STATE OF FLORIDA
DEPARTMENT OF ECONOMIC OPPORTUNITY

BARBARA GRAVES,

Petitioner,

v. DOAH CASE NO. 11-1206GM

CITY OF POMPANO BEACH,

Respondents,

and

PPI, INC.,

Intervenor.

FINAL ORDER

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

Background

This is a proceeding to determine whether comprehensive plan future land use map ("FLUM") and text amendments adopted by the City of Pompano Beach on February 11, 2011, by Ordinances No. 2011-24 and 2011-25 (the "Plan Amendments") are "in compliance" as defined in section 163.3184(1)(b), Fla. Stat.[1] The Plan Amendments change the future land use designation on property owned by Intervenor PPI, Inc., from Regional Activity Center and Commercial Recreation ("CR") to Regional Activity Center ("RAC") and establish allowable

[1] References to the Florida Statutes are to the 2012 version of the statutes unless otherwise indicated.

uses, density, and intensity standards within the new RAC area. The ALJ recommends that the Department find the Plan Amendments "in compliance."

The City of Pompano Beach is in Broward County, which is a charter county. The Broward County Charter requires that certain comprehensive plan amendments adopted by municipalities within the County also be adopted as amendments to the Broward County comprehensive plan. In this case, Broward County did adopt companion comprehensive plan amendments for the subject property. The Broward County plan amendments are the subject of a separate administrative proceeding pending before DOAH and are not addressed in this Final Order.

Role of the Department

The Plan Amendments were adopted under former section 163.32465, Fla. Stat. (2010), which established the Alternative State Review Pilot Program under which the Department of Community Affairs ("DCA"), the former state land planning agency, was one of several commenting agencies and did not make a determination of whether plan amendments were in compliance. The process was similar to the expedited state review process in the current version of section 163.3184(3), Fla. Stat.

After adoption, the Plan Amendments were challenged by Barbara Graves ("Petitioner") in a petition timely filed with DOAH. The Department was not a party to the proceeding. Because the ALJ's Recommended Order recommends that the Plan Amendments be found in compliance, the ALJ submitted the Recommended Order to the Department pursuant to section 163.3184(5)(e), Fla. Stat. The Executive Director of the Department or his designee must either determine that the Plan Amendments are in compliance and enter a Final Order to that effect, or

determine that the Plan Amendments are not in compliance and submit the Recommended Order to the Administration Commission for final agency action.

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.

The agency may not reject or modify the findings of fact in a recommended order unless the agency first determines from a review of the entire record, and states with particularity in its 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. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. Id.

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 of fact 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 Business Regulation, 475 So. 2d 1277, 1281-1283 (Fla. 1st DCA 1985). If the evidence presented in an administrative hearing supports two inconsistent findings, it is the ALJ's role to decide the issue one way or the other. See Heifetz at 1281.

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 an administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of an administrative rule and must make a finding that its substituted conclusion of law or interpretation of an administrative rule is as reasonable or more reasonable than that which was rejected or modified. See §120.57(1)(l), Fla. Stat.; see also, DeWitt v. School Board of Sarasota County, 799 So. 2d 322 (Fla. 2nd DCA 2001).

The label assigned to a statement is not dispositive as to whether it is a finding of fact or a conclusion of law. See Kinney v. Department of State, 501 So. 2d 1277 (Fla. 5th DCA 1987); Goin v. Commission on Ethics, 658 So. 2d 1131 (Fla. 1st DCA 1995). Conclusions of law labeled as findings of fact, and findings of fact labeled as conclusions, will be considered as a conclusion or finding based upon the statement itself and not the label assigned.

RULINGS ON EXCEPTIONS

After issuance of the Recommended Order, the Petitioner timely filed exceptions, and the Respondent and Intervenor timely filed a joint response to the exceptions. Respondent and Intervenor did not file exceptions to any portion of the Recommended Order.

Ruling on Petitioner's Exception 1 – Findings of Fact 2, 4, and 13

Petitioner takes exception to portions Findings of Fact 2, 4, and 13 that describe the procedural background leading up to adoption of the challenged Plan Amendments and asserts that those findings are not supported by competent, substantial evidence in the record.

Specifically, Petitioner takes exception to the last sentence in Finding of Fact 2, the fifth sentence in Finding of Fact 4, and the third sentence in Finding of Fact 13, which provide:

> 2. . . . . The DCA and other reviewing agencies did, however, issue letters advising that they did not object to the final version of the adopted amendments.
>
> 4. . . . . The amendments were then required to undergo the same review process a second time.
>
> 13. . . . . The DCA reviewed the revised amendments and had no objections.

