidence and post-hearing filings, the Administrative Law Judge entered a Recommended Order. The Order recommends that this matter be referred to the Administration Commission for the entry of a Final Order finding the Plan Amendments "in compliance" with the exception of Future Land Use Element Policies 4.1D.4 and 4.9H.2 adopted by Ordinance No. 845. The Administrative Law Judge recommends that the Administration Commission enter a Final Order determining that these two

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Substitution of Parties filed November 23, 2010, Becker B-14 is substituted for Grove 12 as a Petitioner in this consolidated proceeding.

Policies are not "in compliance." The County and The Groves both filed Exceptions to the Recommended Order.

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 Martin County's Exceptions to Findings of Fact

Exception One: Paragraph 45

The County takes exception to Paragraph 45, which provides in full as follows:

> MCCA objects to new Policy 4.9H.2, regarding residential PUDs, because the policy indicates that commercial uses can be included in a residential PUD, even if the PUD is located outside the Primary USDs. Policy 4.7A.2 requires all new commercial development to be located in the Primary USDs. Objective 4.5F and its associated policies allow for residential PUDs in agricultural areas outside the USDs, but do not indicate that PUDs in agricultural areas can include commercial uses. Policy 4.9H.2 conflicts with Policy 4.7A.2 and with Objective 4.5F and its associated policies.

The County specifically asserts that Policy 4.9H.2 is not "new" and, therefore, should not be subject to compliance challenge.

The County is correct. There is no competent, substantial evidence to support the Administrative Law Judge's finding. Policy 4.9H.2 is not new to the local comprehensive plan and was not the subject of any substantive change pursuant to the Plan Amendments. Like many of the other underscored provisions of the updated local comprehensive plan, Policy 4.9H.2 was simply relocated and subject to minor semantic alterations, none of which effected a substantive change. See Martin County

Exceptions at 4-5; Tr. at 295. The Administrative Law Judge properly found in numerous other instances that such changes are not substantive and do not open a policy to a new administrative challenge when they have been previously determined by the Department to be "in compliance." See Recommended Order at ¶¶ 26, 36, 39, 41, 44, 52 & 113. The same reasoning should have been applied to Policy 4.9H.2. To the extent the Administrative Law Judge's Findings may be considered Conclusions of Law, the substituted Conclusions are as or more reasonable than those rejected.

County Exception One is GRANTED. Paragraph 45 is modified to read as follows:

> MCCA objects to ~~new~~ Policy 4.9H.2, regarding residential PUDs, because the policy indicates that commercial uses can be included in a residential PUD, even if the PUD is located outside the Primary USDs. However, there is no substantive difference between the text of Policy 4.9H.2 and the text of former Policy 4.6A.2. Accordingly, because it has been previously found "in compliance," Policy 4.9H.2 is not subject to a new compliance challenge. As to MCCA's claims on the merits regarding the location of commercial uses, this Policy remains subject to Policy 4.5F.4, preventing the location of commercial development to which objection is raised. ~~Policy 4.7A.2 requires all new commercial development to be located in the Primary USDs. Objective 4.5F and its associated policies allow for residential PUDs in agricultural areas outside the USDs, but do not indicate that PUDs in agricultural~~

~~areas can include commercial uses. Policy 4.9H.2 conflicts with Policy 4.7A.2 and with Objective 4.5F and its associated policies.~~

Exception Two: Paragraph 65

The County next requests that the Department change the word "preventing" to "prohibiting" in the following sentence of Paragraph 65: "It is the general practice of the Department to require local governments to use theoretical maximum densities unless there are policies in the comprehensive plan prohibiting landowners from attaining the theoretical maximum densities . . . ."

The Administrative Law Judge's Finding is supported by competent, substantial evidence. Tr. at 360.

County Exception Two is DENIED.

Exception Three: Paragraphs 79 & 80

The County takes exception to Paragraph 79, save the first sentence, and all of Paragraph 80. The County argues that these Paragraphs are unwarranted Conclusions that a density limitation found outside the local comprehensive plan must be included when accounting for the theoretical maximum density allowed under that plan. The County is correct.

