STATE OF FLORIDA
DEPARTMENT OF ECONOMIC OPPORTUNITY

EDWIN KRAVITZ, JR.,

Petitioner,

v.

DOAH Case No. 20-1703
DEO Case No. 20-060

VENETIAN ISLES HOMEOWNERS ASSOCIATION, INC., AND STATE OF FLORIDA, DEPARTMENT OF ECONOMIC OPPORTUNITY,

Respondents.

_____/

FINAL ORDER

This matter was considered by the Florida 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 a proposed revived declaration of covenants for Venetian Isles Homeowners Association ("VIHA") was properly approved by parcel owners and complied with all statutory requirements. On February 21, 2020, the Department entered Determination Number 20041 ("Determination"), approving the proposed revitalization pursuant to Chapter 720, Part III, Florida Statutes (2019). Substantially affected parcel owner Edwin Kravitz, Jr. filed a Petition for Challenging Agency Action and for Administrative Proceeding ("Petition") on March 18, 2020, challenging the Department's approval of the proposed revitalization. The Department referred the Petition to DOAH on April 1, 2020. A final hearing on

the matter was held on June 8, 2020, and the ALJ entered her Recommended Order on August 17, 2020.

Role of the Department

The Department previously reviewed VIHA's proposed revitalization submission and entered a non-final agency determination approving revitalization of the proposed declaration of covenants pursuant to section 720.406(2), Florida Statutes. Petitioner timely filed his Petition, which was timely referred to DOAH by the Department. After an administrative hearing, the ALJ entered a Recommended Order recommending that the Department enter a final order denying the revitalization.

Standard of Review of a Recommended Order

Pursuant to Florida's 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 the 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, 1281-83 (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.* at 1281.

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, the agency may only 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 reasonable as or more reasonable than that which was rejected or modified. § 120.57(1)(1), Fla. Stat.; see also DeWitt v. Sch. Bd. of Sarasota Cnty., 799 So. 2d 322, 324-25 (Fla. 2d DCA 2001).

The label assigned to a statement is not dispositive as to whether it is a finding of fact or a conclusion of law. Stokes v. State, Bd. of Prof'l Engineers, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007) (citing Kinney v. Dep't of State, Div. of Licensing, 501 So. 2d 129, 132 (Fla. 5th DCA 1987)). A conclusion of law or finding of fact should be considered as such based upon the statement itself and not the label assigned. See, e.g., Goin v. Comm 'n on Ethics, 658 So. 2d 1131, 1137-38 (Fla. 1st DCA 1995).

Department's Review of the Recommended Order

The Department has been provided copies of the Recommended Order ("RO") and the documentary evidence introduced at the final hearing. As of the date of this Final Order, no transcript of the final hearing has been provided. Petitioner Kravitz, Jr. filed exceptions to the RO on September 1, 2020, which are now considered as follows:

A – Petitioner's Exception 1: Original Restrictions for Units 1 through 9 - ¶ 50

Petitioner takes exception to the Conclusion of Law in paragraph 50 of the RO, in which the ALJ held that VIHA was not required to provide the Department with the "developer's restrictions" on Units 1-9. Petitioner argues that the developer's restrictions fall within Section 720.406(1)(b)'s ambit of "previous declaration of covenants and other previous governing documents for the community, including any amendments thereto," and therefore VIHA was required to provide the Department with verified copies of same.

Paragraph 50 of the RO states:

> *As noted above*, the Association need not have provided the restrictions placed individually on Units 1 through 9 by the developer *because those were superseded by the 1978 Restrictive Covenants*. However, the Association's 2013 bylaws were not submitted to the Department. Therefore, the DEO Package was incomplete and did not comply with section 720.406(1)(b).

