FINAL ORDER NO. AC-09-002

STATE OF FLORIDA
ADMINISTRATION COMMISSION

THE VIZCAYANS, INC., a Florida not-for-profit corporation; GROVE ISLE ASSOCIATION, INC., a Florida not-for-profit corporation; CONSTANCE STEEN; JASON E. BLOCH; and GLENCOE NEIGHBORHOOD ASSOCIATION, INC., a Florida not-for-profit corporation,

Petitioners,

vs.

CITY OF MIAMI,

Respondent,

and

TRG-MH VENTURE, LTD., and MERCY HOSPITAL, INC., a not-for-profit Florida corporation,

Intervenors.
_____/

AC Case No. ACC-08-004
DOAH Case Nos. 07-2498GM
07-2499GM

FINAL ORDER

This cause came before the Governor and Cabinet, sitting as the Administration Commission ("Commission") on March 24, 2009, upon the Recommended Order and the Supplement to Recommended Order After Remand ("Supplement") entered pursuant to Section 163.3187(3), Florida Statutes, in Division of Administrative Hearings ("DOAH") Case Nos. 07-2498GM and 07-2499GM. The Commission is charged with taking final agency action regarding whether a small scale development amendment is not "in compliance." See § 163.3187(3)(b)1., Fla. Stat. For the reasons stated below, and upon review of the record, the

Commission adopts the findings of fact and conclusions of law set forth in the Recommended Order and Supplement, except as modified herein, which are incorporated and attached as Exhibits "A" and "B."

BACKGROUND

On April 26, 2007, Respondent City of Miami ("Miami") adopted a comprehensive plan amendment ("Amendment"), through City of Miami Ordinance 12911 ("Ordinance 12911"), that changed the future land use designation on its Future Land Use Map ("FLUM") for a 6.72-acre parcel of land from Major Institutional, Public Facilities, Transportation and Utilities ("Major Institutional") to High Density Multifamily Residential ("H/D Residential").[1] The comprehensive plan amendment was adopted through the procedure established for a small-scale FLUM amendment in Section 163.3187, Florida Statutes (2007). The mayor signed Ordinance 12911 on May 7, 2007.

On June 4, 2007, The Vizcayans, Inc. ("Vizcayans"), Alvah H. Chapman, Jr., Betty B. Chapman and Cathy L. Jones filed a petition with DOAH challenging the FLUM Amendment's compliance with Chapter 163, Florida Statutes (2007). Their petition was assigned DOAH Case Number 07-2498GM. On June 6, 2007, Grove Isle Association, Inc. ("Grove Isle"), Constance Steen ("Steen"), Jason E. Bloch ("Bloch"), and Glencoe Neighborhood Association ("Glencoe") filed a similar petition. Their petition was assigned DOAH Case Number 07-2499GM.

On June 13, 2007, the two cases were consolidated, and TRG-MH Venture, LTD. ("TRG-MH"), the contract vendee and proposed developer of the parcel, filed its Petition to Intervene in support of Ordinance 12911. TRG-MH's Petition was soon followed by the Petition to Intervene filed by Mercy Hospital, Inc. ("Mercy"), the parcel's owner and contract vendor,

[1] At the same time the City Commission voted to approve the FLUM Amendment, it also approved the zoning change and major use special permit subject to the condition that the size and scale of the project be reduced by 25 percent across the board.

also in support of Ordinance 12911. Both Petitions to Intervene were granted. Also in June, Cathy L. Jones voluntarily dismissed her claim and was dropped as a party. Alvah and Betty Chapman subsequently filed their voluntary dismissals and were dropped as parties in July 2007.

After several motion hearings, the final hearing took place in the Miami-Dade County Courthouse from January 22 through January 25, 2008. On July 10, 2008, the Administrative Law Judge (ALJ) issued a Recommended Order finding the FLUM Amendment adopted by Ordinance 12911 not "in compliance." On October 20, 2008, the Commission issued an "Order of Remand" in which it rejected Conclusions of Law 70, 78, 79, 80 and part of 84 and determined that the ALJ applied the incorrect standard of proof for the purposes of determining whether the FLUM Amendment is related to and consistent with the local comprehensive plan. Four days later, the ALJ issued the Supplement in which he amended Finding of Fact 70 of the Recommended Order. The Commission is authorized to take final agency action and determine whether the small-scale FLUM Amendment adopted by Ordinance 12911 is not "in compliance." See § 163.3187(3)(b)1., Fla. Stat.

STANDARD OF REVIEW OF RECOMMENDED ORDER AND EXCEPTIONS

The Administrative Procedure Act provides that the Commission will adopt the ALJ's Recommended Order except under certain limited circumstances. The Commission has only limited authority to reject or modify the ALJ's 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.
>
> § 120.57(1)(l), Fla. Stat. (2007)

When fact-finding functions have been delegated to a hearing officer, as is the case here, the Commission must rely upon the record developed before the hearing officer. See Fox v.

