STATE OF FLORIDA
DEPARTMENT OF ECONOMIC OPPORTUNITY

STEPHEN DIBBS,

Petitioner,

v. DOAH CASE NO. 12-1850GM

HILLSBOROUGH COUNTY,

Respondent.

CORRECTED FINAL ORDER
RULING ON PETITIONER'S AMENDED EXCEPTIONS

This matter was considered by the Executive Director of the Department of Economic Opportunity ("Department") following an Order Relinquishing Jurisdiction entered by the Second District Court of Appeal on October 31, 2013.

BACKGROUND

This is a proceeding to determine whether Comprehensive Plan Amendments No. 12-01 and 12-03 adopted by Hillsborough County on May 17, 2012 (the "Plan Amendments"), are in compliance as defined in section 163.3184(1)(b), Fla. Stat.[1] The Plan Amendments amend portions of the Keystone-Odessa Community Plan ("KOCP") in the Livable Communities Element and portions of the Transportation Element in the County's comprehensive plan.

On April 22, 2013, after an administrative hearing, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") issued a Recommended Order recommending that the Department enter a final order finding the challenged Plan Amendments to be in compliance as defined in section 163.3184(1)(b), Fla. Stat. On July 22, 2013, the

[1] All references to the Florida Statutes are to the 2012 edition unless otherwise indicated.

Department issued its Final Order finding the challenged Plan Amendments in compliance. As part of the Final Order, the Department ruled on Petitioner's Exceptions filed with the Department on May 7, 2013, but overlooked Petitioner's Amended Exceptions filed on May 17, 2013. Petitioner filed his notice of appeal with the Second District Court of Appeal on August 21, 2013.

On October 18, 2013, after discovering that the Amended Exceptions had not been addressed in the Final Order, the Department filed a Motion to Relinquish Jurisdiction with the Second District Court of Appeal. On October 31, 2013, the Second District Court of Appeal entered its Order Relinquishing Jurisdiction to the Department for 45 days so it could rule on Petitioner's Amended Exceptions filed on May 17, 2013. This Corrected Final Order is entered in response to the Court's Order Relinquishing Jurisdiction and replaces the Final Order issued by the Department on July 22, 2013.

Rulings on Petitioner's Amended Exceptions

Petitioner's Exception 1 – Conclusions of Law in Paragraphs 5, 9, and 49

In Exception 1, Petitioner contends that by extending the planning horizon for the KOCP, the County did not merely update the community plan but readopted the entire community plan. Therefore, according to Petitioner, the ALJ erred as a matter of law in limiting the scope of the proceeding to the amended text instead of allowing Petitioner to challenge portions of the KOCP that were not changed by the Plan Amendments. Findings of Fact 5 and 9 suggest but do not expressly find that the administrative proceeding is limited to the amended portions of the KOCP.

The ALJ articulated his reasons for limiting the proceedings to the amended text in the Plan Amendments in an interlocutory order entered on July 2, 2012. That ruling was

incorporated into the Recommended Order as Conclusion of Law 49, which provides in relevant part:

> A well-established principle in a compliance proceeding is that once a plan provision is determined to be in compliance, it cannot be collaterally attacked in a subsequent proceeding. See Schember v. Dep't of Cmty. Affairs, Case No. 00-2066GM at pp. 78-80 (Fla. DOAH July 16, 2001), adopted, Case No. DCA01-GM-167 (Fla. DCA Oct. 31, 2001); Order on Motion, July 2, 2012. . . . [t]he state land planning agency has consistently followed the principle in Schember that pre-existing plan provisions not amended are not subject to review or challenge. The prior rulings on this issue are reaffirmed.

The one exception to this principle occurred in Department of Community Affairs v. Lee County, Case No. 95-0098GM (Fla. DOAH Jan. 31, 1996), adopted, 1996 Fla. ENV. LEXIS 101 (Fla. Admin. Comm. July 25, 1996), on which Petitioner relies. In that case, the County amended its comprehensive plan to remove a future land use map overlay, which resulted in increased land use capacity throughout the local government's entire jurisdiction and constituted such a fundamental revision of the future land use map that it was subject to further review.[2] Here, the ALJ concluded, and the Department agrees, that those unusual circumstances are not present.

The ALJ correctly noted that the state land planning agency has consistently followed the principle that existing plan provisions that were previously determined to be in compliance and that are not amended are not subject to review or challenge in a subsequent plan amendment proceeding. If an entire comprehensive plan could be challenged every time a local government adopted a plan amendment, there would be little incentive for local governments to improve their

[2] In the Lee County case, the state land planning agency found the County's adopted future land use map not in compliance with Chapter 163, Part II, Fla. Stat. The overlay was adopted to limit density and bring the future land use map into compliance. When the overlay was proposed to be removed, the original deficiencies in the future land use map affecting the entire County would have been present again.

comprehensive plans or respond to landowner requests or changed conditions because of the risk of expensive, unwarranted, and potentially duplicative challenges to its comprehensive plan.

Further, the Community Planning Act gives local governments the power and responsibility "[t]o adopt and amend comprehensive plans, or elements or portions thereof, to guide their future development and growth." §163.3167(1)(b), Fla. Stat. (emphasis supplied). Petitioner's suggestion that the Community Planning Act contemplates that adoption of a plan amendment opens an entire plan up to challenge negates the Legislature's authorization to local governments to limit amendments to elements or portions of elements of a comprehensive plan, as Hillsborough County did in this case. The Department will not interpret the Community Planning Act in a manner that renders a provision meaningless. See Borden v. East-European Insurance Co. 921 So. 2d 587, 595 (Fla. 2006) ("It is also a basic rule of statutory construction that 'the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.'" (internal citations omitted)).

