

FINAL ORDER NO. AC-04-004

STATE OF FLORIDA  
ADMINISTRATION COMMISSION

JIM DURHAM AND CITIZENS  
FOR PROPER PLANNING, INC.,

Petitioners,

vs.

AC CASE No. ACC-04-002  
DOAH CASE Nos. 03-0593 GM  
03-0933GM

POLK COUNTY,

Respondents,

and

JACK M. BERRY, INC.,

Intervenor.

Post-It® Fax Note	7671	Date	6/28	# of pages	7
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Co./Dept.		Co.	Leighton		
Phone #		Phone #			
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FINAL ORDER

This cause came for hearing before the Administration Commission (Commission) on June 24, 2004. Based on a review of the record and being duly advised in the premises, the Commission hereby finds as follows:

1. The issue for the Commission's review is whether the small scale amendment, as that term is defined in section 163.3187(1)(c), Florida Statutes (2003), to Polk County's Comprehensive Plan adopted in Ordinance No. CPA2003S-02 and modified by Ordinance No. 03-03 is in compliance with Florida's Local Government Comprehensive Planning and Land Development Regulation Act.

2. The Division of Administrative Hearings (DOAH) recommends that the Commission find that the small scale amendment is not in compliance. Accordingly, the

Commission, in accordance with section 163.3187(3)(b)1, Florida Statutes (2003), must take final agency action on the Recommended Order issued by DOAH in this matter.

3. The Commission's scope of review of the Findings of Fact and Conclusions of Law in the Recommended Order is governed by section 120.57(1)(l), Florida Statutes (2003).

4. The Commission hereby adopts and incorporates by reference herein DOAH's Recommended Order with the following modifications and rejections to the Recommended Order:

a. The Commission hereby rejects all of the Recommended Order's Conclusions of Law that address whether Citizens for Proper Planning, Inc. (CPPI) has standing in this case. As a threshold matter, the parties do not contest that the Commission, by virtue of its authority in section 163.3187(3)(b)1, Florida Statutes (2003), has substantive jurisdiction to determine whether the parties that appear before it in these proceedings have standing to do so. *See* § 120.57(1)(l), Fla. Stat. (2003) (stating that the Commission, as the agency with final order authority in this case, may reject conclusions of law over which it has substantive jurisdiction).

As such, the Commission rejects all Conclusions of Law that address whether CPPI has standing because neither the Commission nor DOAH needs to exercise its jurisdiction to address that issue in order to resolve the substantive issues regarding the small scale amendment's compliance with the Local Government Comprehensive Planning and Land Development Regulation Act. *See Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400, 403 n.4 (Fla. 1996) ("While we question the standing of [one plaintiff], we need not discuss that issue because of the standing of the other plaintiffs."). *See also Scott v. U.S.*, 98 S. Ct. 1717, 1722 n.10 (1978).

As Paragraph 53 of the Recommended Order notes,

CPPI has been allowed to fully participate in this proceeding and to have its claims addressed in this Recommended Order. Further, its co-Petitioner, Durham, has standing to continue to pursue the common interests of the two parties.

The Recommended Order held and the parties do not contest that Petitioner Durham has standing to pursue the issues presented in this proceeding. Accordingly, even if the Commission were to decide that CPPI has no standing, the Commission would be compelled to decide the underlying substantive issues. *See Coalition for Adequacy and Fairness*, 680 So. 2d at 403 n.4; *Scott*, 436 S. Ct. at 1722 n.10. On the other hand, if the Commission decides that CPPI does have standing, the Commission would simply repeat the same analysis that it has applied to Petitioner Durham's claims. *See Coalition for Adequacy and Fairness*, 680 So. 2d at 403 n.4; *Scott*, 436 S. Ct. at 1722 n.10. Because neither the Commission nor DOAH needs to decide the issue of CPPI's standing under these circumstances, *see Coalition for Adequacy and Fairness*, 680 So. 2d at 403 n.4; *Scott*, 436 S. Ct. at 1722 n.10, the Commission's rejection of the Recommended Order's Conclusions of Law on CPPI's standing is as or more reasonable than the Recommended Order's Conclusions of Law on this issue. *See* § 120.57(1)(l), Fla. Stat. (2003). Accordingly, the Commission hereby rejects the Recommended Order's Conclusions of Law on CPPI's standing.

