STATE OF FLORIDA
DEPARTMENT OF ECONOMIC OPPORTUNITY

MARTIN COUNTY LAND CO.,

Petitioner,

v. DOAH CASE NO. 15-0300GM

MARTIN COUNTY,

Respondent.
_____/

FINAL ORDER

This matter was considered by the Interim 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 Martin County Comprehensive Plan Amendment 14-6, adopted by Ordinance No. 965 on December 16, 2014, is "in compliance" as defined in section 163.3184(1)(b), Florida Statutes.[1] The challenged Plan Amendment amends the Martin County Comprehensive Plan in the following ways: it deletes the Expressway-Oriented Transit Commercial Service Center ("EOTCSC") land use designation, imposes a 2,000 gallon-per-day limit for onsite sewage treatment and disposal systems (septic systems), eliminates the use of septic systems in urban service districts where regional wastewater treatment is available, restricts the extension of regional wastewater treatment systems outside the primary Urban Service

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

District (while also prohibiting new package treatment plants), and limits new development within the primary Urban Service District to low-density residential.

Role of the Department

The Plan Amendment was adopted under the expedited state review comprehensive plan amendment process pursuant to section 163.3184, Florida Statutes, and was challenged by Martin County Land Co. ("Petitioner") in a petition timely filed with DOAH.[2] The Legislature enacted the expedited state review process in 2011, substantially increasing local control of growth management issues by reducing the State's scope of review. Increased local control means that, so long as local growth management decisions fall within the broad discretion granted local governments, affected parties will have to resort to local government—not the State—to resolve growth management disputes. Depending on the policy orientation of a local government, those who favor more or less growth may be satisfied or dissatisfied with local decisions. In most cases, though, it is not the State's role to resolve these local policy disputes.

The Department is not a party to the proceeding. The ALJ's Recommended Order recommends that the Plan Amendment be found in compliance, and therefore the ALJ submitted the Recommended Order to the Department pursuant to section 163.3184(5)(e), Florida Statutes. The Department must either determine that the Plan Amendment is in compliance and enter a Final Order to that effect, or determine that the Plan Amendment is not in compliance and submit the Recommended Order to the Administration Commission for final agency action.

[2] A number of other Petitioners also separately challenged the Plan Amendment. The above challenge was consolidated with the other challenges under DOAH Case. No. 15-0229GM. The other challenges were settled and dismissed, so for the purposes of the Final Order, Martin County Land Co. is the sole Petitioner.

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. Dep't 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. Dep't of Bus. 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. In its final order, an agency 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. Sch. Bd. of Sarasota County*, 799 So. 2d 322 (Fla. 2d 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. Dep't of State*, 501 So. 2d 129 (Fla. 5th DCA 1987); *Goin v. Comm'n 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 three-volume transcript of the proceedings. Petitioner filed Exceptions to the Recommended Order, along with a Motion to Accept Late Filed Exceptions to the Recommended Order, on September 29, 2015. The filed Exceptions were received after the fifteen-day filing deadline due to a scrivener's error caused by Petitioner inputting the Department Clerk's email address incorrectly. The County had no opposition to the late filing, and in fact timely received Petitioner's Exceptions and filed a timely Response to the Exceptions on September 28, 2015. As Petitioner's untimely filing of the Exceptions was due to a scrivener's error, the County had no opposition to the untimely filing and filed a timely Response to the Exceptions, and that the Department's late receipt of the Exceptions caused no harm to any parties involved, the Department accepts Petitioner's Exceptions and will rule on them as set forth below.

Ruling on Petitioner's Exceptions to the Recommended Order

Exceptions Regarding the Removal of EOTCSC Designations

A – Exception 1 (Paragraph 38)

In Exception 1, Petitioner contends that to amend the Comprehensive Plan to remove the EOTCSC designation, the County must show that the previous data and analysis that supported the EOTCSC implementation must have been wrong or superseded. Section 163.3177(1)(f), Florida Statutes, requires that comprehensive plan amendments be "based upon relevant and appropriate data and analysis . . . ." In some cases, it is possible that data and analysis can support multiple policy decisions, and if that is the case, then the decision of which policy to adopt is left to the local governments and may be changed over time as policy priorities shift. Petitioner's proposed conclusion of law is not as or more reasonable than the conclusion of law reached by the ALJ.

Petitioner's exception to Paragraph 38 is DENIED.

B – Exception 2 (Paragraphs 39-41)

In Exception 2, Petitioner argues that its evidence was more persuasive than the County's, that the ALJ rejected Petitioner's arguments that the County did not consider other data during the comprehensive plan amendment process, and that the ALJ heightened the burden of proof on Petitioner.

The persuasiveness of evidence and witnesses, as well as findings concerning what evidence or data and analysis the County considered during the comprehensive plan amendment process, are findings are findings of fact. 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.

