STATE OF FLORIDA
DEPARTMENT OF ECONOMIC OPPORTUNITY

NEW TESTAMENT BAPTIST CHURCH,
INCORPORATED OF MIAMI, FLORIDA,

Petitioner,

v. DOAH Case No. 13-2952GM

TOWN OF SOUTHWEST RANCHES,

Respondent.

FINAL ORDER OF DISMISSAL

This matter was considered by the Executive Director of the Department of Economic Opportunity ("Department") based on a Recommended Order of Dismissal entered by an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH").

Procedural Background

On February 28, 2013, the Town of Southwest Ranches adopted Ordinance No. 2013-006 amending the text of the Town's comprehensive plan (the "Ordinance"). The Ordinance was signed and filed with the Town Clerk a month later, on or about April 1, 2013. Under Fla. R. App. P. 9.020(h), April 1, 2013, was the date of rendition of the Ordinance.

On April 30, 2013, within thirty days after rendition of the Ordinance, Petitioner filed a Petition for Writ of Certiorari and Complaint for Declaratory Relief in the Broward County Circuit Court challenging the Ordinance.[1] The Petition included allegations that the Ordinance does not comply with certain statutory requirements in Chapter 163, Part II, Fla. Stat. On August 7, 2013, the Court entered an order dismissing the Petition for Writ of Certiorari on the ground

[1] A petition for writ of certiorari is required to be filed within thirty days after rendition of the order appealed. See Fla. R. App. P. 9.100(c) and 9.190(b)(3).

that adoption of a plan amendment is a legislative act,[2] and certiorari is not the proper remedy to challenge a legislative act. The Court further ordered the Clerk of the Court to transfer the Complaint for Declaratory Judgment to the Court's General Civil Division for further proceedings.

The next day, August 8, 2013, Petitioner filed a letter petition with DOAH to which it attached copies of the Petition for Writ of Certiorari and Complaint for Declaratory Judgment and the Circuit Court's August 7, 2013, Order.

On September 5, 2013, the Town filed a motion to dismiss Petitioner's DOAH petition as untimely because it was not filed within thirty days after the Ordinance was adopted. DOAH issued an order to show cause why the petition should not be dismissed. Petitioner responded that it mistakenly filed its Petition for Writ of Certiorari in the Broward County Circuit Court because of the Town's characterization of the adoption public hearing as a quasi-judicial proceeding for which certiorari review is proper; that the "trigger" for filing a challenge to the Ordinance is the date of rendition as provided in the Florida Rules of Appellate Procedure, not the date the Town Council verbally adopted the Ordinance; that the filing in Broward County was merely a filing in the wrong venue; and that because the Petition for Writ of Certiorari was timely filed under the Florida Rules of Appellate Procedure in the wrong venue, the petition filed with DOAH on August 8, 2013, should also be deemed to be timely filed.

On September 30, 2013, the ALJ issued his Recommended Order of Dismissal. The ALJ concluded that adoption of the Ordinance occurred at the February 28, 2013 adoption public hearing, the Florida Rules of Appellate Procedure do not apply to a challenge to a plan amendment under section 163.3184(5), Fla. Stat., and Petitioner's DOAH petition was untimely

[2] See Martin County v. Yusem, 690 So. 2d 1288, 1293-1295 (Fla. 1997), holding that all amendments to comprehensive plans are legislative decisions.

and should be dismissed. Neither party filed exceptions with the Department. Petitioner, however, filed exceptions with DOAH on October 7, 2013, reiterating most of the legal arguments in its response to the ALJ's order to show cause, particularly its argument that it timely filed its petition mistakenly in the wrong forum. Even though Petitioner's exceptions were not filed with the Department as required by section 120.57(1)(k), Fla. Stat., the Department has elected to consider them. The Town did not file a response to the exceptions.

Challenges to comprehensive plan amendments on the ground that they are not "in compliance" as defined in section 163.3184(1)(b), Fla. Stat., are governed by sections 163.3184(5)(a) and (10), Fla. Stat., which provide:

> (5) ADMINISTRATIVE CHALLENGES TO PLANS AND PLAN AMENDMENTS.—
> (a) Any affected person as defined in paragraph (1)(a) may file a petition with the Division of Administrative Hearings pursuant to ss. 120.569 and 120.57, with a copy served on the affected local government, to request a formal hearing to challenge whether the plan or plan amendments are in compliance as defined in paragraph (1)(b). This petition *must be filed with the division within 30 days after the local government adopts the amendment.* The state land planning agency may not intervene in a proceeding initiated by an affected person. (emphasis supplied).
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> (10) EXCLUSIVE PROCEEDINGS.—The proceedings under this section shall be the sole proceeding or action for a determination of whether a local government's plan, element, or amendment is in compliance with this act.

Section 120.569(2)(c), Fla. Stat., requires that a petition be dismissed if it has been untimely filed. This section goes on to provide that "[t]his paragraph does not eliminate the availability of equitable tolling as a defense to the untimely filing of a petition."