None of these findings of fact affect the determination of whether the Plan Amendments are in compliance. However, Petitioner is concerned that they imply that DCA reviewed the final version of the plan amendments as "in compliance" and thereby give the Plan Amendments an unwarranted air of legitimacy. In preparing this Final Order, the Department has not found or considered any perceived "air of legitimacy" based on what DCA did or did not do regarding the subject Plan Amendments.

a. Finding of Fact 2

On November 3, 2010, the City transmitted the proposed plan amendments to DCA and the other state review agencies for review and comment. The record reflects that prior to that time, DCA reviewed and commented on the companion Broward County plan amendments, and the Intervenor revised its City comprehensive plan amendment application to address DCA's comments regarding those amendments. The proposed plan amendment package the City transmitted to DCA and the other state review agencies on November 3, 2010, included those revisions.

In November and early December 2010, DCA and other review agencies provided written comment letters to the City advising that they had no objections to the revised proposed

plan amendments. See Exhibit J.Ex. 3, pp. LLW-000842 through LLW-0000849. The proposed comprehensive plan amendments transmitted to the review agencies on November 3, 2010, were adopted without change on February 8, 2011. Compare J.Ex. 2, pp. LLW-001268 through LLW-001274, to J.Ex. 3, pp. LLW-000936 through LLW-000942. The Department believes that in the last sentence of Finding of Fact 2, the ALJ intended to find that DCA and the other state review agencies expressed no objections to the final version of the proposed plan amendments that were eventually adopted by the City, which is what the record reflects.

Petitioner's exception to the last sentence of Finding of Fact 2 in the Recommended Order is granted and the sentence is modified to read as follows:

> 2. . . . . The DCA and other reviewing agencies did, however, issue letters advising that they did not object to the final version of the proposed amendments that ultimately became the adopted amendments.[2]

b. Finding of Fact 4

Finding of Fact 4 is in a portion of the Recommended Order entitled "The Amendment Process in Broward County" and provides:

> 4. Under the County Charter, land use changes to the City's Plan that are not more restrictive than the County Land Use Plan must be reviewed by the Planning Council to ensure that they are in "substantial conformity" with the County Land Use Plan. However, the Planning Council does not review the City's plan amendments for consistency with the City's Plan or chapter 163. After the County's review was completed, the DCA recommended that certain changes be made. The amendments were transmitted back to the City and were amended to conform to the DCA's recommendations. *The amendments were then required to undergo the same review process a second time.* Although a determination was made by the Planning Council that the initial amendments were in substantial conformity with the County Land Use Plan, the revised amendments cannot be recertified for

[2] In modified findings of fact and conclusions of law in this Final Order, deleted words are ~~struck through~~ and added words are underlined.

> consistency until this challenge has been concluded. (emphasis supplied).

Petitioner takes exception to the fifth sentence of Finding of Fact 4 shown in italics above. Petitioner's position appears to be that the italicized sentence suggests that DCA reviewed the proposed plan amendments a second time when in fact it did not.

Finding of Fact 4 describes only the County review process, not the process involving state agency review. The finding of fact is supported by competent, substantial evidence in the record. Therefore, Petitioner's exception to the fifth sentence of Finding of Fact 4 in the Recommended Order is denied.

c. Finding of Fact 13

Finding of Fact 13 describes DCA comments that were made regarding the companion proposed Broward County plan amendments, the Intervenor's modification of its City plan amendment application based on those comments, the City's approval of the revised proposed plan amendments in October 2010, and the City's subsequent transmittal of the revised proposed plan amendments to DCA and the review agencies on November 3, 2010. Petitioner takes exception to that portion of Finding of Fact 13 that "[t]he DCA reviewed the revised amendments and had no objections."

The proposed plan amendments transmitted on November 3, 2010, were the revised plan amendments, having been revised by the Intervenor in response to DCA comments regarding the companion Broward County plan amendments. The finding of fact is based on competent, substantial evidence in the record. Accordingly, Petitioner's exception to Finding of Fact 13 in the Recommended Order is denied.

Ruling on Petitioner's Exception 2 – Finding of Fact 9

Finding of Fact 9 states:

> 9. The CR property can have more than one primary use. For example, besides the harness track, the casino is an "indoor recreation facility" and qualifies as a second primary use. *If a hotel has resort and destination features that are open to the public, the amenities can become a primary use. Under the City's interpretation of CR land, a hotel containing a destination function with resort and recreational features is also a primary use.* Ancillary facilities for each of these uses is also allowed. (emphasis supplied).

