

STATE OF FLORIDA
DEPARTMENT OF ECONOMIC OPPORTUNITY

DIANE BROWN,

Petitioner,

vs.

DEO Case No.: DEO-11-0051
DOAH Case No.: 11-0584GM

BAY COUNTY,

Respondent,

and

CEDAR CREEK RANCH, INC.,

Intervenor.

_____ /

FINAL ORDER

This matter was considered by the Executive Director of the Department of Economic Opportunity following receipt of a Recommended Order issued by an Administrative Law Judge (“ALJ”) of the Division of Administrative Hearings.

Background and Summary of Proceedings

On November 16, 2010, Bay County adopted Ordinance 10-22, amending the Bay County Comprehensive Plan to make text and map changes to its Future Land Use Element related to the Sand Hills Rural Community Special Treatment Zone (“RCSTZ”). Sand Hills RCSTZ is one of three RCSTZs designated on the Bay County Comprehensive Plan’s Future Land Use Map. Guidelines for development of RCSTZs are contained in Policy 3.4.4 and Table 3A of the Bay County Comprehensive Plan. Specifically, the proposed Amendment seeks to increase the allowable number of residential units and expand the allowable commercial development that can occur in the Sand Hills RCSTZ by the addition of Policy 3.4.10

specifically addressing the Sand Hills RCSTZ and amending Table 3A of the Future Land Use Element of the Plan. Petitioner challenged the Plan Amendment pursuant to section 163.3184(9), Florida Statutes (2010), alleging that the proposed Amendment is inconsistent with the requirements of section 163.3177, Florida Statutes, the state comprehensive plan and Chapter 9J-5, Florida Administrative Code. Specifically, Petitioner alleges that the Amendment is not supported by data and analysis; lacks measurable goals, objectives and policies; creates internal inconsistencies within the Bay County Comprehensive Plan; fails to demonstrate need; exhibits indicators of urban sprawl; and is not energy efficient. Cedar Creek Ranch, Inc. ("Cedar Creek") intervened in support of the Plan Amendment. The final hearing was concluded on April 29, 2011.

On July 27, 2011, the Department of Community Affairs, predecessor in interest to the Department of Economic Opportunity, was dismissed as a party, based on the changes to chapter 163, Florida Statutes, made by chapter 2011-139, Laws of Florida. Effective October 1, 2011, the functions of the Department of Community Affairs were transferred to the Department of Economic Opportunity.

Standard of Review of Recommended Order

The Administrative Procedure Act contemplates that the Department will adopt a Recommended Order as the agency's Final Order in most proceedings. To this end, the Act restricts the Department's authority to reject or modify findings of fact in a Recommended Order.

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. (2011). 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. Dep’t 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 Department may not reweigh the evidence or judge the credibility of witnesses, both tasks being within the sole province of the Administrative Law Judge as the finder of fact. Bill Salter Adver., Inc. v. Dep’t of Transp., 974 So. 2d 548, 551 (Fla. 1st DCA 2008) citing Rogers v. Dep’t of Health, 920 So.2d 27, 30 (Fla. 1st DCA 2005); and Heifetz v. Dep’t of Bus. Reg., 475 So. 2d 1277, 1281-83 (Fla. 1st DCA 1985). No exception to this general principle has been recognized relating to expert testimony, and the Department must accept the ALJ’s evaluation of the relative value of this type of evidence, just as with any other type of evidence. Heifetz. Additionally, the ALJ, rather than the Department, is empowered to draw permissible inferences from the evidence and to reach ultimate findings of fact based on competent, substantial evidence. Id.

The Administrative Procedure Act also specifies the manner in which the Department 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.

§120.57(1)(l), Fla. Stat. (2011). Specifically, the agency lacks substantive jurisdiction to reject the ALJ's conclusions of law ruling that particular evidence is inadmissible hearsay. Barfield v. Dep't of Health, 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001).

The label assigned to a statement is not dispositive as to whether it is a finding of fact or conclusion of law. See Kinney v. Dep't 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 nature of the statement itself and not the label assigned. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. §120.57(1)(l), Fla. Stat. (2011).

