STATE OF FLORIDA
DEPARTMENT OF ECONOMIC OPPORTUNITY

ALERTS OF PBC, INC., PATRICIA D. CURRY, ROBERT SCHUTZER, AND KAREN SCHUTZER,

Petitioners,

vs.

DOAH CASE NO. 14-5657GM

PALM BEACH COUNTY.

Respondent,

and

MINTO PBLH, LLC,

Intervenor.

FINAL ORDER

This matter was considered by the Director for the Division of Community Development, within 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 amendments to the Palm Beach County Comprehensive Plan, adopted by Ordinance No. 14-030 on October 29, 2014 (the "Plan Amendments"), are in compliance as defined in section 163.3184(1)(b), Fla. Stat.[1] The Plan Amendments amend portions of the Future Land Use Map, the Future Land Use Element, the

[1] References to the Florida Statutes are to the 2014 version of the statutes.

Transportation Element, and the Introduction and Administration portions of the Comprehensive Plan as it relates property owned by Intervenor Minto PBLH, LLC ("Minto").

Role of the Department

The Plan Amendments were adopted under the expedited state review process pursuant to section 163.3184(3), Fla. Stat., and were challenged by Alerts of PBC, Inc., Patricia D. Curry, Robert Schutzer, and Karen Schutzer ("Petitioners") in a petition timely filed with DOAH. The Department was not a party to the proceeding. The ALJ's Recommended Order recommends that the Plan Amendments be found in compliance, therefore the ALJ submitted the Recommended Order to the Department pursuant to section 163.3184(5)(e). The Department 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

Pursuant to the Administrative Procedure Act, an 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 final 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. *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. When rejecting or modifying a conclusion of law, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law and must make a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified. §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. *Kinney v. Dept. of State*, 501 So. 2d 129 (Fla. 5th DCA 1987); *Goin v. Comm. 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 of law, will be considered as a conclusion or finding based upon the statement itself and not the label assigned.

Department's Review of the Recommended Order

The Department has been provided copies of the parties' pleadings, the documentary evidence introduced at the final hearing, and a five-volume transcript of the proceedings. Petitioners timely filed exceptions to the Recommended Order on May 1, 2015. Respondent and Intervenor timely filed a Joint Response to Petitioners' Exceptions on May 8, 2015.

Ruling on Petitioners' Exceptions to the Recommended Order

A - Exception 1: Agricultural Enclaves Section 163.3164, Florida Statutes

In Exception 1, Petitioners take exception to Paragraph 25 (a finding of fact) and Paragraphs 73 and 74[2] (conclusions of law) and contend that the ALJ should have determined that the Plan Amendments were not "in compliance" with sections 163.3162 and 163.3164. Petitioners also contend that the Plan Amendments exceed the density and intensity of the limitations established in an Agricultural Enclave pursuant to section 163.3214.

1- Jurisdiction to consider compliance with sections 163.3162 and 163.3164, Florida Statutes

Petitioners take exception to the finding of fact in Paragraph 25 and the conclusion of law in Paragraph 73 because the ALJ did not make an "in compliance" determination on whether the Plan Amendments were in compliance with sections 163.3162 and 163.3164. However, as conceded by Petitioners in Exception 1 on page 4, neither sections 163.3162 nor 163.3164 are included within the definition of "in compliance" located within section 163.3184(1)(b). Specifically, "in compliance" is defined as:

> "In compliance" means consistent with the requirements of ss. 163.3177, 163.3178, 163.3180, 163.3191, 163.3245, and 163.3248, with the appropriate strategic regional policy plan, and with the principles for guiding development in designated areas of critical state concern and with part III of chapter 369, where applicable.

Section 163.3184(1)(b), Florida Statutes.

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[2] Petitioners state in the text that they take exception to Paragraph 23 and Paragraph 70. However, in the excerpt of the Recommended Order, they reference Paragraphs 23, 73, and 74. As it relates to Paragraph 23, Petitioners instead quote Paragraph 25, including its header. Additionally, all arguments raised with respect to the finding of fact concern Paragraph 25 (consistency with section 163.3164) and not Paragraph 23 (map amendments.) Given Petitioners' arguments and references, the Department finds that Exception 1 encompasses Paragraph 25 and not Paragraph 23.

Furthermore, Petitioners' citation to Paragraph 70 appears to be in error in that Paragraph 70 concluded that Petitioners were affected persons with standing to challenge. Given Petitioners' argument, their excerpt of the Recommended Order showing Paragraphs 73 and 74, and the unlikelihood that they would be challenging their own standing, the Department finds that Exception 1 encompasses Paragraphs 73 and 74.

