IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

ADELE SIMONS, and CORNER LAKES ESTATES HOMEOWNERS ASSOCIATION, INC.,

Appellants,

v.

ORANGE COUNTY, FLORIDA, BANKSVILLE OF FLORIDA, INC., et al.

Appellees.

_____/

CASE NO. 5D18-1418
Lt. Case No. ACC-17-002
DOAH Case No. 16-4556GM

REPLY BRIEF

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Make no mistake, the subject amendments increase the density substantially to many units per acre instead of one unit per ten acres. Absent the subject plan amendments, the lands within the RSA are limited to 1 unit per 10 acres. (ALJ Finding of Fact 33 "The property subject to the amendment is currently undeveloped and has a FLUM designation of Rural with a density limitation of 1du/10 acres.").

I. THE PLAN – USA / RSA Line of Demarcation : Urban in the USA and Rural in the RSA.

The Plan is clear. "The County has an overarching goal to direct its growth to the USA. FLUE Objective 1.1 states the County "shall use urban densities and intensities . . . to direct development to the [USA] and to facilitate such development." Policy 1.1.1 states, "Urban uses shall be concentrated within the [USA]" except as specified in particular designations. Policy 1.2.2 requires that "Urban development during the 2007-2030 planning period . . . will ***occur only in*** the Urban Service Area and established exception areas." *ALJ R.O. FOF 36.* Policy 1.2.2 prohibits urban development outside the USA boundary, with certain inapplicable exceptions, during the 2007-2030 planning period. *ALJ R.O. FOF 39.* Residential development densities allowed within the USA range from Low Density Residential (LDR), up to a maximum of 4du/acre, to High Density Residential (HDR), up to a maximum of 50du/acre. ALJ R.O. FOF 40. That portion of the County outside the USA is designated as the Rural Service Area (RSA). The RSA designation is a tool for "managing agricultural lands, environmental lands, and

historic resources." To preserve and promote the "intended rural character" of the RSA, the County regulates the scale, density, and intensity of new development in the RSA. The only FLUE category correlating with the RSA is "Rural," in which the County ***limits residential development to a maximum density of 1du/10 acres***. *ALJ R.O. FOF 41*.

A. <u>Exceptions to RSA Density Limitation</u>. The FLUE recognizes specific, established exceptions to the density limitation of residential development at 1du/10 acres within the RSA. These include Rural Settlements, Growth Centers, Specific Area Plans (SAP), and the Innovation Way (IW) Overlay. *ALJ R.O. FOF 42.*

B. <u>Expansion of the USA Boundary Line</u>. The County allows for expansion of the USA boundary only in limited circumstances. FLUE Objective 1.3 and implementing policies provide a process for evaluating applications for expansion of the boundary. An applicant must submit data and analysis to demonstrate that the development would not constitute urban sprawl and is needed to satisfy acreage demands of the projected population. *ALJ R.O. FOF 67.* FLUE Policy 1.2.4 lists the applications which have met the criteria and are recognized as expansions to the USA boundary. The list contains approximately 38 developments ranging in size from 1.23 acres to 2,549 acres. In the case at hand, Banksville and CHCG have not applied for an expansion of the USA to encompass the LPSA. In fact, Jim Hall, one of the developer's consultants, expressed his dismissal of

pursuing an expansion to the USA to accommodate LPSA because expansions have "a ton of rules" associated with them. *ALJ R.O. FOF 68.*

II. THE FINAL ORDER and Changing Findings of Fact

Appellee's seek to avoid the blatant violation of Ch. 120 that the Commission committed when substituting its findings of fact for that of the ALJ. The Appellees mischaracterize this case by claiming that the "issue … is the County Commission's broad legislative authority and discretion to define what constitutes 'rural' development within [its] jurisdictional boundaries …." Answer Brief p. 1. The County exercised that discretion years ago when adopting its comprehensive plan urban development boundary demarcation between the USA and RSA and the goals, objectives and policies that apply on either side of the USA/RSA demarcation line. The Final Order authorizes land use amendments that violate the statutory prohibition on comprehensive plan amendments that are inconsistent with a plan's adopted goals, objectives and policies. That determination depended on an illegal reversal of an ALJ's binding findings of fact. The ALJ, in multiple findings of fact supported by competent substantial evidence, found that development to be "urban". See Initial Brief.

