STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

HERBERT PAYNE, ANN STETSER,
THE DURHAM PARK NEIGHBORHOOD
ASSOCIATION, INC., and
THE MIAMI RIVER MARINE GROUP, INC.,

Petitioners,

v.

DOAH Case No. 04-2754GM

CITY OF MIAMI,

Respondent,

and

BALBINO INVESTMENTS, INC.,

Intervenor.
_____/

FINAL ORDER

This matter was considered by the Secretary of the Department of Community Affairs ("the Department") following receipt and consideration of a Recommended Order issued by an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings. A copy of the Recommended Order is attached hereto as Exhibit A.

BACKGROUND

This matter involves a challenge to a "small scale" comprehensive plan amendment adopted by the City of Miami ("the City") by Ordinance No. 12550, hereinafter referred to as the "Plan Amendment."

The Petitioners challenged the Plan Amendment by filing a Petition with the Division of Administrative hearings, as authorized by Section 163.3187(3), Fla. Stat.

(2005).[1] A formal hearing was conducted by an ALJ of the Division of Administrative Hearings ("DOAH"). Following the hearing, the ALJ submitted his Recommended Order to the Department. The ALJ recommended that the Department enter a final order determining that the Plan Amendment is in compliance.

ROLE OF THE DEPARTMENT

The Plan Amendment was not reviewed by the Department and the Department was not a party to the DOAH proceeding. §163.3187(3)(a), Fla. Stat. Therefore, the ban on *ex parte* communications imposed by Section 120.66, Fla. Stat., does not apply to any employees of the Department.

The Secretary of the Department and agency staff have reviewed the entire record and the Recommended Order in light of the exceptions. Based upon that review, the Secretary of the Department must either enter a final order consistent with the ALJ's recommendations finding the Plan Amendment in compliance, or determine that the Plan Amendment is not in compliance and submit the Recommended Order to the Administration Commission for final agency action. §163.3187(3)(b)2., Fla. Stat.

Having reviewed the entire record, the Secretary accepts the recommendation of the Administrative Law Judge as to the disposition of this case.

STANDARD OF REVIEW OF RECOMMENDED ORDER AND EXCEPTIONS

The Administrative Procedure Act contemplates that the Department will adopt the Recommended Order except under certain limited circumstances. The Department has only limited authority to reject or modify the ALJ's findings of fact.

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[1] Unless otherwise indicated, all statute citations refer to the 2005 codification of the Florida Statutes, and all rules refer to the current codification of the Florida Administrative Code.

> 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.
>
> Section 120.57(1)(*l*), Fla. Stat.

The Department cannot reweigh the evidence considered by the ALJ, and cannot reject findings of fact made by the ALJ if those findings of fact are supported by substantial competent evidence in the record. *Heifetz v. Department of Business Regulation*, 475 So.2d 1277 (Fla. 1st DCA 1985); and *Bay County School Board v. Bryan*, 679 So.2d 1246 Fla. 1st DCA 1996), construing a provision substantially similar to Section 120.57(1)(*l*), Fla. Stat. (2002). See also, *Pillsbury v. Department of Health and Rehabilitative Services*, 744 So. 2d 1040 (Fla. 2d DCA 1999).

The Department may reject or modify the ALJ's conclusions of law or interpretation of administrative rules, but only those,

> 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.
>
> Section 120.57(1)(*l*), Fla. Stat.

The label assigned to a statement is not dispositive as to whether it is a conclusion of law or a finding of fact. *Battaglia Properties, Ltd. v. FLWAC*, 629 So.2d 161 (Fla. 5th DCA 1993); *Kinney v. Department of State*, 501 So.2d 1277 (Fla. 5th DCA 1987). Conclusions of law, even though stated in the findings of fact section of a recommended order, may be considered under the same standard as any other conclusion of law.

RULINGS ON EXCEPTIONS

The Petitioners and the Intervenor each timely filed exceptions to the Recommended Order. On June 7, 2006, seven days after exceptions were due, the City filed a Notice of Adopting Intervenor's Exceptions to Administrative Law Judge's Recommended Order. The Notice was untimely and therefore has not been considered in writing this final order. On June 12, 2006, Balbino Investment LLC filed a Response to Petitioners' Exceptions. As the Response was received more than 10 days after the date the Petitioners' Exceptions were served, it has not been considered in writing this final order.