Petitioner argues that the ability to challenge an entire comprehensive plan when an amendment to that plan is adopted makes sense because a plan amendment could change the entire scope of the comprehensive plan, rendering other portions not in compliance. It is difficult to imagine how that scenario could occur, and Petitioner does not provide an example in his Amended Exceptions. If a local government did propose a plan amendment that somehow changed the scope of the adopted comprehensive plan, the plan amendment itself would not be internally consistent with the local government's adopted comprehensive plan and could be challenged as violating the internal consistency requirement in section 163.3177(2), Fla. Stat. That circumstance would involve a challenge to the plan amendment, not the comprehensive plan, consistent with the long-standing interpretation of the applicable statutes as precluding a

challenge to existing comprehensive plan provisions that are not amended by a challenged plan amendment.

The Department agrees with the ALJ's Conclusion of Law 49. The fact that the Plan Amendments include the extension of the planning timeframe for the KOCP does not justify retreating from the long-accepted principle limiting the scope of review in plan amendment cases to the amendments themselves. The Department notes that here, the policy directive of the Hillsborough County Board of County Commissioners was to update community plans, not readopt them, every ten years. (T. 401). The County was not looking at a wholesale rewrite of the KOCP. (T. 386).

Findings of Fact 5 and 9 are supported by competent, substantial evidence in the record and, therefore, Petitioner's Exception 1 as it relates to Findings of Fact 5 and 9 is DENIED. To the extent Findings of Fact 5 and 9 along with Conclusion of Law 49 all incorporate the challenged conclusion of law, the Department finds that a substituted conclusion of law would not be as reasonable as, or more reasonable than, the ALJ's conclusion of law. Therefore, the Department cannot reject the ALJ's conclusion of law. §120.57(1)(*l*), Fla. Stat.

Petitioner's Exception 1 is DENIED.[3]

Petitioner's Exception 2 – Finding of Fact 9

In Exception 2, Petitioner contends that the portion of Finding of Fact 9 finding that one of the Plan Amendments was adopted on December 12, 2011, is not supported by competent substantial evidence in the record. The Planning Commission adopted a resolution recommending that the Board of County Commissioners adopt the Plan Amendments on

[3] In footnotes 1 and 2 under Exception 1, Petitioner argues that the County's pre-hearing motion to limit the proceedings to the amended text was not an authorized motion and should not have been granted for various reasons. The Department has no authority to address prehearing motions and the ALJ's orders on such motions.

December 12, 2011 (Petitioner's Ex. 67), and the Plan Amendments were adopted by the Board on May 17, 2012. Therefore, Petitioner's Exception 2 is GRANTED and the second to the last sentence in Finding of Fact 9 is amended to read as follows:

> 9. . . . . The review process included 20 meetings and two open houses over a two-year period and resulted in the adoption of the Planning Commission's resolution in support of a proposed plan amendment on December 12, 2011.

Petitioner's Exception 3 – Finding of Fact 10

In Finding of Fact 10 in the Recommended Order, the ALJ describes Petitioner's contention that a small group of anti-growth activists controlled the KOCP review process and the Board of County Commissioners simply rubber-stamped the Planning Commission's recommended amendments to the KOCP. The last two sentences of Finding of Fact 10 provide:

> 10. . . . Even if this is true, Petitioner's remedy for changing the County's community plan review process lies in another forum, and not in a plan amendment challenge. Notably, Petitioner has not contended that the County failed to comply with the adoption procedures required under the expedited state review process.

Petitioner argues that the above two sentences in Finding of Fact 10 are not supported by competent substantial evidence in the record because no evidence was submitted of another available process to raise procedural issues, and Petitioner challenged the amendments as not being based on appropriate data and analysis as part of the plan amendment adoption process.

The data and analysis requirement in section 163.3177(1)(f), Fla. Stat., is a substantive compliance requirement under section 163.3184(1)(b), Fla. Stat., not a procedural one. Therefore, Petitioner's challenge to the data and analysis related to the Plan Amendments does not support Petitioner's Exception 3.

The procedures for adopting a plan amendment under the expedited state review process applicable here are found in section 163.3184(3), Fla. Stat. Those procedures do not include the

Planning Commission's process for reviewing community plans prior to making a recommendation to the County regarding proposed plan amendments. Even if they did, the procedural requirements for adoption of a plan amendment are not part of the definition of "in compliance" in section 163.3184(1)(b), Fla. Stat., and, therefore, are not a proper part of this plan amendment challenge. If there is a mechanism available to change the Planning Commission's process for reviewing community plans, it lies somewhere other than at DOAH. The Department sees no statutory prohibition against the ALJ making such an observation in a Recommended Order. Alternatively, the ALJ's finding regarding an alternative process to change the Planning Commission's procedures is a conclusion of law that is not required to be supported by competent substantial evidence.

Further, Petitioner's eleven-page Amended Petition does not challenge the Plan Amendments on procedural grounds. Petitioner's proposed prehearing stipulation raised twenty-one proposed disputed issues of fact and six disputed issues of law, none of which relate to the plan amendment adoption process in section 163.3184, Fla. Stat. Petitioner's proposed recommended order does not raise issues related to the statutory plan amendment adoption process. The ALJ's finding in the last sentence of Finding of Fact 10 that Petitioner did not raise procedural issues under section 163.3184, Fla. Stat., in this proceeding is supported by Petitioner's pleadings, which are part of the record. Therefore, the Finding of Fact is supported by competent substantial evidence.

Petitioner's Exception 3 is DENIED.