Consideration of sections 163.3162 and 163.3164 are not part of an "in compliance" determination by section 163.3184(1)(b)'s explicit terms, and are therefore not a proper part of a plan amendment challenge. *See e.g. Dibbs v. Hillsborough County*, 2013 Fla. Div. Adm. Hear. 2013 WL 6699969 (DEO F. O. No. DEO-13-071-C issued December 10, 2013) (finding that statutes not listed within section 163.3184(1)(b) are beyond the scope of an "in compliance" determination); *Cemex Construction Materials Florida, LLC et. al. v. Lee County*, 2012 Fla. Div. Adm. Hear. 2012 WL 605891 (DEO F.O. No. DEO-12-029 issued March 30, 2012) (finding that inconsistency with sections 337.0261(3) or 1613.161(10) could not form the basis for a compliance determination because section 163.3184(1)(b) does not include those statutes in the definition of "in compliance.")

Petitioners have not demonstrated that the finding of fact in Paragraph 25 is not supported by competent substantial evidence in the record and, furthermore, there is competent substantial evidence in the record to support the ALJ's finding of fact in Paragraph 25.

Petitioners' exception to the finding of fact in Paragraph 25 is DENIED.

As explained above, the Department agrees with the ALJ's conclusion of law that section 163.3184(1)(b) does not contain either section 163.3162 or 163.3164, so that consistency with those statutes as it relates to an "in compliance" determination in the hearing was not relevant. A substituted conclusion of law would not be as or more reasonable than the ALJ's conclusion of law in Paragraph 73 of the Recommended Order.

Petitioners' exception to the conclusion of law in Paragraph 73 is DENIED.

2 - Whether the Plan Amendments exceed the limitations on an Agricultural Enclave

Petitioners also take exception to Paragraph 74 and reargue that the Plan Amendments do not comply with the requirements of sections 163.3162 and 163.3164 as they relate to the

Agricultural Enclave designation. As the ALJ sets forth in Paragraph 11, the Agricultural Enclave designation for the Property has been in effect since 2008. The ALJ is also clear in pointing out in Paragraph 17 that:

> Many of the issues raised and the arguments made by Petitioners fail to acknowledge or distinguish the 2008 Amendments that address future development of the Property. In several respects, as discussed below, the 2008 Amendments already authorize future development of the Property in a manner which Petitioners object to....

Even more clearly, the ALJ sets forth in Paragraph 26 that the Property is already designated an Agricultural Enclave in the Comprehensive Plan. Petitioners take no exception to these findings of fact, of which there is substantial competent evidence in the record, which support the conclusion of law reached in Paragraph 74.

In addition to the findings of fact noted above, Petitioners did not take exception to the conclusion of law in Paragraph 75, which plainly states that:

> The 2008 Amendments are part of the existing Comp Plan and are not subject to review or challenge in this proceeding. See §163.3184(9)(a), Fla. Stat. (2007) (providing third parties 21 days following publication of a notice of intent to find in compliance to challenge plan amendments.

In support of Exception 1 as it relates to the Agricultural Enclave designation, Petitioners rely on expert testimony as the basis to overturn the ALJ's determination. It can be inferred that the ALJ considered Petitioners' experts' testimony, but did not assign the weight that Petitioners believe should be given to the testimony.

Where there is competent substantial evidence in the record to support the ALJ's findings of fact, of which there is here, the Department is unable to reweigh evidence or judge the credibility of witnesses, both tasks being within the sole province of the ALJ as the finder of fact. *See Heifetz,* 475 So. 2d at 1281-1283. Further, based on the supporting findings of fact and the conclusion of law reached in Paragraph 75, there is not a conclusion the Department could reach that would be

as or more reasonable than the ALJ's conclusion of law in Paragraph 74 of the Recommended Order.

Petitioners' exception to the conclusion of law in Paragraph 74 is DENIED.

B – Exception 2: The term "appropriate new urbanism concepts" lacks meaningful and predictable standards, vests unbridled discretion and is void for vagueness

In Exception 2, Petitioners take exception to Paragraphs 20-22 (findings of fact) and Paragraph 80 (a conclusion of law) and contend that the term "appropriate new urbanism concepts" as used in the Plan Amendments lacks meaningful and predictable standards, is void for vagueness, or unconstitutionally vests unbridled discretion to approve developments without meaningful and predictable standards.

In support of Exception 2, Petitioners only rely on their expert planner's testimony concerning the term "appropriate new urbanism concepts." Based on the Recommended Order, it can be inferred that the ALJ considered Petitioners' expert testimony, but did not assign it the weight that Petitioners believe it should have had. Furthermore, Petitioners have not demonstrated that the findings of fact are not supported by competent substantial evidence in the record.