Role of the Department

The Department of Economic Opportunity is the successor to the Department of Community Affairs. §3, Chapter 2011-142, Laws of Florida (2011). The Executive Director of the Department must either determine that the Plan Amendment is in compliance and enter a Final Order to that effect, or determine that the Plan Amendment is not in compliance and submit the Recommended Order to the Administration Commission for final agency action. § 163.3184(5)(e), Fla. Stat. (2011).

Rulings on Petitioner's Exceptions

Paragraphs 1-8

Paragraphs 1-8 of Petitioner's Exceptions to the Recommended Order of the Administrative Law Judge generally describe Petitioner's disagreement with the ALJ's recommendation and her perspective of the applicable standard of review. In these paragraphs, Petitioner fails to identify the disputed portions of the recommended order by page number or paragraph and also fails to provide any citations to the record. Additionally, these paragraphs

contain several misstatements of the law governing the Department's review of the recommended order. To the extent that these paragraphs are intended as exceptions, they are procedurally inadequate. §120.57(1)(k), Fla. Stat. (2011). These exceptions are therefore DENIED and, in the foregoing paragraphs, the Department has set forth the appropriate standard of review which it will apply to this matter.

Paragraph 9A

Petitioner takes exception to the factual finding that Petitioner does not live within the Sand Hills RCSTZ contained in Paragraph 3 of the Recommended Order. The Department has reviewed the complete record of this case and no evidence was introduced relating to whether Petitioner lived within the Sand Hills RCSTZ. This exception, therefore, is well taken and SUSTAINED. Paragraph 3 of the Recommended Order is modified as follows:

3. Petitioner Diane Brown resides and owns property in Bay County, ~~but not in the Sand Hills STZ~~. Petitioner submitted comments to Bay County during the time between the transmittal and adoption hearings for the Plan Amendment.

Paragraph 9B

Petitioner takes exception to what she perceives to be implied by the ALJ in Paragraph 6 of the Recommended Order. Paragraph 6 contains 4 sentences that identify particular facts.

Competent substantial evidence supports each of these sentences as follows:

That the area contains a number of platted and unplatted subdivisions, [T. I at 67-68];

That the area includes a police station, a fire station and a school, [Co. Ex. 14 at 2, T. II at 404-407];

That homes and businesses in the area are served by private wells and septic tanks, [T. I at 47]; and,

That the school in the area is served by central water and sewer, [T. I at 183, 189, Co. Ex. 4].

The implications of these findings are addressed in other paragraphs of the Recommended Order and are addressed in turn to the extent necessary to rule on Petitioner's exceptions, but, because each of the findings within Paragraph 6 is supported by competent, substantial evidence, the exception is DENIED.

Paragraph 9C

Petitioner takes exception to the finding in Paragraph 8 relating to the characterization of the density of residential development as either rural or suburban, that the Rural Residential land use designation allows for suburban densities, and that the RCSTZs are not altogether rural. The findings within Paragraph 8 are supported by competent, substantial evidence, and, therefore, the exception is DENIED. [T I at 67-8, 150-51, 164].

Paragraph 9D

Petitioner takes exception to Paragraph 17 of the Recommended Order relating to the requirement imposed by the Amendment for a site analysis by a licensed engineer or geologist and the anticipated effect thereof. As found by the ALJ, this requirement is one of multiple features of the Amendment intended to protect karst features and aquifer recharge areas. Other protection features specifically identified in the recommended order are enhanced stormwater treatment, buffers around karst features, low impact design and landscaping standards, and open space requirements. The findings within Paragraph 17 are supported by competent, substantial evidence and, therefore, the exception is DENIED. [T. I at 202-03, T. II at 402, T. III at 472-76, 486-88, 490-91, 499-502].

Paragraph 9E

Petitioner explicitly takes exception to the ALJ's finding in Paragraph 21 of the Recommended Order that Petitioner misunderstood Policy 3.4.4, however, Petitioner's discussion focuses on the ALJ's finding and conclusion regarding the primary purpose of the policy. To the extent that Petitioner's exception is based on the "Wide Open Spaces Strategy", the implications of that document are addressed by the ALJ in Paragraphs 23-27 of the Recommended Order and Petitioner's exceptions thereto which will be addressed in due course. The ALJ's finding as to the purpose of that policy is supported by competent, substantial evidence, [Co. Ex. 29 at 3-18 - 3-19], and to the extent that the ALJ's characterization of that purpose as the primary purpose of the Policy constitutes a conclusion of law, it is adopted by the Department. Petitioner's exception is, therefore, DENIED.

