STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

CLIFTON CURTIS HORTON and
HORTON ENTERPRISES, INC.,

Petitioners,

vs. DOAH Case No. 10-5965GM

CITY OF JACKSONVILLE,

Respondent.
_____/

FINAL ORDER

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

Background and Summary of Proceedings

On June 22, 2010, the City of Jacksonville adopted Ordinance 2010-401-E which amended the text of the Commercial land use designations in its Comprehensive Plan (the "Amendment"). The Amendment was adopted under the Alternative Review Process Pilot Program which is codified in section 163.32456, **Florida Statutes** (2010).

The Petitioners filed a Petition challenging the Amendment pursuant to section 163.32456(6). The final hearing on the

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allegations in the Petition was held on October 20 and 21, 2010. The Department was not a party to this proceeding, and did not participate in the final hearing.

The ALJ entered a Recommended Order recommending that the Amendment be found "in compliance." All parties filed Exceptions to the Recommended Order and Responses to Exceptions.

Role Of The Department

Since the ALJ recommended that the Amendment should be found "in compliance," the ALJ submitted the Recommended Order to the Department. The Secretary of the Department must either determine that the Amendment is in compliance and enter a Final Order to that effect, or determine that the Amendment is not in compliance and submit the Recommended Order to the Administration Commission for final agency action. **Fla. Stat.** § 163.32465(6)(f).

After review of the Recommended Order, the Record, the Exceptions and the Responses to Exceptions, the Secretary accepts the recommendation of the ALJ and determines that the Amendments are in compliance.

Standard of Review of Recommended Order

The Administrative Procedure Act contemplates that an agency will adopt the ALJ's Recommended Order as the agency's

Final Order in most proceedings. To this end, the agency has been granted only limited authority to reject or modify findings of fact in a Recommended Order.

> 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. **Fla. Stat.** § 120.57(1)(l).

Absent a demonstration that the underlying administrative proceeding departed from essential requirements of law, "[a]n ALJ's findings cannot be rejected unless there is no competent, substantial evidence from which the findings could reasonably be inferred." Prysi v. Department of Health, 823 So. 2d 823, 825 (Fla. 1st DCA 2002)(citations omitted). In determining whether challenged findings are supported by the record in accord with this standard, the agency may not reweigh the evidence or judge the credibility of witnesses, both tasks being within the sole province of the ALJ as the finder of fact. See Heifetz v. Department of Bus. Reg., 475 So. 2d 1277, 1281-83 (Fla. 1st DCA 1985).

The Administrative Procedure Act also specifies the manner in which the agency is to address conclusions of law in a Recommended Order.

> The agency in its final order may reject or modify the 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. **Fla. Stat.** § 120.57(1)(l).

See also, DeWitt v. School Board of Sarasota County, 799 So. 2d 322 (Fla. 2nd DCA 2001).

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

City Exception: Standing

In order to establish standing to participate in a comprehensive plan amendment challenge proceeding, an "affected

person" must: 1) own property, reside, or own or operate a business within the boundaries of the local government whose plan is the subject of the review, and 2),

> ... shall also have submitted oral or written comments, recommendations, or objections to the local government during the period of time beginning with the transmittal hearing for the plan or plan amendment and ending with the adoption of the plan or plan amendment. **Fla. Stat.** § 163.3184(1)(b) and § 163.32465(6)(a).

The City takes exception to the ALJ's conclusion that the Petitioners met the second prong of the standing requirement.

The parties stipulated that the Petitioners did not attend any meeting regarding the adoption of the Amendment. The parties dispute whether certain written and oral communications between the parties during the relevant time period qualified as oral or written comments, recommendations or objections submitted to the local government.

Based upon stipulation by the parties, the ALJ found that the Petitioners engaged in written communications with the City Council Secretary and the City's legal counsel regarding public records requests and notice requirements, that counsel for Petitioners engaged in a conference call with the City's Deputy General Counsel and that,

> ... the reason for the conference call was "that [Petitioners] were trying to reach a mutually acceptable approach with the City by which enforcement

> of the City of Jacksonville's amortization ordinance against [them] . . . would be deferred pending the outcome of the appeal to the Eleventh Circuit." During that call, counsel also advised the City's counsel that "there were [procedural] problems with the enactment of the subject Comprehensive Plan Amendment and that they would likely be filing challenges to its enactment." Finding of Fact 33, citations to record omitted.

The City did not file an exception to these findings of fact.

The City contends that, since the Petitioners did not offer oral or written comments at a public hearing, the only other way to comment to the local government was to provide those comments in writing. The City argues that the Petitioner's written communications were not comments on the Amendment, and that the Petitioner's oral communications with the City's Deputy General Counsel cannot be used to establish standing.