Petitioner contends that sentences three and four in Finding of Fact 9, shown in italics above, are internally inconsistent and are not supported by competent, substantial evidence in the record. Petitioner further contends that the findings in sentences three and four are actually conclusions of law, and that the ALJ misinterpreted the plain language in the City's comprehensive plan.

The third sentence stating that "if a hotel has resort and destination features that are open to the public, the amenities can become a primary use" is supported by competent, substantial evidence in the record. To the extent this sentence is a conclusion of law, the Department finds that a substituted conclusion of law by the Department would not be as reasonable as, or more reasonable than, the ALJ's conclusion of law. Therefore, under section 120.57(1)(*l*), Fla. Stat., the Department cannot reject it.

The fourth sentence of Finding of Fact 9 is a finding of fact, not a conclusion of law. In the fourth sentence, without reaching his own conclusion, the ALJ describes an interpretation of the City's CR comprehensive plan policy to which Robin Bird, the City's Director of Development Services, testified at the final hearing in this case. The testimony is competent, substantial evidence supporting the ALJ's finding of fact.

Petitioner's exceptions to sentences three and four in Finding of Fact 9 of the Recommended Order are denied.

Ruling on Exception 3 – Finding of Fact 14 and Footnote 2

Finding of Fact 14 states:

> The map amendment (Ordinance No. 2011-25) changes the land use designation on the CR property to RAC. It consolidates the 70-acre parcel with the 160-acre parcel to create a unified RAC designation. *The amendment does not change the boundary of or designation of uses within the existing Arvida RAC.* The amended FLUM now shows only a single RAC, with different intensity and density standards assigned to the North and South RACs in the text amendment. [fn.2] (emphasis supplied).

Footnote 2 to Finding of Fact 14 recites Petitioner's position that the map and text amendments are internally inconsistent and concludes: "The inconsistency, if any, is considered *de minimus.*"

a. Footnote 2 – *De Minimus* Exception.

The Department agrees with Petitioner that the ALJ's conclusion in Footnote 2 is a conclusion of law. The reasonable inference from the ALJ's conclusion of law is that the ALJ will not conclude that the Plan Amendments are not in compliance based on an internal inconsistency the ALJ believes is *de minimus*. Because the internal consistency requirement is part of the definition of "in compliance" in section 163.3184(1)(b), Fla. Stat., the ALJ in effect created a *de minimus* exception to the definition of "in compliance."

There is no *de minimus* exception to either the internal consistency requirement or the definition of "in compliance" in the cited statutes. When the Legislature wishes to create a *de minimus* exception to a requirement in Chapter 163, Part II, Fla. Stat., it knows how to do so. See, e.g., §163.3180(6), Fla. Stat. (2011) (creating a *de minimus* exception related to transportation concurrency). In construing and applying the cited statutes, it is not appropriate to

add words that were not placed there by the Legislature. The Department finds that based on the plain language of sections 163.3177(2) and 163.3184(1)(b), Fla. Stat., and the absence of a legislatively-created *de minimus* exception in either statute, the Department's conclusion of law that there is no *de minimus* exception to these statutory requirements is more reasonable than the ALJ's contrary conclusion of law in Footnote 2 of the Recommended Order.

b. Finding of Fact 14 – Arvida RAC Boundary and Uses.

Petitioner asserts that the portion of Finding of Fact 14 that "The amendment does not change the boundary of or designation of uses within the existing Arvida RAC" is not supported by competent, substantial evidence because the Plan Amendments – specifically the text amendments – do change the boundary and uses in the Arvida RAC. The Plan Amendments remove 70 acres of Intervenor's property south of Racetrack Road from the Arvida RAC and adjust the boundary and uses in the Arvida RAC accordingly.

Finding of Fact 14 describes only the FLUM amendment, not the accompanying text amendment. The FLUM amendment does not reflect the changes to the boundary and uses in the Arvida RAC, nor is it required to reflect those changes. Section 163.3177(6)(a), Fla. Stat., requires that each comprehensive plan contain a future land use element that includes a FLUM that shows "the proposed distribution, location, and extent of the various categories of land" in the local government's jurisdiction. The statute does not require that the FLUM show the boundaries of properties or the uses allowed within each future land use designation. The uses allowed in the various future land use categories are found in the text of the future land use element – the goals, objectives and policies – that are adopted to supplement the FLUM, as required by section 163.3177(6)(a)1., Fla. Stat.

