STATE OF FLORIDA
DEPARTMENT OF ECONOMIC OPPORTUNITY

KINGSWOOD MANOR ASSOCATION, INC., et al.

Petitioners,

v. DOAH CASE NO. 15-0308GM

TOWN OF EATONVILLE,

Respondent,

and

LAKE WESTON, 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 Future Land Use Element (FLUE Policy 1.6.10) and Future Land Use Map of the Town of Eatonville Comprehensive Plan, adopted by Ordinance No. 2014-2 on December 16, 2014 (the "Plan Amendments"), are in

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compliance as defined in section 163.3184(1)(b), Fla. Stat.[1] The Plan Amendments relate generally to lands surrounding Lake Weston by designating the affected area as the "Lake Weston Subarea." The Plan Amendments were intended to correct an inconsistency between the Town of Eatonville's ("the Town") Comprehensive Plan and Future Land Use Map.

Role of the Department

The Plan Amendments were adopted under the expedited state review process in section 163.3184(3), Fla. Stat., and were challenged by Kingswood Manor Association, Inc., Sharon Leichering, Lori Erlacher, Dale Dunn, Doreen Morath, George Perantoni, Valerie Perantoni and Friends of Lake Weston and Adjacent Canals, Inc. ("Petitioners") in a petition timely filed with DOAH. Petitioners John Walker, Robert Perantoni, Isabel D'Ambrosi, Anthony D'Ambrosi, Linda Lukanic, and Carla McMullen voluntarily dismissed their claim against the Town.

The Department was removed as a party to the proceeding. Because the ALJ's Recommended Order recommends that the Plan Amendments be found in compliance, the ALJ submitted the Recommended Order to the Department pursuant to section 163.3184(5)(e), Fla. Stat. The 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

The Administrative Procedure Act contemplates that an agency will adopt the ALJ's Recommended Order as the agency's Final Order in most proceedings. To this end, the agency has been granted only limited authority to reject or modify findings of fact in a recommended order.

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

The agency may not reject or modify the findings of fact in a recommended order unless the agency first determines from a review of the entire record, and states with particularity in its 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. See Heifetz at 1281.

The Administrative Procedure Act also specifies the manner in which the agency is to address conclusions of law in a recommended order. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of an administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of an administrative rule and must make a finding that its substituted conclusion of law or interpretation

of an administrative rule is as reasonable or more reasonable than that which was rejected or modified. §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. Dep't of State, 501 So. 2d 129 (Fla. 5th DCA 1987), and 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 two-volume transcript of the proceedings. Furthermore, neither party filed exceptions to the ALJ's 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 each of the Plan Amendments. Accordingly, the Department accepts the findings of fact in the Recommended Order.

The Department has reviewed the ALJ's 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 a 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. Therefore, the Department accepts the ALJ's conclusions of law.

ORDER

Based on the foregoing, the Department adopts the Recommended Order, a copy of which is attached as Exhibit A, as the Department's final order and finds that the Plan Amendments adopted by the Town of Eatonville Ordinance No. 2014-2 on December 16, 2014, are in compliance as defined in section 163.3184(1)(b), Fla. Stat.

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

NOTICE OF RIGHT TO APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION UNDER CHAPTER 120, FLORIDA STATUTES. A PARTY WHO IS ADVERSELY AFFECTED BY FINAL AGENCY ACTION IS ENTITLED TO JUDICIAL REVIEW IN ACCORDANCE WITH SECTION 120.68, FLORIDA STATUTES, AND FLORIDA RULES OF APPELLATE PROCEDURE 9.030(B)(1)(c) AND 9.110.

TO INITIATE AN APPEAL OF THIS FINAL AGENCY ACTION, A NOTICE OF APPEAL MUST BE FILED WITH THE DEPARTMENT'S AGENCY CLERK, 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 13th day of August, 2015.

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By U.S. Mail:

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The Honorable Bram D. E. Canter
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KINGSWOOD MANOR ASSOCIATION, INC., SHARON LEICHERING; LORI ERLACHER; DALE DUNN; DOREEN MORATH; GEORGE PERANTONI; VALERIE PERANTONI; AND FRIENDS OF LAKE WESTON AND ADJACENT CANALS, INC.,

Petitioners,

vs.