Treasure Coast Reg'l Planning Council, 442 So. 2d 221, 227 (Fla. 1st DCA 1983). As the hearing officer in an administrative proceeding is the trier of fact, he or she is privileged to weigh and reject conflicting evidence. See Cenac v. Fla. State Bd. of Accountancy, 399 So. 2d 1013, 1016 (Fla. 1st DCA 1981). Therefore, "[i]t is the hearing officer's function in an agency proceeding to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." Bejarano v. State of Fla., 901 So. 2d 891, 892 (Fla. 4th DCA 2005)(quoting Heifetz v. Dep't of Bus. Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) (citing State Beverage Dep't v. Ernal, Inc., 115 So. 2d 566 (Fla. 3rd DCA 1959))). The Commission cannot reweigh 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, 475 So. 2d 1277 (Fla. 1st DCA 1985). Competent substantial evidence means "such evidence as will establish a substantial basis of fact from which a fact at issue can be reasonably inferred," and evidence which "should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

The Commission may modify or reject conclusions of law in the Recommended Order over which it has substantive jurisdiction, and the standard for review is well-settled. See § 120.57(1)(l), Fla. Stat. When rejecting or modifying a conclusion of law, the Commission must state with particularity its reasons for rejecting or modifying such conclusion of law. Any substituted conclusion of law must be as or more reasonable than the conclusion of law provided by the ALJ in the recommended order. Id.

RULINGS ON EXCEPTIONS

AMENDED EXCEPTIONS & EXCEPTION TO SUPPLEMENT

OF PETITIONER VIZCAYANS

Exception 1

In its "Exceptions to Supplement to Recommended Order," Petitioner Vizcayans incorporates by reference and reaffirms its "Amended Exceptions to Recommended Order." However, Petitioner Vizcayans did not incorporate or reaffirm Exception 1. The Commission will treat Exception 1 as withdrawn.

Exception 2

Petitioner Vizcayans takes exception to Paragraph 60, in which the ALJ finds that the Petitioners failed to prove by a preponderance of the evidence that High Density Multifamily Residential future land use on the site is incompatible with the surrounding uses or is inappropriate. The Commission has reviewed both Petitioner Vizcayans' exception and Intervenor Mercy's response to that exception, as well as the relevant parts of the record. Petitioner Vizcayans mostly reargues the evidence presented at the hearing, and its argument is essentially a request for the Commission to reweigh the evidence. The Petitioner renewed this exception with Exception S1. Therefore, for the reasons the Commission explains under Petitioner Vizcayans' Exception S1, the Petitioner Vizcayans' Exception 2 is DENIED.

Exception 3

Petitioner Vizcayans takes exception to mixed Finding of Fact and Conclusion of Law 53, in which the ALJ finds that the NCD-3 zoning overlay does not apply to the property subject to the FLUM Amendment. The Commission has reviewed both Petitioner Vizcayans' exception to the finding of fact and Intervenor Mercy's response to that exception, as well as the relevant

parts of the record. The Commission finds that the ALJ's findings of fact are supported by competent substantial evidence and that Petitioner's assertions are not as or more reasonable than the ALJ's determinations as to conclusions of law. Therefore, Petitioner Vizcayans' Exception 3 is DENIED.

Exception 4

Petitioner Vizcayans takes exception to the list of witnesses who testified by deposition on page 8 of the Recommended Order. The Commission has reviewed Petitioner Vizcayans' exception to the finding of fact as well as the relevant parts of the record. The Commission finds that there is no competent substantial evidence to show that William Thompson, Ana Gelabert, Lourdes Slazyk and John Matuska testified in their individual capacities. The evidence shows that these four individuals were deposed as corporate representatives and authorized to speak on behalf of their respective employers. Therefore, Petitioner Vizcayans' Exception 4 is GRANTED.

Exception 5

Petitioner Vizcayans takes exception to the list of admitted evidence on page 9 of the Recommended Order because it does not indicate that the Miami Comprehensive Neighborhood Plan was admitted into evidence or that the ALJ took judicial notice of the FLUM and the City of Miami Zoning Code. The Commission has reviewed Petitioner Vizcayans' exception to the finding of fact as well as the relevant parts of the record. The record shows that the Miami Comprehensive Neighborhood Plan was admitted into evidence and that the ALJ took judicial notice of the FLUM and the City of Miami Zoning Code. Therefore, Petitioner Vizcayans' Exception 5 is GRANTED.