(emphasis added). This Conclusion appears to be predicated on paragraph 6 of the RO, which reads:

> The Restrictive Covenants the Association seeks to revive were recorded on January 24, 1978. *At that time, the developer's restrictions were superseded because Venetian Isles was fully developed and authority for enforcement of the restrictions was transferred from the developer to the Association.* As reflected in the "Whereas" clause in the 1978 Restrictive Covenants, the homeowners in Units 1 through 9 approved the new restrictions; the homeowners in Unit 10 did not. *The undersigned finds that the 1978 Restrictive Covenants were validly enacted and recorded, and that they extinguished the restrictions previously recorded by the developer for Units 1 through 9.*

(emphasis added). It is fairly debatable whether the ALJ's statements in paragraph 6 constitute one or more Findings of Fact or Conclusions of Law. Section 120.57(1)(l), Florida Statutes provides that the Department may not reject or modify an ALJ's Findings of Fact, except upon a review of the "entire record." The "entire record" necessarily includes a transcript of the final hearing from which the Finding of Fact is drawn. See Roberts v. Dep't of Corr., 690 So. 2d 1383, 1384 (Fla. 1st

DCA 1997); Financial Marketing Group, Inc. v. Sate Dep't of Banking & Finance, Div. of Securities, 352 So. 2d 524, 525 (Fla. 3d DCA 1977). No transcript of the hearing has been filed with the Department. Therefore, to the extent the ALJ's paragraph 6 statement may be properly understood as a Finding, it may not be disturbed. On the other hand, to the extent the ALJ's paragraph 6 statement may be properly understood as a Conclusion of Law, it falls outside the Department's substantive jurisdiction and thus, also may not be disturbed.

Left to stand, the paragraph 6 statements directed to the supersession and/or extinguishment of the "developer's restrictions" present an unusual scenario in support of the ALJ's paragraph 50 Conclusion of Law, clearly distinguishable from the precedent cited by Petitioner. Petitioner's proposed Conclusion of Law is not more reasonable than the ALJ's. Petitioner's first exception is DENIED.

B – Petitioner's Exception 2: Expiration of Restrictive Covenants by Operation of MRTA - ¶¶ 7 and 52

Petitioner takes exception to the ALJ's Conclusions of Law in paragraphs 7 and 52 regarding the precise operation of the Marketable Record Title Act (MRTA) on the restrictive covenants at issue, arguing that the covenants expired in August of 1997, not January 24, 2008. The Department may only modify or reject those Conclusions of Law over which it has substantive jurisdiction. The Department has no substantive jurisdiction over the Conclusions of Law subjected to this exception. Therefore, Petitioner's second exception is DENIED.

C – Petitioner's Exception 3: Post-1978 Amendments After the Expiration of Restrictive Covenants By Operation of MRTA - ¶¶ 8, 46, and 47

Petitioner takes exception to Conclusions of Law in paragraphs 8, 46, and 47, arguing that they should be modified in light of his prior exception as to the precise operation of MRTA:

specifically, he contends that because MRTA operated to extinguish the restrictive covenants on an earlier date, the subsequent amendments were null and void, and cannot be revitalized because they are more restrictive than those earlier, now-unamended restrictive covenants. As above, the Department has no substantive jurisdiction over the MRTA-specific Conclusion of Law subjected to this exception. Consequently, the downstream Conclusions proposed by Petitioner are not as reasonable as, or more reasonable than those stated in the RO. Petitioner's third exception is DENIED.

D – Petitioner's Exception 4 – Communications from Organizing Committee - ¶¶ 20 and 37

Petitioner takes exception to paragraph 20 of the RO, arguing that the ALJ's Finding that certain communications were not from the organizing committee is not supported by competent, substantial evidence in the record. Petitioner then contends that record evidence supports the opposite and takes exception to paragraph 37 of the RO, in which the ALJ failed to Conclude that those communications violated Section.720.405(1), Florida Statutes.