The Appellees cite to a statement made by the ALJ that she found none of the expert witness testimony to be persuasive on the question of the nature of the development authorized by the land use amendments. Answer, p. 35. **They left out**

the very next sentence of the very same finding #77 upon which they rely, that: "The testimony of [Simons and Corner Lakes's] experts, combined with the Comprehensive Plan itself, was the most reliable and persuasive evidence on this issue." (R. 805 at ¶ 77).

The Appellees declare incorrectly, that findings of fact regarding amendments to comprehensive plans are subject to the "fairly debatable standard of review", without informing the Court that this applies only to the legal conclusions - not to the findings of fact. The Appellee's characterization of the issue on appeal is an attempt to avoid the strict statutory prohibition on an agency's rejection of an ALJ's findings of fact. They argue that the "Administration Commission concluded that "the County Commission's finding that the development is 'rural' rather than 'urban' is within the realm of possibility where two reasonable persons could disagree over the conclusion, and, thus, the Plan Amendments met the highly-deferential 'fairly debatable' standard of review." See Jt. Answer Brief at page 3. While the ultimate conclusions of law as to the compliance of a comprehensive plan amendment are governed by the "fairly debatable" standard, the underlying findings of fact are governed by the "preponderance of evidence" standard in §120.57 (1)(l), Fla. Stat. Appellees incorrectly assert that the ALJ and Administration Commission was required to uphold the County's determination that the authorized development was rural if "two reasonable persons could disagree." Answer Brief at p. 17. The

statutory mandate, quite to the contrary, is that an ALJ resolves factual disputes by use of the "preponderance of evidence" standard. § 120.57(1) (j), Fla. Stat. In turn, the resulting factual findings are binding on the agency Final Order. Section 120.57 (1) (l), Fla. Stat.

A review of the transcript of the Administration Commission, p. 125-127 (weblink at Joint Answer footnote 5), reveals that the Governor and Cabinet mistakenly believed that their decision could not be based on the ALJs factual findings, but instead they were required to defer to the Orange County Commission!

At least one Final Order of the state planning agency confirms the applicability of this statutory rule to findings of fact in comprehensive plan amendment cases such as this one. *Sierra Club et. al. v. Miami Dade County*, 2006 Fla. ENV LEXIS 155, 2006 ER FALR 209 (Final Order No. DCA 06-GM 219 (Sept. 12, 2006)(Adopting an ALJ's Conclusion of Law that "185. Petitioners correctly take pains to point out that the Fairly Debatable Standard governs the legal determination of whether the Plan Amendment is in compliance; it is not to be used to find facts. In this administrative proceeding, facts are found based on a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat. The Fairly Debatable Standard, on the other hand, is applicable to the ultimate legal determination: whether the Plan Amendment is in compliance as the term is defined in Section 163.3184(1)(b), Florida Statutes. Recommended Order ¶ COL 185).

Per the ALJ's findings, and their plain terms, the amendments:

- Allow an "**average density**" of **5 and 6 homes per acre**, depending on the specific land use category. (R 788 R.O. p.12-13 [FOF 21])

- Allow a "mix of residential . . . and non - residential uses, including commercial, office, service, and civic uses, as well as "community centers", a "street network", a "green infrastructure plan", "neighborhood schools, and service by public infrastructure, including water and wastewater", and "reclaimed water facilities" (R 788-780 R.O. p.12 -14, 23 [FOF 13, 20, 21, 23, 24])

The ALJ specifically found that these uses, densities and public facilities are categorically the same as the developments that the comprehensive plan considers "urban" developments. (R 808 813 R.O. p.32- 37 [FOF-84-97]). The Appellees left out the following factual findings made by the ALJ, which leave no doubt that these findings were factual findings based on record evidence:

- **"Based on the preponderance of the evidence**, under the existing Comprehensive Plan, **the density, uses, and pattern of development** authorized by the Plan Amendments **is urban, rather than rural**." (Rec. Order at 38 [FOF 102] (Emphasis added)

- "Jim Hall, **Intervenors'** [Appellees] **planning expert, acknowledged that he based the LPSA concept on these 'exception areas' where 'new rules' apply."** (Rec. Order at 38 [FOF 103] (Emphasis added)

- "**Dwight Saathoff, contractor purchaser of portions of Lake Pickett South, as much as admitted that the development approved for Lake Pickett South is urban, rather than rural** …. [He] testified that "the Rural Service Area acreage would go from 58.6 percent of the total land, and with the Grow, it would be 58.4 percent. The Urban Service Area land was 41.4 and 41.6 with approval of the Grow." [Tr. 595:3-6]. **Mr. Saathoff's**

testimony further supports a finding that the project converts rural land to urban use…." (Rec. Order at 38-39 [FOF 104] (Emphasis added)