Petitioner's Exception 4 – Finding of Fact 13

The existing text in the Transportation section of the KOCP provides, in part, that "Gunn Highway will be identified as a County roadway, which cannot be widened further due to social,

economic, policy and environmental constraints." Consistent with this existing text, the Plan Amendments delete Gunn Highway from the County's right-of-way preservation ordinance in the Transportation Element of the Comprehensive Plan. Finding of Fact 13 addresses this amendment as follows:

> 13. The deletion eliminates Gunn Highway from the Corridor Preservation Ordinance. That Ordinance allows the County to acquire right-of-way from developments as they occur and require setbacks from existing roads in order to preserve future right-of-way for road widening and improvements. Thus, if the County decides at some future time to enhance that part of Gunn Highway, and additional right-of-way is required for a particular improvement, the cost of making that improvement *will likely rise.* The amendment does not change the roadway in any other respect.

Petitioner takes exception to the ALJ's finding, in italics above, that if right-of-way is required for a future road improvement to Gunn Highway, the cost of making that improvement "will likely rise." Petitioner asks that the Department change the sentence to say that the cost of making a future improvement to Gunn Highway "could be cost prohibitive." The record citations relied upon by Petitioner include the following question and an answer given by Petitioner's expert civil engineer, Jeremy Couch:

> QUESTION BY MS. TOLBERT: The concern, I think, at least in part is that some improvement will be built in that right-of-way and then it will become either to[o] costly to condemn and ultimately the ride [sic] can't be improved; is that --
>
> ANSWER BY MR. COUCH: Absolutely.

(T. 170). Mr. Couch went on to express his opinion that local governments include roadways in road preservation ordinances in order to require developers along the roadway to dedicate right-of-way when they develop, that this approach reduces the cost to the local government of acquiring right-of-way for future road improvements, and that this approach is less burdensome on the taxpayers. Mr. Couch's testimony does not clearly contradict the ALJ's finding of fact.

While Petitioner objects to the ALJ's phrasing of Finding of Fact 13, the statement that the cost of making future improvements "will likely rise" is one way of describing the testimony on this subject. Finding of Fact 13 is supported by competent substantial evidence in the record.

Petitioner's Exception 4 is DENIED.

Petitioner's Exception 5 – Finding of Fact 14

Finding of Fact 14 in the Recommended Order provides:

> 14. Petitioner purchased his property *from Tampa Electric Company* in 2002 or 2003, or after the initial KOCP was adopted and its development restrictions were in place. Although Petitioner says he knew there were some restrictions when he bought the property, it was not until a few years later that he says he learned the full extent of these restrictions. He desires to develop his property and has a potential buyer who believes that a 920-unit apartment complex could be a successful venture. However, under the current Plan, he is limited to building one dwelling unit per five upland acres (most of the parcel is wetlands), and *because the parcel is not in the urban service area, he is prohibited from hooking up to County urban services (water and sewer)* even though they are located in the right-of-way of the street in front of his property. At the same time, owners of properties that are vested (grandfathered) are able to develop their properties and connect to water and sewer. For example, one of his neighbors is zoned to allow up to 304 residential units on quarter-acre lots, 25,000 square feet of commercial space, and access to urban services; there is a major subdivision (built by Cheval) across the street to the south; and a major residential subdivision lies to the north just across the Pasco County line. *There are also a number of other planned developments and subdivisions that were approved in the early 1990s before the KOCP was adopted.*

A. Petitioner's purchase of his property. Petitioner takes exception to that portion of the first sentence of Finding of Fact 14, in italics above, that Petitioner purchased his property in the KOCP area from Tampa Electric Company in 2002 or 2003. Petitioner claims that this portion of the sentence is not supported by competent substantial evidence in the record and the words "from Tampa Electric Company" must be deleted.

Petitioner testified that he purchased a parcel from Tampa Electric Company on which he developed a shopping center. (T. 73). He then testified that in 2002 he purchased approximately 320-360 acres on Lutz Lake Fern Road in the Keystone-Odessa area. (T. 73-74). Petitioner did not identify the seller of the Lutz Lake Fern Road property and, therefore, there is no competent substantial evidence in the record to support the portion of Finding of Fact 14 that Petitioner's KOCP property was purchased from Tampa Electric Company.

Petitioner's Exception 5.A. is GRANTED, and the first sentence of Finding of Fact 14 is modified to delete the words "from Tampa Electric Company."

B. Connection to Water and Sewer. Petitioner takes exception to the portion of the fourth sentence of Finding of Fact 14, in italics above, that because Petitioner's property is not in the urban service area, Petitioner is prohibited from hooking up to County urban services. Petitioner contends that there is no competent substantial evidence in the record to support that finding and that the evidence demonstrates that the reason he is prohibited from connecting to water and sewer is because his property is in the KOCP.

In his exception, Petitioner acknowledges that the provision of urban services is generally limited to development within the County's Urban Service Area. Policy 4.9 in the Future Land Use Element of the County's comprehensive plan creates an exception for connections to existing water/wastewater systems in Rural Areas if they meet certain criteria set forth in the policy. However, Policy 4.9 also states that this exception "shall not be available for use within the boundaries of the Keystone-Odessa Community Plan." (Petitioner's Ex. 14, pp. 8-9). The interplay of these policies means that Petitioner's inability to connect to urban services (water and sewer) is due to the property's location in the KOCP only if Petitioner would otherwise qualify for the exception in Policy 4.9 if his property was outside the KOCP boundary.