It is undisputed that the seventy-percent reduction in density in the "Commercial-Office-Residential" (COR) land use category afforded by the Administrative Law Judge is not contained in the local comprehensive plan. Tr. at 664-65. Thus, the Conclusion in Paragraphs 79 and 80 to include this reduction is erroneous. Department of Community Affairs v. Collier County, ER F.A.L.R. 99: 259 (Admin. Comm. 1999). A contrary Conclusion consistent with this long-standing precedent is clearly as or more reasonable than the one reached by the Administrative Law Judge.

County Exception Three is GRANTED. Paragraphs 79 and 80 are modified as follows:

> 79. The County has a mixed-use land use category called Commercial-Office-Residential (COR). ~~The County allows only a third of a COR parcel to be developed for residential uses and this practice reduces the theoretical maximum density of COR lands. However, the RCA assumes 100 percent of the COR acreage is available for residential use. The County attempted to justify this discrepancy by point out that the limitation of residential uses on COR lands is not incorporated into the CGMP. However, it is an undisputed fact (datum) that the County's practice reduces residential capacity on COR lands. The RCA fails to account for this fact.~~
>
> ~~80. If the RCA accountedfor the limitation of residential development on COR lands, the supply of dwelling units in the Eastern USDs would be reduced by 733 units.~~

Exception Four: Paragraph 88

The County takes exception to the use of the word "deficit" in Paragraph 88 as "misleading," and requests that the Department supplement the Paragraph to "paint the entire picture."

The use of the word "deficit" is correct and in keeping with the County's Residential Capacity Analysis, which includes a 125% "market factor." See Groves Ex. 32 at 11; County Ex. 1, Tab 4 at 49.

County Exception Four is DENIED.

Exception Five: Paragraph 89

This Exception is based upon the same premise as Exception Four, the ruling on which is incorporated herein by reference.

County Exception Five is DENIED.

Exception Six: Paragraph 91

The County re-states its Exceptions Three and Four in support of its argument that Paragraph 91 should be stricken in large part. The rulings above on these Exceptions are incorporated by this reference, and Exception Six is GRANTED IN PART and DENIED IN PART. Paragraph 91 is modified as follows:

> The Groves argues that, because the RCA overestimates supply, the deficit in the

> Eastern USDs is actually substantially larger. FN.5. ~~For example, taking into account the County's policy regarding limiting residential uses on COR lands, the deficit would be 1,348 units in the Eastern USDs.~~ The ~~deficit would be enlarged by the effects of the other~~ factors discussed above in Paragraphs 81-85 ~~that~~ may reduce a landowner's ability to attain the theoretical maximum density.

Exception Seven: Paragraph 92

The County next takes exception to Paragraph 92, which reads in full as follows:

> The County contends that there is additional residential capacity outside the USDs that should be considered. The County also points to the large surplus of available dwelling units in the Indiantown USDs. The County asserts that there is excess supply to meet the need when all the available dwelling units in the County are considered. These other considerations, however, are not part of the RCA and, therefore, are in conflict with the RCA.

The County accepts the first three sentences of this Paragraph as being "generally correct and supported by competent substantial evidence," but takes issue with the fourth sentence. The County asserts that this sentence is actually an erroneous conclusion of law that misinterprets its local comprehensive plan. The County is correct.

New Policy 4.1D.4 establishes the exclusive list of factors that are to be considered by the County when performing a

Residential Capacity Analysis. However, Policy 4.1D.4 does not establish the Residential Capacity Analysis as the exclusive factor to be considered by the County when determining whether a need exists for an amendment to the future land use map: it is one factor to be evaluated when considering such amendments (see Policy 4.1D.5) and the principal factor in considering changes to Urban Service District Policies (see Policy 4.1D.6). Nothing in the local comprehensive plan or testimony at the final hearing supports a conclusion that Policy 4.1D.4, which establishes only a methodology for an analysis, is to be used as a the sole test for need under the local comprehensive plan.

The fourth sentence of Paragraph 92 is a Conclusion of Law. A Conclusion contrary to the one reached by the Administrative Law Judge is as or more reasonable.

