

STATE OF FLORIDA
DEPARTMENT OF ECONOMIC OPPORTUNITY

ERICH NIKOROWICZ,

Petitioner,

v.

FINAL ORDER NO.: DEO-17-140
DOAH CASE NO.: 15-7236

ANTIQUERS AERODROME, INC.,

Respondent.

STEPHEN J. BYERS,

Petitioner,

v.

FINAL ORDER NO.: DEO-17-140
DOAH CASE NO.: 15-7237

ANTIQUERS AERODROME, INC.,

Respondent.

FILED
2017 MAY 30 PM 2:11
DIVISION OF
ADMINISTRATIVE HEARINGS

FINAL ORDER

This matter was considered by the General Counsel for the Department of Economic Opportunity (“Department”), following receipt of a Recommended Order issued by an Administrative Law Judge (“ALJ”) of the Division of Administrative Hearings (“DOAH”).

Background

This is a proceeding to determine whether Antiquers Aerodrome, Inc., referred to herein as “the Association” or “Respondent,” properly revived its restrictive covenants and other governing documents in accordance with section 720.403-407, Florida Statutes.¹ On November 5, 2015, the

¹ References to the Florida Statutes are to the 2015 version of the statutes unless otherwise noted.

Department entered Final Order Number DEO-15-183 (“Final Order”) approving the Association’s proposed revived declaration of covenants and other governing documents (“Proposed Revived Declaration”). Petitioner, Erich Nikorowicz² (“Nikorowicz”), filed a Petition for Administrative Proceeding on December 8, 2015, challenging the Final Order. Nikorowicz stated that the Association’s Proposed Revived Declaration should not have been approved for revitalization for the following reasons: (1) Seven of the voting ballots were invalid because the names on the limited proxies did not have authorization to sign for the property owners; and (2) the Association did not submit the most recent Bylaws to the property owners or the Department.

On December 14, 2015, Petitioner, Stephen Byers³ (“Byers”), also filed a Petition for Administrative Proceeding challenging the Department’s Final Order. Byers’ Petition contained the same objections found in Nikorowicz’s December 8, 2015, Petition with one additional objection. Byers’ third objection states that the Proposed Revived Declaration should not have been approved because two of the notices provided to the property owners regarding revitalization did not contain the name, address, and telephone number of the members of the organizing committee.

On December 18, 2015, the Department forwarded Nikorowicz and Byers’ Petitions to DOAH. The ALJ entered an Order consolidating the two cases on December 29, 2015.

Role of the Department

The Department reviewed Respondent’s Proposed Revived Declaration and approved the Proposed Revived Declaration, pursuant to section 720.406, Florida Statutes. Nikorowicz and Byers timely filed their Petitions, which were timely referred to DOAH by the Department. The Department was not a party to the consolidated DOAH proceeding. The ALJ’s Recommended Order

² Erich Nikorowicz is an affected parcel owner and a member of Antiquers Aerodrome, Inc.

³ Stephen Byers is an affected parcel owner and a member of Antiquers Aerodrome, Inc.

recommends that the Department enter a Final Order disapproving the revitalization of Respondent's Proposed Revived Declaration.

Specifically, the Recommended Order states that Respondent's Proposed Revived Declaration should not be approved because the November 7, 2010, Amended Bylaws were not provided to the property owners or to the Department. Also, two of the meeting notices to the property owners did not comply with section 720.405(1), Florida Statutes, in that the name, address, and telephone numbers of the organizing committee members were missing. The Department must determine whether Respondent's Proposed Revived Declaration package submitted to the property owners and to the Department complied with the requirements found in Chapter 720, Florida Statutes.

Standard of Review of Recommended Order

Pursuant to the Administrative Procedure Act, an agency may not reject or modify the findings of fact in a recommended order unless the agency first determines from a review of the entire record, and states with particularity in its final 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. § 120.57(1)(l), Fla. Stat. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. *Id.*

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. Dep't of Health*, 823 So. 2d 823, 825 (Fla. 1st DCA 2002) (citations omitted). In determining whether challenged findings of fact are supported by the record in accord with this standard, the agency 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. Dep't of Bus. Reg.*, 475 So. 2d 1277, 1281-1283 (Fla. 1st DCA 1985). If the evidence

presented in an administrative hearing supports two inconsistent findings, it is the ALJ's role to decide the issue one way or the other. *Id.*

The Administrative Procedure Act also specifies the manner in which the agency is to address conclusions of law in a recommended order. In its final order, an agency may reject or modify the conclusions of law over which it has substantive jurisdiction. When rejecting or modifying a conclusion of law, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law and must make a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified. § 120.57(1)(l), Fla. Stat.; *see also DeWitt v. Sch. Bd. of Sarasota County*, 799 So. 2d 322 (Fla. 2d DCA 2001).