In his exception, Petitioner does not claim, and does not cite to evidence that proves, that his property could be connected to water and sewer under Policy 4.9 if it was not within the KOCP boundaries. Petitioner has therefore failed to demonstrate that his inability to connect to water and sewer is specifically because his property is in the KOCP. The ALJ's finding that Petitioner is prohibited from connecting to water and sewer because his property is outside the County's Urban Service Area is supported by competent substantial evidence in the record.

Petitioner's Exception 5.B. is DENIED.

C. Properties Connected to Water and Sewer. Petitioner also takes exception to Finding of Fact 14 because, in describing the area, the ALJ did not make a finding that the Stillwater property to the west of Petitioner's property is connected to water and sewer. Petitioner asks the Department to add a new finding of fact to that effect in order to "accurately describe the surrounding area." See Petitioner's Amended Exceptions, p. 7.

Under section 120.57(1)(*l*), Fla. Stat., the Department can only accept or reject findings of fact. The Department has no statutory authority to supplement the findings of fact in the Recommended Order, and it is not appropriate for the Department to do so. See Florida Power & Light Co. v. State, 693 So. 2d 1025, 1027 (Fla. 1st DCA 1997) (stating that "[i]t is not appropriate for an administrative agency to make supplemental findings of fact on matters on which the ALJ did not rule."); Cemex Construction Materials Florida, LLC v. Lee County, 2012 WL 1303681, 2 (Fla. Dept. of Economic Opportunity Final Order No. DEO-12-029, March 30, 2012) (rejecting an invitation by Lee County to supplement findings of fact to make them clearer on the ground that it is not appropriate for an agency to make supplemental findings of fact); Rogers v. Department of Health, 920 So. 2d 27, 29 (Fla. 1st DCA 2005) ("If there is competent

substantial evidence in the record to support the ALJ's findings of fact, the agency may not reject them, modify them, substitute its findings, or make new findings.").

Here, Petitioner does not claim that the ALJ's findings of fact are not supported by competent substantial evidence, and the Department has no authority to add a new finding of fact related to the Stillwater property.

Petitioner's Exception 5.C. is DENIED.

D. Other Planned Developments. Petitioner urges that the last sentence of Finding of Fact 14 is not descriptive of the evidence in the record and should be revised to say, instead, that there are more than 60 other planned developments and subdivisions in the KOCP. Petitioner does not assert that the ALJ's finding of fact is not supported by competent substantial evidence in the record or point to any evidence that supports the language he asks the Department to substitute.

Referring to the KOCP, the Planning Commission Amendment Report dated December 12, 2011, states that "[a]t the time the plan was adopted there were a number of planned developments and subdivisions approved in the early 1990's, which have now been built." (Respondent's Ex. 3, p. 14). Patricia Ann Wells-Ortiz testified that the green areas on the Keystone-Odessa Community Plan Adopted Boundary Map accepted in evidence as Petitioner's Exhibit 64 are subdivisions that were planned and approved prior to adoption of the KOCP. (T. 317-318; see also the testimony of Steve Allison and Melissa Zornitta, T. 144, 387, 402). The last sentence in Finding of Fact 14 is supported by competent substantial evidence in the record. For the reasons stated in the Department's ruling on Petitioner's Exception 5.C., the Department has no authority to supplement or modify the ALJ's finding of fact.

Petitioner's Exception 5.D. is DENIED.

Petitioner's Exception 6 – Findings of Fact 16 and 17

The Plan Amendments amend the section in the KOCP entitled "Rural Residential Community Character" as follows:

> The Keystone-Odessa community desires to retain its ~~predominant~~ rural residential character as an area of lakes, agriculture activities, and homes built on varied lot sizes and in a scattered development pattern. Rural is based on the County's Future Land Use Element, Urban Service Area boundary objectives and policies. (Underlined language represents new language, while strike through language has been deleted.)

Petitioner takes exception to the ALJ's Findings of Fact 16 and 17 that the word "predominant" was stricken as "unnecessary" and finding as a result that the amendment is not "unreasonable." Finding of Fact 16 does not make the findings of fact to which Petitioner takes exception and, therefore, Petitioner's exception to Finding of Fact 16 is DENIED.

The findings of fact to which Petitioner takes exception are in Finding of Fact 17 in the Recommended Order, which provides:

> 17. Petitioner's primary concern is that the deletion of the word "predominant" changes the meaning, intent, and application of the provision and will require that the entire area remain rural in perpetuity. In striking the word "predominant," however, the County simply deferred to the standards found in the urban services area boundary objectives and policies of the FLUE, cited in the second sentence of the paragraph. These broad guidelines provide that if land is in the urban service area, the land is considered urban, while land outside the urban service area is considered rural. In distinguishing between rural and urban areas, the FLUE recognizes that within the rural area, there may be small suburban enclaves and other non-rural properties that predate the KOCP and which are located in the urban service area. To make the first sentence more consistent with the Plan, the County removed the word "predominant," as being unnecessary. *It is not unreasonable to interpret this revision as not being the equivalent of a declaration that the KOCP is exclusively rural and as not materially changing the meaning of the provision. Finally, it is not unreasonable for the County to rely on FLUE provisions having*

countywide application in characterizing the Keystone-Odessa area as rural.

Petitioner takes exception to the last two sentences in Finding of Fact 17 in italics above. These findings are supported by the testimony of County witness Melissa Zornitta, which is competent substantial evidence supporting Finding of Fact 17. (T. 387-388). By objecting to the ALJ's findings of fact that the County's interpretation of this portion of the Plan Amendments is not unreasonable, Petitioner essentially objects to the ALJ accepting the testimony of the County witness over Petitioner's witnesses. However, 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 v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985).

