FINAL ORDER NO. AC-11-001

STATE OF FLORIDA
ADMINISTRATION COMMISSION

RICHARD BURGESS,

Petitioner,

vs.

AC Case No. ACC-10-008
DOAH Case No. 09-2080GM

DEPARTMENT OF COMMUNITY AFFAIRS
and CITY OF EDGEWATER,

Respondents,

and

HAMMOCK CREEK GREEN, LLC,

Intervenor.
_____/

FINAL ORDER

This cause came before the Governor and Cabinet, sitting as the Administration Commission ("Commission") on February 22, 2011, on 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. 09-2080GM, the Department determined that the comprehensive plan amendment adopted by the City of Edgewater ("City") and a subsequent remedial amendment adopted by the City pursuant to a settlement agreement entered into between the Department, the City, and Intervenor Hammock Creek Green, LLC ("Hammock Creek") are not "in compliance" as defined by section 163.3184(1)(b), Florida

Statutes. The Commission is authorized to take final agency action and determine whether the Plan Amendment as remediated is "in compliance," and, if the Plan Amendment is found not "in compliance," to specify remedial actions that would bring the Plan Amendment into compliance. §§ 163.3184(9)(b), 163.3184(11)(a), and 163.3189(2), 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 February 2, 2009, the City adopted an amendment to its comprehensive plan by Ordinance 2008-O-10 creating the "Restoration Sustainable Community Development District" ("Restoration SCD") mixed-use land use category through text and map amendments to the City's comprehensive plan ("Plan Amendment"). The Department reviewed that Plan Amendment and issued a notice and statement of intent to find it not "in compliance."

Thereafter, the Department, City and Hammock Green entered into a stipulated settlement agreement ("Settlement Agreement"). By Ordinance No. 2010-O-01, the City adopted a remedial amendment pursuant to the Settlement Agreement and, on March 18, 2010, the Department issued a cumulative notice to find the Plan Amendment as remediated "in compliance." The parties were realigned pursuant to section 163.3184(16)(f), Florida Statutes, with Mr. Burgess as the sole remaining Petitioner, and the matter then proceeded to a final hearing. Prior to the final hearing before DOAH, this proceeding was expedited by Hammock Creek pursuant to section 163.3189(3), Florida Statutes.

The final hearing was held on May 17 and 18, 2010. Upon consideration of the evidence and post-hearing filings, the Administrative Law Judge ("ALJ") entered a Recommended Order

rejecting all of the allegations raised by Petitioner Burgess. The ALJ recommends that the Department find the Plan Amendment "in compliance." Petitioner timely filed Exceptions to the Recommended Order and a Motion for Remand. The Department also timely filed Exceptions, to which the Petitioner filed Responses. The City and Hammock Creek jointly filed Responses to Petitioner's Exceptions and to Petitioner's Motion for Remand.

After receipt of the Recommended Order, the Department issued a Determination of Non-Compliance in which the Department recommends that the Plan Amendment as remediated be found not "in compliance" and forwarded this proceeding to the Commission for final agency action.

STANDARD OF REVIEW FOR 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.

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.

The label assigned a statement is not dispositive as to whether it is a finding of fact or conclusion of law. See Kinney v. Department of State, 501 So. 2d 1277 (Fla. 5th DCA 1987). Conclusions of law labeled as findings of fact, and findings labeled as conclusions, will be considered as a conclusion or finding based upon the statement itself and not the label assigned.

RULINGS ON EXCEPTIONS

Petitioner and the Department each filed a set of exceptions to the Recommended Order. The Department's Determination of Non-Compliance addresses those exceptions. The Department's recommended rulings on the exceptions are not binding on the Commission, however they were reviewed and considered by the Commission in conjunction with the record below, the Recommended Order and the parties' post-hearing filings.

Petitioner's Exceptions to Findings of Fact

Exception One: Paragraph 17

Petitioner alleges that Finding of Fact 17 "is an inaccurate characterization of Mr. Burgess' allegations on the mixed-use issues and lacks any evidentiary foundation." Although this statement does not contain the same level of detail included in the Amended Petition for Administrative Hearing, it is a fair summation of those allegations and is supported by competent substantial evidence.

Petitioner's Exception One is DENIED.