To be clear, where there is competent substantial evidence in the record to support the ALJ's findings of fact for Paragraphs 20, 21, and 22. (T. 351-362, 470-471, 477-478, 557-558 just as an example), the Department is unable to reweigh evidence or judge the credibility of witnesses, both tasks being within the sole province of the ALJ as the finder of fact. *See Heifetz,* 475 So. 2d at 1281-1283.

Petitioners' exceptions to the findings of fact in Paragraphs 20, 21, and 22 are DENIED.

For the reasons expressed in the Department's ruling related to findings of fact 20, 21, and 22, a substituted conclusion of law would not be as or more reasonable than the ALJ's conclusion of law in Paragraph 80 of the Recommended Order.

Petitioners' exception as it relates to conclusion of law 80 is DENIED.

C – Exception 3: Finding of Fact Paragraph 40

In Exception 3, Petitioners take exception to Paragraph 40 (a finding of fact) and contend that the Acreage, a subdivision north of the property at issue in the Plan Amendments, is rural in character rather than suburban, and that the residential densities surrounding the perimeter of the property do not correspond with the density of the Acreage.

In support of Exception 3, Petitioners only rely on citations to the Comprehensive Plan and again on their expert's testimony concerning the character of the Acreage and the surrounding residential density. Based on the Recommended Order, it can be inferred that the ALJ considered Petitioners' expert testimony, but did not assign it the weight that Petitioners believe it should have had.

Additionally, in Paragraph 17 (to which Petitioners do not take exception), the ALJ found that:

> Many of the issues raised and the arguments made by Petitioners fail to acknowledge or distinguish the 2008 Amendments that address future development of the Property. In several respects, as discussed below, the 2008 Amendments already authorize future development of the Property in a manner which Petitioners object to. In several respects, the types of impacts that Petitioners are concerned about are actually diminished by the Proposed Amendments from what is currently allowed under the 2008 Amendments.

Finally, Petitioners have not demonstrated that the finding of fact in Paragraph 40 is not supported by competent substantial evidence in the record.

Where there is competent substantial evidence in the record to support the ALJ's finding of fact for Paragraph 40 (T. 464-478, 488, 491-494, 563-564, and 557-58, as an example), the Department is unable to reweigh evidence or judge the credibility of witnesses, both tasks being within the sole province of the ALJ as the finder of fact. *See Heifetz*, 475 So. 2d at 1281-1283.

Petitioners' exception to the finding of fact in Paragraph 40 is DENIED.

D – Exception 4: Transportation Improvements

In Exception 4, Petitioners take exception to Paragraph 29 (a finding of fact) and Paragraphs 81 and 82 (conclusions of law) and contend that the roadway and transportation improvements needed to serve the increased density and intensity of the Property do not exist and are not contemplated by the Comprehensive Plan.

In support of Exception 4, Petitioners rely on the language of section 163.3177 and, yet again, expert testimony as the basis to overturn the ALJ's finding of fact in Paragraph 29. As was the case previously, it can be inferred that the ALJ considered Petitioners' experts' testimony, but did not assign the weight that Petitioners believe should be given to the testimony.

Petitioners have not demonstrated that the finding of fact in Paragraph 29 is not supported by competent substantial evidence in the record.

Where there is competent substantial evidence in the record to support the ALJ's findings of fact for Paragraph 29 (T.306-09, 316-329, 371, 420-430, 464-478, 488, 491-494, 501-504, 553-561, and 563-564, for example), the Department is unable to reweigh evidence or judge the credibility of witnesses, both tasks being within the sole province of the ALJ as the finder of fact. *See Heifetz,* 475 So. 2d at 1281-1283.

Petitioners' exception to the finding of fact in Paragraph 29 is DENIED.

Paragraph 81 is a conclusion of law, and more specifically is a recitation of the requirements of Section 163.3177(1)(f), Florida Statutes. There is no substituted conclusion of law that would be as or more reasonable than the recitation of the statute in the conclusion of law in Paragraph 81.

Petitioners' exception to the conclusion of law in Paragraph 81 is DENIED.

For the reasons expressed in the Department's ruling related to the finding of fact in Paragraph 29, a substituted conclusion of law would not be as or more reasonable than the ALJ's conclusion of law in Paragraph 82 of the Recommended Order.

Petitioners' exception as it relates to conclusion of law 82 is DENIED.

E – Exception 5: Blanket Exemption from Rural Tier Policies

In Exception 5, Petitioners take exception to Paragraphs 48-50 (findings of fact) and Paragraphs 80[3] and 85 (conclusions of law) and contend that the Plan Amendments create a blanket exemption for the Property from other portions of the Comprehensive Plan, making the Comprehensive Plan internally inconsistent, and creating a lack of meaning and predictable standards.