The equitable tolling doctrine was developed to accommodate both a defendant's right not to be called upon to defend a stale claim and a plaintiff's right to assert a meritorious claim when

equitable circumstances have prevented a timely filing. See Machules v. Department of Administration, 523 So. 2d 1132, 1134 (Fla. 1988); *see also* Major League Baseball v. Morsani, 790 So. 2d 1071, 1076 n.11 (Fla. 2001) (Equitable tolling "may delay the running of the limitations period based on the plaintiffs blameless ignorance and lack of prejudice to the defendant"). Generally, "the tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." Machules, 523 So. 2d at 1134 (internal citations omitted).

Petitioner does not use the words "equitable tolling" in its exceptions. It does, however, seek the application of equitable principles to permit the administrative proceeding to continue and, therefore, equitable tolling has been considered as a defense to the late filing with DOAH.

Rulings on Petitioner's Exceptions

The Petition for Writ of Certiorari

First, Petitioner argues that the Town mistakenly advertised and conducted the plan amendment adoption hearing as a quasi-judicial proceeding, which misled Petitioner into thinking the appropriate avenue of relief was a petition for writ of certiorari under the Florida Rules of Appellate Procedure rather than an administrative petition filed with DOAH.

In its response to the ALJ's order to show cause, Petitioner relied on Walgreen Co. v. Polk County, 524 So. 2d 1119 (Fla. 2nd DCA 1984), noting that if a city commission acted in a quasi-judicial capacity, the proper method of review is by certiorari but if the action of the city commission was quasi-legislative, the proper method of review is a suit in circuit court for declaratory or injunctive relief. If Petitioner was misled by the Town's characterization of its adoption public hearing as quasi-judicial, it would have filed only a petition for writ of certiorari.

Petitioner, however, filed a Petition for Writ of Certiorari *and* a Complaint for Declaratory Judgment, thereby challenging the Ordinance as a quasi-judicial action and alternatively as a quasi-legislative action. Under that circumstance, Petitioner's argument that it filed suit in the Broward County circuit court instead of with DOAH because it was misled by the Town's characterization of its public hearing as quasi-judicial is unpersuasive. Further, in its Order dismissing Petitioner's Petition for Writ of Certiorari (attached to Petitioner's DOAH petition), the Broward County Circuit Court noted that the Town's Unified Land Development Code, §105-010, provides that "if a quasi-judicial hearing is held, it shall not be construed as an admission that the application was quasi-judicial, rather than legislative." Thus, Petitioner was on notice that a quasi-judicial hearing did not necessarily signal that the proceeding was quasi-judicial in nature.

Regardless of how the Town conducted the adoption public hearing, the governing statutes–sections 163.3184(5)(a) and (10), Fla. Stat.–plainly require the filing of a petition with DOAH as the exclusive proceeding to challenge whether a comprehensive plan amendment is in compliance. Because DOAH is the exclusive venue for a comprehensive plan amendment challenge, "a circuit court is not vested with subject matter jurisdiction to consider in the first instance whether a comprehensive plan is in compliance with Chapter 163, Part II, Fla. Stat." City of Jacksonville v. Wynn, 650 So. 2d 182, 186 (Fla. 1st DCA 1995), *rehearing denied.* That determination is made solely through the administrative procedures established by the Legislature in the Community Planning Act in Chapter 163, Part II, Fla. Stat.

Date of Adoption of the Ordinance

Under section 163.3184(5)(a), Fla. Stat., a comprehensive plan amendment challenge must be filed with DOAH "within 30 days after the local government adopts the amendment." In his Recommended Order of Dismissal, the ALJ concluded that the date of adoption of a plan

amendment is the date of the second public hearing, citing section 163.3184(3)(c), Fla. Stat. Petitioner points out that "adoption" is not defined in the statute, but does not suggest that adoption occurs at any time other than at the adoption public hearing.

Section 163.3184(11), Fla. Stat., provides that adoption of a comprehensive plan amendment "shall be by affirmative vote of not less than a majority of the members of the governing body present at the hearing." The local government is required to hold at least two advertised public hearings, with the second public hearing "at the adoption stage." §§163.3184(11)(b)1. and 2., Fla. Stat.

The Department agrees with the ALJ that adoption of a plan amendment occurs at the second advertised public hearing, which is held by a local government for the express purpose of deciding whether to adopt the proposed plan amendment. If the governing body votes to adopt the proposed plan amendment, then at that point adoption has occurred. Accordingly, the thirty-day time period within which to file a petition with DOAH runs from the date of the adoption public hearing where the governing body votes to adopt the plan amendment, which in this case was February 28, 2013.

Timeliness of Petition

Petitioner claims that it timely filed its petition challenging the Ordinance in the wrong venue. Petitioner's Petition for Writ of Certiorari and Complaint for Declaratory Judgment was timely filed under the Florida Rules of Appellate Procedure on April 30, 2013, in that it was filed within thirty days after rendition of the Ordinance. The date of rendition, however, is not relevant in an administrative challenge under section 163.3184(5)(a), Fla. Stat. As previously noted, the Ordinance was adopted at the adoption public hearing on February 28, 2013, and a petition challenging the Ordinance was required to be filed with DOAH within thirty days after

adoption. The deadline to file a petition with DOAH in this case was Monday, April 1, 2013,[3] not April 30, 2013. Petitioner's petition filed in the Broward County circuit court was filed twenty-nine days after the filing deadline in section 163.3184(5)(a), Fla. Stat. Petitioner's petition filed with DOAH on August 8, 2013, was filed 128 days after the filing deadline.