Exception Two: Paragraph 19, First Sentence

Petitioner alleges that the first sentence in this finding of fact is a mislabeled and incorrect conclusion of law. This sentence reads: "Various policies of the Restoration SCD Sub-Element establish minimum and maximum percentages for the subcategories of use."

This finding addresses the substantive content of the Plan Amendment with respect to the "subcategories of use" and is properly labeled a finding of fact, not a conclusion of law. Accordingly, the issue before the Commission is whether this finding is supported by competent substantial evidence.

Upon review of the Plan Amendment it is found that the subcategories of uses do not include minimum and maximum percentages. There is no competent substantial evidence to support this finding and it is rejected. This ruling does not alter any other findings of fact or conclusions of law. As discussed below in response to Petitioner's Exceptions One through Three to Conclusions of Law 63 and 64, there is no requirement for land use subcategories, in addition to land use categories, to meet the requirements of section 163.3177(6)(a), Florida Statutes, and rule 9J-5.006(4)(c), Florida Administrative Code, regarding mixed-use categories.

Petitioner's Exception Two is DENIED to the extent it argues that the sentence is a mislabeled conclusion of law, but is GRANTED to the extent this sentence is an unsupported finding of fact.

Exception Three: Paragraph 19, Second Sentence

The second sentence of Finding of Fact 19 provides as follows: "Table 1-4 in the Plan Amendments shows the various land uses, their densities and intensities, and their acreages." Petitioner takes issue with this finding on the basis that it "implies that Table 1-4 relates to the 'sub-categories of use' in the RSE [as opposed to 'land uses']." The ALJ consistently refers to "subcategories of use" and "land use" by those different terms when referring to one or the other in the Recommended Order. See, e.g., Paragraphs 7, 9 & 18. Table 1-4 is a "Vacant Land Analysis" which lists different land uses by category, density or intensity, and acreage. Finding of Fact 19 accurately describes this table and is supported by competent substantial evidence. There is no basis to support a contrary implication.

Petitioner's Exception Three is DENIED.

Exception Four: Paragraph 42, Second Sentence

Finding of Fact 42 notes that the City's Comprehensive Plan has different planning timeframes for the overall Plan, the Recreation and Open Spaces Element, the water supply work plan, and the Public Schools Facilities Element. Petitioner takes exception to this Finding alleging, "[i]t is inaccurate to the extent that it omits to find/conclude that the Coastal Management Element only has one long-term timeframe to 2010."

Due to the untimely raising of this issue, the ALJ was not required to make any findings of fact about the Coastal Management Element's planning period. Petitioners are bound by allegations in their Petition. Heartland Environmental Council, Inc. v. Dep't of Community Affairs, Case No. 94-2095GM, RO ¶ 85, (DOAH Oct. 15, 1996), rejected in part by, Case No. 94-2095GM (DCA Nov. 25, 1996). The Amended Petition and the Joint Prehearing Stipulation do not identify the Coastal Management Element's planning period, and the Amendment's alleged inconsistency with it, as a disputed issue of material fact or law. Petitioner also failed to present any testimony at hearing about the Coastal Management Element's planning period or the Amendment's alleged inconsistency with it. He first addressed that element's planning period after the hearing in his Proposed Recommended Order.

Petitioner does not allege that this finding is not supported by competent substantial evidence, and a review of the record shows that the finding is supported by competent substantial evidence.

Petitioner's Exception Four is DENIED.

Exception Five: Paragraph 43

The Petitioner takes exception to the ALJ's finding that "Petitioner did not identify an adverse effect created by the different planning periods." The Petitioner contends that this finding of fact is irrelevant to the compliance determination and is not supported by competent substantial evidence.

While Finding of Fact 43 is irrelevant to determining whether the different planning timeframes are internally inconsistent, an agency may reject a finding of fact only if it is not supported by competent substantial evidence. A review of the record shows that Finding of Fact 43 is supported by competent substantial evidence.

Petitioner's Exception Five is DENIED.

Exception Six: Paragraph 44, First Sentence

The first sentence of Finding of Fact 44 provides as follows: "The City is currently preparing its Evaluation and Appraisal Report (EAR)-based amendments." Petitioner alleges that this sentence is not supported by competent substantial evidence. This finding is supported by the testimony of Darren Lear, the City's director of development services, and is therefore supported by competent substantial evidence. Transcript 211-213.