The Department further notes that removal of the word "predominant" from the provision quoted above is internally consistent with numerous existing comprehensive plan provisions that do not include that word. The paragraph in the KOCP immediately following the above-quoted amended language contains pre-existing text that says rural guidelines will be developed to implement the KOCP in order to "retain the rural residential character" of the KOCP planning area. (Respondent's Ex. 1, p. 16). Other pre-existing provisions in the KOCP that are not at issue in this proceeding also refer to the rural character of the area. For example, the first sentence in the KOCP Vision statement is: "The Keystone-Odessa community will continue to be a rural community, embracing its agricultural past." The KOCP section labeled "Residential" says that the "established rural pattern of residential development will be continued." (Respondent's Ex. 1, pp. 16, 17). Finally, the Future Land Use Element in the County's

comprehensive plan defines "rural" as areas that "typically carry land use densities of 1 du/5 ga[4] or lesser intense designations" and expressly identifies the Keystone area as a rural community. See Comprehensive Plan Future Land Use Element Growth Management Strategy, p. 1, and text following Policy 3.1 under the heading "Rural Area", pp. 5-6.[5]

Petitioner's Exception 6 as it relates to Finding of Fact 17 is DENIED.

Petitioner's Exception 7 – Findings of Fact 18 and 27, Conclusion of Law 47

Petitioner takes exception to the ALJ's findings of fact and conclusions of law that portions of the Plan Amendments are aspirational and therefore do not need data to support them and are not required to be coordinated with Pasco County before being adopted. To support his argument, Petitioner argues that the amendment to the Transportation Element of the County's comprehensive plan is not aspirational. Findings of Fact 18 and 27 and Conclusion of Law 47 do not address the portion of the Plan Amendments that amends the Transportation Element, so Petitioner's argument regarding the Transportation Element does not support his Exception 7. Further, while Petitioner mentions the intergovernmental coordination requirement, his exceptions do not include any argument on that subject so it is not addressed in ruling on Petitioner's Exception 7.

A. Aspirational Amendments. Findings of Fact 18 and 27 refer to amendments to the "Rural Residential Community Character" portion of the KOCP and the addition of language to the Transportation section of the KOCP that "[t]he community supports the expansion of the Suncoast Parkway to 6 lanes (3 in each direction) to relieve traffic through the Keystone-Odessa

[4] 1 du/5 ga means one dwelling unit per five gross acres of land.

[5] The Department officially recognizes the County's Comprehensive Plan, which is published on the County's website at www.planhillsborough.org.

Community Plan area." Conclusion of Law 47 concludes that "[a]spirational amendments require less data and analyses than might otherwise be required."

In common usage, an aspiration is a desire to achieve something or the goal or objective of that desire. See Merriam-Webster, Webster's II New College Dictionary (1999). Because the plain language of the KOCP provisions identified in Findings of Fact 18 and 27 express a community desire and community support for a particular course of action the County may choose to undertake in the future, they were fairly characterized by the ALJ as aspirational. Further, the ALJ's characterization of the amendments to the Rural Residential Community Character and Transportation sections of the KOCP as aspirational is supported by the testimony of County witness Pedro Parra, which is competent substantial evidence supporting the ALJ's findings of fact. (T. 436-437).

Petitioner argues that the KOCP is regulatory, not aspirational, and relies on deposition testimony by Melissa Zornitta that community plans are regulatory. (Petitioner's Ex. 19, p. 52). A general statement that community plans are regulatory does not contradict the ALJ's finding that the specific portions of the Rural Residential Community Character and Transportation sections of the KOCP addressed in Findings of Fact 18 and 27 are aspirational.

B. Data and Analysis. The ALJ's conclusion of law that aspirational plan amendments do not require the level of data and analysis Petitioner suggests is supported by existing case law cited by the ALJ in Conclusion of Law 47. See Indian Trail Improvement District v. DCA, 946 So. 2d 640, 641 (Fla. 4th DCA 2007); see also West Palm Beach v. Department of Community Affairs and Palm Beach County, DOAH Case No. 04-4336GM, Recommended Order ¶¶ 46-47, adopted in agency Final Order No. DCA05-GM-182 (October 21, 2005). The Department agrees with the ALJ and finds that a substituted conclusion of law would not be as reasonable as, or

more reasonable than, the ALJ's conclusion of law. Therefore, the Department cannot reject Conclusion of Law 47 as it relates to the data and analysis requirement. §120.57(1)(*l*), Fla. Stat.

Petitioner's Exception 7 is DENIED.

Petitioner's Exception 8 – Findings of Fact 18 and 22

Petitioner takes exception to findings of fact and conclusions of law in Findings of Fact 18 and 22 "that whether several of the amendments were internally consistent with the Comprehensive Plan did not need to be addressed because Petitioner only challenged these portions as not in compliance with [sections 163.3177] (4)(a) and (6)(a)." (Petitioner's Amended Exceptions, p. 10). Contrary to Petitioner's assertion, neither Finding of Fact 18 nor Finding of Fact 22 finds that it was not necessary to address whether the Plan Amendments are internally consistent with other portions of the County's comprehensive plan. To the contrary, in Finding of Fact 42, the ALJ finds that "[a]ll other arguments not specifically addressed in this Recommended Order have been considered and rejected." Thus, it is clear that the ALJ did consider Petitioner's other internal consistency arguments and rejected them. The ALJ simply did not elaborate on his reasons for rejecting them, and there is no statutory requirement that he do so.

