

**STATE OF FLORIDA
DEPARTMENT OF ECONOMIC OPPORTUNITY**

JAMES ANDERSON,

Petitioner,

v.

CITY OF ST. PETE BEACH,

Respondent,

and

RIA-BRECKENRIDGE, INC., RIA-CORAL REEF, INC., RIA-SANDPIPER, INC., RIA-TRADEWINDS, INC., AND RESORT INNS OF AMERICA, INC.,

Intervenors.

FINAL ORDER NO.: DEO-17-156
DEO CASE NO.: 17-128
DOAH CASE NO.: 17-1884GM

FILED
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DIVISION OF
ADMINISTRATIVE HEARINGS

FINAL ORDER

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

Background

This is a proceeding to determine whether respondent, City of St. Pete Beach’s (“City”), amendment to the Capital Improvements Element of its Comprehensive Plan through adoption of Ordinance 2017-03 (“Plan Amendment”) is “in compliance” as defined in section 163.3184(1)(b), Florida Statutes. The City adopted the Plan Amendment on February 28, 2017. The Plan Amendment amends the City’s Capital Improvements Element, in part, by removing the capital

improvements schedule, and concurrency for parks and public schools. At the same meeting, the City adopted Ordinance 2016-23, which adopted a modified capital improvements schedule for 2017 through 2021.

Role of the Department

The Plan Amendment was adopted under the expedited state review process pursuant to section 163.3184(3), Florida Statutes. The Petitioner timely filed his Petition with DOAH to determine whether the Plan Amendment is “in compliance” as defined in section 163.3184(1)(b), Florida Statutes (2016)¹. In accordance with section 163.3184, the ALJ issued a Recommended Order recommending that the Department enter a final order finding the Plan Amendment to be in compliance. (Recommended Order attached hereto as Exhibit “A” and incorporated herein).² Pursuant to section 163.3184(5), the Department shall determine whether the Plan Amendment should be found “in compliance” and enter a Final Order to that effect, or determine that the Plan Amendment is not “in compliance” and submit the Recommended Order to the Administration Commission for final agency action.

Standard of Review of Recommended Order

The Petition did not raise disputed issues of material fact. Therefore, the only disputed issues relate to questions of law. The Administrative Procedure Act 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

¹ References to the Florida Statutes are to the 2016 version of the statutes unless otherwise noted.

² Initially, the ALJ determined that no material facts were in dispute, and the Court issued an Order Closing File and Relinquishing Jurisdiction to the Department of Economic Opportunity. The Department referred the case back to DOAH stating it had authority only to review a recommended order pursuant to section 163.3184(5)(a) – (c). By Order dated August 24, 2017, DOAH reopened the file.

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 reasonable as, or more reasonable than, that which was rejected or modified. Section 120.57(1)(1), Fla. Stat. *See also, DeWitt v. Sch. Bd. of Sarasota County*, 799 So. 2d 322 (Fla. 2d DCA 2001).

The Department's review is subject to Chapter 163, Part II, Florida Statutes. Accordingly, the Department has reviewed and considered the Recommended Order prior to issuing this Final Order. In determining whether an amendment to a local government's comprehensive plan is in compliance, "the comprehensive plan or plan amendment shall be determined to be in compliance if the local government's determination of compliance is fairly debatable." Section 163.3184(5)(c)1., Florida Statutes; *see also Martin County v. Yusem*, 690 So.2d 1288, 1295 (Fla. 1997) ("The fairly debatable standard of review is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety.")

Department's Review of the Record

The Department has reviewed and considered the same record as was before the ALJ. The ALJ considered the following in preparation of the Recommended Order: the pleadings; Ordinance 2016-23; the City's Motion for Summary Judgment, with attachments and Intervenors' Brief in support thereof; Petitioner's response to the City's Motion to Relinquish Jurisdiction, with attachments; and the parties' Pre-Hearing Stipulation. The Petitioner timely submitted his Exceptions to Recommended Order, which have been reviewed and considered in preparing this Final Order. The City and the Intervenors each filed responses in opposition to the Petitioner's exceptions. The City and the Intervenors' responses were filed after the ten-day filing deadline, and, therefore, were not considered. *See* Rule 28-106.217, Florida Administrative Code. On

November 13, 2017, Petitioner filed a Notice of Filing and Request for Official Recognition of a proposed City Ordinance 2017-28. The Department denies the Petitioner's request to consider facts that were not considered by the ALJ in preparing the Recommended Order.

Ruling on Petitioner's Exceptions to the Recommended Order

The Department has reviewed and considered the Petitioner's Exceptions to Recommended Order and determined that, other than for limited issues identified herein, the exceptions are neither supported by competent substantial evidence in the record nor are they as reasonable as, or more reasonable than, the conclusions reached by the ALJ.