County Exception Seven is GRANTED. Paragraph 92 is modified as follows:

> The County contends that there is additional residential capacity outside the USDs that should be considered. The County also points to the large surplus of available dwelling units in the Indiantown USDs. ~~The County asserts that t~~there is excess supply to meet the need when all the available dwelling units in the County are considered. ~~These other considerations, however, are not part of the RCA and, therefore, are in conflict with the RCA.~~

Rulings on Martin County's Exceptions
to Conclusions of Law

Exception One: Paragraph 119

The County contends that the following Paragraph must be rejected or modified:

> The RCA in FLUE Policy 4.1D.4 is not based on the best available data. It fails to react appropriately to the best available data. As a result, the RCA fails to accomplish its purpose to accurately determine residential capacity or supply. It overestimates supply and, therefore, would cause the County to underestimate need.

The data referred to by this Conclusion are summarized in Paragraphs 79-87 of the Recommended Order. These data relate to provisions within and outside of the local comprehensive plan that purport to restrict the actual density that may be achieved by a particular plan of development.

The findings in Paragraphs 79 and 80 were rejected above. Accordingly, the challenged Conclusion cannot rest upon some alleged reduction in density due to the Commercial-Office-Residential land use category.

Paragraphs 81 through 85, taken as true, do not support a Conclusion that the County's methodology will overestimate supply and underestimate need. While provisions in a local comprehensive plan that will prevent the achievement of a maximum

density should be taken into account when calculating supply, provisions that may or may not cause such a reduction should not be taken into account. To do so would improperly invite guesswork and uncertainty. For example, the Administrative Law Judge relies upon a height limitation in the local comprehensive plan in concluding that the maximum density cannot be achieved: however, the Judge also notes that this limitation applies only "sometimes." Recommended Order at Paragraph 81. The Administrative Law Judge also relies upon transitional density zones as justifying some downward departure, but notes that the local comprehensive plan allows any "lost" density to be transferred to unaffected portions of the development site, therefore preserving the overall net density. Recommended Order at 85. To compel the County to somehow account for completely undeterminable density discounts is not consistent with controlling precedent. See Sheridan v. Lee County, DOAH Case No. 90-7791.

Finally, the Residential Capacity Analysis provides only a snapshot of the theoretical maximum density. It does not purport to be an exact analysis of the actual maximum density. Numerous factors may impact the density that is achieved in any particular instance. It is not reasonable - nor possible with any real certainty - to require a local government to attempt to predict

actual densities at the time of development when engaging in long-term comprehensive planning.

A Conclusion contrary to the one reached by the Administrative Law Judge is as or more reasonable.

County Exception One is GRANTED. Paragraph 119 is modified as follows:

> The RCA in FLUE Policy 4.1D.4 is ~~not~~ based on the best available data. It ~~fails to~~ reacts appropriately to the best available data. As a result, the RCA ~~fails to~~ accomplishes its purpose to accurately determine residential capacity or supply. ~~It overestimates supply and, therefore, would cause the County to underestimate need.~~

Exception Two: Paragraph 120

This Exception is based upon other Exceptions addressed above. For those reasons, a Conclusion contrary to the one reached by the Administrative Law Judge is as or more reasonable and County Exception Two is GRANTED. Paragraph 120 is modified as follows:

> Policy 4.1D.4 is ~~not~~ based on the best available data and analysis regarding the effect of CGMP provisions to reduce a landowner's ability to attain the theoretical maximum density allowed by the land use designation. ~~The effect of each separate development limitation was not qualified, but the combined effect of all the limitations was sufficiently quantified to prove tha their effect is substantially greater than~~

~~accounted for in Policy 4.1D.4.~~

Exception Three: Paragraph 122

This Exception is based upon Exception Seven addressed above. For those reasons, a Conclusion contrary to the one reached by the Administrative Law Judge is as or more reasonable and County Exception Three is GRANTED. Paragraph 122 is stricken in its entirety.