Petitioner's Exception Six is DENIED.

Exception Seven: Paragraph 44, Last Sentence

The Petitioner takes exception to the finding that the EAR process "is the logical process for reviewing and revising planning horizons in the plan" and argues that it is an erroneously mislabeled conclusion of law. The related preceding sentence in Paragraph 44 finds that the EAR process involves a statutorily mandated, periodic review and update of the entire Plan. That portion of Paragraph 44 was not the subject of an exception.

The disputed last sentence involves an interpretation of statutory and rule requirements addressing planning horizons and the EAR process. Section 163.3191(2)(i), Florida Statutes, requires an EAR to "contain appropriate statements to update the comprehensive plan" on several issues, including "new revised planning timeframes." To the extent Exception Seven mislabels this statement as a finding of fact, the Commission agrees with Petitioner.

The EAR process is a logical process for reviewing and revising various planning horizons within a Plan, but the Commission does not agree with the conclusion's implication that the EAR process is the only time when a particular planning horizon logically should be reviewed and revised. For example, each local government is required to annually review and update its plan's five year schedules of capital improvements. See § 163.3177(3)(b)1, Fla. Stat. see also r. 9J-5.016(4)(a)1, Fla. Admin. Code. Also, a local comprehensive plan is required to adopt a water supply facilities work plan that covers a planning period of at least ten years and to update it within eighteen months after the regional water district updates its regional water supply plan. See § 163.3177(6)(c), Fla. Stat. A local comprehensive plan must also be updated to accommodate a future land use map amendment which substantially increases the density and intensity for a large parcel, as was required by the Settlement Agreement to accommodate the Plan Amendment.

Petitioner's Exception Seven is GRANTED to the extent it argues that the sentence is a mislabeled conclusion of law and erroneously concludes that the EAR process is the only logical process for reviewing and updating a planning horizon. This conclusion is more reasonable than the ALJ's conclusion of law.

Petitioner's Exceptions to Conclusions of Law

Exception One: Paragraph 63, First Sentence

Petitioner takes exception to the following portion of Paragraph 63: "Petitioner apparently objects to the flexibility that the Plan Amendments provide through the use of minimum and maximum densities and intensities." Petitioner contends that this mischaracterizes his allegations. This sentence is a mislabeled finding of fact. Although this statement does not contain the same level of detail included in the Amended Petition for Administrative Hearing, it is a fair summation of those allegations and is supported by competent substantial evidence.

Petitioner's Exception One is DENIED.

Exception Two: Paragraph 63, Second Sentence

Petitioner takes exception to the second sentence of Paragraph 63, which reads in full as follows: "The Department does not interpret Section 163.3177(6)(a) or Rule 9J-5.006(4)(c) to prohibit this kind of flexibility, and the Department's interpretation is a reasonable one." The "flexibility" that is the subject of this sentence is set forth in the first sentence of Paragraph 63, which reads in full as follows: "Petitioner apparently objects to the flexibility that the Plan Amendments provide through the use of minimum and maximum densities and intensities."

It is the Restoration SCD land use, not the subcategories, that must comply with the mixed-use requirements of rule 9J-5.006(4)(c), Florida Administrative Code. That rule encourages mixed-use categories and, if used, requires that they include an objective measurement, and provides examples of "types of land uses allowed, the percentage distribution among the mix of uses" as qualifying objective measurements. This requirement is fulfilled by Policy 3.1.1 of the Plan Amendment. As the ALJ finds in undisputed Finding of Fact 18, Policy 3.1.1 describes the seven subcategories of use within the Restoration SCD mixed-use land use

category: Residential, Mixed-Use Town Center, Work Place, Transit-Ready Corridor, Utility Infrastructure Site, Schools, and Open Space.