In footnote 5 in his Amended Exceptions, Petitioner lists nine comprehensive plan policies with which he contends the KOCP is inconsistent. Petitioner's arguments are generally based on the fact that certain general policies do not apply to the KOCP area. Specific comprehensive plan policies that limit the applicability of more general policies within identified areas in the County create exceptions to the general policies, not inconsistencies. See Floyd v. Bentley, 496 So. 2d 862, 864 (Fla. 2nd DCA 1986) ("A special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other

subjects in more general terms; in such a situation the more narrowly-drawn statute operates as an exception to or qualification of the general terms of the more comprehensive statute"). Petitioner's witness Patricia Wells-Ortiz acknowledged that the inconsistencies to which she testified could be attributed to the fact that the comprehensive plan is for county-wide application and the KOCP is the refinement for a specific area. (T. 364). In some instances Petitioner fails to cite all applicable policies. For example, in asserting that the Plan Amendments are not consistent with the Potable Water Element and maps which show sewer and potable water as available services in the KOCP area, Petitioner fails to mention the Future Land Use Element policies recognizing that those facilities exist but prohibiting connections in Rural Areas. Finally, to the extent some of Petitioner's arguments in footnote 5 are related to prior actions by the County denying development approval for Mr. Dibbs' KOCP property, those actions are not at issue in this plan amendment challenge.

Petitioner's Exception 8 is DENIED.

Petitioner's Exception 9 – Finding of Fact 21

The Plan Amendments include the following amendments to the first paragraph under the Commercial section of the KOCP:

> The Keystone-Odessa community desires to have uses that are geared to serving the daily needs of area residents, in a scale and design that complements the character of the community. Currently there are approximately 267,000 square feet of commercial development approved and not built within the community planning area. It is the desire of the community to encourage transfer of development rights for some of ~~this~~ the currently approved unbuilt commercial within the community planning area and to direct the new commercial to the intersection of Gunn Highway and North Mobley Road with the community plan boundary, and to other eligible receiving areas in Hillsborough County.
>
> The intersection of Gunn Highway and North Mobley Road has been recognized as a rural activity center by the community, and should be

> designed to serve the majority of the community's daily shopping needs such as groceries, post office, animal supplies, etc. To ensure that the area is developed in compliance with the Keystone-Odessa Community Plan this area will be defined as an overlay district within the County's land development code. . . .

(Finding of Fact 20; Respondent's Ex. 1, p. 19).

In addressing the above portion of the Plan Amendments, Finding of Fact 21 provides:

> 21. Before the revision, the KOCP reflected a desire by the community to direct new commercial activity to Gunn Highway and North Mobley Road. In the following paragraph of the Commercial section, not changed by Plan Amendment 12-01, the intersection of those two roads is "recognized as a rural activity center." *To implement that recognition, the County later developed a section in the Land Development Code defining the intersection of those two roads as the Keystone Activity Center. The new language is intended to clarify that the KOCP activity center is the intersection of those two roads and to direct new commercial activity to that location. It does not bar commercial development at other locations in the community area, provided that other Plan requirements are met.*

Petitioner asserts that the third, fourth, and fifth sentences in Finding of Fact 21 in the Recommended Order are not supported by competent substantial evidence in the record and should be stricken.

The third, fourth, and fifth sentences of Finding of Fact 21 are supported by the testimony of County witness Melissa Zornitta. In sum, Ms. Zornitta testified that the above provision as originally written was implemented by adoption of land development regulations for the Keystone Activity Center at the intersection of Gunn Highway and North Mobley Road, and that some of the text was amended to reflect what had occurred since the KOCP was originally adopted. She further testified that the Future Land Use Element in the County's comprehensive plan contains locational criteria for development of commercial uses, and if a proposed commercial development meets the locational criteria in the Future Land Use Element, the County Commission could consider approving it, even if it is not in the Keystone Activity

Center.[6] (T. 388-393; see Hillsborough County Comprehensive Plan, Future Land Use Element Policies 22.2 – 22.7). Petitioner's planning expert Patricia Wells-Ortiz acknowledged that the above amendments do not prohibit development of commercial uses at locations other than the intersection of Gunn Highway and North Mobley Road. (T. 339, 358). The findings of fact to which Petitioner takes exception are supported by competent substantial evidence in the record.

Petitioner asserts that the last sentence of Finding of Fact 21 is directly refuted by the testimony of Petitioner's two planning experts who, according to Petitioner, testified to specific instances where the above KOCP provision was used to stop commercial development where the KOCP does not call for it. The testimony and exhibit on which Petitioner relies do not refute the testimony of Mrs. Zornitta upon which the last sentence in Finding of Fact 21 is based.

Petitioner's planning expert Steve Allison testified that approximately ten years ago he was involved in a commercial project that was proposed for a location other than the Keystone Activity Center and that was not approved. (T. 136). Contrary to Petitioner's assertion in his Exception 9, Mr. Allison did not testify that the above KOCP provision was used to stop that development.

Petitioner's planning expert Patricia Ann Wells-Ortiz testified that she had been involved in two proposed commercial projects in the KOCP boundary that had been denied. One was a paintball project that was not supported by County staff because it did not meet a number of comprehensive plan requirements, including those governing setbacks from other sports fields and residential uses. (Petitioner's Ex. 56). The County's written evaluation of this project does

[6] Mrs. Zornitta further testified that "I can't say automatically they would be approved, because that's a whole nother process for the Board of County Commissioners. But, yes, they can be considered and proceed in the zoning process, yes." (T. 392). Petitioner criticizes this testimony in his exception, but since Mrs. Zornitta is not the decision-maker, she could not be expected to give a more definitive response.

not mention the above KOCP provision as a ground for the recommended denial of the project. (See Petitioner's Ex. 56).

