STATE OF FLORIDA
DEPARTMENT OF ECONOMIC OPPORTUNITY

GREG DANIELS AND MICHAEL BELLOWS,

Petitioners,

and

DEPARTMENT OF THE NAVY

Intervenor,

v.

FINAL ORDER NO. 16-214
DOAH CASE NOS. 16-1345GM
16-1349GM

MONROE COUNTY,

Respondent,

and

ROCKLAND OPERATIONS, LLC, AND ROCKLAND COMMERCIAL CENTER, INC.,

Intervenors.
_____/

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 Monroe County Comprehensive Plan Amendment 15-1ACSC, adopted by Ordinances 003-2016 and 004-2016 on February 10, 2016

("Plan Amendment"), is "in compliance" as defined in section 163.3184(1)(b), Florida Statutes.[1] The challenged Plan Amendment amends the Monroe County Comprehensive Plan ("Comprehensive Plan") by amending the Future Land Use Map ("FLUM") and creating Future Land Use Element ("FLUE") Policy 107.1.6. Specifically, the Plan Amendment changes the FLUM designation on five parcels – four on Rockland Key[2], from Industrial to Commercial, and one on Big Coppitt Key, from Mixed Use/Commercial Fishing and Industrial to Mixed Use Commercial. The Plan Amendment also creates a sub-area policy imposing restrictions and limitations on development of the Big Coppitt Key parcel.

Role of the Department

The Plan Amendment was adopted under the state coordinated review comprehensive plan amendment process pursuant to section 163.3184(4), Florida Statutes, and was challenged by Greg Daniels and Michael Bellows ("Petitioners") in a petition timely filed with DOAH, in which the Department of the Navy ("Navy") intervened in the proceeding. 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.

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[1] References to the Florida Statutes are to the 2015 version of the statutes unless otherwise noted.
[2] Paragraph 79 on page 27 of the Recommended Order states, "The Plan Amendment changes the FLUM designation of the Rockland parcels from Industrial, which allows residential development at 47.3du/acre..." However, the Recommended Order should state that the Plan Amendment allows residential development in the amount of 47.3du. *See* Rockland Exhibit 34-26.

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. Reg.*, 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. *Id.*

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. *See Kinney v. Dep't of State*, 501 So. 2d 129 (Fla. 5th DCA 1987); *see also 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. Petitioners timely filed Exceptions to the Recommended Order on August 20, 2016. Rockland Operations, LLC, and Rockland Commercial Center, Inc. ("Defendant Intervenors"), timely filed Exceptions to the Recommended Order on August 24, 2016, and filed a Response to Petitioners' Exceptions to the Recommended Order on August 30, 2016.

Ruling on Petitioners' Exceptions to the Recommended Order

A – Exception 1: (Paragraph 114)

In Exception 1, Petitioners object[3] to the conclusion of law in Paragraphs 114[4] and contend that Petitioners proved beyond fair debate that the Plan Amendment is not consistent with the intent and purpose of FLUE Policy 101.14.1. Petitioners propose that new language should be included to conclude that the primary purpose and intent of FLUE Policy 101.14.1 is to limit

[3] The Department will refer to Petitioners taking exception to portions of the Recommended Order as "Petitioner Objects."

[4] Petitioners state in the Exceptions to the Recommended Order that they take exception to Paragraph 111. However, Petitioners quote Paragraph 114. Given Petitioners' argument and reference, the Department finds that Exception 1 encompasses Paragraph 114 and not Paragraph 111.

development in the Costal High Hazard Area to ensure that residential developments will not be located in coastal areas that are exposed to heightened hazards.

Pursuant to section 120.57(1)(k), Florida Statutes, "an agency need not rule on an exception...that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." Petitioners fail to cite a legal basis for the exception or cite to specific facts or testimony that suggest the ALJ erred in the conclusion of law. Therefore, Petitioners' proposed conclusion of law is not as or more reasonable than the conclusion of law reached by the ALJ in Paragraph 114 of the Recommended Order.

Petitioners' exception to Paragraph 114 is DENIED.

B – Exception 2: (Paragraph 115)

In Exception 2, Petitioners contend that Petitioners did prove beyond fair debate that the Plan Amendment renders the Comprehensive Plan internally inconsistent, and the word "not" should be deleted from the conclusion of law in Paragraph 115.[5] By deleting the word "not" in Paragraph 115, Petitioners are attempting to change the ALJ's conclusion of law without providing any justification for doing so. Pursuant to section 120.57(1)(k), Florida Statutes, "an agency need not rule on an exception...that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." Petitioners fail to cite to specific facts or testimony that suggests the ALJ erred in the findings and conclusions. Therefore, Petitioner's proposed conclusion of law is not as or more reasonable than the conclusion of law reached by the ALJ in Paragraph 115 of the Recommended Order.

[5] Petitioners state in the Exceptions to the Recommended Order that they take exception to Paragraph 112. However, Petitioners quote Paragraph 115. Given Petitioners' argument and reference, the Department finds that Exception 2 encompasses Paragraph 115 not Paragraph 112.

Petitioners' Exception to Paragraph 115 is DENIED.

C – Exception 3: (Paragraph 116)

In Exception 3, Petitioners Object to the conclusion of law in Paragraph 116 that the Plan Amendment is not consistent with the Principles for Guiding Development for the Keys Area of Critical State Concern ("Principles"), pursuant to section 380.0552(7), Florida Statutes. Petitioners propose additional language stating that the increase in density would expose residents of affordable housing to additional noise from the jet aircraft on a continuous basis. Petitioners also contend that the evidence presented did support a finding that the development would adversely impact the value, efficiency, cost-effectiveness, or amortized life of the Naval base.