In undisputed Finding of Fact 20, the ALJ finds that the Restoration SCD land use has an "overall residential cap of 8,500 units and a non-residential intensity cap of 3,300,000 square feet." This Finding adequately addresses the portion of rule 9J-5.006(4)(c), Florida Administrative Code, that requires the density and intensity of each use. Allowing a local government "flexibility" to approve developments and combinations thereof within the permissible ranges adopted in the comprehensive plan is a reasonable interpretation of the rule. Petitioner has not demonstrated that a contrary interpretation - presumably one which would fix exact levels of allowable development for each sub-category - would be as or more reasonable. It is well-settled in Florida that a comprehensive plan establishes a range of permissible uses, but the local government's decision whether to permit the maximum amount or a lower amount of uses is made by the local government sitting in a quasi-judicial capacity. See Brevard County v. Snyder, 627 So. 2d 469, 475 (Fla. 1993).

Petitioner also seems to contend that the sub-categories within the overall Restoration SCD mixed-use category must be individually depicted on the future land use map. This mapping was not the subject of the "flexibility" discussed in Paragraph 63 and this portion of the exception, therefore, need not be addressed. However, it is worth noting that section 163.3177(6)(a), Florida Statutes, specifically contemplates the mapping of areas for mixed-use development: "The future land use plan may designate areas for future planned development involving combinations of types of uses . . . ." That statute does not require mapping of the various land use components allowed within a mixed-use category, only the mapping of the mixed-use category. The mapping requirement applies only to the Restoration SCD land use.

Petitioner's Exception Two is DENIED.

Exception Three: Paragraph 64

This Exception relies upon other Exceptions that have been ruled on elsewhere in this Final Order.

Petitioner's Exception Three is DENIED.

Exception Four: Paragraph 72, Second Sentence

Petitioner takes exception to the second sentence of Paragraph 72 which reads as follows: "There is no express requirement in Chapter 163 or Rule Chapter 9J-5 that a comprehensive plan maintain uniform planning timeframes." Petitioner contends that this sentence is an erroneous conclusion of law.

The requirement for planning timeframes is found in section 163.3177(5)(a), Florida Statutes ("[e]ach local government comprehensive plan must include at least two planning periods, one covering at least the first 5-year period occurring after the plan's adoption and one covering at least a 10-year period.). This requirement is repeated in rule 9J-5.005(4), Florida Administrative Code.

Planning timeframes are at the very foundation of comprehensive planning. A local government selects the timeframes over which it wishes to plan, forecasts anticipated population and growth over those periods, allocates sufficient suitable land to accommodate that forecasted population, and then plans for the infrastructure needed to support that growth. § 163.3177(6)(a), Fla. Stat.; rr. 9J-5.005(2)(e) & 9J-5.006(2)(c). F.A.C. As the testimony at the final hearing stated, these timeframes are the "basis for forecasting growth, identifying land use areas needed to accommodate the growth, and the infrastructure elements to . . . provide for the transportation, the water, the sewer, [and] the other facilities . . ." Transcript at 557.

The several elements of the comprehensive plan must be consistent. "Coordination of the several elements of the local comprehensive plan shall be a major objective of the planning process. The several elements of the comprehensive plan shall be consistent . . . ." § 163.3177(2), Fla. Stat. As part of this coordination, "[w]here data are relevant to several elements, the same data shall be used, *including population estimates and projections*." r. 9J-5.005(5), F.A.C. (emphasis added). In addition to these general requirements, the portions of chapter 163 and Rule 9J-5 which address the individual elements specify that the public facility planning must be based on the planning period. Fla. Admin. Code rr. 9J-5.011(1)(f)1.b.&c. (sanitary sewer, solid waste, stormwater management and potable water facility element), 9J-5.010(3)(c)11. (housing); and Fla. Stat. § 163.3167(13) (water supply), and 163.3177(12)(c)&(h) (public schools).

Coordination of and consistency among the several elements of necessity require that uniform planning timeframes be used throughout the local comprehensive plan. This conclusion is found in the express rule and statutory provisions cited above. This conclusion is as or more reasonable than the Administrative Law Judge's contrary conclusion.

Petitioner's Exception Four is GRANTED.

Exceptions Five and Six: Paragraph 73, First and Second Sentences

Petitioner's next two Exceptions are best addressed as one. Petitioner's Exception Five takes exception to the first sentence of Paragraph 73, which provides in full as follows: "Petitioner's claim that the use of different planning timeframes in different elements of the Comprehensive Plan causes the plan to be internally inconsistent requires more than merely pointing out that different timeframes are being used." Exception Six is directed to the second sentence of Paragraph 73, which provides in full as follows: "Petitioner failed to prove that an

adverse effect is caused by the use of different planning timeframes in the City's Comprehensive Plan."