The ALJ, however, concluded that, "Collectively, these 'comments,' especially the oral ones, arguably constitute the type of comments necessary to support a conclusion that Petitioners are affected persons." Conclusion of Law 36. The ALJ explained that,

> [T]he statute ... authorizes an affected person to submit oral or written comments to the local government at any time between the transmittal and adoption hearings. While the comments cannot be submitted to any City employee, written and oral comments submitted to the City's legal counsel are sufficient to satisfy the requirement. Conclusion of law 37.

The legal theory advanced by the City is not as reasonable as the ALJ's conclusion of law. Therefore, the City's exception is DENIED.

Petitioner Exception 4: Notice, "Void Ab Initio"

The ALJ concluded that,

> The only issue in this case is whether the plan amendment is in compliance, as defined in section 163.3184(1)(b). Even if the doctrine of void ab initio applied in this case, this tribunal lacks authority to declare the Ordinances void. This determination would have to be made by a court of competent jurisdiction. Footnote 2.

The Petitioners contend that the ALJ, the Department and the Administration Commission can determine that the underlying ordinance is defective, and declare the ordinance and the Amendment void ab initio. The Petitioners point out that in the Prehearing Stipulation the parties agreed that these are issues to be determined in this proceeding.

An ALJ, and an agency, are not bound by the agreement of the parties as to legal issues, and the parties cannot grant the agency authority which has not been granted by the Legislature. An agency has only such power as granted expressly or by necessary implication by legislative enactment. An agency has no common law jurisdiction or inherent power such as might reside in a court of general jurisdiction. Chapter 163 grants the Department the power to determine whether the Amendment is

in compliance; and it grants the Administration Commission the power to impose sanctions. **Fla. Stat.** 163.3184(11). Chapter 163 does not grant the Department or the Administration Commission the power to declare an ordinance defective or void.

The legal theory advanced by the Petitioners is not as reasonable as the ALJ's conclusion of law. Therefore, Petitioner exception 4 is DENIED.

Petitioner Exceptions 1: Notice, Prejudice

The ALJ concluded that, "when a party asserts that a statutory notice requirement has not been satisfied, it bears the burden of showing prejudice occasioned by the procedural error." Conclusion of Law 38.

The Petitioners contend that there is no requirement that they demonstrate prejudice; but that any procedural violation should render the amendment void ab initio irrespective of whether prejudice occurred.

As stated above, the Department is not a court of general jurisdiction. In a comprehensive plan amendment challenge proceeding such as this, procedural defects are not jurisdictional in nature, but rather are matters to be considered in determining whether the plan amendment as a whole is in compliance. Gong v. City of Hialeah and DCA,

1994WL1027737, DOAH Case No. 94-3506GM. DCA & Basic Energy v. Hamilton County, 1995 WL 1052618, DOAH Case No. 91-6038GM. As the ALJ stated in Sutterfield v. City of Rockledge, 2002WL3144079, DOAH Case No. 02-1630GM,

> Contrary to Petitioners' claim, notwithstanding the City's non-compliance with Subsection 163.3184(15)(b)1., the City's transmittal hearing and later adoption of Ordinance No. 1266-2002 are not necessarily void. Rather, Petitioners must still demonstrate to the exclusion of fair debate that, when viewing the unsatisfied criterion with the Plan Amendment as a whole, that the Plan Amendment is not "in compliance." Id. At the same time, when a person asserts that statutory notice requirement has not been satisfied, he bears the burden of showing prejudice occasioned by the procedural error, a task made much more difficult when, as here, the Petitioners had actual notice of the relevant hearings and participated throughout the proceeding. Sutterfield, at ¶ 103.

Since the Petitioner's legal theory is not as reasonable as the ALJ's conclusion of law, Petitioner exception 1 is DENIED.

Petitioner Exception 2: Notice, Actual Prejudice

The ALJ found that "Because the Petitioners had actual notice of the adoption hearing, which allowed them to fully participate in the amendment process ..., they were not prejudiced." ¶ 38.

The Petitioners point out that the parties stipulated that, "Petitioners did not receive actual notice of Ordinance 2010-35 until after it had been adopted." However, Ordinance 2010-35

authorized the transmittal of the proposed Amendment to the Department for review. The Petitioners admit in their exception that they were aware of the legislative hearings relating to Ordinance 2010-401, which was the Ordinance which adopted the Amendment. It is the role of the ALJ to draw inferences from the evidence, and he properly determined that the Petitioners had actual notice of the adoption hearing and therefore suffered no actual prejudice.

The finding of fact is supported by competent substantial evidence in the record. The conclusion drawn by the ALJ is more reasonable than the theory advanced by the Petitioners. Therefore, Petitioner exception 2 is DENIED.

