**STATE OF FLORIDA**
**DEPARTMENT OF ECONOMIC OPPORTUNITY**

JACQUELINE ROGERS,

Petitioner,

v.

DOAH CASE NO. 17-5530GM

ESCAMBIA COUNTY,

Respondent.
_____/



## 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 an Escambia County Comprehensive Plan amendment, adopted by Ordinance No. 2017-53 on September 7, 2017 ("Plan Amendment"), is "in compliance" as defined in section 163.3184(1)(b), Florida Statutes.[1] The challenged Plan Amendment amends the Escambia County Comprehensive Plan ("Plan") by permitting an 8.7-acre parcel to withdraw from the County Mid-West Optional Sector Plan and assigning the parcel a new Mixed-Use Suburban (MU-S) future land use (FLU) designation.

[1] References to the Florida Statutes are to the 2017 version of the statutes.

## Role of the Department

The Plan Amendment was adopted under the state coordinated review comprehensive plan amendment process pursuant to section 163.3184, Florida Statutes, and was challenged by Jacqueline Rogers ("Petitioner") in a petition timely filed with DOAH. The Department is not a party to the proceeding. The ALJ's Recommended Order recommends that the Plan Amendment be found in compliance, and the ALJ therefore 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. § 163.3184(5), Fla. Stat.

## 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. *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, the 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 reasonable 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 Cnty.*, 799 So. 2d 322, 324-25 (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); *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 one-volume transcript of the proceedings. Petitioner filed exceptions to the Recommended Order on May 25, 2018. Petitioner's exceptions have been considered and are addressed herein.

## Ruling on Petitioners' Exceptions to the Recommended Order

### A – Exception 1: Finding of Fact ¶ 9

In Exception 1, Petitioner takes exception to Finding of Fact ¶ 9 and contends that Escambia County Ordinance No. 2017-14, which establishes seven criteria for evaluating a Sector Plan opt-out request, was administratively challenged, contrary to the ALJ's finding of fact. The Department finds the record before the ALJ supported Finding of Fact ¶ 9.[2]

Further, Petitioner takes exception to the ALJ's determination in ¶ 9, 18, and 28 that the seven criteria were drafted by the Department. There is competent substantial evidence to support the ALJ's finding of fact. (Transcript p. 300-02) This finding itself is a finding of fact and, as such, where there is competent substantial evidence in the record to support the ALJ's findings of fact, 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's Exception 1 to Findings of Fact ¶ 9, 18, and 28 is DENIED.

### B – Exception 2: Finding of Fact ¶ 12

In Exception 2, Petitioner takes exception to Finding of Fact ¶ 12 and argues that the ALJ erred by omitting information regarding the FLU category of the commercial property located on the east side of Highway 29. The Department has considered Petitioner's exception, reviewed the

[2] The Department notes for the record that subsequent to the February 19, 2018, Final Hearing, Petitioner timely challenged Escambia County Ordinance No. 2017-14 by filing a petition with the Department. (DEO Case No.: 18-034) The Department issued its Determination of Consistency of Land Development Regulation on May 10, 2018, in which the Department determined "Escambia County Ordinance No. 2017-14 is consistent with the Escambia County Comprehensive Plan." As of the date this Final Order was rendered, no petition has been filed contesting the Department's Determination of Consistency of Land Development Regulation concerning Escambia County Ordinance No. 2017-14, and the time under section 163.3213, F.S., for filing a petition challenging the Department's Determination has passed.

record, and determined that Finding of Fact ¶ 12 is supported by competent substantial evidence. (Transcript p. 24-25, 50-51)

Where there is competent substantial evidence in the record to support the ALJ's findings of fact, 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's Exception 2 to Finding of Fact ¶ 12 is DENIED.

**C – Exception 3: Finding of Fact ¶ 15**

In Exception 3, Petitioner takes exception to Finding of Fact ¶ 15 to the extent the ALJ determined all parcels outside the Sector Plan which were zoned Gateway Business District (GBD) were consolidated with similar zoning categories into the new district of Heavy Commercial / Light Industrial (HC/LI). Competent substantial evidence in the record shows that, with a few exceptions, a majority of parcels previously zoned GBD were consolidated into the new district of HC/LI. (Transcript p. 193) Accordingly, Exception 3 is granted to the extent stated above.

The remainder of Exception 3 asks the Department to modify Finding of Fact ¶ 15 to conclude that HC/LI zoning is inconsistent with and does not implement the Mixed Use Suburban FLU and should not have been approved for this parcel due to its incompatibility with the surrounding area. The re-zoning of the parcel from GBD to HC/LI in 2015 is not subject to challenge in the present case and, accordingly, the Department denies the remainder of Exception 3.

Petitioner's exception to Finding of Fact ¶ 15 is GRANTED in part and DENIED in part.

