**Final Order Number DCA11-GM-109**

**STATE OF FLORIDA**
**DEPARTMENT OF COMMUNITY AFFAIRS**

ANGELO'S AGGREGATE
MATERIALS, LTD, ANGELO
IAFRATE CONSTRUCTION COMPANY,
and STONY POINTE LIMITED
PARTNERSHIP,

Petitioners,

v. **Case Nos. 10-1540GM**

PASCO COUNTY 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 December 15, 2009, Pasco County (County) adopted plan amendment 09-1 by Ordinance Nos. 09-23 through 09-37, which includes changes to the Public/Semi-Public land use classification.

The Department of Community Affairs (Department) reviewed

all of the amendments, and on February 23, 2010, issued a Notice of Intent to find plan amendment 09-1 "in compliance" as defined by Section 163.3184(1)(b), Florida Statutes.

Petitioners challenged the Department's in compliance determination, and on March 22, 2010, the Department forwarded Petitioner's petition for hearing to the Division of Administrative Hearings (DOAH) with a letter requesting an Administrative Law Judge (ALJ) be assigned to the case, and that the above cited ordinances, in addition to amendments 09-1(7) and 09-1(13) adopted by Ordinance 09-24, be set for hearing. First the petition, and then the prehearing stipulation, were amended to delete specific challenged amendments or portions thereof.

The final hearing was held on October 27-28, 2010, in Dade City. Upon consideration of the evidence and post-hearing filings, the ALJ entered a Recommended Order rejecting all of the allegations raised by Petitioners. The Order recommends that the Department find the Amendment "in compliance."

Petitioners jointly filed four (4) exceptions, to which the Department and Pasco County filed joint responses. Respondents jointly filed two (2) exceptions, to which Petitioners jointly

filed responses.

Petitioners requested oral argument on the exceptions, to which Respondents filed a motion in opposition and Petitioners responded. The request for oral argument on the exceptions was denied by the Department.

Standard of Review of Recommended Order

The Administrative Procedure Act contemplates that the Department will adopt an ALJ'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, 324-25 (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, 132 (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

**Petitioners' Exception 1: Finding of Fact 9**

Petitioners take exception to paragraph 9 of the Recommended Order, alleging this finding is a mislabeled conclusion of law, and that it is erroneous. The entire paragraph states:

> 9. Density and intensity standards for P/SP have not changed as a result of Ordinance 09-25. Before Ordinance 09-25, they were "not applicable"; after Ordinance 09-25, they are "not applicable."

Petitioners are incorrect in their reading of paragraph 9 as a conclusion of law. Paragraph 9 is a finding of fact, which

correctly states the designation for the density and intensity standards for P/SP before and after Ordinance 09-25 was adopted.

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). Paragraph 9 is supported by competent substantial evidence. One only needs to compare the language of the existing plan to that of the amended plan to see that the density and intensity standards for P/SP are "not applicable" both before Ordinance 09-25 was adopted as well as after. Competent substantial evidence exists in the form of testimony by the County's planning expert, Richard Gehring, as well as by Petitioners' own expert witness, Roger Wilburn.

Petitioners' Exception 1 is DENIED.

**Petitioners' Exception 2: Finding of Fact 11**

Petitioners take exception to paragraph 11 of the Recommended Order, which states:

> 11. Petitioners contend that Pasco County Ordinance 09-25 makes substantive changes to the Comprehensive Plan and does not include the intensity standards required for P/SP under Section 163.3177(6)(a) and Rule 9J-5.006(3)(c)7.

It is Petitioners' position that Section 163.3177(6)(a) and Rule 9J-5.006(3)(c)7. require that any changes, substantive or non-substantive, to the Comprehensive Plan, including the changes to P/SP future land use category found in Ordinance 09-25, must include density and intensity standards. Petitioners have suggested the Department consider additional statements not relied upon by the ALJ and have attempted to convert Finding of Fact 11 into a conclusion of law, which it is not.

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).

Competent substantial evidence in the form of testimony by Petitioners' planner supports the finding that Petitioners contend that Pasco County Ordinance 09-25 makes substantive changes to the Comprehensive Plan, that is, changes to the Comprehensive Plan that would require intensity and density standards.

Petitioners' Exception 2 is DENIED.

**Petitioners' Exception 3: Finding of Fact 12**

Petitioners' take exception to paragraph 12, which states:

12. Even if the changes are considered to be substantive, it is appropriate not to have intensity standards for P/SP. Intensity applies to non-residential use, but logically should only apply to such uses that generate impacts and the need for public services. P/SP responds to impacts and the need for public services generated by other uses. It is logical and appropriate not to have intensity standards for P/SP.

Petitioners contend that Finding of Fact 12 is a mislabeled conclusion of law that is erroneous and is unsupported by a plain interpretation of Rules 9J-5.006(3)(c)7. and 9J-5.003(60).