Department's Review of the Recommended Order

The Department has been provided copies of the Parties' pleadings, the documentary evidence introduced at the final hearing, and a two-volume transcript of the proceedings. Respondent timely filed its Exceptions to the Recommended Order on March 13, 2017. Neither Byers nor Nikorowicz filed Exceptions or Responses to Respondent's Exceptions.

Ruling on Respondent's Exceptions to the Recommended Order

A – Exception 1:

In Exception 1, Respondent objects to the ALJ's conclusion that the Amended November 7, 2010, Bylaws ("Amended Bylaws") must have been provided to the property owners and the Department, pursuant to sections 720.405(3) and 720.406(1)(b), Florida Statutes. Respondent asserts that the Amended Bylaws were not required to be provided to the property owners or the Department because they were amended after the Declaration of Covenants had already expired. However, as explained in the ALJ's Recommended Order, "MRTA only extinguishes interests in real property." *Cirelli v. Ent.*, 885 So.2d 423, 432 (Fla. 5th DCA 2004). The plain language of Chapter 720, Florida

Statutes, requires that all duly adopted amendments to bylaws be included in the revitalization package. The failure to include the 2010 amendments was therefore fatal.

Respondent further argues that amendments to bylaws should not be included in a revitalization package, in accordance with 720.406(1)(b), Florida Statutes, because this would necessarily also require that any invalid amendments to expired Covenants be included to avoid inconsistency. However, the definition of "Governing Documents," includes only those amendments that are "duly adopted." For example, the definition of Governing Documents includes, "The recorded declaration of covenants for a community and all duly adopted and recorded amendments, supplements, and recorded exhibits thereto." § 720.301(8)(a), Fla. Stat., (emphasis added). The word 'duly' is defined in the most recent edition of Black's Law Dictionary, as follows: "In a proper manner; in accordance with legal requirements." BLACK'S LAW DICTIONARY 517 (10TH ed. 2014). Amendments to expired Covenants are not duly adopted because they are not adopted in accordance with the requirements of Florida law. Amendments to expired covenants therefore do not need to be included with a revitalization package even though duly adopted amendments to bylaws must be included.

Respondent incorrectly states that it is the Department's policy and practice to reject any revitalization submission which includes amendments to bylaws or articles of incorporation that post-date the expiration of the declaration of covenants. Pursuant to section 720.406(1)(b), Florida Statutes, the Department must receive a copy of the previous declaration of covenants and other governing documents, which includes, "any amendments thereto." Since bylaws are not interests in real property, they do not expire under MRTA. As a result, "Any amendments thereto," includes amendments to the bylaws even if they were adopted after the expiration of the declaration of covenants. Therefore, any amendments to the bylaws, regardless of the creation date of the amendment, must be submitted to the Department in accordance with section 720.406(1)(b), Florida Statutes.

Pursuant to section 120.57(1)(k), Florida Statutes, “an agency need not rule on an exception...that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.” Respondent fails to cite a legal basis for the exception or cite to specific facts or testimony that suggest the ALJ erred in the conclusion of law. Furthermore, Respondent fails to identify the disputed portion of the Recommended Order by page number or paragraph. Therefore, Respondent’s proposed conclusion of law is not as or more reasonable than the conclusion of law reached by the ALJ.

Respondent’s Exception 1 is DENIED.

B – Exception 2:

In Exception 2, Respondent asserts that the name, address, and telephone numbers of the members of the organizing committee need only be listed on documents that are provided by the organizing committee to the property owners in furtherance of the committee’s responsibilities under Chapter 720, Florida Statutes. Respondent also contends that the evidence presented by Robert Bakeris, a member of the organizing committee, showed that the notices were prepared pursuant to Ms. Peggy Preiser’s role as an officer of the Association and not as a member of the organizing committee.

The ALG rejected Respondents’ argument that Ms. Preiser was not acting in her official capacity as an organizing committee member when she emailed and posted the notices. The ALJ determined that the evidence established that the additional notices were provided by the organizing committee to the property owners who were to be affected by the Proposed Revived Declaration⁴.