Paragraph 9F

Petitioner explicitly takes exception to Paragraph 22 of the Recommended Order because it identifies an assertion that Petitioner alleges that she had not made, however, Petitioner's comments seemingly object to Bay County and the ALJ's interpretation of the phrase "existing rural developed areas" utilized in Policy 3.4.4. In concert with the finding in Paragraph 32 of the Recommended Order, this paragraph finds and concludes that Policy 3.4.4 utilizes the phrase as a general reference to areas that are currently recognizable as the core of village-like features and is not inconsistent with residential density increases on some parcels within that area that are not currently developed. The ALJ's finding in this regard is supported by competent, substantial evidence, [Co. Ex. 29 at 3-18 - 3-19], and to the extent that the ALJ's determination constitutes a conclusion of law, it is adopted by the Department. Petitioner's exception is, therefore, DENIED.

Paragraph 9G

Petitioner takes exception to Paragraph 24 of the Recommended Order that contains a quote taken from the Bay County Wide Open Spaces Strategy. Petitioner argues that this direct excerpt from the Strategy limits its application to the proposed Amendment. The ALJ accurately quoted that portion of the Strategy and, the finding being supported by competent, substantial evidence, Petitioner's exception is DENIED. [Pet. Ex. 41 at p.2].

Paragraphs 9H-9M

Petitioner takes exception to Paragraphs 25 through 27 of the Recommended Order that relate to the Bay County Wide Open Spaces Strategy. Competent, substantial evidence supports the findings that the Strategy is not contained within the Comprehensive Plan, [Co. Ex. 29]; and that the references to the Strategy within the Plan fail to adhere to statutory requirements for adoption by reference, [Co. Ex. 29 at 3-19, 5A-4], and see section 163.3711(1)(b), Fla. Stat. (2011). Competent, substantial evidence supports the finding that the Strategy and the Comprehensive Plan contain inconsistent requirements and limitations (as to permissible densities within rural communities, [Co. Ex. 29 at 3-14; Pet. Ex. 41 at 6]; as to permissible densities within suburban areas, [Co. Ex. 29 at 3-13, Pet. Ex. 41 at 6]; as to provision of water and septic service to rural communities, [Co. Ex. 3, Bay Co. Ex. 14 at 2; Pet. Ex. 41 at.3]), and that references within the Strategy relating to available services are not consistent with the existing services within the Sand Hills RCSTZ, id. Lastly, competent substantial evidence supports the finding that Policy 3.4.4 of the Bay County Comprehensive Plan relates application of the Strategy to designation of an RCSTZ, and the subject Amendment relates to an existing, already designated RCSTZ. [Co. Ex. 29 at p. 3-18 – 3-19, Joint Ex. 2].

The findings relating to uncertainty of the role of the Strategy in a compliance determination and relating to the suggestion that the Strategy is a collection of general statements that are not intended to have the same force and effect as the policies of the Comprehensive Plan are reasonable inferences from the foregoing facts. Section 163.3177(1)(b), Florida Statutes, authorizes adoption of documents by reference within a local comprehensive plan, but requires that the plan "must identify the title and author of the document and indicate clearly what provisions and edition of the document is being adopted." None of the references to the Wide Open Spaces Strategy within the Bay County Comprehensive Plan exhibit the elements required by statute and, therefore, it is not a compliance standard for plan amendments.

The ALJ's final findings, that Petitioner produced insufficient evidence to demonstrate the role of the Strategy in Bay County's comprehensive planning process and that the Amendment was inconsistent with the Strategy, represent reasonable inferences from the resolution of the issues in the preceding discussion and are, as set forth in relation to those specific findings, supported by competent, substantial evidence. The exceptions contained in Petitioner's Paragraphs 9H-9M are therefore DENIED.

Paragraph 9N – 9O

Petitioner takes exception to the ALJ's findings in Paragraph 28 of the Recommended Order. The ALJ found that the proposed Amendment maintains the rural densities of the Sand Hills RCSTZ and that, where the Amendment allows greater density within areas already subject to suburban densities, the requirement that the areas of greater density connect to central sewer and water systems achieves the purpose of Policy 6.10.5 of the Bay County Comprehensive Plan. Petitioner repeatedly refers to the quality of evidence received with regard to these issues, arguing that the Department should impermissibly reweigh the evidence to make factual

determinations contrary to those made by the ALJ. Competent substantial evidence supports the ALJ's findings of fact. [T. I at 67-8, 150-51, 164]. Consistent with the applicable standard of review set forth above, Petitioner's exceptions set forth in Paragraphs 9N and 9O are DENIED.