In support, Petitioners simply cite to provisions of the Comprehensive Plan and the Plan Amendments. They do not demonstrate that the findings of fact in the Recommended Order are not supported by competent substantial evidence, or give any citations to the record to support their contentions. Furthermore, the exception is yet another invitation to have the Department reweigh evidence. Where there is competent substantial evidence in the record to support the ALJ's findings of fact for Paragraphs 48, 49, and 50, which there is here, the Department is unable to reweigh evidence or judge the credibility of witnesses, both tasks being within the sole province of the ALJ as the finder of fact. *See Heifetz*, 475 So. 2d at 1281-1283.

Petitioners' exception to the finding of fact in Paragraphs 48, 49, and 50 are DENIED.

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[3] Petitioners state in the text that they take exception to Paragraph 81, which they previously took exception to in Exception 4. However, in the excerpt of the Recommended Order they reference Paragraph 83 but quote Paragraph 80 and its header. Given that Petitioners' argument is based on the language of Paragraph 80 (concerning meaningful and predictable standards), make no further arguments relating to the subject matter of Paragraph 81 (concerning data and analysis), and the excerpted language is from Paragraph 80, the Department finds that Exception 5 encompasses Paragraphs 48-50, 80, and 85 and that the internally inconsistent references to Paragraphs 81 and 83 were in error.

As it relates to the conclusions of law in paragraphs 80 and 85, specific comprehensive plan policies that limit the applicability of more general policies within identified areas create exceptions to the general policies, not inconsistencies. *See Floyd v. Bentley,* 496 SO. 2d 862, 864 (Fla. 2d 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.")

For the reasons above and also expressed in the Department's ruling related to the findings of fact 48, 49, and 50, substituted conclusions of law would not be as or more reasonable than the ALJ's conclusions of law in Paragraphs 80 and 85 of the Recommended Order.

Petitioners' exception to the conclusions of law in Paragraphs 80 and 85 are DENIED.

Agency Modification to Conclusion of Law

As previously stated, an agency may modify a conclusion of law over which it has substantive jurisdiction, but it must state with particularity its reasons for modifying the conclusion of law and must make a finding that its substituted conclusion of law is as or more reasonable than that which was modified. §120.57(1)(l), Fla. Stat. *See also, DeWitt v. School Board of Sarasota County*, 799 So. 2d 322 (Fla. 2nd DCA 2001).

Conclusions of law labeled as findings of fact, and findings of fact labeled as conclusions of law, will be considered as a conclusion or finding based upon the statement itself and not the label assigned. *Kinney v. Dept. of State*, 501 So. 2d 129 (Fla. 5th DCA 1987), and *Goin v. Comm. on Ethics*, 658 So. 2d 1131 (Fla. 1st DCA 1995).

Although labeled as a finding of fact, Paragraph 54 is more appropriately treated as a mixed finding of fact and conclusion of law. The ALJ first determined that the Plan Amendments were

not inconsistent with FLUE Policy 1.1-c of the County Comprehensive Plan, a finding of fact, then stated a conclusion of law that Evaluation and Appraisal Reviews are no longer required by state law.

The finding of fact is supported by competent substantial evidence. The conclusion of law, however, must be modified. The Department is the agency with substantive jurisdiction over Chapter 163 of the Florida Statutes, and more particularly section 163.3191. Although Evaluation and Appraisal Reviews are no longer specifically mandatory, section 163.3191 does require that local governments determine whether or not "plan amendments are necessary to reflect changes in state requirements in this part since the last update of the comprehensive plan, and notify the state land planning agency as to its determination." However, any determination as to whether or not plan amendments are necessary after such a review is left up to the local government. The Plan Amendments are not inconsistent with FLUE Policy 1.1-c because during any review by the County pursuant to section 163.3191, it is still within their authority to determine whether an Evaluation and Appraisal Review is "necessary to reflect changes in state requirements in this part since the last update of the comprehensive plan." This conclusion of law is as or more reasonable than the conclusion reached by the ALJ.

ORDER

Based on the foregoing, the Department adopts the ALJ's Recommended Order in its entirety (a copy of which is attached as Exhibit A and incorporated herein), subject to the modification for Paragraph 54, as the Department's Final Order and finds that the Plan Amendments adopted by Palm Beach County Ordinance No. 14-030 on October 29, 2014, are in compliance as defined in section 163.3184(1)(b), Florida Statutes.

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, 107 EAST MADISON STREET, CALDWELL BUILDING, MSC 110, TALLAHASSEE, FLORIDA 32399-4128, WITHIN THIRTY CALENDAR (30) DAYS AFTER THE DATE THIS FINAL AGENCY ACTION IS FILED WITH THE AGENCY CLERK, AS INDICATED BELOW. 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 7th day of July, 2015.

Katie Zimmer, Agency Clerk
Department of Economic Opportunity
107 East Madison Street, MSC 110
Tallahassee, FL 32399-4128

By US MAIL

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