Further belying the Answer's argument that the development is rural, p.13, the ALJ's findings of fact set forth fully in Appellants' Initial Brief at pages 11-14 including:

- "The … **development pattern** planned … **is, indeed, urban.**" (Rec. Order at 89 [fn. 7]) (Emphasis added)

- "The Plan Amendments **authorize development of predominantly urban uses** within the RSA." (Rec. Order at 37 [FOF 99])(note: The Final Order improperly struck this finding, an issue that is addressed below) (Emphasis added)

- **"Based on the preponderance of the evidence**, … **the density, uses, and pattern of development** authorized by the Plan Amendments **is urban, rather than rural**." (Rec. Order at 38 [FOF 102] (Emphasis added)

- "The Plan **Amendments do direct urban development to locate within a rural area."** (Rec. Order at 59 [FOF 189] (Emphasis added))

- "The … Amendment directs **urban uses to a location** surrounded by development **recognized in the** … **Plan as rural** … and conservation…." (Rec. Order at 65 [FOF 215]) (note: The Final Order improperly struck this finding, an issue that is addressed below) (Emphasis added)

- The amendments "direct urban development to the [rural area], which is contrary to an urban infill strategy", and "discourage infill by **authorizing urban development outside of the designated urban area**." (Rec. Order at 216 [FOF 217 – 218]) (note: The Final Order improperly struck this finding, an issue that is addressed below) (Emphasis added)

III. THE FINAL ORDER and Changing Conclusions of Law

The ALJ's findings of fact are supported by evidence in the record, including as the ALJ noted the comprehensive plan itself, and allow no other legal conclusion

but that the plan amendments violate the statutory "internal consistency" requirement of §§163.3177(1) & (2), Fla. Stat.

The Final Order improperly rejected and changed conclusions of law that was more reasonable based on the ALJ's properly supported findings of fact, which should not have been changed. The ALJ properly applied the fairly debatable test to the conclusions of law and held that:

> COL 285 "Based on the foregoing Findings of Fact, ***Petitioners proved beyond fair debate that the Plan Amendments are internally inconsistent*** with FLUE Goal 1, Objective 1.1, Policy 1.1.1, Objective 1.2, Policies 1.2.1 and 1.2.2; Goal 2; Goal 6, Objective 6.1, and Policies 6.1.1, 6.1.2, and 6.1.3. The County has established a clear policy of directing urban development to the USA and allowing only low density future residential development in the RSA. The Plan Amendments direct urban development to the RSA, contrary to the County's established desired development pattern. While the County has established exceptions to the policy of limiting future development in the RSA, the Plan Amendments do not meet any of the established exceptions." (*ALJ R.O., p. 86 COL 285)*

The Administration Commission's contrary interpretation was not as reasonable or more reasonable than that of the ALJ. It was not. The commission voted to strike ALJ findings of fact **215** and **216**, claiming that they were not actually findings of fact, but instead conclusions of law. The findings were that the plan amendment "directs urban uses to a location surrounded by development recognized in the Comprehensive Plan as rural agricultural, rural residential, or conservation, or specified exceptions thereto" [FOF 215] (Final Order at 27).

If the plan amendments allow urban development in the RSA, as found by the ALJ, there is no fair debate that the amendments are internally inconsistent with the governing comprehensive plan policies prohibiting urban development on the subject lands in the RSA. The USA/RSA demarcation line has clearly been crossed. This is not allowed by the goals, objectives and policies in Comprehensive Plan cited by the ALJ in her conclusions of law cited above. (*ALJ R.O., p. 86 COL 285).*

It is reversible error for the Commission to first change the findings of fact and then reverse the outcome with new conclusions of law made by the Administrative Law Judge in this case. Appellees, Answer p. 47, was to say: "the ***County*** Commission's finding that the development is "rural" rather than "urban" is within the realm of possibility where two reasonable persons could disagree over the conclusion." As set forth above, this is not the correct standard for findings of fact made by the Administrative Law Judge (not the county commission) that are supported by any record evidence. As fact finder, the ALJ properly made a finding of fact based on the preponderance of the evidence presented at the administrative hearing. It is not reasonable to conclude that development with average residential densities as high as six houses per acre 6 units/acre [allowing even higher maximums] when compared to the maximum residential density in the rural service area of one house per ten acres 1 unit/10 acres in the RSA is internally consistent. (Rec. Order at 16 [FOF 33]. This crosses the line, in more ways than one.