Section 120.57(1)(l), Florida Statutes provides that the Department may not reject or modify an ALJ's Findings of Fact, except upon a review of the "entire record." The "entire record" necessarily includes a transcript of the final hearing from which the Finding of Fact is drawn. See Roberts v. Dep't of Corr., 690 So. 2d 1383, 1384 (Fla. 1st DCA 1997); Financial Marketing Group, Inc. v. Sate Dep't of Banking & Finance, Div. of Securities, 352 So. 2d 524, 525 (Fla. 3d DCA 1977). No transcript of the hearing has been filed with the Department. Consequently, the Department may not modify the Finding as requested, and the proposed Conclusion of Law is not as reasonable as or more reasonable than the Conclusion set forth in paragraph 37. Petitioner's fourth exception is DENIED.

E – Petitioner's Exception 5: Parcel Owner and DEO Revitalization Approval - ¶¶ 17 and 25

Petitioner takes exception to Findings of Fact in paragraphs 17 and 25 of the RO, arguing that they do not accurately reflect what the parcel owners consented to in the revitalization process. Section 120.57(1)(l), Florida Statutes provides that the Department may not reject or modify an ALJ's Findings of Fact, except upon a review of the "entire record." The "entire record" necessarily includes a transcript of the final hearing from which the Finding of Fact is drawn. See Roberts v. Dep't of Corr., 690 So. 2d 1383, 1384 (Fla. 1st DCA 1997); Financial Marketing Group, Inc. v. Sate Dep't of Banking & Finance, Div. of Securities, 352 So. 2d 524, 525 (Fla. 3d DCA 1977). No transcript of the hearing has been filed with the Department. Consequently, the Department may not modify the Findings as requested, and therefore, Petitioner's fifth exception is DENIED.

F – Petitioner's Exception 6: Circuit Court Order ¶ 26

Petitioner takes exception to a Finding of Fact in paragraph 26 of the RO, arguing that it incorrectly characterizes the impact of a March 11, 2020, Order of the Sixth Judicial Circuit Court for Pinellas County, Florida. Section 120.57(1)(l), Florida Statutes provides that the Department may not reject or modify an ALJ's findings of fact, except upon a review of the "entire record." The "entire record" necessarily includes a transcript of the final hearing from which the Finding of Fact was drawn or by which it was potentially affected. See Roberts v. Dep't of Corr., 690 So. 2d 1383, 1384 (Fla. 1st DCA 1997); Financial Marketing Group, Inc. v. Sate Dep't of Banking & Finance, Div. of Securities, 352 So. 2d 524, 525 (Fla. 3d DCA 1977). No transcript of the hearing has been filed with the Department. Consequently, the Department may not modify the Finding as requested. To any extent Petitioner may be arguing the ALJ's statement constitutes an incorrect

Conclusion of Law regarding the Sixth Circuit Court's Order, such a Conclusion is outside of the Department's substantive jurisdiction. Petitioner's sixth exception is DENIED.

G – Petitioner's Exception 7: Burden of Proof - ¶ 28

Petitioner appears to take exception to the burden of proof stated in paragraph 28 of the RO. In Florida Department of Transportation v. J.W.C. Company, Incorporated--cited by both the ALJ in paragraph 28 and by Petitioner in his exception—Florida's First District Court of Appeal analyzed the distinct meanings of the term "burden of proof" and how those distinctions can create confusion when the term is used in isolation. See Florida Dept. of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981). On its face, the isolated "burden of proof" stated in paragraph 28 is not necessarily incorrect within the context of the RO.[1] Petitioner's seventh exception is DENIED.