A – Exception to the ALJ's interpretation of section 163.3177(3)(b), Florida Statutes:

The Petitioner takes exception with the ALJ's conclusion that a local government may update and modify its capital improvements schedule by separate ordinance without rendering its comprehensive plan not in compliance. (See Petitioner's Exceptions to Recommended Order at ¶ 5) The record evidence supports the ALJ's finding that "on February 28, 2017, the City adopted Ordinance 2017-03, which amends the Capital Improvements Element. On the same date, just before it adopted Ordinance 2017-03, the City adopted Ordinance 2016-23, which adopts an updated capital improvements schedule." (See Recommended Order at ¶ 4) The Petitioner provides no legal basis for its alternate conclusion that a local government cannot modify or update its capital improvements schedule through an ordinance outside the plan amendment process proscribed in section 163.3184, Florida Statutes. The Petitioner's sole claim is that the ALJ's interpretation of section 163.3177(3)(b) is erroneous and conflicts with section 163.3177(3)(a). The plain language of section 163.3177(3)(b) permits local governments to modify and update their 5-year capital improvements schedule by ordinance, which may not be deemed to be amendments to the local comprehensive plan. The statute does not contain the restrictions that the

Petitioner urges the Department to read into the provision. Because section 163.3177(3)(b) is clear and unambiguous, the plain language controls. *Daniels v. Fla Dep't of Health*, 898 So.2d 61, 64-65 (Fla. 2005). If the Department were to read beyond the plain text of section 163.3177(3)(b) and reach an alternate conclusion it would “constitute an abrogation of legislative power.” *Id.*

Petitioner’s exception relating to the interpretation of section 163.3177(3)(b) is denied.

B – Exceptions relating to the minimum content required by section 163.3177(3):

The Petitioner takes exception to the ALJ’s Recommended Order and claims the ALJ “failed to address Petitioner’s alternative argument that Ordinance 2016-23 did not include the minimum content required by § 163.3177(3)(a)2. or 5”. (See Petitioner’s Exceptions to Recommended Order at ¶ 6) The ALJ, however, addressed the Petitioner’s argument by finding “the schedule includes, among others, public facilities, capital improvements, and transportation projects.” (See Recommended Order at ¶ 5) Further, as recognized by the Petitioner, “the ALJ correctly recognized in paragraph 7 of the Recommended Order that ‘Ordinance 2016-23 was adopted outside the plan process’ and ‘the new schedule is not subject to an in compliance challenge.’” The Petitioner’s exception is not supported by competent substantial record evidence and is not as reasonable or more reasonable than the ALJ’s conclusion that the disputed content was present in the City’s comprehensive plan.

Petitioner’s exception relating to the minimum content required by section 163.3177(3) is denied.

C – Exception relating to the Public Schools Facilities Element (PSFE):

Petitioner takes exception to the ALJ’s Recommended Order and claims the ALJ “failed to address Petitioner’s claim that the Plan Amendment was inconsistent with the Public School Facilities Element (PSFE) of the City’s Comp Plan since the PSFE required concurrency and the

Capital Improvements Element removed public school facilities from its list of mandatory concurrency requirements.” (See Petitioner’s Exceptions to Recommended Order at ¶ 7) The Petitioner, however, fails to cite to record evidence to support his conclusion that the City’s Comprehensive Plan is not in compliance because of the amendments made by adoption of the Plan Amendment. The removal of the concurrency requirement for public school facilities in the Capital Improvements Element does not create an inconsistency where the PSFE specifically requires it. The ALJ’s conclusion that the City’s comprehensive plan is in compliance is as reasonable as, or more reasonable than, the Petitioner’s conclusion.

Petitioner’s exception relating to the PSFE is denied.

D – Exception to ALJ’s finding the Department reviewed and evaluated Ordinance 2016-23:

Petitioner takes exception with the ALJ’s finding that “DEO reviewed both Ordinances and found no provision that necessitated a challenge to that action.” (See Recommended Order at ¶ 5) The Department accepts the Petitioner’s exception, in part, because no competent substantial record evidence supports a finding that the Department reviewed Ordinance 2016-23 pursuant to section 163.3184. As the Petitioner identifies “the ALJ correctly recognized in paragraph 7 of the Recommended Order that ‘Ordinance 2016-23 was adopted outside the plan process’ and ‘the new schedule is not subject to an in compliance challenge.’” Ordinance 2016-23, accordingly, was not subject to review by the Department. The Department, however, rejects the remainder of the Petitioner’s exception that the Department would have commented on the City’s capital improvements schedule. Competent substantial record evidence supports the ALJ’s finding that the City’s modification and updating of its Capital Improvements Element by adopting the Plan Amendment and 2016-23 comports with the plain language of section 163.3177(3)(b), Florida Statutes, and does not render the City’s comprehensive plan not in compliance.

