STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

1000 FRIENDS OF FLORIDA, INC.,
MARTIN COUNTY CONSERVATION
ALLIANCE, INC., and
DONNA SUTTER MELZER,

Petitioners,

v. Case No. 10-10007GM

MARTIN COUNTY and
DEPARTMENT OF COMMUNITY AFFAIRS,

Respondents,

and

TURNER GROVES, LTD., and CONSOLIDATED
CITRUS LIMITED PARTNERSHIP,

Intervenors.
_____/

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 August 10, 2010, Martin County adopted Ordinance Nos. 881 and 882, which changed the future land use map designation of a

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1,717 acre parcel from "Agriculture" to "AgTech," and amended the text of Martin County Comprehensive Plan to create the new "AgTEC" land use category (the "Plan Amendments").

The Petitioners filed a Petition challenging the Plan Amendments pursuant to section 163.3184(9), Florida Statutes (2010). The final hearing on the allegations in the Petition was held on March 15 and 16, 2011.

On May 5, 2011, the ALJ entered a Recommended Order recommending that the Amendment be found "in compliance." The Petitioners filed Exceptions to the Recommended Order, and the Intervenors filed Responses to Exceptions which were adopted by the Department and Martin County. All were filed by June 1, 2011.

Role Of The Department

On June 2, 2011, the Governor signed House Bill 7207, which then became effective and substantially changed the procedure for comprehensive plan amendment challenges. However, the procedural provisions of the new version of Chapter 163 which apply to this stage of the proceeding are similar to the 2010 version. Both section 163.3184(9)(b), Florida Statutes (2010), and section 163.3184(5)(e) as amended by House Bill 7207, direct the ALJ to submit this Recommended Order to the Department for issuance of a

final order finding the Amendments in compliance, or for a determination that the Amendments are not in compliance and referral of the Recommended Order to the Administration Commission for final agency action.

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

Minor Errors; Exceptions 4, unnumbered and 5

The parties agree that the Recommended Order contains minor errors, and the record supports their agreement. Therefore, Exceptions 4, unnumbered and 5 are GRANTED, and the Recommended Order is modified as follows:

A. The last half of the first sentence of paragraph 9 is modified to: "the proposed future land use category was titled 'I-95 Agricultural & Employment Center.'"

B. The references to Dr. Nicholson in paragraphs 12 and 41 are modified to: "Dr. Nicholas."

C. The last sentence of paragraph 14 is rejected.

"AgTech" v. AgTEC"; Exceptions 1, 6 and 8

The Petitioners contend that certain discrepancies in the terminology used in Ordinance Nos. 881 and 882, and in the

numbering system for goals, objectives and policies caused by the adoption of EAR-based amendments while the Plan Amendments at issue in this case were pending, render the Plan Amendments vague, confusing and internally inconsistent. The ALJ found:

> When reading the two ordinances, a reasonable person would not be confused as to which property designated for the new land use category applies. The more persuasive evidence supports a finding that no other parcel of land within the County could be similarly designated as "AgTEC," absent an amendment to the AgTEC future land use category in the Plan. RO, par. 16;
>
> There was no evidence that the new EAR-based amendments create an inconsistency with these amendments. RO, par. 18;
>
> The single reference to "AgTech" in Ordinance No. 881 is simply a misspelling of the proper title of the new future land use category to be applied to the property. The simultaneous adoption of the two ordinances, the application for both ordinances by the same applicant, and the obvious similarity between the correct spelling and the misspelling support a finding that the use of "AgTech" in Ordinance No. 881 is also a scrivener's error. RO, par. 21; and
>
> In any event, these non-substantive, minor scrivener's errors do not render the amendments not in compliance. RO, par. 22.

To the extent that the paragraphs challenged by Exceptions 1, 6 and 8 are findings of fact, they are supported by competent substantial evidence in the record. To the extent those

paragraphs are conclusions of law, the ALJ's conclusions are more reasonable than those advanced by the Petitioners.

Exceptions 1, 6 and 8 are DENIED.

Conversion of Agricultural Land; Exceptions 2 and 10

The ALJ stated in paragraphs 6 and 23 that the property which is the subject of the Plan Amendments was an active orange grove, but that "the property is now desolate and unprofitable and cannot be converted to any other profitable or feasible agricultural use." The Petitioners assert that this finding is contrary to the evidence. However, there is competent substantial evidence in the record, the testimony of Charles Lucas and Tobin Overdorf, that supports this finding of fact; therefore, the Department cannot reject it.

The Petitioners also contend that the ALJ incorrectly applied Future Land Use Element Policy 4.13A.(2), which requires that the conversion from Agriculture to a more intensive land use category "not adversely impact the hydrology of the area or the productive capacity of adjacent farmlands," and be "a logical and timely extension of a more intense land use designation in a nearby area." The Petitioners argue that the Policy requires a formal statement by the Board of County Commissioners in the adoption ordinance regarding these standards.

The language of Policy 4.13A.(2) does not require formal written statements in the adoption ordinance. By adopting the Plan Amendments the Commission found that the standards of Policy 4.13A.(2) were met. More importantly, the ALJ found that the Plan Amendments meet the standards in Policy 4.13A.(2), and competent substantial evidence in the record supports the ALJ's conclusion.

