

FINAL ORDER NO. DCA07- GM-166

**STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS**

FLORIDA KEYS CITIZENS
COALITION, INC., and PROTECT
KEY WEST AND THE FLORIDA KEYS,
INC., d/b/a LAST STAND,

Petitioners,

DOAH Case No. 06-2449GM

vs.

DEPARTMENT OF COMMUNITY
AFFAIRS and MONROE COUNTY,

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 June 16, 2006, the Department published notice of five Final Orders determining that Ordinance Nos. 008-2006, 009-2006, 010-2006, 011-2006 and 013-2006 adopted by the County in March 2006 were, with one minor exception, consistent with the requirements of Chapter 380, Florida Statutes, and were therefore approved.

On July 7, 2006, Florida Keys Citizens Coalition, Inc. and Protect Key West and the Florida Keys, Inc., d/b/a Last Stand,

filed a Petition for administrative hearing regarding the Notice. This Petition was amended once prior to the final hearing.

The final hearing was scheduled for September 11-15, 2006. At the request of the parties, the hearing was continued twice and then held in Miami, Florida on February 6-7, 2007. A continued hearing was held on March 14-15, 2007 in Tallahassee, Florida. Upon consideration of the evidence and post-hearing filings, the Administrative Law Judge entered a Recommended Order rejecting all but three (3) of the allegations raised in the Amended Petition. The Order recommends that the Department enter a final order approving Ordinance No. 008-2006, except for the deletion of Section 9.5-342; Ordinance No. 009-2006; Ordinance No. 010-2006 except for Sections 9.5-256(c)(4)a., 9-5.256(c)(3), and 9-5.256(c)(3)b.2.; Ordinance No. 011-2006; and Ordinance No. 013-2006 except for the parcels identified in Findings of fact 65, 80, 86, and 132.

Standard of Review of Recommended Order

The Administrative Procedure Act contemplates that the Department will adopt an Administrative Law Judge'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)(1).

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 Administrative Law Judge as the finder of fact. See Heifetz v. Department of Bus. Reg., 475 So. 2d 1277, 1281-83 (Fla. 1st DCA 1985).

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)(1); DeWitt v. School Board of Sarasota County, 799 So. 2d 322 (Fla. 2nd 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 1277 (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.

Rulings on Exceptions

The Recommended Order, entered June 26, 2006, contains the following Notice of Right to File Exceptions:

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this matter. [emphasis added]

This Notice accurately sets forth the timing and filing requirements for exceptions set forth in Section 120.57(1)(k), Florida Statutes, and Rule 28-106.217, Florida Administrative Code. Fifteen (15) days from entry of the Recommended Order is July 11, 2006.¹ The agency that will issue the Final Order in this case is the Department of Community Affairs.

Petitioners filed "Petitioner's Exceptions to the Recommended Order" on July 11, 2006. Respondents filed "Respondents' Exceptions to the Recommended Order" on July 11, 2006. Petitioners filed "Petitioner's Response to Respondents' Exceptions to the Recommended Order" on July 20, 2006. Finally, Respondents filed a "Joint Response to Petitioners' Exceptions to the Recommended Order" on July 23, 2006. These Exceptions and Responses were timely filed with the Department, the proper agency for such filing.

These Exceptions and that Response were considered and the Exceptions are ruled upon in turn below.

1. Petitioner Exception One: Wetlands - Findings of Fact 55-60

The Administrative Law Judge made findings about the exclusion of wetlands in the Tier I designation criteria.

¹ The fifteen (15) days for filing exceptions is not automatically extended by virtue of the manner of service. See Fla. Admin. Code r. 28-106.217(4) ("No additional time shall be added to the time limits for filing exceptions or responses to exceptions when service has been made by mail.").

Petitioner challenges this exclusion and requests that certain parcels be given a Tier I designation because they contain wetlands. The court interpreted the criteria in the Plan and Code to not require the inclusion of wetlands. Petitioner argues that the uniform testimony of the experts that the Keys ecosystem is a mix of upland and wetland that work together does not support such a finding. The Administrative Law Judge found that the criteria for Tier I designation are not vague and do not include wetland native upland habitats. He found the criteria consistent with the County's Comprehensive Plan which provides that the Plan criteria refer to "upland native vegetation" ...and..."upland native habitat" and does not refer to "upland wetlands." The court also found that wetlands were adequately protected in other sections of the County's land development regulations. A review of the record validates existence of substantial, competent evidence as the basis of the court's respective findings of fact and conclusion of law. (Comprehensive Plan Goal 205, Objective 205.4 and Policy 205.1.1, Sections 9.5-256(c), 9.5-338, 9.5-347(b), 9.5-347(c) and 9.5-348(d) of the County's Land Development Regulations.) Accordingly, Petitioners' Exception One is DENIED.