As noted immediately above, the several elements of the comprehensive plan must be consistent.

> Coordination of the several elements of the local comprehensive plan shall be a major objective of the planning process. The several elements of the comprehensive plan shall be consistent . . . .
>
> § 163.3177(2), Fla. Stat.

Regarding Exception Five, it is reasonable for the ALJ to require consistency between the elements, in accordance with Section 163.3177(2), Florida Statutes, so as to evaluate whether the different planning horizons conflict and derail the plan from achieving its goals. The ALJ's conclusion that different planning timeframes in different elements of a Comprehensive Plan alone does not cause the plan to be internally inconsistent is as or more reasonable than the Petitioner's conclusion.

Regarding Exception Six, the plain language of the relevant statute does not support the ALJ's conclusion and, in fact, can only support a contrary conclusion. Importantly, the definition of "in compliance" provides in pertinent part as follows: "'In compliance' means consistent with the requirements of ss. 163.3177 . . . ." There is nothing in this definition that requires a showing of some adverse impact beyond a showing of a lack of coordination as a prerequisite for a finding of non-compliance. There must be a demonstration that the different timeframes result in a lack of coordination among the elements, which was not done by the Petitioner in this case. This conclusion is more reasonable than the ALJ's conclusion of law.

Petitioner's Exception Five is DENIED, and Petitioner's Exception Six is GRANTED. The second sentence in Paragraph 73 is stricken and replaced with: "Petitioner failed to prove that the different timeframes result in a lack of coordination among the elements."

Exception Seven: Paragraph 74

Petitioner takes exception with Paragraph 74 in which the ALJ finds that "[t]he City's determination that the Plan Amendments are internally consistent is fairly debatable."

For the reasons set forth above, the ALJ's conclusion of law is more reasonable than the theory advanced by the Petitioner.

Petitioner's Exceptions 7 is DENIED.

Exception Eight: Paragraph 82

Petitioner next takes exception to Paragraph 82, which contains the ALJ's ultimate conclusion that the issue of whether the Plan Amendment is "in compliance" is fairly debatable.

As the ALJ found in Finding of Fact 42, the Plan Amendment extends the planning horizon of the Edgewater Comprehensive Plan to 2020, but includes a few other planning horizons. And, as the ALJ found in Finding of Fact 44, the City is currently preparing its EAR based amendments, which can be expected to correct these minor differences. A review of the record shows that Petitioner did not prove that the planning horizons listed in finding of fact 42 create an internal inconsistency in the Edgewater Comprehensive Plan.

In a prior case, the ALJ concluded that:

> 83. One approach to determining consistency with the other criteria of Sections 163.3177 and 163.3178 and Chapter 9J-5 is to emphasize the "minimum criteria" language. Under this approach, the failure to satisfy any single requirement of Sections 163.3177 and 163.3178 or criterion of Chapter 9J-5 results in a finding of inconsistency.
>
> 84. Another approach to determining consistency with the criteria of Sections 163.3177 and 163.3178 and Chapter 9J-5 is to emphasize the "consistency" language. Under this approach, the plan is first examined under the "minimum criteria" approach. If no criterion is left unsatisfied, then the plan is consistent with Sections 163.3177 and 163.3178 and Chapter 9J-5. If, as is often if not invariably the case, the plan fails to satisfy one or more of these criteria, further analysis must be undertaken before determining that the plan is not consistent with applicable statutory and regulatory criteria.

85. Borrowing the statutory definition of consistency as applied to comparisons with state and regional plans, the "consistency" approach would permit a finding of consistency if the plan as a whole were not in conflict with, and took action in the direction of, realizing the criteria unsatisfied by the plan. This approach would require, among other things, consideration of the purposes of the unsatisfied criteria in light of the entire plan, the Act, and Chapter 9J-5.