⁴ The July 30, 2015, email sent by Ms. Preiser to the property owners states, “As noticed to all members, this special meeting is being held for the purpose of voting to revitalize (restore) the Associations’ Restrictive Covenants and Reservations as provided by Sections 720.403 through 720.407, Florida Statutes.” Byers’ Exhibit 34. Also, in the signature block of the email, Ms. Preiser lists that she is an organizing committee member. *Id.*

As set forth above, there is competent substantial evidence in the record to support the ALJ's conclusion. The ALJ considered Robert Bakeris' testimony, but did not assign the weight that Respondent believed should be given to the testimony. Where there is competent substantial evidence in the record to support the ALJ's findings of fact, as here, the Department is unable to reweigh evidence or judge the credibility of witnesses. *See Heifetz v. Dep't of Bus. Reg.*, 475 So. 2d 1277, 1281-1283 (Fla. 1st DCA 1985).

Pursuant to section 120.57(1)(k), Florida Statutes, "an agency need not rule on an exception...that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." Respondent fails to cite to specific facts or testimony that suggest the ALJ erred in the findings and conclusions. Also, Respondent fails to identify the disputed portion of the Recommended Order by page number or paragraph.

The ALJ's finding of fact and credibility regarding Robert Bakeris' testimony is based on competent substantial evidence in the record. Furthermore, based on the findings of fact and the conclusion of law reached in Paragraph 12 and Paragraph 49 of the Recommended Order, there is not a conclusion the Department could reach that would be as or more reasonable than the ALJ's conclusion.

The Department notes that its decision as to the second exception is limited to the specific facts of this case, wherein the ALJ determined as a matter of fact that the notices from Ms. Preiser were sent on behalf of the organizing committee.

Respondent's Exception 2 is DENIED.

Remainder of the Recommended Order


As for the remainder of the Recommended Order, the Department concludes that the ALJ's findings of fact are based on competent substantial evidence in the record and that the proceedings on which the findings are based comply with essential requirements of law, which are the only

statutory grounds on which an agency may reject findings of fact. § 120.57(1)(l), Fla. Stat. In the Recommended Order, the ALJ describes the competent substantial evidence presented at the final hearing that supports the disapproval of the Final Order. Accordingly, the Department accepts all of the findings of fact in the Recommended Order.

The Department has reviewed the ALJ's conclusions of law in light of the Department's substantive jurisdiction over covenant revitalization under Chapter 720, Part III, Florida Statutes. The Department has not identified any conclusion of law within its substantive jurisdiction for which a substituted conclusion of law would be as reasonable as, or more reasonable than, the ALJ's conclusions of law. § 120.57(1)(l), Fla. Stat. Therefore, the Department accepts all of the ALJ's conclusions of law.

ORDER

Based on the foregoing, the Department adopts the ALJ's Recommended Order in its entirety (a copy of which is attached as Exhibit A and incorporated herein), as the Department's Final Order and finds that Final Order DEO-15-183 should be reversed, and Respondent's request to revitalize its Proposed Revived Declaration should be denied.



David J. Guerrieri, Jr.
General Counsel
Department of Economic Opportunity

NOTICE OF RIGHT TO APPEAL

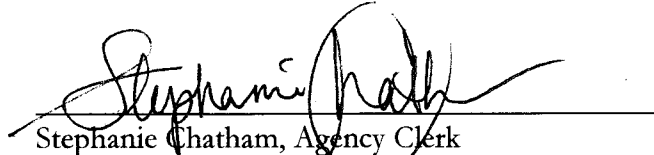
THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION UNDER CHAPTER 120, FLORIDA STATUTES. A PARTY WHO IS ADVERSELY AFFECTED BY FINAL AGENCY ACTION IS ENTITLED TO JUDICIAL REVIEW IN ACCORDANCE WITH SECTION 120.68, FLORIDA STATUTES, AND FLORIDA RULES OF APPELLATE PROCEDURE 9.030(B)(1)(c) AND 9.110.

TO INITIATE AN APPEAL OF THIS FINAL AGENCY ACTION, A NOTICE OF APPEAL MUST BE FILED WITH THE DEPARTMENT'S AGENCY CLERK, 107 EAST MADISON STREET, CALDWELL BUILDING, MSC 110, TALLAHASSEE, FLORIDA 32399-4128, WITHIN THIRTY CALENDAR (30) DAYS AFTER THE DATE THIS FINAL AGENCY ACTION IS FILED WITH THE AGENCY CLERK, AS INDICATED BELOW. 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.

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 25th day of May, 2017.


Stephanie Chatham, Agency Clerk
Department of Economic Opportunity
107 East Madison Street, MSC 110
Tallahassee, FL 32399-4128

By Certified U.S. Mail

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