**D – Exception 4: Finding of Fact ¶ 16**

In Exception four, Petitioner takes exception to Finding of Fact ¶ 16, continuing her objection to the 2015 county wide re-zoning, which was not timely challenged. (Transcript p. 36) Again, the 2015 county wide re-zoning, which consolidated a majority of the previously zoned GBD parcels into HC/LI, is not the subject of the present proceeding. The Department does not find competent substantial evidence in the record to support the modification of Finding of Fact ¶ 16 set forth in Petitioner's fourth exception.

Petitioner's exception to Finding of Fact ¶ 16 is DENIED.

**E – Exception 5: Finding of Fact ¶ 21**

In Exception five, Petitioner takes exception to Finding of Fact ¶ 21, wherein the ALJ determined that "the county also evaluated the application in light of the criteria found in section 2-7.4 and determined that, as a whole, it satisfied those requirements." Petitioner takes exception to the ALJ's finding of fact that the County determined the opted out parcel satisfied the criteria found in section 2-7.4 of the County's Land Development Code. The Department has considered the exception, reviewed the record, and determined that competent substantial evidence supports the ALJ's finding of fact that the County evaluated the applications in light of the criteria found in section 2-7.4 of the Land Development Code and determined that, as a whole, it satisfied those requirements. (Transcript p. 307-09)

Petitioner's exception to Finding of Fact ¶ 21 is DENIED.

**F – Exception 6: Finding of Fact ¶ 29**

Petitioner's exception to Finding of Fact ¶ 29 is akin to the Exception 1, above, in that she asserts a timely challenge was filed contesting Ordinance No. 2017-14, which created the criteria

for considering an opt-out request. The Department previously addressed this exception in Section A, above, and, accordingly, further elaboration is not necessary.

Petitioner's exception to Finding of Fact ¶ 29 is DENIED.

**G – Exception 7: Finding of Fact ¶ 34**

Petitioner takes exception to Finding of Fact ¶ 34 concerning the ALJ's determination that "property should revert to the underlying zoning in existence when the Sector Plan was established." Petitioner argues that the HC/LI zoning category did not exist when the Sector Plan was established and the property, prior to the establishment of the Sector Plan, was zoned GBD. The Department determines the ALJ's finding of fact is supported by competent substantial evidence because the majority of parcels previously zoned GBD were re-zoned HC/LI in 2015 and the GBD zoning category no longer exists. (Transcript 146-47, 184-85, 193) The ALJ's determination concerning the evidence presented at the hearing, such as weighing 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 judgment as to the credibility of witnesses. *See Heifetz,* 475 So. 2d at 1281-1283.

Petitioner's exception to Finding of Fact ¶ 34 is DENIED.

**H – Exception 8: Finding of Fact ¶ 39**

Petitioner takes exception to Finding of Fact ¶ 39, wherein the ALJ determined "[t]he County verified that Emerald Coast Utility Authority had available water, sewer, and garbage capacity to serve the parcel." The ALJ's determination is supported by competent substantial evidence. (Transcript p. 87 – 91) The ALJ's determination concerning the evidence presented at the hearing, such as weighing 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 judgment as to the credibility of witnesses. *See Heifetz,* 475 So. 2d at 1281-1283.

Petitioner's exception to Finding of Fact ¶ 39 is DENIED.

**I – Exception 9: Conclusion of Law Paragraph 45**

Petitioner's exception to ¶ 45 contests the ALJ's conclusion of law that an opt-out application is a plan amendment and, therefore, shall proceed pursuant to section 163.3184, Florida Statutes. Petitioner contends the Recommended Order conflates a master plan opt-out and a detailed specific area plan opt-out. Petitioner asserts the County improperly withdrew the property from the sector plan by legislative action pursuant to section 163.3184, Florida Statutes, and argues the proper procedure should have been to process the opt-out through a quasi-judicial decision. Petitioner's legal conclusion is rebutted by the clear and unambiguous language of section 163.3245(8), Florida Statutes, which sets forth "an owner may withdraw his or her property from the master plan only with the approval of the local government by plan amendment adopted and reviewed pursuant to s. 163.3184." Moreover, plan amendments that propose an amendment to an adopted sector plan are statutorily mandated to follow the state coordinated review process set forth in section 163.3184(4), Florida Statutes. § 163.3184(2)(c), Fla. Stat. These statutory requirements are clear and unambiguous. Petitioner's legal conclusion is not as reasonable as or more reasonable than the conclusion set forth by the ALJ in Paragraph 45.

Petitioner's exception to Conclusion of Law ¶ 45 is DENIED.