Paragraph 9P

Petitioner takes exception to the finding that the proposed Amendment maintains rural designations on the Future Land Use Map consistent with the stated performance measure for Policy 6.10.5 of the Bay County Comprehensive Plan. Petitioner fails to include in this exception any appropriate citation to the record, and argues only that this finding avoids what Petitioner perceives as the determinative issue. The exception is procedurally inadequate, see §120.57(1)(k), Fla. Stat. (2011), and the finding is supported by competent, substantial evidence, [Co. Ex. 14 at 2]. Petitioner's exception in Paragraph 9P is therefore DENIED.

Paragraph 9Q

Petitioner takes exception to the ALJ's finding in Paragraph 30 of the Recommended Order that Policy 3.2.3 of the Bay County Comprehensive Plan does not prohibit the County from providing central services in the Rural Community Special Treatment Zones. Petitioner specifically recites that this finding is refuted by a preponderance of evidence in the record. Petitioner's sole contention is that Policy 3.2.3, by operation of the restrictive application of the Bay County Wide Open Spaces Strategy urged by Petitioner, prohibits provision of central services to the Sand Hills RCSTZ. Petitioner does not dispute that central water and sewer services are planned for the Sand Hills RCSTZ and are provided to the public school in the Sand Hills RCSTZ. As set forth above, Petitioner failed to demonstrate that the Strategy has been incorporated into the Bay County Comprehensive Plan and, because that is the determinative issue with regard to this exception, Petitioner's exception in Paragraph 9Q is DENIED.

Paragraph 9R

Petitioner explicitly takes exception to the ALJ's finding in Paragraph 31 of the Recommended Order alleging that it distorts her allegations. Petitioner appears to object to the finding that general commercial uses were already permitted in the Sand Hills RCSTZ arguing that such uses were limited to neighborhood scale commercial uses. Policy 3.4.4 of the Bay County Comprehensive Plan identifies warehouses and industrial or commerce parks as permissible within RCSTZs provided that they are compatible with the surrounding residential areas. Planned and mixed use developments are also allowed within RCSTZs. This is inconsistent with the interpretation that uses within RCSZTZs are restricted to neighborhood scale only. [T. I at 205-207, 222-223; Co. Ex. 29 at 3-13 (Table 3A), 3-19]. The ALJ's finding is supported by competent substantial evidence, and Petitioner's exception in Paragraph 9R is therefore DENIED.

Paragraph 9S

Petitioner takes exception to the ALJ's summarization that Petitioner has failed to prove facts showing that the Amendment causes the Comprehensive Plan to be internally inconsistent. This exception contains no citation to the record and states only that the finding is refuted by a preponderance of evidence in the record. As established in the above discussion of the standard of review, the Department will not reweigh the evidence introduced in this matter to reach findings contrary to those of the ALJ. As this exception is procedurally inadequate and requests that the Department engage in a prohibited level of review, Petitioner's exception in Paragraph 9S is DENIED.

Paragraphs 9T and 9U

Petitioner takes exception to the ALJ's determination in Paragraph 33 of the Recommended Order that recognizes a local government's discretion to accommodate more than the projected population. By requiring that the Future Land Use Element, at a minimum, accommodate the projected mid-range population for the planning period, section 163.3177(1)(f)3., Florida Statutes, establishes a floor rather than a ceiling as it relates to a demonstration of need. The ALJ's finding on the issue is the correct interpretation of the law; Petitioner's exceptions in Paragraphs 9T and 9U are therefore DENIED.

Paragraph 9V

Petitioner takes exception to Paragraph 34 of the Recommended Order complaining of evidentiary rulings by the ALJ, of witness testimony that is not supported by competent evidence, and generally reiterating Petitioner's arguments. As previously stated, the Department lacks the authority to revisit evidentiary rulings or whether evidence is supported by, or conflicts with, other evidence. The findings contained in Paragraph 34 of the recommended order are supported by competent, substantial evidence. [T. I at 69-70, 167, 178, 188, 192-209; T. II at 278-79, 395, 401-03, 405-06, 430, 444]. Accordingly, Petitioner's exception set forth in Paragraph 9V is DENIED.