TOWN OF EATONVILLE, Case No. 15-0308GM

Respondent,

and

LAKE WESTON, LLC,

Intervenor.
_____/

RECOMMENDED ORDER

The final hearing in this case was held on March 26, 2015, in Orlando, Florida, before Bram D.E. Canter, Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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For Respondent Town of Eatonville:

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For Intervenor Lake Weston, LLC:

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STATEMENT OF THE ISSUE

The issue to be determined in this case is whether the amendment of the Town of Eatonville Comprehensive Plan adopted through Ordinance 2014-2 ("Plan Amendment") is "in compliance" as that term is defined in section 163.3184(1)(b), Florida Statutes (2014).

PRELIMINARY STATEMENT

On December 16, 2014, the Town of Eatonville adopted Ordinance No. 2014-2, which amended the Eatonville Comprehensive Plan to establish a new Policy 1.6.10 within the Future Land Use Element, entitled "Lake Weston Subarea Policy," and amended the

Future Land Use Map to designate certain lands surrounding Lake Weston as subject to the subarea policy.

On January 15, 2015, Sharon Leichering, Lori Erlacher, Carla McMullen, Kingswood Manor Association, Inc., George Perantoni, Valerie Perantoni, Robert Perantoni, John Walker, Dale Dunn, Doreen Maroth, Linda Lukanic, Anthony D'Ambrosi, Isabel D'Ambrosi, and Friends of Lake Weston and Adjacent Canals, Inc., filed a petition challenging the Plan Amendment. Before the final hearing, Petitioners Carla McMullen, Robert Perantoni, John Walker, Linda Lukanic, Anthony D'Ambrosi, and Isabel D'Ambrosi made written requests to be dismissed and orders were entered dismissing them from the proceeding. On February 11, 2015, Lake Weston, LLC, moved to intervene in these proceedings and intervention was granted.

Lake Weston, LLC, filed a motion to dismiss or to strike the petition for hearing, alleging lack of standing and failure to state a cause of action. The motion to dismiss was denied, but all claims directed to related land development regulations were stricken as being beyond the scope of the proceeding.

At the final hearing, Petitioners Sharon Leichering, Lori Erlacher, George Perantoni, and Valerie Perantoni each presented testimony. Petitioners also presented the testimony of the town's planning consultant Valerie Hubbard and Ken Clayton, an owner of the property. The Town of Eatonville and Lake

Weston, LLC, presented testimony of Town Clerk Debra Franklin; Linda Dodge, representative of Lake Weston, LLC; and Valerie Hubbard.

Petitioners' Exhibits 1 and 7 were admitted into evidence. Respondent's Exhibits R-1 and R-3 through R-14 were admitted into evidence. Intervenor's Exhibits I-1, I-2, and I-4 through I-7 were admitted into evidence.

The two-volume transcript of the final hearing was filed with DOAH. Respondent and Intervenor filed a joint proposed recommended order. Petitioners did not file a proposed order.

FINDINGS OF FACT

The Parties

1. Respondent Town of Eatonville is a municipality in Orange County with a comprehensive plan which it amends from time to time pursuant to chapter 163, Florida Statutes.

2. Intervenor Lake Weston, LLC, is a Florida limited liability company whose sole member is Clayton Investments, Ltd. It owns approximately 49 acres of land along Lake Weston on West Kennedy Boulevard in Eatonville ("the Property"), which is the subject of the Plan Amendment.

3. Petitioners Sharon Leichering, Lori Erlacher, George Perantoni, Valerie Perantoni, and Doreen Maroth own or reside in unincorporated Orange County near Lake Weston. The record does

not establish whether Dale Dunn lives or owns property in the area.

4. Petitioner Kingswood Manor Association, Inc., is a non-profit corporation whose members are residents of Kingswood Manor, a residential subdivision near the Property.

5. Petitioner Friends of Lake Weston and Adjacent Canals, Inc., is a non-profit corporation whose objective is to protect these waters.

Standing

6. Petitioners Sharon Leichering and George Perantoni submitted comments to the Eatonville Town Council on their own behalves and on behalf of the Kingswood Manor Association and Friends of Lake Weston, respectively, regarding the Plan Amendment.

7. Petitioner Valerie Perantoni is the wife of Petitioner George Perantoni. She did not submit comments regarding the Plan Amendment to the Town Council.

8. Petitioner Dale Dunn did not appear at the final hearing. There is no evidence Mr. Dunn submitted oral or written comments to the Town Council regarding the Plan Amendment.

9. Petitioner Doreen Maroth did not appear at the final hearing for medical reasons. Ms. Maroth submitted oral comments to the Town Council regarding the Plan Amendment.