Exception 6

Petitioner Vizcayans takes exception to Finding of Fact 33, in which the ALJ finds no covenant-in-lieu of unity of title has been prepared or executed for the site. The Commission has reviewed Petitioner Vizcayans' exception to the finding of fact as well as relevant parts of the record. While the record shows that a draft Declaration of Restrictions, Covenants and Easements was prepared, it does not indicate that a final version has been prepared or that any version has been executed. The Respondents did not file a response to this exception. Without further information, the Commission cannot find that Finding of Fact 33 is not supported by competent and substantial evidence. Therefore, Petitioner Vizcayans' Exception 6 is DENIED.

Exception 7

Petitioner Vizcayans takes exception to Finding of Fact 47, in which the ALJ finds that the view corridors of Vizcaya's Gardens are not protected by federal, state or local statutes, rules or ordinances. The Commission has reviewed both Petitioner Vizcayans' exception to the findings of fact and Intervenor Mercy's response to that exception, as well as relevant parts of the record. Petitioner Vizcayans reargues the evidence presented at the hearing and essentially requests for the Commission to reweigh the evidence. The Commission finds that the ALJ's findings of fact are supported by competent substantial evidence. Therefore, Petitioner Vizcayans' Exception 7 is DENIED.

Exception S1

In its Exception S1, Petitioner Vizcayans takes exception to Paragraph 60 of the Recommended Order and Paragraph 70(b) of the Supplement. The Commission has reviewed both Petitioner Vizcayans' exception to the findings of fact and conclusions of law as well as relevant parts of the record.

The Petitioner includes numerous photographs and an "Analysis for Land Use Change Request" ("Analysis") in its exception but does not state whether the photographs or Analysis are from the record below. If the photographs and Analysis are from the record below, the Petitioner must include "appropriate and specific citations to the record." See § 120.57(1)(k), Fla. Stat. If the photographs and Analysis are not from the record below, it is inappropriate for the Petitioner to include them in its exception. See § 120.57(1)(j), Fla. Stat.

In the Recommended Order, after reviewing all the evidence, the ALJ finds that the Petitioners did not prove by a preponderance of the evidence that the Amendment is incompatible with the surrounding uses or is inappropriate. In its exception, Petitioner Vizcayans reargues the evidence presented at the hearing and essentially requests that the Commission reweigh the evidence.

The Petition alleges that the FLUM Amendment is inconsistent with Future Land Use Element Policy LU-1.1.3, which provides that the City's Zoning Ordinance will protect the City from incompatible uses. As the term "compatibility" is not defined in the local comprehensive plan, it is appropriate to refer to the definition of that term in Rule 9J-5.003(23), Florida Administrative Code, for guidance. This Rule defines compatibility as "a condition in which land uses or conditions can coexist in relative proximity to each other in a stable fashion over time such that no use or condition is unduly negatively impacted directly or indirectly by another use or condition."

The Supplement may be read as concluding as a matter of law that buffering alone necessarily ensures compatibility. However, the existence of a buffer is not sufficient in and of itself to demonstrate that land uses can coexist over time in the manner set forth in the Rule.

Notwithstanding this erroneous legal conclusion, the Commission finds that the ALJ's ultimate finding and conclusion that Petitioners failed to prove by a preponderance of the evidence that the FLUM Amendment is inconsistent with Policy LU-1.1.3 is supported by the record. Therefore, Petitioner Vizcayans' Exception S1 is DENIED.

AMENDED EXCEPTIONS & EXCEPTIONS TO SUPPLEMENT OF PETITIONERS GROVE ISLE, STEEN, BLOCH AND GLENCOE

Exception 1

Petitioners Grove Isle, Steen, Bloch and Glencoe take exception to the ALJ's "conclusory findings on issues of incompatibility and inconsistency." The Commission has reviewed both Petitioners' exception to the findings of fact and Intervenor Mercy's response to that exception, as well as relevant parts of the record. To the extent that the Petitioners argue that the ALJ applies the incorrect standard of proof for consistency determination purposes, this argument is moot after the Commission issued an "Order of Remand" stating that the ALJ applied the incorrect standard of proof for the purposes of determining whether the small-scale amendment is related to and consistent with the local comprehensive plan. The rest of Petitioners' exception reargues the evidence presented at the hearing and essentially requests for the Commission to reweigh the evidence. To the extent that the exception relates to compatibility, the Commission denies the exception for the reasons explained under Petitioner Vizcayans' Exception S1. Therefore, Petitioners' "Exception to ALJ's Conclusory Findings on Issues of Incompatibility and Inconsistency" is DENIED.