2. Petitioner Exception Two: Biological Opinion - Finding of Fact 71

Petitioner challenges the Administrative Law Judge's finding to limit Tier I protections to known locations identified on specified maps and through on-site surveys. Petitioner asks that the County be directed to use the United States Fish and Wildlife Service 2006 Biological Opinion Maps of Potentially Suitable Habitat for federally protected species. While acknowledging that these maps "would obviously be more desirable to use" the Administrative Law Judge found that, at some point, the process must come to an end and using constantly changing data and mapping studies would result in there being no finality to the process. The court also found that the Tier I designation criteria providing for inclusion of "known locations of threatened and endangered species" was consistent with the County's Comprehensive Plan. Plan Objective 205.1 is clear in providing that one criterion for Tier I designation is similarly "known locations of threatened and endangered species." Known locations are where such species have actually been observed. Conversely, the United States Fish and Wildlife Service Maps proposed for use in Petitioner's complaint map "potentially suitable habitat." In addition the new County Land Development

Regulations provide for a means to modify Tier I maps based on new information, including that which might come from the United States Fish and Wildlife Service Maps. A review of the record validates existence of substantial, competent evidence as the basis of the court's findings. (County Comprehensive Plan Objective 205.1 and Section 9.5-256(e) of the County's Land Development Regulations.) Accordingly, Petitioners' Exception Two is DENIED.

3. Respondents' Exception One: Tier I Natural Areas Above Four Acres - Findings of Fact 61-65

Policy 205.1.1 of the Monroe County Comprehensive Plan establishes the criteria for the designation of the Tiers. One of those criteria is "natural areas including old and new growth upland vegetated areas, above 4 acres in area." The Administrative Law Judge found that Policy 205.1.1 "merely sets the 'minimum' standard which the County must follow in establishing the Tier I boundary designation and does not bar a smaller threshold, if appropriate." Accordingly, the court directed re-evaluation of those parcels placed in an incorrect category due to the arbitrary four acre limitation. Respondent argues that the four acre Tier I designation criterion was a policy decision of the County and is consistent with the Principles for Guiding Development of the Florida Keys Area of

Critical State Concern, and that the parcels need not be re-evaluated. The Administrative Law Judge found that the existing County Comprehensive Plan established a four (4) acre threshold as "one criteria for Tier I designation" of such natural areas. Testimony substantiated that the relevant Plan Policy did not seek to limit Tier I designation to only hammocks exceeding four (4) acres in size. A review of the record validates existence of substantial, competent evidence as the basis of the court's findings. (Plan Policy 205.1.1, Testimony Conaway V2 at 247-250; Jetton V10 at 1212-1213, 1216-1217; Trivette V5 at 558-559; Kreur V7 at 849-852 and Calvo V3 at 340-341.) Accordingly, Respondents' Exception One is DENIED.

4. Respondents' Exception Two: Special Protection Area (SPA) Hardwood Hammock or Pinelands Above One Acre

As with the four acre criterion for Tier I, the Administrative Law Judge found that the County's Comprehensive Plan one acre criterion for SPA merely established a minimum standard and that a smaller size threshold is not barred. Respondent again argues that the County made a policy decision and that Goal 205 of the Comprehensive Plan leaves no room for a smaller size. The Administrative Law Judge found that the one (1) acre threshold was arbitrary, was reputed by science and represented simply a number the County Commission "felt

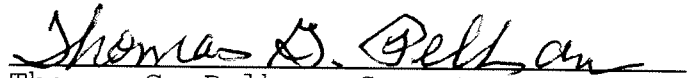
comfortable with." A review of the record validates existence of substantial, competent evidence as the basis of the court's findings. (Plan Policy 205.1.1, Testimony Calvo V3 at 340-341; Harrison V10 at 1351-1353; Conaway V2 at 186; Jetton V9 at 1176-1177, V10 at 1209-1210, 1227-1229, 1235.) Accordingly, Respondents' Exception Two is DENIED.

Order

Upon review and consideration of the entire record of this proceeding, including the Recommended Order and exceptions filed by Petitioners and Respondents, it is hereby ordered as follows:

1. The findings of fact and conclusions of law in the Recommended Order are adopted.
2. The Administrative Law Judge's recommendation is accepted.
3. Monroe County Ordinance No. 008-2006, except for the deletion of Section 9.5-342; Ordinance No. 009-2006; Ordinance No. 010-2006 except for Sections 9.5-256(c)(4)a., 9-5.256(c)(3), and 9-5.256(c)(3)b.2.; Ordinance No. 011-2006; and Ordinance No. 013-2006 except for the parcels identified in Findings of fact 65, 80, 86, and 132, are hereby approved.

DONE AND ORDERED in Tallahassee, Florida.



Thomas G. Pelham, Secretary
DEPARTMENT OF COMMUNITY AFFAIRS
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

NOTICE OF RIGHTS

ANY PARTY TO THIS ORDER HAS THE RIGHT TO SEEK JUDICIAL REVIEW OF THE 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 20th day of September, 2007.


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Agency Clerk

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