* * *

87. The "consistency" approach is supported by the language in the Act and Chapter 9J-5 that a plan must be "consistent with the requirements" of Sections 163.3177 and 163.3178 and Chapter 9J-5. Section 163.3184(1)(b). Similarly, Rule 9J-5.002(1) requires consistency merely with Sections 163.3177 and 163.3178 and Chapter 9J-5, and not with any "minimum criteria." If truly "minimum criteria," they should be "satisfied" or "met," but these terms are not used in the Act or Chapter 9J-5 with reference to the criteria of Sections 163.3177 and 163.3178 and Chapter 9J-5 with one exception inapplicable to the present case.

* * *

89. The language of the Act favors the "consistency" approach over the "minimum criteria" approach. The "consistency" approach derives its support from the critical provision of the Act defining "in compliance." By contrast, the "minimum criteria" approach derives its support from less operative sources within the Act--a legislative declaration and a legislative directive to DCA regarding rulemaking.

* * *

91. Under the "consistency" approach to Sections 163.3177 and 163.3178 and Chapter 9J-5, each unsatisfied criterion must be carefully considered to determine its function in light of the Act and Chapter 9J-5 as a whole. Then the relationship between-the plan as a whole and the unsatisfied criterion, in light of its role within the Act and Chapter 9J-5, must be examined to determine whether, among other things, the plan conflicts with the unsatisfied criterion, the plan takes action in the direction of realizing the unsatisfied criterion, and the plan is related to, coordinated with, and, ultimately, consistent with the unsatisfied criterion.

Cooper v. City of St. Petersburg Beach, DOAH Case No. 90-8189GM (emphasis added). See also, Manasota 88 v. Sarasota County, DOAH Case No. 89-6723GM, and DCA v. Lee County, DOAH Case No. 89-2159.

The Petitioner did not demonstrate that the Remedial Plan Amendment adopted pursuant to the Settlement Agreement does not take action in the direction of realizing the coordination of the various elements. With the 2020 planning horizon adopted by the Remedial Amendment, the Edgewater Comprehensive Plan is related to, coordinated with, and ultimately consistent with the criterion.

Therefore, the ALJ's conclusion in Paragraph 82 that the Plan Amendment is in compliance is more reasonable than the theory advanced by the Petitioner.

Petitioner's Exception 8 is DENIED.

Exception to Recommendation

Petitioner takes exception to the ALJ's recommendation that the Department enter a Final Order finding the Plan Amendment "in compliance." This Exception is based entirely upon Exceptions addressed above. Therefore, for the reasons addressed previously, a recommendation contrary to the one reached by the ALJ is not as or more reasonable.

Petitioner's Exception to Recommendation is DENIED.

Respondent Department's Exceptions to Findings of Fact

Exception One: Paragraph 32

The Department takes exception to Paragraph 32, which provides in full as follows:

> The Director of the Department's Division of Community Planning stated that it is not the practice of the Department to treat a format error or omission as requiring a determination that a plan amendment is not in compliance.

The Department alleges that this Paragraph is not based upon competent substantial evidence as it does not accurately recount the testimony of the Director.

This Paragraph does accurately recount the Director's testimony that formatting errors do not require a finding of non-compliance in every instance. This Paragraph does not provide that such errors could never support a finding of non-compliance, as argued by the Department in this

Exception. A review of the entire record demonstrates that this finding is supported by competent substantial evidence.

The Department's Exception One is DENIED.

Exception Two: Paragraph 43

This Exception is substantially similar to Petitioner's Exception Five to Findings of Fact, the ruling on which is incorporated by this reference.

The Department's Exception Two is DENIED.

Exception Three: Paragraph 72

This Exception is substantially similar to Petitioner's Exception Four to Conclusions of Law, the ruling on which is incorporated by this reference.

The Department's Exception Three is GRANTED.

Exception Four: Paragraph 73

This Exception is substantially similar to Petitioner's Exception Six to Conclusions of Law, the ruling on which is incorporated by this reference.

The Department's Exception Four is GRANTED.

Exception Five: Paragraph 79 (second sentence)

The Department takes exception to the second sentence of Paragraph 79, which provides as follows: "The most recent population projections are not the 'best' available data if use of the data would cause an internal inconsistency." Although Petitioner did not take exception to this conclusion, he agrees "that the sentence to which exception is taken has no basis in law." Response to Department's Exceptions at 6. There is indeed no basis in statute or rule for this conclusion. Striking it completely from the Recommended Order is as or more reasonable as allowing it to remain. The striking of this sentence does not alter any other Conclusions of Law.