The Petitioner's exception that the Department did not review Ordinance 2016-23 is accepted, however, the Petitioner's remaining exception is not supported by competent substantial evidence contained in the record and is not as reasonable as, or more reasonable than, the ALJ's conclusions.

Petitioner's exception relating to the Department's review of Ordinance 2016-23 is accepted in part and denied in part.

E – Exception to the ALJ's conclusion that the City's ordinances comport with section 163.3177, Florida Statutes:

The Petitioner takes exception with the ALJ's Recommended Order and claims "the City's approach is not a 'modification' or an 'update' but is instead the initial adoption of the schedule itself, which § 163.3177(3)(a) requires to be in the Comp Plan and based upon data and analysis." (Petitioner's Exceptions to Recommended Order at ¶ 9) The Petitioner does not provide any legal authority that conflicts with the ALJ's conclusion that the ordinances are a modification or update to the City's capital improvements schedule. The Department does not find the Petitioner's conclusion as reasonable as, or more reasonable than, the conclusion of the ALJ. The plain language of section 163.3177(3)(b) permits local governments to modify and update their capital improvements schedule through ordinances that are not considered amendments to the local comprehensive plan, which the City did through adoption of Ordinance 2016-23. Competent substantial record evidence supports the ALJ's finding that the City made such a modification or update to its capital improvements schedule and the Petitioner's conclusion is not as reasonable as, or more reasonable than, the ALJ's conclusion that section 163.3177(3)(b) permits the City to make such a modification or update as it accomplished by adopting the Plan Amendment and Ordinance 2016-23.

Petitioner's exception is denied.

F – Exception to the ALJ reserving jurisdiction to consider the City's fee claim:

The Petitioner takes exception with the ALJ's conclusion to retain jurisdiction for the limited purpose of considering the City's Motion for Attorney's Fees and Costs pursuant to section 163.3184(9). (See Petitioner's Exceptions to Recommended Order at ¶ 10) The Petitioner does not cite to any legal authority conflicting with the ALJ's conclusion. In the absence of any conflicting legal authority, the Department accepts the ALJ's conclusion to retain jurisdiction for the specified limited purpose. The Petitioner's conclusion is not as reasonable as, or more reasonable than, the ALJ's conclusion.

Findings of Fact


As for the remainder of the Recommended Order, the Department concludes 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. Therefore, the Department accepts all of the remaining findings of fact in the Recommended Order.

Conclusions of Law

As for the remainder of the Recommended Order, the Department has reviewed the ALJ's conclusions of law in light of the Department's substantive jurisdiction under Chapter 163, Part II, Florida Statutes. The Department has not identified a 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. Accordingly, the Department accepts all of the ALJ's remaining conclusions of law in the Recommended Order.

Order

Based on the foregoing, the Department adopts the ALJ's Recommended Order, as modified herein, as the Department's Final Order and finds that the Plan Amendment adopted by the City of St. Pete Beach, Ordinance 2017-03, is "in compliance" as defined in section 163.3184(1)(b), Florida Statutes.



Julie Dennis
Director of Community Development
Department of Economic Opportunity

NOTICE OF RIGHT TO APPEAL

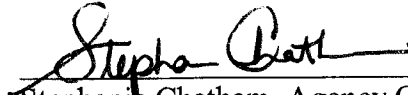
THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION UNDER CHAPTER 120, FLORIDA STATUTES. A PARTY WHO IS ADVERSELY AFFECTED BY FINAL AGENCY ACTION IS ENTITLED TO JUDICIAL REVIEW IN ACCORDANCE WITH SECTION 120.68, FLORIDA STATUTES, AND FLORIDA RULES OF APPELLATE PROCEDURE 9.030(B)(1)(c) AND 9.110.

TO INITIATE AN APPEAL OF THIS FINAL AGENCY ACTION, A NOTICE OF APPEAL MUST BE FILED WITH THE DEPARTMENT'S AGENCY CLERK, AGENCY.CLERK@DEO.MYFLORIDA.COM, 107 EAST MADISON STREET, CALDWELL BUIDLING, MSC 110, TALLAHASSEE, FLORIDA 32399-4128, WITHIN THIRTY (30) CALENDAR DAYS OF 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 Agency Clerk and that true and correct copies were furnished to the persons listed below in the manner described on the 27th day of November, 2017.


Stephanie Chatham, Agency Clerk
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By Certified U.S. Mail

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