H – Petitioner's Exception 8: Association Governing Documents - ¶¶ 48 and 51

Petitioner takes exception to the ALJ's Conclusions of Law in paragraphs 48 and 51 that a determination of the validity of the 2004 and 2007 bylaws of the VIHA was not within the administrative scope of this matter. He argues that instead the ALJ should have made a Finding of Fact that the 2004 and 2007 bylaws were not "duly adopted," and an attendant Conclusion of Law that VIHA failed to comply with several portions of Section 720.405, Florida Statutes. First and foremost, the ALJ's Conclusions and Petitioner's exception speak to different legal concepts. Second, the Conclusions to which Petitioner takes exception are both qualified by the ALJ's statement that they are made *in response to the arguments of Petitioner*. As already noted, no

[1] Petitioner attempts to support his exception with a bare reference to the July 8, 2020, final hearing, and contends that at the hearing, the ALJ correctly stated the "burden of proof" he now wishes the Department to adopt. As no transcript of the proceeding was filed with the Department, it does not rely on that purported statement in ruling on this exception. Nevertheless, if Petitioner's assertion is true, it would support a belief that he simply misapprehends the burden to which the ALJ is referring in paragraph 28 of the RO.

transcript of the final hearing in this matter was filed with the Department. It therefore cannot be ascertained what argument Petitioner made which invited the statement—regardless of the more reserved position he now offers in his exception.

Lastly, even assuming, without accepting, that the proposed Fact-Finding would be necessary for *VIHA* to prevail, it is not dispositive of this matter; the ALJ recommends that the Department enter a final order in favor of *Petitioner,* disapproving the revitalization of restrictive covenants at issue, and that recommendation will be adopted below. The Department does not have the authority to make Findings of Fact *ab initio*, see Cohn v. Dep't of Prof'l Regulation, 477 So. 2d 1039,1047 (Fla. 3d DCA 1985), and there is nothing to be gained by remanding this matter to the ALJ for additional Fact-Finding—especially when such a remand may be prompted in part by an incomplete record. For each and all of the foregoing, Petitioner's eighth exception is DENIED.

I – The remainder of the RO

The Department identifies no Conclusion of Law within its substantive jurisdiction for which a substituted Conclusion would be as reasonable as, or more reasonable than, the ALJ's Conclusions in the RO.

Order

Based on the foregoing, the Department adopts the ALJ's Recommended Order in its entirety.[2] The Department's Determination Number 20041 is hereby VACATED and RESCINDED,[3] and the proposed revitalization at issue in this matter is DISAPPROVED.

James D. Stansbury, Chief
Bureau of Community Planning and Growth
Department of Economic Opportunity

[2] A copy of which is attached as Exhibit A and incorporated herein.
[3] A copy of which is attached as Exhibit B and incorporated herein.

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 16th day of November, 2020.

Laura Z. Douglas for Tarey Lovett
Agency Clerk
Department of Economic Opportunity
107 East Madison Street, MSC 110
Tallahassee, FL 32399-4128

By Certified U.S. Mail

The Honorable Hetal Desai
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

Connie Davies, Esquire
The Law Office of Connie Davies, P.A.
2158 Montana Avenue Northeast
St. Petersburg, FL 33703

Anne Hathorn, Esquire
Anne Hathorn Legal Services, LLC
Suite 1270
150 2nd Avenue North
St. Petersburg, Florida 33701

Valerie A. Wright, Esquire
Jon F. Morris, Esquire
Department of Economic Opportunity
107 East Madison Street
Tallahassee, Florida 32399-6508

Keith G. Shevenell, Esquire
Groelle & Salmon, P.A.
Suite 320
1715 North Westshore Boulevard
Tampa, Florida 33607

NOTICE OF RIGHT TO JUDICIAL REVIEW

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 JUDICIAL REVIEW 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, AGENCY.CLERK@DEO.MYFLORIDA.COM, WITHIN THIRTY (30) CALENDAR DAYS AFTER THE DATE OF THE FINAL AGENCY ACTION. A DOCUMENT IS FILED WITH THE AGENCY CLERK 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 APPROPRIATE DISTRICT COURT OF APPEAL. THE NOTICE OF APPEAL MUST BE ACCOMPANIED BY THE FILING FEE SPECIFIED IN SECTION 35.22, FLORIDA STATUTES.