Paragraphs 9W and 9X

Petitioner takes exception to Paragraph 35 of the Recommended Order relating to the adequacy of the data and analysis addressing protection of aquifer recharge areas. These two paragraphs contain a single citation to the record, that being to Volume III of the transcript in its entirety. That citation is inadequate and these exceptions are procedurally insufficient. §120.57(1)(k), Fla. Stat. (2011). Additionally, the finding is based on competent substantial

evidence. [T. III at 473-476]. Petitioner's exceptions to Paragraph 35 of the Recommended Order are therefore DENIED.

Paragraphs 9Y and 9Z

Petitioner takes exception to Paragraph 36 of the Recommended Order in two paragraphs that lack any appropriate citation to the record, and primarily complain of matters related to the weight of the evidence, specifically the Deer Point Lake Hydrologic Analysis, and the ALJ's evidentiary rulings prohibiting Petitioner from introducing hearsay. These exceptions are procedurally insufficient, and the Department lacks the authority to revisit evidentiary rulings and the relative merits of the testimony. §120.57(1)(k), Fla. Stat. (2011). These exceptions are, therefore, DENIED.

Paragraphs 9AA, and 9BB

Petitioner takes exception to the ALJ's findings in Paragraph 37 of the Recommended Order relating to Petitioner's failure to explain what additional data and analysis should be required regarding impacts on species and habitats. Petitioner also objects to the ALJ's ruling that documentary evidence containing comments by the Fish and Wildlife Commission were inadmissible hearsay. The Department has reviewed the complete record in this cause, and the sole evidence offered by Petitioner in this regard is written comments submitted by the Fish and Wildlife Commission attached to the Department of Community Affairs' Objections, Recommendations and Comments Reports. Jt. Ex. 7. Petitioner offered no testimony in support of the written comments. The ALJ has ruled the comments to be hearsay. "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil

actions.” § 120.57(1)(c), Fla. Stat. (2011). The ALJ’s finding is supported by the lack of competent, substantial evidence, and Petitioner’s exceptions are therefore DENIED.

Paragraph 9CC

In this paragraph, Petitioner recites what she contends are additional examples of insufficient data and analysis to support the Amendment. Petitioner fails to identify any portion of the Recommended Order by page or paragraph number to which this exception is directed. This exception is therefore DENIED. § 120.57(1)(k), Fla. Stat. (2011).

Paragraph 9DD

Petitioner takes exception to the ALJ’s finding in Paragraph 39 of the Recommended Order that “[a] large area where septic tanks are used can be expected to be a source of groundwater contamination because a significant number of septic tanks will fail.” Petitioner concedes that testimony was introduced to support this finding and bases her exception solely on matters of credibility of that testimony. As set forth above, the Department cannot reweigh the evidence or judge the credibility of witnesses. This exception is therefore DENIED.

Paragraph 9EE

Petitioner takes exception to the ALJ’s findings in Paragraph 39 concerning data and analysis supporting a new map depicting priority areas to address parcels using wells and septic tanks and connecting those parcels to central water and sewer. Specifically, the ALJ found that development density and proximity to the County’s primary source of drinking water were sufficient data and analysis upon which to base the map. Petitioner identifies the Department of Community Affairs’ Objections, Recommendations and Comments Reports [Jt. Ex. 7] as the evidentiary support for her allegation that the data and analysis were insufficient. The testimony produced at the hearing of this cause, however, indicated that the County sufficiently addressed

the cited comment. [T. I at 81-82]. Additionally, the ALJ's findings are supported by competent, substantial evidence. [T. II at 184-86, 307-311; Co. Ex. 7]. Petitioner's exception is therefore DENIED.

Paragraph FF

Petitioner takes exception to the ALJ's finding in Paragraph 39 of the Recommended Order which she interprets as requiring her to produce "data and analysis that was the County's statutory responsibility to produce." The ALJ's finding, however, is only that Petitioner failed to produce any contrary data and analysis. The Department has reviewed the entire record in this cause, and the ALJ's finding is supported by the lack of any competent, substantial evidence of data and analysis contrary to that data and analysis identified by the County in support of its Future Utilities Plan Map. [T. II at 184-86, 307-311; Co. Ex. 7]. This exception is therefore DENIED.