Exception 2

Petitioners Grove Isle, Steen, Bloch and Glencoe take exception to the ALJ's conclusion that the word "use," in the context of Section 163.3187(1)(c)(1), Florida Statutes, refers to the property that is the subject to the Amendment, which is to be developed for residential use and not to adjoining property. The Commission has reviewed both Petitioners' exception to the finding of fact and Intervenor Mercy's response to that exception, as well as relevant parts of the record. The Commission finds that the ALJ's findings of fact are supported by competent substantial evidence and that Petitioner's assertions are not as or more reasonable than the ALJ's conclusions of law. Therefore, Petitioners' "Exception: Small Scale Amendment Area Calculation" is DENIED.

Exception 3

Petitioners Grove Isle, Steen, Bloch and Glencoe take exception to the ALJ's application of the fairly debatable standard to determine whether the Amendment is internally consistent with other goals, objectives and policies of a comprehensive plan. The Commission rejected Conclusions of Law 70, 78, 79, 80 and part of 84 of the Recommended Order and issued an "Order of Remand" stating that the ALJ applied the incorrect standard of proof for the purposes of determining whether the small-scale amendment is related to and consistent with the local comprehensive plan. Therefore, Petitioners' "Exception: Burden of Proof" is DENIED as MOOT.

Exception S1

Petitioners Grove Isle, Steen, Bloch and Glencoe take exception to "the ALJ's conclusory findings on issues of incompatibility and inconsistency in paragraph 70" of the Supplement. The Commission has reviewed the Petitioners' exception to the Supplement's finding of fact as well

as relevant parts of the record. Petitioners reargue the evidence presented at the hearing and essentially request that the Commission reweigh the evidence. To the extent that the exception relates to compatibility, the Commission denies the exception for the reasons explained under Petitioner Vizcayans' Exception S1. Therefore, Petitioners' exception to Paragraph 70 is DENIED.

EXCEPTIONS OF INTERVENOR MERCY[2]

Exception 1

Intervenor Mercy takes exception to Findings of Fact 57, 61, 62 and 65, in which the ALJ finds that the City misinterpreted the Pyramid Concept in the Miami Comprehensive Neighborhood Plan. The Commission has reviewed both Intervenor's exception to the findings of fact and Petitioners' responses to that exception, as well as relevant parts of the record. To the extent that Findings of Fact 57, 61, 62 and 65 are findings of fact, they are supported by competent substantial evidence. To the extent that Findings of Fact 57, 61, 62 and 65 are conclusions of law, the Intervenor's assertions are not as or more reasonable than the ALJ's conclusions of law. Therefore, Intervenor Mercy's Exception 1 is DENIED.

Exception 2

Intervenor Mercy takes exception to Findings of Fact 28, 66 and 69, as well as Conclusions of Law 82 and 83, in which the ALJ finds and concludes that the FLUM Amendment was not supported by adequate data and analysis. The Commission has reviewed both Intervenor's exception to the findings of fact and Petitioners' responses to that exception, as well as relevant parts of the record. The Commission finds that the ALJ's findings of fact are

[2] Respondent City of Miami and Intervenors TRG-MH and Mercy jointing filed "Exceptions to the Recommended Order" and "Response to the Petitioners' Exceptions to the Recommended Order." However, Respondent City of Miami and Intervenor TRG-MH withdrew their exceptions on October 7, 2008.

supported by competent substantial evidence and that the Intervenor's assertions are not as or more reasonable than the ALJ's conclusions of law. Therefore, Intervenor Mercy's Exception 2 is DENIED.

CONCLUSION

The Commission adopts the ALJ's findings of fact and conclusions of law in the Recommended Order and the Supplement, except those previously rejected in the Order of Remand and those modified herein. This decision by the Commission shall not be construed to mean that the proposed use is compatible but that the Petitioners did not meet their burden of proving the FLUM amendment is incompatible. Upon review of the record, the Recommended Order and the Supplement, and after considering the parties' exceptions thereto, the Commission further determines that the FLUM Amendment adopted by City of Miami Ordinance 12911 is not "in compliance" as defined by Section 163.3184(1)(b), Florida Statutes. In accordance with Section 163.3189(2)(b), Florida Statutes, the Commission directs the City of Miami to adopt the following remedial measures: 1) rescind City of Miami Ordinance 12911; and 2) provide a report to the Commission on the status of Ordinance 12911 within 45 days of this Final Order.

NOTICE OF RIGHTS

Any party to this Order has the right to seek Judicial review of the Final Order pursuant to section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Commission, Office of Policy and Budget, Executive Office of the Governor, The Capitol, Room 1801, 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. Notice of Appeal must be filed within 30 days of the day this Order is filed with the Clerk of the Commission.

DONE AND ORDERED this 27th day of March, 2009.

for JERRY L. MCDANIEL, Secretary
Administration Commission

FILED with the Clerk of the Administration Commission this 27th day of March, 2009.

Barbara Leighty

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 or hand delivery this 27th day of March, 2009.

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