Petitioners' Exceptions

Most of Petitioners' exceptions argue that the ALJ accepted the evidence of the Respondent and Intervenor over that offered by the Petitioners, or that the ALJ accepted the evidence of the Respondent and Intervenor despite contradicting evidence, or that the ALJ failed to make a finding of fact that the Petitioners believe was supported by the Petitioners' evidence. The Department cannot reweigh the evidence or make supplemental findings of fact. *Prysi v. Dept. of Health*, 823 So.2d 823 (Fla. 1st DCA 2002); *Lawnwood Med. Ctr. v. Agency for Health Care Admin.*, 678 So.2d 421 (Fla. 1st DCA 1996). The ALJ's findings of fact are supported by competent, substantial evidence in the record.

Furthermore, many of Petitioners' exceptions merely reiterate positions which were repeatedly asserted before the ALJ, and which were clearly and specifically addressed in the Recommended Order. Therefore, these exceptions need not be addressed again in the agency's final order. *Britt v. Depart. of Prof'l. Reg.*, 492 So.2d

697 (Fla. 1st DCA 1986); *disapproved on other grounds*; *Dept. of Prof'l. Reg. v. Bernal*, 531 So.2d 967 (Fla. 1988).

Accordingly, any of Petitioners' exceptions which are not expressly ruled upon below are DENIED.

Petitioners' Exceptions 1, 2, and 5 and Intervenor's Exception 1; Minor Corrections

Petitioners' Exceptions 1 and 2 ask the Department to modify the Statement of the Issue and the Preliminary Statement to clarify that the Plan Amendment was adopted on July 7, 2004, per *Herbert Payne et al. v. City of Miami et al.*, 913 So.2d 1260 (Fla. 3d DCA 2005) (Payne I). The Court in Payne I actually determined that the Plan Amendment was adopted on July 6, 2004. Id. at 1261. Since the date correction adds clarity to the Recommended Order, while not modifying the essential facts found by the ALJ, Petitioners' Exceptions 1 and 2 should be granted.

Petitioners' Exception 5, in part, requests that the Department amend the ALJ's finding that the land subject to the Plan Amendment is currently unused. This finding is not supported by competent substantial evidence as the transcript and other components of the record demonstrate that the property currently contains a self-help boatyard. The correction proposed by the Petitioners is supported by the record and does not modify an essential fact found by the ALJ, therefore it should be granted.

Intervenor's Exception 1 points out a scrivener's error on page 5 of the Recommended Order. There the ALJ acknowledges that his Order granting a Motion to Strike filed by the Intervenor fails to address an allegation related to Policy HO-1.1.8, which pertains to Special District zoning. Policy HO-1.1.8 does not refer to Special District zoning, whereas Policy HO-2.1.4 explicitly does. Additionally, a review of the Order shows that HO-2.1.4 was not addressed.

Petitioners' Exceptions 1, 2 are GRANTED in paragraphs 1 and 2 below. Petitioners' Exception 5 is GRANTED in paragraph 3.A. below as to the description of the existing use of the land subject to the Plan Amendment. Intervenor's Exception 1 is GRANTED in paragraph 2.B. below.

Petitioners' Exception 3; Striking of Allegations

Petitioners' Exception 3 contends that the ALJ inappropriately struck allegations contained in the Amended Petition that related to the City's land development regulations, zoning ordinances, and issuance of development orders. Such goals, objectives, and policies provide direction for later decisions which implement the plan. A plan amendment, such as the subject of this case, does not implement the comprehensive plan; it changes the comprehensive plan. Therefore, the ALJ correctly determined that the stricken goals, objectives and polices are not appropriate subjects of a compliance proceeding under Chapter 163, Fla. Stat.

Petitioners' Exception 3 is DENIED.

Petitioners' Exception 4; Additional Case Law/Motion to Continue

Petitioners' Exception 4 argues that the ALJ erred in denying Petitioners' request for official recognition of the case of *Herbert Payne et al. v. City of Miami et al.*, 30 Fla. L. Weekly D2601 (Fla. 3d DCA, November 16, 2005) (Payne II) and request for continuance, while granting Intervenor's request for official recognition of the case of *Monkus et al. v. City of Miami et al.*, (DOAH Sept. 3, 2004; DCA Oct. 26, 2004). At the time of the hearing, a motion for rehearing was pending in the Payne II case. However, the ALJ considered the Payne II case in the Recommended Order, as he expressly vacated his denial of the Petitioners' request for official recognition and then granted it.

Additionally, although the Petitioners' argue prejudice due to the initial denial of the request, the Payne II case is based on a standing issue, with the discussion of the interpretation of the Port of Miami River Element and its related policies occurring as dicta.