10. Respondent and Intervenor contend there is no evidence that Lori Erlacher appeared and gave comments to the Town Council, but the Town Clerk testified that Petitioner Leichering was granted an extension of time "to speak for others" and Petitioner Leichering testified that the "others" were Lori Erlacher and Carla McMullen.

The Plan Amendment

11. The Property is zoned "Industrial" in the Town's Land Development Code, but is designated "Commercial" on the Future Land Use Map in the Comprehensive Plan. The Town adopted the Plan Amendment to make the zoning and future land use designations consistent with each other.

12. The Plan Amendment attempts to resolve the inconsistency by designating the Property as the "Lake Weston Subarea" within the Commercial land use category. The designation would appear on the Future Land Use Map and a new policy is made applicable to the Subarea, allowing both industrial and commercial uses:

> 1.6.10. Lake Weston Subarea Policy.
>
> Notwithstanding the provisions of Policy 1.6.9, within the Lake Weston Subarea Policy boundaries as shown on the Future Land Use Map, light industrial uses may be allowed in addition to commercial uses. The specific permitted uses and development standards shall be established by the Lake Weston Overlay District, which shall be adopted as a zoning overlay district in the Land

> Development Code; however, the wetlands adjacent to Lake Weston within the Lake Weston Subarea Policy boundaries are hereby designated as a Class I Conservation Area pursuant to Section 13-5.3 of the Town of Eatonville Land Development Code and shall be subject to the applicable provisions of Section 13-5 of the Land Development Code. The intent of this subarea policy and related Lake Weston Overlay District is to allow a range of commercial and industrial uses on the subject property with appropriate development standards, protect environmental resources, mitigate negative impacts and promote compatibility with surrounding properties. Subject to requirements of this subarea policy and of the Lake Weston Overlay district, the current industrial zoning of the property is hereby deemed consistent with the Commercial Future Land Use designation of the area within the boundaries of this subarea policy.

Data and Analysis

13. Petitioners contend the Plan Amendment is not supported by relevant and appropriate data and analysis. Relatively little data and analysis were needed to address the inconsistency between the Land Development Code and the Comprehensive Plan or to address the protection of Lake Weston and adjacent land uses.

14. The need to protect environmental resources, to mitigate negative impacts of development, and to promote compatibility with surrounding land uses was based on general principles of land planning, the report of a planning consultant, as well as public comment from Petitioners and others.

15. A wetland map, survey, and delineation were submitted to the Town. The effect of the Class I Conservation Area designation is described in the Land Development Code. The availability of public infrastructure and services was not questioned by Petitioners.

16. The preponderance of the evidence shows the Plan Amendment is based on relevant and appropriate data and analysis.

Meaningful Standards

17. Petitioners contend the Plan Amendment does not establish meaningful and predictable standards for the future use of the Property.

18. It is common for comprehensive plans to assign a general land use category to a parcel, such as Residential, Commercial, or Industrial, and then to list the types of uses allowed in that category. The Plan amendment does not alter the Comprehensive Plan's current listing of Commercial and Industrial uses.

19. The Plan Amendment designates the wetlands adjacent to Lake Weston as a Class I Conservation Area subject to the provisions of the Eatonville Wetlands Ordinance in the Land Development Code. This designation means the littoral zone of the lake and associated wetlands would be placed under a conservation easement. This is meaningful guidance related to the future use of the Property.

20. The Plan Amendment directs the Land Development Code to be amended to create a Lake Weston Overlay District with the expressed intent to "protect environmental resources, mitigate negative impacts and promote compatibility with surrounding properties." This direction in the Plan Amendment is guidance for the content of more detailed land development and use regulations.

21. Contemporaneous with the adoption of the Plan Amendment, the Eatonville Land Development Code was amended to establish the Lake Weston Overlay District, which has the same boundaries as the Property. The Land Development Code describes in greater detail the allowed uses and development standards applicable to the Property.

22. The preponderance of the evidence shows the Plan Amendment establishes meaningful and predictable standards.

Internal Consistency

23. Petitioners contend the Plan Amendment is inconsistent with the relatively recent Wekiva Amendments to the Comprehensive Plan, but Petitioners failed to show how the Plan Amendment is inconsistent with any provision of the Wekiva Amendments.