Nevertheless, the Commission recognizes that whether CPPI has standing under section 163.3184(1)(a), Fla. Stat. (2003), is debatable and, therefore, recommends that the Legislature address the ambiguity presented by the meaning of "operating a business" in section 163.3184(1)(a), Fla. Stat. (2003), in order to provide clarity to future participants in the growth management process.

b. The Commission hereby modifies Paragraph 58 of the Recommended Order solely for the reason that it contains a typographical error. Paragraph 58 states that the amendment does not comply with Policy 2.113-B-1 in the Future Land Use Element in the County's Comprehensive Plan but that it does comply with Policy 2.110-C3 in the Future Land Use Element in the County's Comprehensive Plan. This statement, however, is inconsistent with the Recommended Order's Findings of Fact, specifically Paragraphs 30, 31, 32, 45, 46, 47, and 48, regarding the amendment's consistency with Policy 2.113-B-1 and Policy 2.110-C3. Accordingly, the Commission hereby modifies Paragraph 58 so that it reads as follows:

58. For the reasons stated in the Findings of Fact, the preponderance of the evidence supports the County's determination that the plan amendment does not conflict with Policies 2.102-A1, 2.113-B-3, and 2.110-C3. Conversely, the preponderance of the evidence establishes that the County's determination of the amendment's consistency with Policies 2.113-B-4 and 2.113-B-1 was incorrect, and that the amendment conflicts with those provisions, in violation of Section 163.3177(2), Florida Statutes. This being so, the amendment is not in compliance.

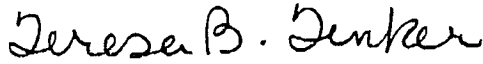
The Commission's modification of Paragraph 58 to correct a typographical error is more reasonable than accepting the Conclusions of Law in Paragraph 58 that are inconsistent with the Findings of Fact in Paragraphs 30, 31, 32, 45, 46, 47, and 48. *See* § 120.57(1)(l), Fla. Stat. (2003).

With these two exceptions, the Commission otherwise hereby adopts and incorporates by reference all of the remaining Findings of Fact and Conclusions of Law in the Recommended Order and, therefore, determines that the amendment does not comply with Florida's Local Government Comprehensive Planning and Land Development Regulation Act.

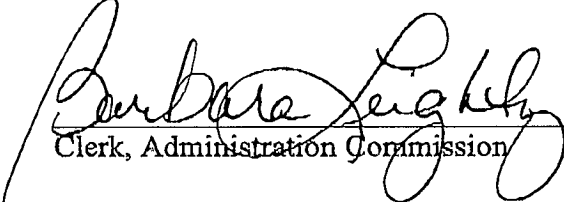
**NOTICE OF RIGHTS**

Any party to this Final Order has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes (2003), by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with Barbara Leighty, Clerk of the Commission, Office of Planning and Budgeting, Executive Office of the Governor, the Capitol, Room 1802, Tallahassee, Florida 32399-0001; and by filing a copy of the Notice of Appeal, accompanied by the applicable filing fees, with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days of the day this Final Order is filed with the Clerk of the Commission.

**DONE AND ORDERED** this 25th day of June, 2004.

  
for MICHAEL P. HANSEN, Secretary  
Administration Commission

FILED with the Clerk of the Administration Commission on this 25th day of June, 2004.

  
Clerk, Administration Commission

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to the following persons by United States mail, facsimile or hand delivery this 25th day of June, 2004.

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*Terese B. Junker*  
for MICHAEL P. HANSEN, Secretary  
Administration Commission