Exception Four: Paragraph 123

This Exception is based upon Exception Seven addressed above. For those reasons, a Conclusion contrary to the one reached by the Administrative Law Judge is as or more reasonable and County Exception Four is GRANTED. Paragraph 123 is stricken in its entirety.

Exception Five: Paragraph 124

This Exception is based upon Exceptions 1 through 4 to the Conclusions of Law addressed above. For those reasons, a Conclusion contrary to the one reached by the Administrative Law Judge is as or more reasonable and County Exception Five is GRANTED. Paragraph 124 is modified as follows:

The Groves failed to ~~proved~~ beyond fair

debate that Policy 4.1D.4 is not based on the best data and analysis.

Exception Six: Paragraph 132

This Exception is based upon Exception One to Findings of Fact addressed above. For those reasons, a Conclusion contrary to the one reached by the Administrative Law Judge is as or more reasonable and County Exception Six is GRANTED. Paragraph 132 is stricken in its entirety.

Exception Seven: Paragraph 133

This Exception is based upon Exceptions One to Findings of Fact addressed above. For those reasons, a Conclusion contrary to the one reached by the Administrative Law Judge is as or more reasonable and County Exception Seven is GRANTED. Paragraph 133 is modified as follows:

> MCCA failed to proved ~~that it is~~ beyond fair debate that Policy 4.9H.2 causes the CGMP to be internally inconsistent.

Exception Eight: Paragraph 142

This Exception is based upon all of the foregoing Exceptions addressed above. For those reasons, a Conclusion contrary to the one reached by the Administrative Law Judge is as or more reasonable and County Exception Eight is GRANTED. Paragraph 142

is modified as follows:

> In summary, MCCA and the Groves failed to prove beyond fair debate that the Plan Amendments are not in compliance~~, with the exception of Policies 4.1D.4 and 4.9H.2~~.

Rulings on the Groves Exceptions to Findings of Fact

Exception One: Paragraph 96

The Groves takes exception to the second sentence of Paragraph 96, which provides in full as follows: "Apparently, the County is also satisfied with the existing size and distribution of future land use categories as depicted on the FLUM." This Finding regarding the position of the County on this issue is supported by competent substantial evidence. Tr. at 259 & 291.

The Groves Exception One is DENIED.

Exception Two: Paragraph 100

The Groves next takes exception with Paragraph 100, which provides in full as follows: "There is no state-wide standard for the amount of commercial, industrial, institutional, conservation, or agricultural lands that a local government must identify in its comprehensive plan in order to accommodate its projected population."

While The Groves take issue with the County's non-

residential needs analyses (or, as they allege, lack thereof), no basis for rejecting the Finding regarding the absence of a "state-wide standard" is provided. This Finding is supported by competent substantial evidence. Tr. at 377-79.

The Groves Exception Two is DENIED.

Rulings on the Groves Exceptions to Conclusions of Law

Exception One: Paragraph 126

The Groves also takes exception with Paragraph 126, which provides in full as follows:

> The Groves' assertion that the County failed to express residential need in terms of the amount of land needed in each land use category was refuted because specific acreages for all land use categories were calculated and shown by the County.

Residential need was shown by category as reflected in the Recommended Order. See Recommended Order at ¶ 96 ("The existing vacant land acreages for each land use category, set forth in the CGMP, represents the amount of land in each land use category that the County believes is needed to meet the projected population."). Paragraph 97 further describes the land use categories, noting the "imbalance in the various types of residential land uses . . . ."

The Groves Exception One is DENIED.

Exception Two: Paragraph 142

This Exception is based entirely upon Exceptions addressed above. For those reasons, a Conclusion contrary to the one reached by the Administrative Law Judge is not as or more reasonable and The Groves Exception Two is DENIED.

ORDER AND RULING ON EXCEPTIONS TO RECOMMENDATION

Based on the foregoing, the Department has determined that the Plan Amendments adopted by Ordinance Nos. 843 through 856, as revised by Ordinance No. 857, are "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)(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 designated Agency Clerk, and that true and correct copies have been furnished to the persons listed below by the method indicated on this 3rd day of January, 2011.

for Paula Ford
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