The City's FLUM contains a color key identifying the color assigned to each future land use category depicted on the map. Under the FLUM amendment, the Arvida RAC north of Racetrack Road and the new RAC south of Racetrack Road (the "South RAC") are both shown in the color that signifies the RAC future land use designation, which is an accurate depiction.

Finding of Fact 14 says that the amended FLUM now shows only a single RAC. It is more accurate to say that the amended FLUM shows two adjacent RACs in the same map color so that the boundary between the two cannot be determined from the FLUM alone. That does not mean that the FLUM fails to recognize the two separate RACs. More significantly, however, while the FLUM does not show the boundary between the two RACs, it does show the proposed distribution, location, and extent of the RAC future land use category under the City's comprehensive plan, which is all it is required to show under section 163.3177(6)(a), Fla. Stat. The text amendment portion of the Plan Amendments, which supplements the FLUM, clearly identifies the location, boundaries, and uses allowed in the Arvida RAC and the South RAC. The Plan Amendments are internally consistent.

Petitioner's exception to Footnote 2 is granted, and the Recommended Order is modified to delete Footnote 2. Petitioner's exception to Finding of Fact 14 in the Recommended Order is denied.

Ruling on Petitioner's Exception 4 - Finding of Fact 25

In Finding of Fact 25, the ALJ described a revised impact analysis prepared by the Intervenor property owner and the assumptions of the maximum potential development under the CR future land use category that were used in the analysis. Finding of Fact 25 concludes with the following sentence:

> While these assumed uses dramatically expand the existing development on the parcel, each is permitted under the CR

> category, and *the intensities are substantially lower than those allowed under the FLUE [future land use element] limitations.* (emphasis supplied).

Petitioner urges that the portion of the last sentence of Finding of Fact 25 shown in italics above is not supported by competent, substantial evidence in the record and must be rejected.

The methodology for assessing the transportation impacts of a proposed plan amendment involves a comparison of the maximum potential development allowed under the proposed new future land use category to the maximum potential development allowed under the existing (pre-amendment) future land use category. The net increase in impacts, if any, may require mitigation. The maximum potential development allowed under an existing future land use category is determined by reference to the comprehensive plan goals, objectives, and policies governing that future land use designation.

The intensity standard for the CR future land use category in the City's comprehensive plan, found in Policy 01.07.20, is a height limit of 105 feet with a 50 percent floor area coverage, which equates to an effective floor area ratio (FAR) of 5.0. See Finding of Fact 17 and Exhibit J-1, p. 12. The comprehensive plan intensity standard was not used by the parties in the various plan amendment transportation impact analyses because it yields what they all agree is an unrealistically high maximum development potential. See Finding of Fact 17. Nevertheless, the comprehensive plan intensity standard is what was in effect and applicable to Intervenor's CR designated land at the time the Plan Amendments were adopted. For that reason, during its review of the companion Broward County proposed plan amendments, DCA requested an impact analysis based on the intensity standard for the CR future land use category in the City's comprehensive plan. The Intervenor prepared a revised impact analysis with FARs for the various assumed land uses to address DCA's comment.

The Plan Amendments establish a maximum FAR of 0.31 for commercial recreational use, 0.84 for office use, and 0.65 for commercial use. See Finding of Fact 17 and Exhibit J-5, p. LLW-001181. Petitioner does not dispute these ratios, which are clearly lower than the 5.0 FAR allowed in the City's CR future land use category. The fifth sentence of Finding of Fact 25, and in particular the finding that the "intensities are substantially lower than those allowed under the FLUE limitations," is supported by competent, substantial evidence in the record.

Petitioner argues that the challenged finding of fact avoids addressing the evidence that a plat of Intervenor's CR property is the best available data of the maximum development potential of the property under the CR future land use category. As explained in the Department's ruling on Petitioner's exception to Finding of Fact 34 below, a plat is not part of a local government comprehensive plan and, therefore, cannot be relied upon to determine the maximum development the comprehensive plan allows.

Petitioner's exception to Finding of Fact 25 in the Recommended Order is denied.