The Department's Exception Five is GRANTED.

Intervenor Hammock Creek's Notice of Errata

Hammock Creek notes that Paragraph 13 of the Recommended Order refers to the "Resolution SCD" instead of the "Restoration SCD." This is clearly a typographical error and is hereby corrected in this Final Order.

RULING ON PETITIONER'S MOTION FOR REMAND

On August 2, 2010, the Petitioner filed a Motion for Remand with the Department. Petitioner alleges that the ALJ failed to make findings of fact and conclusions of law regarding allegations in the Amended Petition and requests that this proceeding be remanded to the ALJ so that he may make such findings and conclusions. Specifically, Petitioner alleges that the ALJ failed to make detailed findings and conclusions regarding the data and analysis submitted to support the Housing Element, but instead dismissed them with "a broad-brush rejection." Motion at 3.

Petitioner is correct in asserting that basic tenets of due process require that an agency final order contain specific findings of fact to support the ultimate decision. See Gentry v. Department of Professional and Occupational Regulations, 283 So. 2d 386 (Fla. 1st DCA 1973).

The Recommended Order addresses the Housing Element data and analysis as follows:

> 46. Similarly, Petitioner contends that some of the support documentation that is included as part of the Housing Element is not the best available data. Petitioner did not produce better data or show how better data do not support the Plan Amendments.
>
> * * *
>
> 81. Petitioner failed to prove beyond fair debate that the Plan Amendments are not based on relevant and appropriate data, including data and analysis regarding need.

Recommended Order at 14 & 23. The above-cited Finding of Fact and Conclusion of Law directly address and dispose of the compliance issue with the Housing Element raised by Petitioner.

The Motion for Remand is DENIED.

RULING ON PETITIONER'S MOTION TO STRIKE DEPARTMENT'S PROPOSED FINAL ORDER

On February 15, 2011, Petitioner filed a Motion to Strike the Department's Proposed Final Order, which was filed with the Commission on February 11, 2011. Petitioner alleges that the Department lacks any authority for filing the Proposed Final Order and that such Proposed Final Order is prejudicial to him. The Petitioner also asks for attorney's fees under section 163.3184(12), Florida Statutes.

Rule 28-206.215, Florida Administrative Code, provides that all parties may file proposed findings of fact, conclusions of law, orders, and memoranda on the issues. The Commission has not set a deadline for such filings and accepts proposed orders.

Section 163.3184(12), Florida Statutes, provides that an administrative law judge shall impose appropriate sanctions, including attorney's fees, if a party files a pleading, motion or other paper for any improper purpose, "such as to harass or to cause unnecessary delay, or for economic advantage, competitive reasons, or frivolous purposes or needless increase in the cost of litigation." The Petitioner does not explain how the Department's Proposed Final Order was filed for an improper purpose, and a review of the Proposed Final Order shows that it was not filed for any improper purpose.

The Motion to Strike, including its request for attorney's fees, is DENIED.

CONCLUSION

The Commission hereby adopts the ALJ's Findings of Fact and Conclusions of Law in the Recommended Order, except as modified or rejected herein.

Upon review of the entire record, the Recommended Order, the parties' Exceptions, the parties' Responses to Exceptions, and the Department's Determination of Non-Compliance, the Commission determines that the Plan Amendment adopted by the City of Edgewater by Ordinance No. 2008-O-10, as remediated by Ordinance No. 2010-O-01, is "in compliance."

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 24th day of February, 2011.

For JERRY L. MCDANIEL, Secretary
Administration Commission

FILED with the Clerk of the Administration Commission on this 28th day of February, 2011.

Clerk, Administration Commission

CERTIFICATE OF SERVICE

I ~~HEREBY~~ CERTIFY that a copy of the foregoing have been furnished by U.S. Mail on this 28th day of February, 2011 to:

Barbara Linehan
Clerk, Administration Commission

Honorable Rick Scott
Governor
The Capitol
Tallahassee, FL 32399

Honorable Jeff Atwater
Chief Financial Officer
The Capitol
Tallahassee, FL 32399

Honorable Pam Bondi
Attorney General
The Capitol
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