Petitioners' Exception 4 is DENIED.

Petitioners' Exception 10; Acreage of Plan Amendment

In Exception 10, Petitioners allege that the Plan Amendment is not a small-scale amendment because the City uses an incorrect methodology to obtain the acreage of Future Land Use Map (FLUM) amendments. The Petitioners' believe their argument is bolstered by the fact that the companion rezoning amendment encompasses 10.41 acres. The City's "net lot area" approach to determining the acreage for FLUM amendments is long-standing and reasonable. The fact that the rezoning encompasses 2.5 additional acres than the Plan Amendment points to an inconsistency between the zoning code and the comprehensive plan, which is not an issue appropriately addressed in this proceeding. The Findings of Fact related to the acreage of the Plan Amendment are supported by competent substantial evidence in the record. Likewise, the ALJ's determination that the Plan Amendment was properly considered by the City as a small-scale amendment is as or more reasonable than that of the Petitioners.

Petitioners' Exception 10 is DENIED.

Petitioners' Exceptions 11, 12, and 15; Burden of Proof

Petitioners' contend that the ALJ erred in applying the fairly debatable standard in Finding of Facts 76 and 81. Although the Petitioners are correct, the ALJ does appropriately apply the preponderance of evidence standard in reaching his ultimate

conclusions. By deleting Paragraphs 76 and 81, the error will be removed without modifying essential findings of fact or conclusions of law.

The portion of Petitioners' Exceptions 11, 12, and 15 dealing with the burden of proof is GRANTED in paragraphs 3.C. and 3.D. below.

Intervenor's Exceptions 2 and 3; Standing

In Finding of Fact 13 the ALJ stated that "[t]he parties agree that Miami River Marine Group, Inc. is an affected person and has standing to participate." Likewise, in Conclusion of Law 89 the ALJ stated that "[e]xcept for Durham Park, the City and Intervenor agree that all other Petitioners are affected persons...and thus have standing to participate in this proceeding." The Intervenor and City did not stipulate to Petitioners' standing in the Pre-hearing Stipulation or anywhere else in the record. The above noted portions of Paragraphs 13 and 89 are not supported by competent substantial evidence.

Intervenor's Exceptions 2 and 3 are GRANTED in paragraph 3.B. and 3.E. below.

ORDER

Upon review and consideration of the entire record of the proceeding, including the Recommended Order, it is hereby ordered that:

1. The Statement of the Issue on page 2 is modified to state:

The issue is whether the City of Miami's small scale development amendment adopted by Ordinance No. 12550 on July 6, 2004, is in compliance.

2. The Preliminary Statement is modified as follows:

A. The first paragraph of the Preliminary Statement on page 2 is modified to state:

On July 6, 2004, Respondent City of Miami (City), adopted a small-scale plan amendment (Ordinance No. 12550), which changed the future land use designation on the City's Future Land Use Map (FLUM) on a 7.91-acre parcel

from Industrial and General Commercial to Commercial Restricted. The parcel is located...

B. The last sentence on page 5 is modified to read:

Because the Order inadvertently failed to address an allegation related to Policy HO-2.1.4, which pertains to Special District zoning, that portion of the Amended Petition is likewise stricken.

3. The findings of fact and conclusions of law in the Recommended Order are adopted, except:

A. The last sentence of Finding of Fact 6 is modified to read:

The property is currently being used as a self-help boatyard.

B. The last sentence of Finding of Fact 13 is modified to read:

Miami River Marine Group, Inc. is an affected person and has standing to participate.

C. Finding of Fact 76 is deleted.

D. Finding of Fact 81 is deleted.

E. The first sentence of Conclusion of Law 89 is modified to read:

Except for Durham Park, all other Petitioners are affected persons within the meaning of Section 163.3184(1)(a), Florida Statutes, and thus have standing to participate in this proceeding.

4. The Administrative Law Judge's recommendation is accepted; and

5. The City of Miami small-scale comprehensive plan amendment adopted by Ordinance No. 12550 is determined to be in compliance as defined in §163.3184(1)(b) (2005).

DONE AND ORDERED in Tallahassee, Florida.

THADDEUS L. COHEN

Thaddeus L. Cohen, AIA, Secretary
DEPARTMENT OF COMMUNITY AFFAIRS

NOTICE OF RIGHTS

ANY PARTY TO THIS FINAL 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.

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 the true and correct copies have been furnished to the persons listed below this 21st day of June, 2006.

Paula Ford, Agency Clerk
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