24. Petitioners contend the Plan Amendment is inconsistent with objectives and policies of the Comprehensive Plan that require development to be compatible with adjacent residential uses. Compatibility is largely a matter of the distribution of

land uses within a parcel and measures used to create natural and artificial buffers. These are matters usually addressed when a landowner applies for site development approval.

25. Protection is provided in the Plan Amendment for Lake Weston and its wetlands. Petitioners did not show there are other factors that make it impossible to make light industrial uses on the Property compatible with adjacent residential uses.

26. The preponderance of the evidence shows the Plan Amendment is consistent with other provisions of the Comprehensive Plan.

Urban Sprawl

27. Petitioners contend the Plan Amendment promotes urban sprawl based on the potential for more impervious surfaces and less open space. However, this potential does not automatically mean the Plan Amendment promotes urban sprawl.

28. Section 163.3177(6)(a)9. sets forth thirteen factors to be considered in determining whether a plan amendment discourages the proliferation of urban sprawl, such as failing to maximize the use of existing public facilities. The Plan Amendment does not "trigger" any of the listed factors.

29. The preponderance of the evidence shows the Plan does not promote the proliferation of urban sprawl.

CONCLUSIONS OF LAW

Standing

30. To have standing to challenge a comprehensive plan amendment, a person must be an "affected person," which is defined in section 163.3184(1)(a) as a person owning property, residing, or owning or operating a business within the boundaries of the local government, and who made timely comments to the local government regarding the amendment.

31. Sharon Leichering, George Perantoni, Lori Erlacher, Doreen Maroth, Kingswood Manor Association, Inc., and Friends of Lake Weston and Adjacent Canals, Inc., are affected persons with standing to initiate this proceeding.

32. Because there is no evidence that Dale Dunn submitted comments to the Town Council regarding the Plan Amendment, his standing was not established.

33. Valerie Perantoni did not make oral comments on the Plan Amendment to the Town Council. Because of the privity and identity of interests of a husband and wife recognized by the law, and the broad standing intended by chapter 163, it is arguable that the comments offered by her husband, George Perantoni, should confer standing on Ms. Perantoni as if she had addressed the Town Council to repeat what her husband said. However, it is unnecessary to reach a conclusion on whether

Valerie Perantoni qualifies as an affected person because there are other Petitioners with standing to present the same claims.

Burden and Standard of Proof

34. As the challengers of the Plan Amendment, Petitioners have the ultimate burden of persuasion.

35. A person challenging a plan amendment must show that it is not "in compliance" as that term is defined in section 163.3184(1)(b):

> "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.

36. The Town of Eatonville's determination that the Plan Amendment is "in compliance" is presumed correct and must be sustained if the Town's determination of compliance is fairly debatable. See § 163.3184(5)(c), Fla. Stat.

37. The term "fairly debatable" is not defined in chapter 163, but the Florida Supreme Court held in Martin County v. Yusem, 690 So. 2d 1288 (Fla. 1997) that "[t]he fairly debatable standard is highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety." Id. at 1295.

38. The standard of proof to establish a finding of fact is preponderance of the evidence. See § 120.57(1)(j), Fla. Stat.

Data and Analysis

39. Section 163.3177(1)(f) requires that all plan amendments be based on relevant and appropriate data and an analysis by the local government.

40. Petitioners failed to prove that the Plan Amendment is not based on relevant and appropriate data and analysis.

Meaningful Standards

41. Section 163.3177(1) requires a comprehensive plan to include meaningful and predictable standards for the use and development of land and provide meaningful guidelines for the content of more detailed land development and use regulations.

42. Petitioners failed to prove the Plan Amendment does not establish meaningful and predictable standards.

Internal Consistency

43. The elements of a comprehensive plan must be consistent. § 163.3177(2), Fla. Stat.

44. Petitioners failed to prove the Plan Amendment would be inconsistent with other provisions of the Town of Eatonville Comprehensive Plan.

Urban Sprawl

45. Plan amendments must discourage the proliferation of urban sprawl. § 163.3177(6)(a)9., Fla. Stat.

46. Petitioners did not prove the Plan Amendment fails to discourage the proliferation of urban sprawl.

Summary

47. The Town of Eatonville's determination that the Plan Amendment is in compliance is fairly debatable.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Economic Opportunity enter a final order determining that the Plan Amendment adopted by Eatonville Ordinance No. 2014-02 is in compliance.

DONE AND ENTERED this 3rd day of June, 2015, in Tallahassee, Leon County, Florida.

BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of June, 2015.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.