Finally, Ms. Wells-Ortiz testified regarding a proposed rezoning of property in the KOCP to accommodate a planned commercial development. (T. 311-312; Petitioner's Ex. 56, Application Number RZ 05-1119 KE). The staff reports reflect that the proposed development was not supported by staff for a number of reasons. While Ms. Wells-Ortiz testified that the KOCP locational criteria was a factor in the denial (T. 312), it is clear from the staff report that the locational criteria that was used to evaluate the proposed development were the locational criteria in the Future Land Use Element, not in the KOCP. (Petitioner's Ex. 56). The KOCP provision quoted above was mentioned in a memorandum from the Planning Commission staff to the County Planning and Growth Management Department as one of a number comprehensive plan provisions with which the proposed rezoning did not comply. However, the record does not contain staff memoranda to the County Commission or the action by the County Commission to deny the proposed rezoning, and therefore does not demonstrate that the above KOCP provision was used to stop this proposed commercial development.

Petitioner's Exception 9 is DENIED.

Petitioner's Exception 10 – Findings of Fact 25 and 27

As noted above, the Plan Amendments modify the Transportation section in the KOCP to add the following language:

> The community supports the expansion of the Suncoast Parkway to 6 lanes (3 in each direction) to relieve traffic through the Keystone-Odessa Community Plan Area.

Petitioner takes exception to Findings of Fact 25 and 27 that the above language is simply a statement of support and finding that the amendment to this section is subject to fair debate.

Petitioner argues that the added language is not supported by data and analysis showing that widening the Suncoast Parkway will actually relieve traffic through the KOCP area. Findings of Fact 25 and 27 provide:

> 25. The Suncoast Parkway is a toll road running in a north-south direction from Hernando County to the northern terminus of the Veterans Expressway (in the northern part of the County), passing on the eastern side of the KOCP. The new language does not mandate that the State or any other entity expand the Suncoast Parkway. Also, it does not mean that an expanded toll road would cure all traffic problems throughout the Keystone-Odessa community area. The language is simply a statement of support by the community for the widening of the toll road if that project is ever considered in the future.
>
> * * *
>
> 27. The amendment depends on future activities, assessments, and decision-making by the County or other entities that have the responsibility of funding and building toll roads. It does not require the County to take any immediate action. In short, it does not mandate anything. Given these considerations, Petitioner has failed to prove to the exclusion of all fair debate that the aspirational language is not in compliance for the reasons alleged.

Because the language added to the KOCP begins with the words "[t]he community supports," the ALJ fairly characterized it as a statement of support by the community for the widening of the Suncoast Parkway if Hillsborough County ever decides to undertake that project. Whether and the extent to which widening the Suncoast Parkway would actually relieve traffic in the KOCP area does not change the character of the statement as a statement of support. Because this provision is a statement of support and not a mandatory comprehensive plan policy, it is not required to be supported by data and analysis showing the project the community supports would actually work. See Indian Trail Improvement District v. Department of Community Affairs, 946 So. 2d 640, 641 (Fla. 4th DCA 2007).

Further, the ALJ recognized that the County did not claim that widening the Suncoast Parkway would relieve traffic in the Keystone-Odessa community. In addressing this specific

part of the Plan Amendments, County witness Melissa Zornitta testified that "I don't think anybody was under the impression that just doing this would fix all of the traffic problems in Keystone." (T. 393).

The ALJ's statement in Finding of Fact 27 that Petitioner failed to prove beyond fair debate that the challenged language is not in compliance is a conclusion of law. An agency's authority to reject conclusions of law is limited by section 120.57(1)(*l*), Fla. Stat., to issues within the agency's substantive jurisdiction. As the statutorily designated state land planning agency under section 163.3164(43), Fla. Stat., the Department has substantive jurisdiction and expertise over land use planning issues. The application of the fairly debatable standard involves the application of a legal concept typically resolved by judicial or quasi-judicial officers and is not within the Department's substantive jurisdiction. See, e.g., Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So.2d 1140, 1141-1142 (Fla. 2nd DCA 2001) (holding that an ALJ's decision not to apply collateral estoppel or res judicata requires the application of a legal concept typically resolved by judicial or quasi-judicial officers and is not within the substantive jurisdiction of the Secretary of the Department of Environmental Regulation). Therefore, under section 120.57(1)(*l*), Fla. Stat., the Department cannot reject Conclusion of Law 41.

Petitioner's Exception 10 is DENIED.

Petitioner's Exception 11 – Conclusion of Law 41

Conclusion of Law 41 addresses the deletion of Gunn Highway from the County's Corridor Preservation Plan and provides:

> 41. In summary, Petitioner has failed to prove to the exclusion of all fair debate that the deletion in Plan Amendment 12-03 is not in compliance.

As explained in the Department's ruling on Petitioner's Exception 10 above related to Finding of Fact 27, the Department's authority to reject conclusions of law is limited by section 120.57(1)(*l*), Fla. Stat., to issues within the Department's substantive jurisdiction. Application of the fairly debatable standard is not within the Department's substantive jurisdiction. Therefore, the Department cannot reject Conclusion of Law 41.

Petitioner's Exception 11 is DENIED.