**J – Exception 10: Finding of Fact ¶ 11**

Petitioner's exception to ¶ 11 contests the ALJ's finding that "[w]ithdrawing from a DSAP does not modify the DSAP because the DSAP is the development standard itself." Petitioner asserts the Finding of Fact is an erroneous Conclusion of Law. The Department has reviewed the

Exception, the record, and determined there is competent substantial evidence to support the ALJ's Finding of Fact determining that the removal of a parcel from the DSAP does not alter the DSAP, which is the development standard. (Transcript p. 167, 176, 224-25, 241) The ALJ's determination concerning the evidence presented at the hearing, such as weighing 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 judgment as to the credibility of witnesses. *See Heifetz,* 475 So. 2d at 1281-1283.

Petitioner's exception to Finding of Fact ¶ 11 is DENIED.

**K – Exception 11: Finding of Fact ¶ 27**

Petitioner's exception to Finding of Fact ¶ 27 contests the ALJ's finding that "because the opt-out process is a statutory right created by the Legislature, the County is obligated to consider every opt-out application filed, and if it satisfies the applicable criteria, it must be approved." The Department determines this is a conclusion of law and, accordingly, treats it as such. *See Kinney*, 501 So. 2d 129. The Department has considered the exception, reviewed the conclusion of law, and determined that it can substitute a conclusion of law that is more reasonable than the conclusion in ¶ 27.

A more reasonable conclusion of law, which the Department substitutes in place of ¶ 27, is set forth below:

> 27. Petitioner contends approval of the application will lead to further requests by other property owners to opt out of the Sector Plan. Currently, there are over 1,000 property owners in the Sector Plan. During the County hearings, staff identified 24 or 25 other properties that might choose to file an opt-out application in the future. Whether those owners will do so is no more than

speculation at this point. The County responds that it will evaluate each application on a case-by-case basis. A case-by-case analysis is necessary because an application involving a large parcel of property would clearly have a different analysis than one which involves only 8.67 acres. More importantly, because the opt-out process is a statutory right created by the Legislature, the County is obligated to consider every opt-out application filed. Pursuant to section 163.3245, Florida Statutes, "[a]fter adoption of a long-term master plan, an owner may withdraw his or her property from the master plan only with the approval of the local government by plan amendment adopted and reviewed pursuant to s. 163.3184." In any event, there is nothing in sections 163.3184 or 163.3245 which requires the local government to deny an application merely because another property owner might file a similar application at some point in the future.

Petitioner's Exception 11 is GRANTED to the extent set forth above.

**L – Exception 12: Finding of Fact ¶ 34**

Petitioner's exception to Finding of Fact ¶ 34 contests the ALJ's finding that the County had "no requirement that it consider the compatibility of non-Sector Plan property with property in the DSAP." Petitioner's exception relates, again, to the underlying zoning of the property, which is not changed through the challenged ordinance and is not the subject of the present case. The sole issue before the ALJ was whether the Plan Amendment, opting the subject property out of the Sector Plan and assigning it a FLU of Mixed Use Suburban, is "in compliance" as defined in section 163.3184(1)(b), Florida Statutes. Petitioner's exception concerns an alleged inconsistency between the previously established zoning category and the existing DSAP land

uses. This analysis is outside the scope of the present administrative proceeding, which concerned whether the opt-out and designation of the FLU category of MU-S complied with section 163.3184(1)(b), Florida Statutes.

Petitioner's exception to Finding of Fact ¶ 34 is DENIED.

**M – Exception 13: Finding of Fact ¶ 35**

Petitioner's exception to Finding of Fact ¶ 35 contests the ALJ's finding that "[i]t is fairly debatable that the underlying zoning will be compatible with the neighboring area." As stated previously, the underlying zoning of the property is not changed through the Plan Amendment and, accordingly, is not subject to the present challenge. The time period to contest the 2015 county-wide re-zoning has expired. (Transcript p. 37)

Petitioner's exception to Finding of Fact ¶ 35 is DENIED.

## Remainder of the Recommended Order

### Findings of Fact

As for the remainder of the Recommended Order, the Department concludes 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. Therefore, the Department accepts all of the remaining findings of fact in the Recommended Order.

### Conclusions of Law

The Department has reviewed the ALJ's conclusions of law in light of the Department's substantive jurisdiction over comprehensive planning pursuant to Chapter 163, Part II, Florida Statutes. Aside from the substituted conclusion of law set forth in Section K, above, 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. Accordingly, the Department accepts all of the ALJ's remaining conclusions of law.

## ORDER

Based on the foregoing, except as set forth in Sections C and K above, 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 Escambia County Ordinance No. 2017-53 on September 7, 2017, is in compliance as defined in section 163.3184(1)(b), Florida Statutes.

Dated this August 8th, 2018

Julie A. Dennis, 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 foregoing 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 8th day of August, 2018.

Stephanie Webster

Stephanie Webster, Agency Clerk
Department of Economic Opportunity
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**By U.S. Mail**

The Honorable D.R. Alexander
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