Paragraph 9GG

Petitioner takes exception to the ALJ's finding in Paragraph 40 of the Recommended Order which finds that ". . . Petitioner failed to prove facts showing that the Plan Amendment is not supported by relevant and appropriate data and analysis." Petitioner herself identifies the data and analysis identified by the County during the hearing, the Deer Point Lake Hydrologic Analysis [Joint Ex. 5]; maps containing pictographic data [Co. Exs. 1, 3, 5, 6, 7, 8]; and testimony concerning availability of infrastructure, [T. II at 318-356]. The ALJ's finding is supported by this competent, substantial evidence identified by Petitioner. The exception is therefore DENIED.

Paragraphs 9HH, 9II and 9JJ

Petitioner takes exception to the ALJ's finding in Paragraphs 41 and 42 of the Recommended Order that Petitioner failed to prove the existence of any indicators of urban

sprawl. These exceptions, and particularly 9II and 9JJ, contain inadequate citation to the record. §120.57(1)(k), Fla. Stat. (2011). Competent, substantial evidence supports each of the individual findings contained in Paragraphs 41 and 42. [T. II at 403-412]. These exceptions are therefore DENIED.

Paragraph 9KK

Petitioner takes exception to the ALJ's findings in Paragraph 44 of the Recommended Order that Bay County has water and sewer facilities with sufficient capacity to serve the Sand Hills RCSTZ and that fact's effect of demonstrating the lack of merit to Petitioner's contention that the Amendment's provisions relating to infrastructure were not financially feasible. The finding is supported by competent, substantial evidence. [T. II at 330, 336, 397]. This exception is therefore DENIED.

Paragraph 9LL

Petitioner takes exception to the ALJ's findings in Paragraph 45 of the Recommended Order that Petitioner alleged that the Amendment improperly changes the future land use map. The Petition filed in this cause states that "the Amendment is, to all intents and purposes, a "Future Land Use Map" amendment." Petition for Formal Administrative Hearing, Paragraph 28. Petitioner now argues that her allegation was that the Amendment was the equivalent of an amendment to the future land use map. The semantic difference is a matter of the record rather than a matter of fact to be discerned from the evidence and Petitioner has failed to demonstrate that the ALJ's characterization of her allegation is material to the determination of any issue. The balance of Paragraph 45 finds that the Amendment does not change the future land use map due to the nature of RCSTZs as overlays and that finding is supported by competent, substantial evidence. [T. I at 57; Bay Co. Ex. 14 at 2; Bay Co. Ex. 29 at 3-4, 3-18 – 3-20]. This exception is therefore DENIED.

Paragraphs 9MM and NN

Petitioner takes exception to the ALJ's finding in Paragraph 47 of the Recommended Order relating to Petitioner's allegations that the Amendment was inconsistent with former statutory requirements relating to energy conservation and efficiency. This finding is supported by competent, substantial evidence or, as it relates to Petitioner's statement addressing the scope of her allegations, clarification by parties on the record. [T. I at 188; T. II at 376-80; T. III at 412-13]. These exceptions, therefore, are DENIED.

Paragraph 9OO

Petitioner takes exception to the ALJ's finding in Paragraph 48 of the Recommended Order that the provisions of the Amendment were self implementing. The ALJ clarified the finding that the specific conditions for development contained within the Plan Amendment combined with guiding principles and references to other regulatory programs within the Plan Amendment provide the necessary standards and measures for the implementation of its new policies. Competent, substantial evidence supports this finding. Joint Ex. 2; [T. I at 128-29, 156, 199, 202-203 205-206, 222]. The exception is therefore, DENIED.

Paragraph 9PP

Petitioner takes exception to the alleged failure by the ALJ to address an issue raised in relation to the Capital Improvements Element and the purported failure of the County to amend this element to provide for central water and sewer to support the Amendment. Paragraph 44 of the Recommended Order finds that Bay County has water and sewer facilities with sufficient capacity to serve the area and this finding is supported by competent, substantial evidence. [T. II at 323-33]. The exception also fails to contain adequate citation to the record and, therefore, the exception is DENIED.