Petitioner's Exception 12 – Conclusions of Law in Paragraphs 23, 27, 34, 41, and 50

Petitioner takes exception to the conclusions of law in paragraphs 23, 27, 34, 41 (also addressed in Exception 11), and 50 of the Recommended Order that the challenged Plan Amendments are in compliance because, according to Petitioner, unrefuted expert testimony was ignored. The paragraphs provide as follows:

> 23. Petitioner has failed to show to the exclusion of all fair debate that these revisions [to the Commercial section of the KOCP] are not in compliance.
>
> 27. The amendment [expressing support for the widening of the Suncoast Parkway] depends on future activities, assessments, and decision-making by the County or other entities that have the responsibility of funding and building toll roads. It does not require the County to take any immediate action. In short, it does not mandate anything. Given these considerations, Petitioner has failed to prove to the exclusion of all fair debate that the aspirational language is not in compliance for the reasons alleged.
>
> 34. Petitioner has failed to show to the exclusion of all fair debate that the revisions in the Transportation section of the KOCP are not in compliance.
>
> 41. In summary, Petitioner has failed to prove to the exclusion of all fair debate that the deletion [of Gunn Highway from the corridor preservation plan] in Plan Amendment 12-03 is not in compliance.
>
> 50. The evidence supports a conclusion that Petitioner has failed to prove beyond fair debate that the plan amendments are not in

> compliance. Therefore, the plan amendments adopted by Ordinance No. 12-01 and 12-03 on May 17, 2012, should be found in compliance.

As explained in its rulings on Petitioner's Exceptions 10 and 11 above, the Department's authority to reject conclusions of law is limited by section 120.57(1)(*l*), Fla. Stat., to issues within the Department's substantive jurisdiction. Application of the fairly debatable standard is not within the Department's substantive jurisdiction. Therefore, the Department cannot reject the conclusions of law in paragraphs 23, 27, 34, 41, and 50 in the Recommended Order.

Petitioner's Exception 12 is DENIED.

Petitioner's Exception 13 – Findings of Fact 18, 22, 33, and Conclusion of Law 48

Petitioner takes exception to the ALJ's finding of fact and conclusion of law in paragraphs 18, 22, 33, and 48 of the Recommended Order that the County did not have to comply with any part of section 163.3177(6), Fla. Stat., because the community plans are contained in a separate optional element. Petitioner asserts that the ALJ has created "an end around the Florida Statutes" and allowed the County "to usurp the power of the Florida Legislature by legislative fiat." The Department disagrees.

The specific findings and conclusions to which Petitioner takes exception relate to the statutory requirements for the future land use and housing elements of a comprehensive plan and provide:

> 18. . . . The plan amendment being challenged is a part of the Livable Communities Element, and not the FLUE. Therefore, the requirements imposed on a local government when adopting a FLUE amendment do not apply.

> 22. . . . He also contends that the amendment violates subsections 163.3177(6)(a)2. b., d., and h. These provisions prescribe certain requirements for FLUE amendments. Because the changes are to the Livable Communities Element, the requirements do not apply.

> 33. Petitioner also contends that the amendment violates section 163.3177(6)(a) because it is not based on the necessary surveys, studies, and data required for FLUE amendments. However, the amendment is to the Livable Communities Element and not the FLUE.
>
> 48. Petitioner has argued that both amendments must comply with sections 163.3177(6)(a), (b), and (f), which require that each comprehensive plan contain a Future Land Use, Transportation, and Housing Element, respectively, and describe the content of each. While the Transportation Element has been revised by Plan Amendment 12-03, and its requirements must be considered for that amendment, the other elements have not been amended. Even so, Petitioner contends that the KOCP, a part of an optional element, is controlling over the more generic provisions of the mandatory Future Land Use and Housing Elements, and therefore any KOCP amendment must comply with the statutory requirements when adopting FLUE and Housing Element amendments. However, the plain language in the statute provides that these requirements apply only when the local government adopts a FLUE or Housing Element amendment. Petitioner has cited no persuasive authority supporting a contrary interpretation of the law. The argument has been rejected.

Section 163.3177(1)(a), Fla. Stat., provides that "[t]he comprehensive plan shall consist of elements as described in this section, and may include optional elements." Section 163.3177(3)(a) and (6)(a)–(g), Fla. Stat., describe mandatory comprehensive plan elements, prescribe the issues to be addressed in those elements, and identify the specific data on which each element is to be based.[7]

Under section 163.3177(1)(f), Fla. Stat., optional elements are required to be based on data and analysis "appropriate to the element" but are not statutorily required to be consistent with the requirements for similar or related mandatory elements. Had the Legislature intended that optional elements comply with the requirements for similar or related mandatory elements, it could easily have said so.

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[7] The eight mandatory elements are a capital improvements element; a future land use element; a transportation element; a general sanitary sewer, solid waste, drainage, potable water, and natural groundwater aquifer recharge element; a conservation element; a recreation and open space element; a housing element; and for coastal communities, a coastal management element.

The ALJ's findings and conclusions that sections 163.3177(6)(a) and (f), Fla. Stat., do not apply to the County's optional Livable Communities Element are conclusions of law, not findings of fact, and are consistent with the wording of the statute. The Department finds that a substituted conclusion of law would not be as reasonable as, or more reasonable than, the ALJ's conclusion of law that the requirements for the future land use element in section 163.3177(6)(a) and the housing element in section 163.3177(6)(f) do not apply to the County's optional Livable Communities Element. §120.57(1)(*l*), Fla. Stat. Therefore, the Department cannot reject the ALJ's conclusion of law.

Petitioner's Exception 13 is DENIED.

CORRECTED ORDER

Based on the foregoing, it is ORDERED that, as modified herein, the findings of fact and conclusions of law in the Recommended Order attached hereto as Exhibit A and incorporated herein are accepted as the Department's findings of fact and conclusions of law in this Corrected Final Order, which replaces the Department's Final Order issued on July 22, 2013, and Plan Amendments No. 12-01 and 12-03 adopted by Hillsborough County on May 17, 2012, are found to be "in compliance" as defined in section 163.3184(1)(b), Fla. Stat.

December 10, 2013

JESSE PANUCCIO, Executive Director