Paragraph 12 is not a mislabeled conclusion of law, but rather a finding based on evidence presented at hearing. Competent substantial evidence in the form of testimony by Respondents' Pasco County and Department of Community Affairs expert planners supports the finding that it is appropriate not to have intensity standards for the P/SP designation.

Petitioners' Exception 3 is DENIED.

**Petitioners' Exception 4: Conclusion of Law 28**

Petitioners take exception to Conclusion of Law 28, which states:

> 28. Section 163.3177(6)(a) states that future land use categories "must include standards to be followed in the control and distribution of population densities and building and structure intensities." Neither this statute nor Florida Administrative Code Rule 9J-5.006(3)(c)7. requires intensity standards for Pasco's P/SP category, which is designed to serve the needs generated by the density and intensity of

> residential and non-residential development under a comprehensive plan. See Fla. Admin Code R. 9J-5.003(60) (defining "intensity" as "an objective measurement of the extent to which land may be developed or used, including the consumption or use of the space above, on or below ground; the measurement of the use of or demand on natural resources; and the measurement of the use of or demand on facilities and services"). It was not proven beyond fair debate that the plan amendments fail to include necessary intensity standards.

Petitioners contend that Conclusion of Law 28 is inconsistent with Florida case law, specifically Key Biscayne Village v. Dep't of Community Affairs et al., 696 So. 2d 495, at 495, (Fla. 3d DCA 1997), where the Court reversed the Department's Final Order adopting the ALJ's Recommended Order. Petitioners also cite Dep't of Community Affairs v. City of Bushnell (Final Order No. DCA10-GM-241). Both of these cases concern plan amendments that are easily distinguishable from the nonsubstantive text amendments adopted by Pasco County in this case.

The ALJ's conclusion of law, that "neither [163.3177(6)(a)] nor Florida Administrative Code Rule 9J-5.006(3)(c)7. requires intensity standards for Pasco's P/SP category, which is designed to serve the needs generated by the density and intensity of residential and non-residential development under a

comprehensive plan," is based on findings of fact that are supported by competent substantial evidence. Petitioners' suggested modifications to the conclusion of law are not as or more reasonable than that of the ALJ.

Petitioners' Exception 4 is DENIED.

**Respondents' Exception 1: Finding of Fact 12**

Respondents' Exception 1 challenges paragraph 12, which states:

> 12. Even if the changes are considered to be substantive, it is appropriate not to have intensity standards for P/SP. Intensity applies to non-residential use, but logically should only apply to such uses that generate impacts and the need for public services. P/SP responds to impacts and the need for public services generated by other uses. It is logical and appropriate not to have intensity standards for P/SP.

Respondents take exception to the underlined phrase in paragraph 12, because that first phrase infers that the changes made by Ordinance 09-25 could be substantive changes to the existing Comprehensive Plan.

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 inference that is not stated in the finding.

Respondents' Exception 1 is DENIED.

**Respondents' Exception 2: Conclusion of Law 28**

Respondents take exception to Conclusion of Law 28, which states:

> 28. Section 163.3177(6)(a) states that future land use categories "must include standards to be followed in the control and distribution of population densities and building and structure intensities." Neither this statute nor Florida Administrative Code Rule 9J-5.006(3)(c)7. requires intensity standards for Pasco's P/SP category, which is designed to serve the needs generated by the density and intensity of residential and non-residential development under a comprehensive plan. See Fla. Admin Code R. 9J-5.003(60) (defining "intensity" as "an objective measurement of the extent to which land may be developed or used, including the consumption or use of the space above, on or below ground; the measurement of the use of or demand on natural resources; and the measurement of the use of or demand on facilities and services"). It was not proven beyond fair debate that the plan amendments fail to include necessary intensity standards.

Respondents take exception to this conclusion of law because it "fails to incorporate findings of fact found within the Recommended Order that conclude (1) that 'density and intensity standards for P/SP have not changed as a result of Ordinance 09-25' . . . 'and (2) that Ordinance 09-25 contains

only text amendments, not future land use map amendments.'" Respondents suggest a revised conclusion of law to incorporate the identified Findings of Fact. The suggested revisions for Conclusion of Law 28 rely to a certain extent upon suggested modifications to Finding of Fact 12, which were denied above.

Respondents' modified Conclusion of Law is not as or more reasonable than that of the ALJ.

Respondents' Exception 2 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. Petitioners' Exceptions 1 through 4 are DENIED.

2. Respondents' Exceptions 1 and 2 are DENIED.

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

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

5. Plan Amendment 09-1, adopted by Pasco County on December 15, 2009, by Ordinance 09-25 is determined to be "in

compliance" as defined in Section 163.3184(1)(b), Florida Statutes.

DONE AND ORDERED in Tallahassee, Florida.

William A. Buzzett, 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 16th day of June, 2011.

Paula Ford
Agency Clerk

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