FINAL ORDER NO. AC-09-006

STATE OF FLORIDA
ADMINISTRATION COMMISSION

SUSAN WOODS and KAREN LYNN RECIO,

Petitioners,

vs.

MARION COUNTY and DEPARTMENT OF COMMUNITY AFFAIRS,

Respondents,

and

AUSTIN INTERNATIONAL REALTY, LLC, CASTRO REALTY HOLDINGS, LLC, and HALCYON HILLS, LLC,

Intervenors.
_____/

AC Case No. ACC-09-002
DOAH Case No. 08-1576GM

FINAL ORDER

This cause came before Governor and Cabinet, sitting as the Administration Commission ("Commission") on September 15, 2009, upon the Determination of Non-Compliance issued by the Secretary of the Department of Community Affairs (Department). Following the receipt of the Recommended Order entered pursuant to Section 163.3184(9), Florida Statutes, in Division of Administrative Hearings ("DOAH") Case No. 08-1576GM, the Department determined that the amendment to Marion County's Comprehensive Plan adopted in Ordinance 07-31 is not "in compliance" as defined by Section 163.3184(1)(b), Florida Statutes. The Commission is charged with taking final agency action regarding whether a plan amendment is not "in compliance." See § 163.3184(9), Fla. Stat. For the reasons stated below and in the Determination of Non-

Compliance, which is attached as Exhibit A, and upon review of the record, the Commission adopts the findings of fact and conclusions of law set forth in the Recommended Order, which is incorporated and attached as Exhibit B, except as modified herein.

BACKGROUND

On November 20, 2007, Respondent Marion County ("County") adopted a comprehensive plan amendment, through Marion County Ordinance 07-31, which changed the future land use designation of its Future Land Use Map ("FLUM") for approximately 395.83 acres from Urban Reserve (378 acres) and Rural Land (17.83 acres) to Medium Density Residential. The Department of Community Affairs ("Department") reviewed the FLUM Amendment and published a Notice of Intent to find the Amendment "in compliance," as defined in Section 163.3184 (1)(b).

On March 14, 2008, Susan Woods and Karen Lynn Recio filed a petition challenging the FLUM Amendment's compliance with Chapter 163, Florida Statutes, and the Department's Notice of Intent. The petition was referred to DOAH and was assigned DOAH Case Number 08-1576GM. On May 6, 2008, Austin International, LLC, Castro Realty Holdings, LLC, and Halcyon Hills, LLC ("Intervenors"), owners of the property subject to the FLUM Amendment, were granted leave to intervene. Both designations (Urban Reserve & Rural Land) allow a maximum of 1 dwelling unit per 10 acres. The FLUM Amendment would change the designation of the entire parcel to Medium Density Residential ("MDR"), which generally allows up to 4 dwelling units per acre. However, Future Land Use Element ("FLUE") Policy 12.5.k, which was also adopted as part of County Ordinance 07-31, limits the maximum density on the property to 2 dwelling units per acre.

Prior to the final hearing, the Department announced it had changed its position on the FLUM Amendment and joined the Petitioners in asserting that the FLUM Amendment is not "in compliance," because of inconsistency with provisions of the County's Comprehensive Plan and the lack of an adequate demonstration of need.

The Final Administrative Hearing was held October 29 and 30, 2008, in Ocala, Florida. Upon consideration of the evidence and post-hearing filings, the ALJ entered a Recommended Order recommending the Department determine the Amendment to be, not "in compliance." After reviewing the Recommended Order, the Department then issued a Determination of Non-Compliance on March 26, 2009, and submitted it to the Commission for final agency action. The Commission is authorized to take final agency action and determine whether the FLUM Amendment adopted by Ordinance 07-31 is not "in compliance." See § 163.3184(9)(b), Florida Statutes.

STANDARD 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.
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> § 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. 3d 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. Id. 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

The Commission hereby adopts and incorporates by reference the recommendations made by the Department in its Determination of Non-compliance, attached as Exhibit A, on the exceptions to the Recommended Order. Therefore the Commission denies all exceptions to the Recommended Order, except for Respondent Department's Exception to Finding of Fact 26, which is granted.

CONCLUSION

The Commission adopts the ALJ's findings of fact and conclusions of law in the Recommended Order except as modified herein. Upon review of the record, the Recommended Order, the parties' exceptions to the Recommended Order and the Determination of Non-compliance, the Commission determines the FLUM Amendment adopted by Ordinance 07-31 is not "in compliance" as defined by Section 163.3184(1)(b), Florida Statutes. In accordance with Sections 163.3184(11)(a) and 163.3189(2)(b), Florida Statutes, the Commission finds that under the facts presented, no remedial actions would bring the plan amendment into compliance, and thus directs the County to adopt the following remedial actions: 1) rescind Marion County Ordinance 07-31; and 2) provide a report to the Commission on the status of Ordinance 07-31 within 60 days of this Final Order.

SANCTIONS

Pursuant to Section 163.3189(2)(b), Florida Statutes, the County may elect to make the FLUM amendment to Marion County's Comprehensive Plan adopted in Ordinance 07-31 effective notwithstanding the finding of not "in compliance" stated in this Final Order. In the unlikely event the County elects to make the amendment effective without taking the required

remedial actions, the County shall be subject to sanctions pursuant to Section 163.3184(11), Florida Statutes. The Commission retains jurisdiction for the purpose of imposition of sanctions.

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, 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. 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 17th day of September, 2009.

for: JERRY L. MCDANIEL, Secretary
Administration Commission

FILED with the Clerk of the Administration Commission on this 17th day of September, 2009.

Clerk, Administration Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was delivered to the following persons by United States Mail, facsimile, electronic mail, or hand delivery this 17th day of September, 2009.

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Clerk, Administration Commission

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