Exceptions 2 and 10 are DENIED.

Freestanding Urban Service District; Exception 3

The ALJ found in paragraph 8 that,

> The re-designated parcel would become a "freestanding urban service district," which requires that the property be served by water and sewer services from a regional supplier rather than individual wells, septic tanks, or on-site package treatment plants.

The Petitioners suggest that the sentence should be replaced with,

> The re-designated parcel would become a "freestanding urban service district," which requires that the property be served by a central utility system funded and maintained by the landowner.

To the extent there is any distinction between the two paragraphs, the ALJ's description of the requirements adopted by the Plan Amendments for the provision of water and sewer services is more accurate than the description proposed by the Petitioners. Jt Ex. 5, Policy 4.4.M.1.h(3)(d).

The Petitioners also contend that footnote 1 misstates the purpose of a freestanding urban service district. The Respondents agree that footnote 1 should be deleted.

Therefore, Exception 3 is partially GRANTED and footnote 1 is rejected; and Exception 13 is otherwise DENIED.

Numbering System; Exception 7

The ALJ found in paragraph 18 that the Municipal Code Corporation will renumber the policies adopted by the Plan Amendments to conform to the new numbering system adopted by the EAR-based amendments, without changing the content of the Plan or the Plan Amendments. The ALJ concluded that, "There was no evidence that the new EAR-based amendments create an inconsistency with these amendments."

The Petitioners contend that the ALJ misconstrued the authority of the Municipal Code Corporation. However, the adoption Ordinance states that, "... the sections of this ordinance may be renumbered or re-lettered." Also, the Martin County Planning Director confirmed that renumbering and re-lettering adopted plan amendments is commonly accomplished by the Municipal Code Corporation.

The legal theory advanced by the Petitioners is not as reasonable as the ALJ's conclusion of law. Exception 7 is DENIED.

Scriveners Errors; Exception 9

The ALJ found in paragraph 22 that,

> More than likely, these scrivener's errors will be corrected by another plan amendment. In any event, these non-substantive, minor scrivener's errors do not render the amendments not in compliance.

The Petitioners contend that these two sentences should be rejected, because there is no evidence in the record that any effort has been made to correct these minor errors. However, there is evidence in the record (the testimony of the Planning Director) that the County has a practice of correcting scriveners errors. Moreover, the Exception does not offer any reason why the Department should reject the ALJ's conclusion that the minor errors do not render the amendments not in compliance.

Exception 9 is DENIED.

Public Services; Exception 11

The Petitioners contend that paragraphs 29 through 32 are not based on competent substantial evidence because there is no evidence that public facilities are available to serve the parcel subject to the Plan Amendments.

The Plan Amendments require that the property must "... be served by central water and sewer facilities provided by the City of Port St. Lucie...." Jt. Ex. 5, Policy 4.4.M.1.h(3)(d). There is testimony in the record that the City has adequate capacity to serve the property, and that there are adequately sized water and sewer lines within a quarter mile of the property. Tr. 464-465. Paragraphs 29 through 32 are supported by competent substantial evidence, and the Department cannot reject these findings of fact.

Exception 11 is DENIED.

Urban Sprawl; Exception 12

Paragraphs 34 through 40 address the urban sprawl indicators, and determine that none are triggered. The Petitioners contend that these paragraphs ignore the County staff report and the testimony of Petitioner's land planning expert.

There is no indication in the Recommended Order that the ALJ ignored the County staff report or the Petitioner's expert. It is the ALJ's task to weigh the evidence and to determine which evidence is most persuasive. The ALJ accepted the expert testimony presented by the Intervenors on the urban sprawl indicators. Tr. 458-477.

Since paragraphs 34 through 40 are supported by competent substantial evidence in the record, Exception 12 is DENIED.

Vacant Commercial and Industrial Land; Exception 13

In paragraph 41, the ALJ stated,

> Dr. [Nicholas] established that ... the vast majority of [available industrial] sites [in the County] are small, less than five acres in size, and are inadequate.

The Petitioners contend that this misstates Dr. Nicholas' testimony, and point to one statement made during cross examination. However, the totality of Dr. Nicholas' testimony supports the ALJ's finding. Tr. 402 - 404.

Exception 13 is DENIED.

Ultimate Conclusion of Law and Recommendation; Exception 14

Exception 14 is a request to change the ultimate conclusion of law and recommendation based on the changes to the Recommended Order requested in the previous exceptions. Since most of those exceptions have been denied, and those that were granted do not affect the disposition of this case, Exception 14 is DENIED.

ORDER

IT IS THEREFORE ORDERED as follows:

1. Except as noted above, the findings of fact and conclusions of law are ADOPTED.

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

3. The Plan Amendments adopted by Martin County Ordinance Nos. 881 and 882 are 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

EACH PARTY IS HEREBY ADVISED OF ITS RIGHT TO SEEK JUDICIAL REVIEW OF THIS FINAL 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 13th day of June, 2011.

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