The ALJ determined that the evidence did not clearly establish that community noise complaints would negatively impact the "value, efficiency, cost-effectiveness, and amortized life," of the Naval base. 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. *See Heifetz v. Dep't of Bus. Reg.*, 475 So. 2d 1277, 1281-1283 (Fla. 1st DCA 1985). The ALJ considered Petitioners' experts' testimony, but did not assign the weight that Petitioners believed should be given to the testimony.

The ALJ's finding of fact and credibility regarding Petitioners' expert's testimony are based on competent substantial evidence in the record. Furthermore, based on the findings of fact and the conclusion of law reached in Paragraph 116 of the Recommended Order, there is not a conclusion the Department could reach that would be as or more reasonable than the ALJ's conclusion.

Petitioners' Exception to Paragraph 116 is DENIED.

D – Exception 4: (Paragraph 117)

In Exception 4, Petitioners Object to the conclusion of law in Paragraph 117 and contend that Petitioners proved the Plan Amendment was not consistent with section 380.0552(7)(h)4, Florida Statutes, and conclude that the Plan Amendment is inconsistent with the Principles. Petitioners delete language in the Recommended Order so that the ALJ's conclusion of law would be consistent with Petitioners' conclusion of law. However, Petitioners fail to provide specific facts or testimony that suggests the ALJ erred in her findings of fact and conclusions of law. The Department is not required to rule on an exception that fails to identify the legal basis for the exception. §120.57(1)(k), Fla. Stat. Therefore, Petitioners' proposed conclusion of law is not as or more reasonable than the conclusion of law reached by the ALJ in Paragraph 117 of the Recommended Order.

Petitioners' Exception to Paragraph 117 is DENIED.

E – Exception 5: (Paragraph 118)

In Exception 5, Petitioners Object to the conclusion of law in Paragraph 118 and contend that the evidence shows that the Plan Amendment is not consistent with the Principles as a whole. Petitioners propose adding the word "not" to state that the evidence supports the conclusion that the Plan Amendment is not consistent with the Principles. Petitioners cite to *Toppino v. Dep't of Cmty Affairs*, DOAH Case No. 02-0418GM (Recommended Order April 29, 2004), to support its conclusion that the Plan Amendment is not consistent with the Principles.

The Plan Amendment exclusively addresses the need for affordable housing and limits development of the Big Coppitt Key parcel to deed-restricted affordable housing, but the prior *Toppino* case did not address the issue of affordable housing. The ALJ determined that the evidence did not establish that the Plan Amendment is inconsistent with the Principles as a whole.

Petitioners do not provide further justification as to why the Plan Amendment is inconsistent with the Principles as a whole. Therefore, the substituted conclusion of law would not be as or more reasonable than the ALJ's conclusion of law in Paragraph 118 of the Recommended Order.

Petitioners' Exception to Paragraph 118 is DENIED.

F – Exception 6: (Paragraph 119)

In Exception 6, Petitioners Object to the conclusion of law in Paragraph 119 and propose to include new language that concludes Petitioners did prove beyond fair debate that the Plan Amendment is not in compliance as the term is defined in section 163.3184(1)(b), Florida Statutes.

Exception 6 is a request to change the ultimate conclusion of law and recommendation based on the changes to the Recommended Order requested in the previous Exceptions, which have all been denied. Based on the conclusion of law reached in Paragraph 119 of the Recommended Order, there is not a conclusion of law the Department could reach that would be as or more reasonable than the ALJ's conclusion.

Petitioners' Exception to Paragraph 119 is DENIED.

Ruling on Defendant Intervenors' Exception to the Recommended Order

Exception 1: (Paragraph 42)

Defendant Intervenors take exception to the last sentence of Paragraph 42 of page 15. The ALJ found in Paragraph 42 that "the revised application included the Big Coppitt Key parcel for the first time."[6] Defendant Intervenors contend that this finding of fact is incorrect because the Big Coppitt Key parcel was included in the original application that was submitted on May 18, 2012, citing to Rockland Exhibit 13-6.

[6] Paragraph 40 also states that "On May 18, 2012, Rockland applied for a FLUM amendment which included the Rockland Parcels, but *did not include the Big Coppitt Parcel.*" Defendant Intervenors did not file exceptions as it relates to this finding.

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 not competent, substantial evidence from which the findings could reasonably be inferred." *Prisi v. Dep't of Health*, 823 So. 2d 823, 825 (Fla. 1st DCA 2002). The ALJ determined that the Big Coppitt Key parcel was not included in the original application, and the record supports that the Big Coppitt Key parcel was added in the Revised Amendment.[7] In reviewing the record, Paragraph 42 is supported by competent substantial evidence, and the Department cannot reject this finding of fact.

Defendant Intervenors' Exception to Paragraph 42 DENIED.

Remainder of the Recommended Order

As for the remainder of the Recommended Order, the Department concludes that the ALJ's findings of fact are based on competent substantial evidence in the record and that the proceedings on which the findings are based 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. Accordingly, the Department accepts all of 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, Florida Statutes.

[7] The ALJ does not make clear the specific evidence relied upon for the findings in paragraphs 40 and 42. The evidence indicates that the parcel number(s) associated with the Big Coppitt parcel were included in the May 2012 application. *See* Rockland Exhibit 13-6, 13-8, 34-1, 35-6. 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. *Id.* The Department chooses not to overturn the ALJ's determination, in part, because these findings of fact do not change the ultimate outcome.

The Department has not identified any 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 all of the ALJ's conclusions of law.

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), as the Department's Final Order and finds that the Plan Amendment adopted by Monroe County Ordinance Nos. 003-2016 and 004-2016 on February 10, 2016, is in compliance as defined in section 163.3184(1)(b), Florida Statutes.

Taylor Teepell, 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 4th day of November, 2016.

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

By Certified U.S. Mail

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