Ruling on Petitioner's Exception 5 – Finding of Fact 28

Finding of Fact 27 in the Recommended Order describes net new daily and afternoon peak hour trips identified by the Intervenor in its October 2010 traffic analysis. It further finds that the analysis identified a number of State and County roadway segments that would continue to operate at an unacceptable level of service F regardless of whether the Plan Amendments were adopted. In Finding of Fact 28 in the Recommended Order, the ALJ found:

> 28. To mitigate these impacts, the revised study identified various improvements or modifications to the three affected segments, Racetrack Road east of Powerline Road, Racetrack Road east of Southwest 23rd Avenue, and Powerline Road north of McNab Road. These modifications were accepted as adequate mitigation by the City. Although Petitioner questioned whether the proposed mitigation could be enforced without being incorporated into the Plan, the City takes the position that PPI's representations

> are enforceable. If additional mitigation is required, PPI has agreed that this can be provided during the permit stage.

Petitioner takes exception to Finding of Fact 28 for a number of reasons: (1) the Plan Amendments do not require the Intervenor to make the improvements identified in the transportation impact analysis; (2) the improvements are not incorporated into the comprehensive plan Transportation Element or Capital Improvements Element; and (3) there is no evidence in the record that the improvements will mitigate traffic impacts of the Plan Amendments. Petitioner asks that the Department reject Finding of Fact 28 as being unsupported by competent, substantial evidence in the record and replace it with a finding of fact that the Plan Amendments do not address traffic impacts and are not supported by the best available data and analysis regarding mitigation of transportation impacts. The City and the Intervenor counter, in part, that the City relied on the Broward County Planning Council's analysis that the development authorized by the Plan Amendments will not significantly impact state and County roads so no transportation mitigation is required; that the Intervenor nevertheless agreed to make certain roadway improvements; and that the Petitioner failed to carry her burden to show that the Plan Amendments are not in compliance.

The specific findings in Finding of Fact 28 that the Intervenor's traffic analysis identified three impacted road segments to be mitigated, that the City accepted the proposed improvements (as evidenced by the City's adoption of the Plan Amendments), that the City's position is that the Intervenor's commitment to make those improvements is enforceable, and that the Intervenor agrees that other mitigation can be required at the permit stage are all supported by competent, substantial evidence in the record. Petitioner's exception to Finding of Fact 28 in the Recommended Order is denied.

Ruling on Petitioner's Exception 6 – Findings of Fact 34 and 35

Petitioner takes exception to the sixth sentence in Finding of Fact 34 and the last sentence in Finding of Fact 35 which provide:

> 34. . . . . Because it can be amended at any time, usually when a land use amendment is being processed or when more development is contemplated, a plat is not used to determine the maximum potential development capacity on a parcel.
>
> 35. . . . . However, this assumption [that the plat can be used to identify pre-amendment maximum potential development] is contrary to the plat's intended use, and it does not represent a parcel's true development potential, and at best it produces results that are no more reasonable than the results presented by PPI.

The CR policy in the City's comprehensive plan is broad and does not define the mix of uses allowed in the CR future land use category. That makes it challenging to identify the maximum potential development allowed under the comprehensive plan. Petitioner urges that, in this case, a recorded plat for Intervenor's CR property represents the best available data and analysis of the maximum development allowed under the City's comprehensive plan because it is consistent with the development assumptions underlying the Transportation Element of the City's comprehensive plan.

None of the parties relied on the comprehensive plan CR policy and the intensity standard in Policy 01.07.20 because they yield what the parties agreed is an unrealistic amount of development. The plat Petitioner relies upon is not part of the record in this proceeding.

As found by the ALJ, a plat is a development permit approved by the County. §163.3164(16), Fla. Stat. Because a plat is not part of the local government's comprehensive plan and can be amended at any time outside the comprehensive plan amendment process, it is not appropriate to rely on a plat to determine the maximum potential development the

comprehensive plan allows. A plat merely represents one possible development scenario for which the landowner obtained one particular local government approval.

In her arguments in her exception to Finding of Fact 4 above, Petitioner argues that if one relies on the comprehensive plan policies applicable to the CR future land use category instead of relying on the plat to determine maximum potential development, there would never be any impacts related to a plan amendment on CR land because the comprehensive plan intensity standard yields such a large development capacity. If the maximum potential development in the CR future land use district under the City's comprehensive plan is unrealistically large and is not consistent with the data and analysis underlying the Transportation Element, the time to challenge that maximum potential development was when the policies were adopted. The policies cannot be collaterally attacked in this proceeding. The City's CR future land use policy and the intensity standard in FLUE Policy 01.07.20 were lawfully in compliance, in effect, and applicable to the Intervenor's 160 acre CR property at the time the challenged Plan Amendments were proposed and adopted, and the Intervenor was entitled to rely on them. The fact that no transportation mitigation for the Plan Amendments would be required if one relied on the maximum development allowed in the CR future land use category does not justify deviating from the long-standing, accepted methodology of relying on the text of the comprehensive plan itself to determine what the comprehensive plan allows.