Petitioner must prove beyond fair debate that the elimination of the EOTCSC was not supported by data and analysis. *See* Paragraphs 140-145 of the Recommended Order. A finding that this high standard was not met does not mean the ALJ heighted the burden on Petitioner. The Recommended Order is clear throughout, as well as specifically in Paragraphs 146, 149, and 151 that Petitioner did not meet its burden to prove beyond fair debate that the Plan Amendment lacked relevant and appropriate supporting data and analysis. The ALJ's finding that there was a lack of evidence supporting Petitioner's arguments is a finding of fact based upon the ALJ's weighing of evidence, which cannot be overturned by the Department if, as here, competent substantial evidence exists in the record.

Petitioner's exceptions to Paragraphs 39-41 are DENIED.

C – Exception 3 (Paragraphs 28 and 43)

In Exception 3, Petitioner argues that because the EOTCSC predates the adoption of the Urban Service Areas, the County cannot now claim that it is eliminating the EOTCSC because it is inconsistent with its urban containment strategy. As noted above, however, in some cases it is possible that data and analysis can support multiple policy decisions. Data and analysis can support adoption of the EOTCSC designation as an exception to an urban containment strategy and also support rejection or elimination of the EOTCSC designation. This appears to be the case here, given the prior approval of the EOTCSC designation and the ALJ's instant findings of fact that data and analysis support its elimination. In such a case, the policy choice is left to the local government. The ALJ's finding that the Plan Amendment was supported by data and analysis is supported by competent substantial evidence.

Additionally, the Petitioner's contention that these paragraphs are a misunderstanding of the statutory legal requirement and an error of law is not as or more reasonable than the conclusion of law reached by the ALJ.

Petitioner's exceptions to Paragraphs 28 and 43 are DENIED.

D – Exception 4 (Paragraph 146)

In Exception 4, Petitioner argues that—based on the arguments Petitioner raised in Exceptions 1, 2, and 3—Paragraph 146 is unsupported and must be overturned. As explained above, there is competent substantial evidence in the record to support the ALJ's findings of fact outlined in Paragraph 146. 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. Furthermore, there is not a conclusion of law to be reached that would be as or more reasonable than the one reached by the ALJ.

Petitioner's exception to Paragraph 146 is DENIED.

E – Exception 5 (Paragraphs 59 and 60)

In Exception 5, Petitioner challenges the ALJ's conclusion in Paragraphs 59 and 60 that removal of the EOTCSC is not inconsistent with Policy 4.7A.5, which provides that "Martin County shall provide reasonable and equitable options for development outside the urban service districts . . . ." Policy 4.7A.5 requires "options" for such development, not a particular option. Removal of one option, the EOTCSC, is not necessarily inconsistent with Policy 4.7A.5. Petitioner alleges that "other commercial development outside the urban service district . . . is not otherwise currently allowed by the [Comprehensive Plan]," as such development "would require a [Comprehensive Plan] amendment using different and more demanding criteria" and "no commercial development outside the urban service district is likely to be approved." Policy 4.7A.5

requires "reasonable and equitable options" for development outside the urban service districts. If future County decisions deny reasonable and equitable options, then there may be a basis for a challenge, but speculation about the future is not sufficient in the instant case. Therefore, there is not a conclusion of law to be reached that would be as or more reasonable than the one reached by the ALJ.

Petitioner's exceptions to Paragraphs 59 and 60 are DENIED.

F – Exception 6 (Paragraphs 66-67)

In Exception 6, Petitioner argues that elimination of the EOTCSC designation is inconsistent with FLUE Goal 4.10, which requires that the County "provide for adequate and appropriate sites for commercial land uses to serve the need of the County's anticipated residents and visitors." The ALJ concluded in Paragraph 67 that "members of the public traveling through the County to other destinations" are not "anticipated visitors to [] the County." The County contends this conclusion is "supported by the testimony of the County's planning expert, who testified that visitors and residents are not synonymous with the travelling public.[3]"

FLUE Goal 4.10 does not define "visitors" and the record does not provide competent and substantial evidence sufficient for adequate clarification. The planning expert's testimony was conclusory at best: "this is a different audience … that this is addressing … [those taking] long length trips and the opportunity to take a break from driving to use a restroom facility, perhaps to get something to eat." This purported definition raises more questions than it answers. Would a Palm Beach County resident who enjoys an eatery at an EOTCSC and travels to Martin County

[3] We recognize that a County's interpretation of its comprehensive plan should be given deference. *See St. Johns County v. Owings*, 554 So. 2d 535, 543 (Fla. 5th DCA 1989). Deference, however, is not the same as absolute discretion to proffer an unsupported interpretation.

once a week solely to eat at that establishment be a visitor? Would a Dade County resident, traveling to Volusia County, who specifically pre-plans to stop at an EOTCSC because he enjoys an eatery there be a visitor? Would someone who stops at an EOTCSC for a rest stop but then decides to take a side trip further into the County instantly be transformed into a visitor? Is the length of time spent at an EOTCSC determinative of visitor status? If so, would staying overnight at one of the two hotels at Kanner Highway, ¶ 23, be sufficient to render someone a visitor to Martin County? If one night is not sufficient, would a two-night stay turn someone into a visitor? Would it matter if the person ventured beyond the hotel? Would it matter if the visitor had Martin County residents come visit him at the hotel?