All of the urban areas within the RSA cited by in the Answer, *Corner Lakes Rural Settlement Area, Horizon West Special Planning Area* and the *Innovation Way Overlay* are recognized exceptions to the RSA in the Orange County Comprehensive Plan, however Lake Pickett is not one of the recognized exceptions.[1] The LPSA allows urban development density where only rural density (1 unit/10 acres) is allowed, absent specific exceptions that are expressly recognized in the existing comprehensive plan, which as set forth above include rural settlements such as the Corner Lakes Rural Settlement Area (Answer p. 29), and Horizon West Special Planning Area and the Innovation Way Overlay. (Answer p. 41-42). This increase in density above 1/10 acres violates the Comprehensive Plan goals, objectives and policies listed in the ALJ's conclusion of law, para. 285, cited above.

IV. STANDING: Adjacent landowners adversely affected by density increase on subject property.

The ALJ found that the subject Plan Amendments would impermissibly introduce urban development in the Rural Service Area in a manner that violates eleven (11) important goals, objectives and policies established by the comprehensive plan. DOAH Trans., V. II at 250. Leapfrogging and increasing

[1] See, ALJ Recommended Order, p. 89 endnote 6. "6/ The inconsistencies could be remedied by adding the LPSA to the list of exceptions for urban development in the RSA." However, LPSA was not added to the list of exceptions, presumably due to other "rules" in the plan. Rec. Order at 38 [FOF 103]

density above 1 unit per 10 acres on the subject property improperly crosses the line, and the increase in density on the subject land currently limited to 1 unit/10 acres abutting Appellants creates adverse impact standing for the adjacent Appellants.

Appellees' standing argument that adjacent landowners have only a "general interest" in this case is incorrect. The Appellee's theory that the adjoining owners are not really affected adversely because they are merely speculating about potential impacts, cannot withstand the ALJ's findings of fact and the expert testimony upon which is it baked. As this Court has observed, the forward-looking doctrine of standing simply "requires a would-be litigant to demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings, either directly or indirectly." *Fannie Mae v. Legacy Parc Condo. Ass'n*, 177 So. 3d 92, 93 (Fla. 5th DCA 2015) (citing *Guardianship of Thompson*, 952 So. 2d 498, 505 (Fla. 2006)).

The case to which the Appellees cite, *Battaglia Fruit Co. v. City of Maitland*, 530 So. 2d 940 (Fla. 5th DCA 1988), is not directly applicable because the adjacent landowner's challenge **was instead dismissed for failure to appear and object on the record at the local government hearing below.** Id at 944.

Importantly, the facts of this case are opposite those of *Martin County Conservation Alliance v. Martin County*, 73 So. 3d 856 at 856-857, 860-86 (Fla. 1st DCA 2011) cited in the Answer because Appellants are adjoining landowners challenging an increase in density on abutting, adjacent land. The instant Orange

County LPSA plan amendments increase the allowable average density on the subject adjacent rural RSA lands, which are currently limited to maximum density of 1 unit per 10 acres to up to a maximum average density of 4-6 units per acre. In *Martin County*, the Appellants: **"**offered no evidence … that the Plan amendments would adversely affect their legally protected interests, **because the evidence cannot show any density increase** or other purported environmental effects" and the **ALJ in Martin County case found that no density increase would occur….**" Id at 863 (emphasis added). The Martin County plan amendment did "not allow for more development than currently allowed" 73 So. 3d, at 860. In the instant Orange County case, the opposite is true because there is a significant increase in density. Absent the subject plan amendments, these subject lands are within the RSA and currently limited to **1 unit per 10 acres**, ALJ R.O. FOF 33, and the challenged subject plan amendments would greatly increase the density to many units per acre, including a maximum allowable average density of **more than 4-6 units per acre.**

Appellees stretch credulity to the limit arguing that Ms. Simons, whose home abuts the subject LPSA plan amendments, is to be equated with the Appellants in *Suwannee Am. Cement Co., Inc.*, 802 So. 2d at 522-23 (denying standing based upon an "assertion of standing based upon a generalized interest in the environment") and *O'Connell*, 874 So. 2d at 677 (denying standing based upon "a general interest in maintaining the quality of life"). Simons and Corner Lakes HOA, are adjacent.

abutting landowners and cannot live elsewhere. Appellees contend that Adele Simon lacks standing because she lives adjacent to a potential future Lake Picket North project, which Appellees fail to highlight is still within the LPSA map area contained in the challenged plan amendments. The larger Lake Pickett Study Area policies apply to the entire LPSA area map and increase the maximum allowable average density for future development in the entire Lake Pickett Study Area, including the land adjacent to Simons. ALJ Rec. Order at p.12-16.