Petitioner exception 3; Notice, Public Participation

Rule 9J-5.004, which is part of the definition of "in compliance" in section 163.3184(1)(b), requires local governments to "adopt procedures to provide for and encourage public participation in the planning process." Those procedures must include,

> Provisions to assure that real property owners are put on notice, through advertisement in a newspaper of general circulation in the area or other method adopted by the local government, of official actions that will affect the use of their property. Rule 9J-5.004(2)(a).

The Petitioners contend that this rule requires the ALJ and the Department to determine whether the adoption of the Amendment complied with statutorily-required enactment procedures. However, the rule requires that certain procedures be adopted; it does not authorize the Department to enforce those procedures. There is no claim in this case that the City has failed to adopt the required procedures.

The legal theory advanced by the Petitioners is not as reasonable as the ALJ's conclusion of law; therefore Petitioners exception 3 is DENIED.

Petitioner exception 5; Notice, Waiver

The ALJ found that,

> Although Petitioners contend that the legal notice was published in a portion of the Daily Record where other legal notices and classified advertisements appear, as proscribed by section 166.041(3)(c)2.b., and is thus defective, this allegation was not raised in the Petition or specifically in the parties' Stipulation. Therefore, the issue has been waived. ¶ 26.

The Petitioners point out that this issue was indeed raised in the Petition and in the parties' Prehearing Stipulation. Therefore, Petitioner exception 5 is GRANTED, and paragraph 26 is modified as follows:

> 26. Petitioners contend that the legal notice was published in a portion of the Daily Record where other legal notices and classified advertisements appear, as proscribed by section 166.041(3)(c)2.b., and is thus defective.

In view of the ALJ's conclusions of law regarding the legal effect of procedural defects in a comprehensive plan amendment challenge proceeding, which the Department has adopted above, and the ALJ's finding that no prejudice was demonstrated, granting Petitioner exception 5 does not require any further modifications to the Recommended Order.

Petitioner exception 6: Notice, § 166.041(3)(c)2.

Section 163.3184(15)(e) provides that a plan amendment which "changes the actual list of permitted, conditional, or prohibited uses within a future land use category" requires a heightened notice procedure. The ALJ concluded in footnote 4 that the Amendment does not fall within this category.

The Petitioners point out that the parties stipulated that the Amendment does fall within the category of amendments which require the heightened notice procedure.

The ALJ was not bound to accept the parties stipulation regarding conclusion of law. The ALJ found that the Amendment does not change the permitted uses, because the change in permitted uses was made by a prior amendment (which is in litigation in federal court) and the Amendment at issue in this case simply clears up an inconsistency in the comprehensive plan noted by the federal court. ¶ 22.

Since the ALJ's conclusion of law is more reasonable than the theory advanced by the Petitioners, Petitioner exception 6 is DENIED.

Even if the ALJ's interpretation of the federal court order is incorrect, granting Petitioner exception 6 would not require any further modifications to the Recommended Order. The ALJ correctly concluded that procedural defects in the adoption of a comprehensive plan amendment are not a compliance issue unless prejudice is shown, and the ALJ found that no prejudice was demonstrated.

Petitioner exception 7: Residential Enclaves

The ALJ found that there are "grandfathered enclaves of residential areas within the HI category." ¶ 23. The Petitioners appear to argue that this finding of fact is not supported by competent substantial evidence in the record. However, Mr. Killingsworth, the City's Director of Planning and Development, testified on this point in response to a question from the Petitioner's attorney.

Q: We recognize that there are various industrial categories, correct?

A: Correct.

Q: Are residences allowed in any of the industrial categories, to your knowledge?

A: They are not. There are some areas that are called residential enclaves that were pre-existing to the comp plan, but as a term of right, no.

Petitioners Exhibit X, page 48.

Since the ALJ's finding of fact is supported by competent substantial evidence in the record, Petitioners exception 7 is DENIED.

ORDER

IT IS THEREFORE ORDERED as follows:

1. The findings of fact and conclusions of law are ADOPTED, except as modified or rejected herein.

2. The Administrative Law Judge's recommendation is ACCEPTED.

3. The City of Jacksonville Amendment to its comprehensive plan, adopted by Ordinance 2010-401-E, is determined to be "in compliance" as defined in Section 163.3184(1)(b), Florida Statutes.

DONE AND ORDERED in Tallahassee, Florida.

William A. Buzzett, Secretary
DEPARTMENT OF COMMUNITY AFFAIRS

NOTICE OF RIGHTS

ANY PARTY TO THIS 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.

MEDIATION UNDER SECTION 120.573, FLA. STAT., IS NOT AVAILABLE WITH RESPECT TO THE ISSUES RESOLVED BY THIS ORDER.

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 true and correct copies have been furnished to the persons listed below in the manner described, on this 21st day of February, 2011.

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