Petitioner's exceptions to the above-quoted portions of Findings of Fact 34 and 35 in the Recommended Order are denied.

Ruling on Petitioner's Exception 7 – Finding of Fact 37

Finding of Fact 37 states:

> 37. The Planning Council traffic impact study is a part of the data and analysis supporting the City amendments. In

> performing their pre-amendment analyses, both the Planning Council and the MPO reviewed the same MPO "analysis, findings, and recommendations" that are incorporated by reference into the City's Plan. Notably, the Planning Council's analysis concluded that the additional traffic generated by the difference between the assumed pre- and post-amendment conditions would not cause significant impacts on the regional transportation network.

There appears to be no debate that the Planning Council's traffic impact study is part of the data and analysis for the Plan Amendments, and that the Planning Council's analysis, while using a different methodology, concluded that the Plan Amendments will not cause significant impacts on the regional transportation network. Petitioner does not dispute that the Planning Council and the MPO (Metropolitan Planning Organization) reviewed or relied upon MPO data.

Petitioner argues that there is no competent, substantial evidence in the record that the Planning Council and the MPO reviewed the MPO data that is incorporated into the City's comprehensive plan. Petitioner relies on the testimony of the Planning Council's executive director Barbara Blake Boy who, according to Petitioner, testified that the Broward County Planning Council did not consider either the City's comprehensive plan or the data and analysis supporting it in performing its own traffic analysis.

Ms. Blake Boy testified generally that the Planning Council reviewed the City's proposed plan amendments for consistency with the Broward County comprehensive plan and not for consistency with the City's comprehensive plan, that the Council reviewed the City's proposed plan amendments for informational purposes, and that the Council accepts the MPO model and the land use assumptions built into it. Ms. Blake Boy did not testify about whether the Planning Council reviewed the MPO analysis, findings, and recommendations that are incorporated by reference into the City's Plan. Further, she did not make any representations about what the MPO reviewed or considered other than that it runs its model based on the transportation impacts

provided to it by the Planning Council. Petitioner did not provide any specific citations to Ms. Blake Boy's testimony or any other portion of the record that contradicts the ALJ's finding of fact that the Planning Council and the MPO reviewed the same MPO analysis, findings, and recommendations that are incorporated by reference into the City's Plan.[3]

The Department is unable to conclude, based on Petitioner's exception and a review of Ms. Blake Boy's testimony, that Finding of Fact 37 is not supported by competent, substantial evidence. Therefore, Petitioner's exception to Finding of Fact 37 is denied.

Ruling on Petitioner's Exception 8 – Findings of Fact 50 and 51

In order to obtain the RAC future land use designation, the City's comprehensive plan requires that the property must either be part of a development of regional impact or must "provide direct access to existing or proposed airports, ports, and rail transportation facilities." See Policy 3.02K.4, City of Pompano Beach Comprehensive Plan; Exhibit J-1, p. 112. The issue in dispute in this case is whether the property provides direct access to existing or proposed rail transportation facilities.

The subject property is adjacent to a CSX rail line used by the South Florida Regional Transit Authority ("RTA") to operate a tri-rail mass transit system between Palm Beach and Dade Counties ("Tri-Rail"). There is no existing or proposed station stop on or adjacent to the South RAC property.

The term "direct access" is not defined in the City's comprehensive plan. The Petitioner asserts that direct access means that there must be an existing or planned rail station on or

[3] Section 120.57(1)(k), Fla. Stat., requires that the Petitioner provide the appropriate citations to the record to support her exceptions. The Department is not required to search the record to determine whether there is any evidence to support the exceptions.

adjacent to the property, with no intervening mode of transportation. The ALJ addressed this issue in Findings of Fact 50 and 51 as follows:

> 50. Because the property sits adjacent to the railroad tracks, it is eligible to be considered for a station stop. At any time, but logically after this challenge is concluded and development begins, PPI and the City can submit a formal joint proposal for a station stop. Also, PPI can offer inducements to the RTA, such as dedicating land for a station stop and assisting in its funding. In addition, the RTA currently provides a shuttle service, which can easily transport PPI patrons to the station stop.
>
> 51. These considerations support a finding that the property has "direct access" to the Tri-Rail, as contemplated by the FLUE. Petitioner contends, however, that in order to have direct access, PPI must have a binding commitment from the RTA to build a station stop before the amendment is approved. This narrow interpretation has been rejected as not being as or more reasonable than the City's interpretation of its Plan.

a. Finding of Fact 50.