The Answer improperly singles out prejudicial "dog-whistle" words and phrases taken out of context from the whole, complete testimony of Adele Simons, and we encourage this court to read her testimony in full. (DOAH Trans., V. II at 243-247; Pet. Ex. 7). Appellant Adele Simons is more than just a "tree hugger" with a generalized interest in the environment. Adele owns and lives on a two (2) acre naturally wooded lot**,** that abuts the subject LPSA plan amendment within the RSA currently limited to 1 unit per 10 acres. Id. She would be adversely impacted by the significant increase in density, loss of substantial surrounding open space and wooded areas, and wildlife habitat that comes with 1 unit per 10 acre densities compared to higher urban development densities of multiple units per acre. Id.

It is not Adele's land and Corner Lakes land that is at issue, but the increase in density on the subject adjacent RSA land in the LPSA that creates standing for the adjacent appellants. The Court will recall that some suburban communities in

this rural area, including those where Simons and the residents of Corner Lakes live, pre-date the Comprehensive Plan policies that strictly prohibit urban development in the region. R 804-05 at ¶¶ 78-80. The current policies, designed to prevent additional urban encroachment into the region. As the ALJ found, it "is contradictory for the County to treat the preexisting densities as exceptions, but justify the Plan Amendments, which propose future similar densities, based on the existence of those exceptions." R. 807 at ¶ 82. By creating an Urban Service Area (USA) and a Rural Service Area (RSA), the Orange County Comprehensive Plan established a clear line of demarcation for new development.

Appellant Corner Lakes HOA owns abutting land that is adjacent to the subject LPSA and LPS property, (Rec. Order at 8, ¶ 8), and the President of the HOA (Richard Andrade) testified that Corner Lakes will be adversely affected by the **drastic increase in density on the adjacent subject land**, (**currently limited to 1 unit per 10 acres),** result in the loss of rural character, the loss of open space, reduction of associated wildlife observation opportunities, vistas and open spaces on the subject land adjacent to Corner Lakes. DOAH Trans., Vol. II, at pages 270, 271-273.

"In considering whether a property owner has standing because its interests have been adversely affected, a court is to consider "the proximity of [its] property to the area to be zoned or rezoned, the character of the neighborhood, ... **and the**

type of change proposed." Rinker Materials Corp. v. Metropolitan Dade County, 528 So.2d 904 (Fla. 3d DCA 1987); "A *multitude of cases recognize that neighboring property owners affected by zoning changes have standing* to challenge the changes. City of St. Petersburg Board of Adjustment v. Marelli, 728 So.2d 1197 (Fla. 2d DCA 1999); Renard v. Dade County, 261 So. 2d 832, 834 (Fla. 1972), Wingrove Estates Homeowners Ass'n v. Paul Curtis Realty, Inc., 744 So. 2d 1242, 1243–44 (Fla. Dist. Ct. App. 1999) National Wildlife Federation, Inc. v. Glisson, 531 So.2d 996 (Fla. 1st DCA 1988).

It is nearly universally recognized that an adjoining property owner would nearly always meet the test for legal standing. For example, see Justice Scalia's hypothetical in Lujan, in which an individual ***living adjacent to the site*** for a proposed federally licensed dam ***would have standing*** to challenge the licensing agency's failure to prepare an environmental impact statement is but one of many such examples. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

Relief Requested.

This Court should reverse the Final Order based on the binding findings of fact and conclusions of law made by the ALJ that the land use amendments are "not in compliance", remand to the Administration Commission consistent with the statutory requirements of chapter 163, and award the statutory attorney's fees for changing findings of fact supported by record. See Appellants' Motion for Fees.

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CERTIFICATE OF COMPLIANCE

I certify that Appellants' Initial Brief complies with the font requirements of Fla. R. App. P. 9.210(a) (2).

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CERTIFICATE OF SERVICE

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