Accordingly, the Department finds that, to the extent Paragraphs 67-68 are findings of fact, they are not supported by competent and substantial evidence in the record, and the Department's substituted language is supported by competent and substantial evidence in the record. To the extent Paragraphs 67-68 are conclusions of law, the Department's substituted language, as noted below, is as or more reasonable than the ALJ's.

Paragraphs 67-68 are deleted and replaced by the following:

As explained in Paragraphs 39-41, record evidence does not support a finding that existing services are inadequate to serve the traveling public. Thus, even if members of the traveling public are defined as "visitors" under FLUE Goal 4.10, elimination of the EOTCSC designation is not inconsistent based on the evidence in the record.

Petitioner's exception to Paragraph 67 is GRANTED as explained above.

Exceptions Regarding the 2000 gpd Limit

G – Exception 7 (Paragraphs 120, 121, and 124) & Exception 8 (Paragraph 147)

Petitioner argues that it met its burden to show "there was no relevant and appropriate data and analysis to justify a 2,000 gpd standard." The ALJ's determination concerning the evidence presented at the hearing, such as weighing expert testimony and determining the weight and amount of supportive evidence, is solely within the province of the ALJ as the finder of fact. The Department is unable to reweigh such competent substantial evidence or make its own judgement as to the credibility of witnesses. *See Heifetz*, 475 So. 2d at 1281-1283.

Petitioner argues that the ALJ misinterpreted Petitioner's burden by requiring it to prove that the 2000 gpd flow limit would not protect ground and surface water from nitrogen loading. Petitioner states its burden "was merely to show beyond fair debate that the imposition of a 2,000 gpd flow rate was not supported by relevant and appropriate data and analysis." The Recommended Order, viewed as a whole, properly concluded that the County's adoption of a 2,000 gpd flow rate has to be specifically supported by data and analysis. Paragraph 97 states that, "the 2015 change back to the 2,000 gpd standard must likewise be based on data and analysis." Paragraph 150, which was not objected to by Petitioner, succinctly states: "Petitioner did not prove beyond fair debate that the 2,000 gpd limit was not based on data and analysis."

Petitioner's exceptions to Paragraphs 120, 121, 124, and 147 are DENIED.

Remainder of the Recommended Order

As for the remainder of the Recommended Order, the Department cannot conclude that any of the ALJ's findings of fact are not based on competent substantial evidence in the record or that the proceedings on which the findings were based did not comply with essential requirements of law, which are the only statutory grounds on which an agency may reject findings of fact. §120.57(1)(l), Fla. Stat. In the Recommended Order, the ALJ describes the competent substantial evidence presented at the final hearing that supports the Plan Amendment.

The Department has reviewed the ALJ's remaining conclusions of law in light of the Department's substantive jurisdiction over land-use planning matters under Chapter 163, Part II, Fla. Stat. The Department has not identified any remaining conclusion of law within its substantive jurisdiction for which a substituted conclusion of law would be as reasonable as, or more reasonable than, the ALJ's conclusions of law. §120.57(1)(l), Fla. Stat.

ORDER

Based on the foregoing, the Department adopts the ALJ's Recommended Order (a copy of which is attached as Exhibit A and incorporated herein), as modified herein, as the Department's Final Order and finds that the Plan Amendment adopted by Martin County Ordinance No. 965 on December 16, 2014, is in compliance as defined in section 163.3184(1)(b), Florida Statutes.

Julie A. Dennis, Interim 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 30th day of December, 2015.

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

By Certified U.S. Mail

The Honorable Suzanne Van Wyk Administrative Law Judge Division of Administrative Hearings The DeSoto Building 1230 Apalachee Parkway Tallahassee, FL 32399-6847	Gregory M. Munson, Esq. Gunster, Yoakley and Stewart, P.A. 215 S. Monroe St., Suite 601 Tallahassee, FL 32301
Brian M. Seymour, Esq. Gunster, Yoakley and Stewart, P.A. 777 South Flagler Dr., Suite 500 East West Palm Beach, FL 33401	Mary K. Vettel, Clerk Martin County Board of County Commissioners 2401 Southeast Monterey Rd. Stuart, FL 34996
Lindo Loomis Shelley, Esq. Buchanon Ingersoll & Rooney, PC 101 North Monroe St. Suite 1090 Tallahassee, FL 32301	