Petitioner asserts that the findings in Finding of Fact 50 are not supported by competent, substantial evidence in the record. Intervenor's witness Richard Coker testified that the fact that the railroad tracks are adjacent to the RAC property creates direct access to a rail transportation facility as required by the City's comprehensive plan. He further testified that in order to create mass transit, one must first have the availability of the railroad tracks and must then create the mass – the ridership – that generates the need for a train station stop. When the RAC property is sufficiently built up, the applicable entities can start discussing putting a mass transit stop directly on the property. That will require site development in order to create the necessary ridership. Joseph Quinty, transportation planning manager for the RTA, testified that the railroad tracks being adjacent to the property is a threshold criteria for the property to be considered for a station stop, that the RTA wants to bring the Tri-Rail to where riders and potential riders are, that funding and donation of land would be considerations that might make a particular property

more attractive to the RTA Board as a location for a station stop, and that there is a shuttle service available to transport people from the property to the Cypress Creek station. This testimony is competent, substantial evidence that supports the ALJ's findings of fact.

b. Finding of Fact 51.

The second and third sentences of Finding of Fact 51 are clearly findings of fact. The second sentence describes a position asserted by the Petitioner, and the third sentence states the ALJ's rejection of that position. There is competent, substantial evidence in the record to support these findings of fact.

The first sentence of Finding of Fact 51, although labeled as a finding of fact, is a conclusion of law in that applies the facts to the "direct access" land planning legal criterion in the City's comprehensive plan. As the state land planning agency, land use planning issues are within the Department's substantive jurisdiction.

The Department agrees that the existing railroad tracks adjacent to the Intervenor's property provide "direct access" to a rail transportation facility. Development of the property to create the demand for a station stop bolsters that conclusion. However, the Department does not agree that the existence of the RTA shuttle service is a consideration in determining whether the property provides direct access to a rail transportation facility. Carried to its logical conclusion, any property that is not adjacent to railroad tracks would satisfy the "direct access" criterion for the RAC designation if the users could access any road or highway and travel any distance to reach the railroad. If that was the case, every piece of property in the City would satisfy the "direct access" criterion, rendering that criterion meaningless. The proximity of the property to the rail transportation facility itself is the most significant consideration in determining whether

it meets the "direct access" criterion, not whether someone can get in a car or shuttle and drive to the rail transportation facility.

For the foregoing reasons and pursuant to section 120.57(1)(k), Fla. Stat., the Department finds that a substituted conclusion of law that the RTA shuttle service is not a consideration that supports a finding that the property has "direct access" to the Tri-Rail is as reasonable as, or more reasonable than, the ALJ's contrary conclusion of law.

Petitioner's exception to Finding of Fact 50 in the Recommended Order is denied. Petitioner's exception to Finding of Fact 51 in the Recommended Order is granted in part, and the first sentence of Finding of Fact 51 is modified to read as follows:

> These considerations (other than the shuttle service) support a finding that the property has "direct access" to the Tri-Rail, as contemplated by the FLUE.

In order to avoid a future dispute over the meaning of the term "direct access," the City may wish to consider defining that term in the RAC future land use policy and anywhere else the term is used in its comprehensive plan.

Ruling on Petitioner's Exception 9 – Finding of Fact 55

Finding of Fact 55 provides:

> 55. The traffic impact analyses performed by PPI and the Planning Council demonstrate that the amendments will not significantly impact the regional transportation network. To the extent any adverse impacts may occur, PPI has agreed to mitigate those impacts.

Finding of Fact 55 is supported by competent, substantial evidence in the record. Further, the Department notes that if the parties determined the maximum potential development of the property based on the level of development allowed under the City's comprehensive plan, there be would be no transportation impacts to mitigate since, comparing the FARs, the Plan

Amendments allow less development than the CR future land use category allows. Petitioner admitted as much in her Exception number 6. In that case, the concerns over the traffic impact analyses would be moot.

Petitioner's exception to Finding of Fact 55 is denied.

Ruling on Petitioner's Exception 10 – Conclusion of Law 70

Conclusion of Law 70 provides:

> Petitioner failed to prove beyond fair debate that the data used by the City to support the plan amendments are inconsistent with the data supporting other elements of the Plan.