Equitable tolling applies to a petition filed in the wrong forum only when the petitioner "has timely asserted his rights mistakenly in the wrong forum." Machules, 523 So. 2d at 1134 (internal citations omitted). In this case, Petitioner's filing in the Broward County Circuit Court was not timely under the timeframe established in section 163.3184(5)(a), Fla. Stat., and therefore equitable tolling does not apply. Further, based on the Petitioner's exceptions and the documents filed with DOAH, the Department finds no equitable circumstances that prevented the Petitioner from timely filing a petition with DOAH pursuant to section 163.3184(5)(a), Fla. Stat.

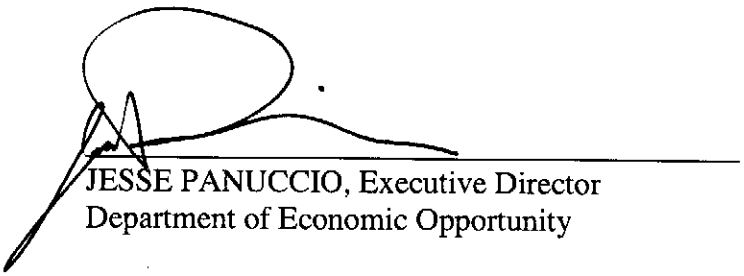
Email Message from Town's Attorney

Finally, Petitioner asserts that even after its petition was filed with DOAH, the Town's attorney advised via email that DOAH was not the proper place to challenge the Ordinance, apparently as evidence that "[t]he Town has attempted at every stage of the proceedings to divert the Church's filing from what the Town now claims is the proper venue." (Petitioner's Exceptions, ¶ 4). As the email from the Town's attorney was sent after Petitioner filed its letter petition with DOAH, that email did not influence Petitioner's decision to file a Petition and Complaint in the Broward County Circuit Court instead of filing a petition with DOAH as required by section 163.3184(5)(a), Fla. Stat.

[3] The thirty-day deadline in this case was Saturday, March 30, 2013. Pursuant to Rule 28-206.103, Fla. Admin. Code, if a deadline falls on a Saturday, Sunday, or legal holiday, the time is extended to the end of the next day that is not a Saturday, Sunday, or legal holiday. The deadline to file a petition with DOAH in this case was extended to Monday, April 1, 2013.

ORDER

BASED ON THE FOREGOING, IT IS ORDERED that Petitioner's exceptions are denied, the recommendation of the Administrative Law Judge in the Recommended Order attached hereto as Exhibit A is accepted, and the letter petition filed with DOAH by the Petitioner New Testament Baptist Church Incorporated of Miami, Florida, on August 8, 2013, is DISMISSED.



JESSE PANUCCIO, Executive Director
Department of Economic Opportunity

NOTICE OF RIGHT TO APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION UNDER CHAPTER 120, FLORIDA STATUTES. A PARTY WHO IS ADVERSELY AFFECTED BY FINAL AGENCY ACTION IS ENTITLED TO JUDICIAL REVIEW IN ACCORDANCE WITH 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 FINAL AGENCY ACTION, A NOTICE OF APPEAL MUST BE FILED WITH THE DEPARTMENT'S AGENCY CLERK WITHIN THIRTY (30) CALENDAR DAYS AFTER THE DATE THIS FINAL AGENCY ACTION IS FILED WITH THE AGENCY CLERK (SEE NOTICE OF FILING AND SERVICE BELOW). THE ADDRESS OF THE AGENCY CLERK IS:

AGENCY CLERK
DEPARTMENT OF ECONOMIC OPPORTUNITY
107 EAST MADISON STREET, CALDWELL BUILDING, MSC 110
TALLAHASSEE, FLORIDA 32399-4128
FAX NUMBER 850-921-3230
Email: James.Bellflower@deo.myflorida.com

A DOCUMENT IS FILED WHEN IT IS RECEIVED BY 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 ALSO BE FILED WITH THE DISTRICT COURT OF APPEAL AND MUST BE ACCOMPANIED BY THE FILING FEE SPECIFIED IN SECTION 35.22(3), FLORIDA STATUTES.

BE ACCOMPANIED BY THE FILING FEE SPECIFIED IN SECTION 35.22(3), FLORIDA STATUTES.

AN ADVERSELY AFFECTED PARTY WAIVES THE RIGHT TO JUDICIAL REVIEW IF THE NOTICE OF APPEAL IS NOT TIMELY FILED WITH BOTH THE DEPARTMENT'S AGENCY CLERK AND THE APPROPRIATE DISTRICT COURT OF APPEAL.

NOTICE OF FILING AND SERVICE

I HEREBY CERTIFY that the above Final Order was filed with the Department's undersigned designated Agency Clerk and that true and correct copies were furnished to the persons listed below in the manner described on the 7 day of NOVEMBER, 2013.

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