Paragraph 9QQ

Petitioner takes exception to the ALJ's conclusion in Paragraph 57 of the Recommended Order that states:

The fairly debatable standard's deference to the local government's determination of compliance means that the local government's interpretation of a challenged amendment or comprehensive plan provision will be used to evaluate the amendment, as long as it is a reasonable interpretation.

Petitioner argues that this reflects the incorrect standard of review, stating that disputed issues of fact should be evaluated by applying the preponderance of evidence standard. While Petitioner has correctly identified the standard applicable to disputed issues of fact, the interpretation of provisions in the Bay County Comprehensive Plan are matters of law. The law is well settled that:

[g]enerally, a reviewing court should defer to the interpretation given a statute or ordinance by the agency responsible for its administration. See *Winemiller v. Feddish*, 568 So.2d 483, 485 (Fla. 4th DCA 1990); *AMISUB (North Ridge General Hosp., Inc.) v. Department of Health and Rehabilitation Servs.*, 577 So.2d 648, 649 (Fla. 1st DCA 1991). Of course, that deference is not absolute, and when the agency's construction of a statute amounts to an unreasonable interpretation, or is clearly erroneous, it cannot stand. See *Legal Envtl. Assistance Found., Inc. v. Board of County Comm'rs of Brevard County*, 642 So.2d 1081, 1083-84 (Fla.1994); *Woodley v. Department of Health and Rehabilitative Servs.*, 505 So.2d 676, 678 (Fla. 1st DCA 1987); *Kearse v. Department of Health and Rehabilitative Servs.*, 474 So.2d 819, 820 (Fla. 1st DCA 1985).

Las Olas Tower Co. v. City of Ft. Lauderdale, 742 So. 2d 308, 312 (Fla. 4th DCA 1999). The conclusion of the ALJ is correct and, therefore, Petitioner's exception is DENIED.

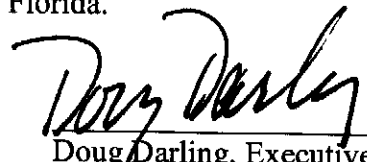
Paragraphs 9RR, 9SS, 9TT, 9UU, 9VV and 9WW

Petitioner takes exception to the ALJ's conclusions of law contained in Paragraphs 60, 62, 63, 65, 66, and 67, of the Recommended Order. Petitioner bases these exceptions upon the allegation that the conclusions are not supported by the sufficient factual predicate. None of these exceptions incorporate any citation to the record to support those allegations. The Department, therefore DENIES these exceptions based on section 120.57(1)(k), Florida Statutes (2011).

Order and Ruling on Exceptions to Recommendation

Based on the foregoing, the Department has determined that the Plan Amendment adopted by Bay County Ordinance No. 10-22 are in compliance and the Recommended Order entered by the ALJ is adopted excepting only the amendment to Paragraph 3 concerning whether Petitioner resides within the Sand Hills RCSTZ.

DONE AND ORDERED in Tallahassee, Florida.



Doug Darling, Executive Director
Department of Economic Opportunity

NOTICE OF RIGHTS

EACH PARTY IS HEREBY ADVISED OF ITS RIGHT TO SEEK JUDICIAL REVIEW OF THIS FINAL ORDER PURSUANT TO SECTION 120.69, FLORIDA STATUTES AND FLORIDA RULES OF APPELLATE PROCEDURE 9.030(b)(1)(C) AND 9.110.

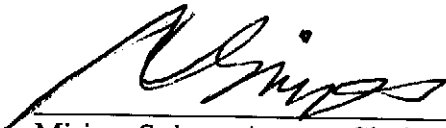
TO INITIATE AN APPEAL OF THIS ORDER, A NOTICE OF APPEAL MUST BE FILED WITH THE DEPARTMENT'S AGENCY CLERK, 107 EAST MADISON STREET, TALLAHASSEE, FLORIDA 32399-4120, WITHIN 30 DAYS OF THE DAY THIS ORDER IS FILED WITH THE AGENCY CLERK. THE NOTICE OF APPEAL MUST BE SUBSTANTIALLY IN THE FORM PRESCRIBED BY 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, FLORIDA STATUTES, 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 designated Agency Clerk, and that the true and correct copies have been furnished to the persons listed below by the method indicated on this 30th day of Dec., 2011.


Miriam Snipes, Agency Clerk
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