Petitioner argues that the MPO model is the data that must be relied upon for the Transportation Element of the City's comprehensive plan, that the data supporting the Plan Amendments contemplate development in excess of what the MPO model assumes, and therefore the data for the Plan Amendments is inconsistent with the data that supports the Transportation Element. The various witnesses were not in agreement on the data to be relied upon or whether evaluation of the data and analysis underlying the Transportation Element was necessary at all. It was up to the ALJ to weigh the evidence, from which he could reasonably reach the conclusion expressed in Conclusion of Law 70. The Department finds that a substitute conclusion of law would not be as reasonable as, or more reasonable than, the ALJ's conclusion of law. Therefore, under section 120.57(1)(*l*), Fla. Stat., the Department cannot reject it.

This issue goes back to the purported disconnect between the maximum potential development of the subject property under the Future Land Use Element and the traffic impacts that can be accommodated under the Transportation Element of the City's comprehensive plan. In other words, according to Petitioner, the Transportation Element can accommodate the level of development approved under the plat for Intervenor's CR property but not the level of

development authorized by the City's comprehensive plan or the reduced level of development assumed by the Intervenor in its traffic analysis.

If the data and analysis underlying the CR land use designation and the intensity standard in Policy 01.07.20 allow more development than the City planned for in the Transportation Element of its comprehensive plan, the time to challenge that was when the policies were adopted, not in this plan amendment challenge. As it is, the Future Land Use Element policies are in effect and Intervenor is entitled to rely on them to identify maximum potential development allowed under the comprehensive plan, even if the data and analysis underlying the Transportation Element does not support it. The data is not part of the comprehensive plan and can be updated by the City at any time it deems appropriate.

Petitioner's exception to Conclusion of Law 70 in the Recommended Order is denied.

Ruling on Petitioner's Exception No. 11 – Conclusion of Law 72

Conclusion of Law 72 provides:

> Petitioner failed to prove beyond fair debate that the plan amendments are inconsistent with any goal, objective, or policy of the City Plan.

Petitioner relies on her arguments in Exceptions 3 and 8 and her arguments regarding the insufficiency of the data and analysis supporting the Plan Amendments to support her argument that Conclusion of Law 72 must be rejected. Because Petitioner's arguments have been rejected by the Department in this Final Order, her exception to Conclusion of Law 72 is also rejected.

ORDER

IT IS THEREFORE ORDERED as follows:

1. With the modifications set forth above, the findings of fact and conclusions of law in the Recommended Order attached as Exhibit A are ADOPTED.

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

3. The Plan Amendments adopted by City of Pompano Beach Ordinances No. 2011-24 and 2011-25 on February 8, 2011, are determined to be in compliance as defined in section 163.3184(1)(b), Fla. Stat.

William B. Killingsworth, Director
Division of Community Development
Department of Economic Opportunity

NOTICE OF RIGHT TO APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION UNDER CHAPTER 120, FLORIDA STATUTES. A PARTY WHO IS ADVERSELY AFFECTED BY FINAL AGENCY ACTION IS ENTITLED TO JUDICIAL REVIEW IN ACCORDANCE WITH 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 FINAL AGENCY ACTION, A NOTICE OF APPEAL MUST BE FILED WITH THE DEPARTMENT'S AGENCY CLERK WITHIN THIRTY CALENDAR (30) DAYS AFTER THE DATE THIS FINAL AGENCY ACTION IS FILED WITH THE AGENCY CLERK. THE ADDRESS OF THE AGENCY CLERK IS:

AGENCY CLERK
DEPARTMENT OF ECONOMIC OPPORTUNITY
107 EAST MADISON STREET, CALDWELL BUILDING, MSC 110
TALLAHASSEE, FLORIDA 32399-4128
FAX NUMBER 850-921-3230
Email: James.Bellflower@deo.myflorida.com

A DOCUMENT IS FILED WHEN IT IS RECEIVED BY 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 ALSO BE FILED WITH THE DISTRICT COURT OF APPEAL AND MUST BE ACCOMPANIED BY THE FILING FEE SPECIFIED IN SECTION 35.22(3), FLORIDA STATUTES.

AN ADVERSELY AFFECTED PARTY WAIVES THE RIGHT TO JUDICIAL REVIEW IF THE NOTICE OF APPEAL IS NOT TIMELY FILED WITH BOTH THE DEPARTMENT'S AGENCY CLERK AND THE APPROPRIATE DISTRICT COURT OF APPEAL.

NOTICE OF FILING AND SERVICE

I HEREBY CERTIFY that the above Final Order was filed with the Department's undersigned designated Agency Clerk and that true and correct copies were furnished to the persons listed below in the manner described on the 22 day of October, 2013.

James W. Bellflower, Agency Clerk
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