STATE OF FLORIDA
DEPARTMENT OF REVENUE

GBR ENTERPRISES, INC.,

Petitioner,

vs.

DOAH Case No.: 18-2772
DOR Final Order No.:

DEPARTMENT OF REVENUE,

Respondent.
_____/

FINAL ORDER

This cause came before the State of Florida, Department of Revenue ("Department") for the purpose of issuing a Final Order. Administrative Law Judge ("ALJ") Darren A. Schwartz, assigned by the Division of Administrative Hearings ("Division") to hear this cause, submitted a Recommended Order to the Department on January 14, 2019. A copy of the Recommended Order is attached as Exhibit 1.[1]

The deadline for filing exceptions to the Recommended Order was January 29, 2019. The Department filed untimely exceptions on February 13, 2019. A copy of the Department's exceptions to the Recommended Order is attached as Exhibit 2. The Petitioner did not file any exceptions. The Petitioner did not file any objections or responses to the Department's exceptions.

STATEMENT OF THE ISSUE AND PRELIMINARY STATEMENT

The Department adopts the Statement of the Issue and the Preliminary Statement in the Recommended Order.

[1] Consolidated cases 18-4475RX and 18-4992RU were challenges to existing and alleged unadopted rules respectively, and are not the subject of this Final Order.

FINDINGS OF FACT

The Department is bound by the findings of fact in the Recommended Order unless, following a review of the entire record, the Department can determine that a finding of fact is not based on competent, substantial evidence or that the proceedings did not comply with the essential requirements of law. Section 120.57(1)(l), Florida Statutes. A rejection of a factual finding requires identifying the reasons for the rejection with particularity. *Id.*; *Prysi v. Department of Health*, 823 So.2d 823, 825 (Fla. 1st DCA 2002). If the evidence presented at the final hearing may support inconsistent findings, it is the role of the Administrative Law Judge to determine which finding is best supported by the evidence. It is not an agency's role, following issuance of a recommended order, to reweigh the evidence presented or to reconsider the credibility of witnesses. *Walker v. Board of Professional Engineers*, 946 So.2d 604, 605 (Fla. 1st DCA 2006) (per curiam).

Under the applicable standard, the Department adopts Findings of Fact 1-17; 19-31; and 33. Findings of Fact 18, 32, 34, and 35 are either in part or in whole unsupported by competent substantial evidence. Findings of Fact 34 and 35 additionally do not comply with the essential requirements of law. Findings of Fact 32, 34, and 35, also contain conclusions of law to the extent they purport to set forth the general criteria to be considered in determining whether there exists a "license" for the use of real property subject to the provisions of chapter 212, Florida Statutes. The conclusions of law in Findings of Fact 32, 34, and 35 are rejected as inconsistent with applicable statutes, rules, case law, and as less reasonable as than the Department's substituted conclusions. Findings of Fact 18, 32, 34, and 35 are accordingly rejected in whole or in part for the detailed reasons set forth below.

Finding of Fact 18 states in full:

> 18. In exchange for GBR's services, the schools receive from GBR, as a commission, a percentage of the gross receipts. However, neither GBR nor

> the schools are guaranteed any revenue unless sales occur from the machines.
>
> Recommended Order at pg. 8.

The first sentence of this Finding of Fact is internally inconsistent. Schools could not receive a commission *from* GBR *in exchange for* GBR's services – in that premise there is no exchange, only a service and a commission provided by GBR. A review of the record confirms a lack of any competent substantial evidence to suggest that "[i] n exchange for GBR's services, the schools receive from GBR, as a commission, a percentage of the gross receipts."

The Department therefore rejects Finding of Fact 18 as set out in the Recommended Order, and substitutes the following in its stead:

> 18. Neither GBR nor the schools are guaranteed any revenue unless sales occur from the machines.

Finding of Fact 32 states in full:

> 32. At hearing, the Department's representative, Mr. Zych, acknowledged that a proper analysis as to whether a particular arrangement constitutes a license to use real property involves consideration of issues of control, such as control over access to and placement or the machines, products, and money.

Finding of Fact 32 is not supported by competent, substantial evidence. A review of the record reveals that the witness did not testify that a "proper analysis" as to whether a particular arrangement is a license to use real property requires consideration of issues of control. Tr. 205. Rather, the witness testified that the Department "often" would look at control when considering taxes related to vending machines generally, not that control is a necessary consideration when determining specifically whether there is a license to use property. Tr. 201-205. The witness confirmed that he could not tell whether control was considered in the instant cause, yet nevertheless confirmed his position that the findings in the Notice of Decision relating to

Petitioner's alleged tax liability for the payment of license fees to the School Board of Broward County were appropriate. Tr. 192; RE 15; Tr. 205. The Department's non-binding Standard Audit Plans, including the specific one developed for auditing vending machine businesses, similarly make no mention of examining the level of control a putative licensor retains over her property to determine whether a license to use or occupy real property has been granted. RE 4. In sum, there is no competent evidence to conclude that the witness, or the Department generally, asserted that a "proper analysis" of whether there is a license as that term is defined in chapter 212, Florida Statutes, requires any consideration of how much control a putative licensor retains over a licensee's access or use of the subject property.

And, although Finding of Fact 32 is framed as a factual finding, it is apparently the only statement in the Recommended Order that sets forth a legal test or definition for the term "license" as that term is used in chapter 212, Florida Statutes. Indeed, the applicable statutory definition of "license" set forth in section 212.02(1)(i), Florida Statutes, is not mentioned once in the Recommended Order.

To the extent Finding of Fact 32 purports to set a controlling legal standard or test to define the term "license" as used in chapter 212, Florida Statutes, Finding of Fact 32 is also a conclusion of law. Whether a provision is labeled a finding of fact or a conclusion of law is not dispositive as to its nature – rather, the substance of the provision must be examined. *See Harry's Restaurant & Lounge, Inc., Dep't of Bus. Reg.*, 456 So.2d 1286, 1288 (Fla. 1st DCA 1984) (refusing to treat a provision in a final order that was labeled as a "Conclusion of Law" as a conclusion of law where it contained a factual finding); s*ee also Florida Public Employees Council 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994) (noting that an interpretation of a statute is a legal conclusion). The conclusion of law in Finding of Fact 32 can therefore be rejected or modified by the Department

as long as the Department states with particularity its reasons for modifying or rejecting the legal conclusion, and makes a finding that its substituted conclusion of law is as or more reasonable than the one that was rejected or modified. Section 120.57(l), Florida Statutes. The legal conclusion in Finding of Fact 32 that an analysis of "issues of control" is a necessary component of determining whether a license to use real property has been granted is unreasonable and is rejected for the foregoing reasons.

First, the recommended "issues of control" analysis is contradicted by the plain language of section 212.02(10)(i), Florida Statutes and Rule 12A-1.070(1)(e), Florida Administrative Code, which define a license as "the granting of a privilege to use or occupy a building or parcel of real property for *any purpose*." (emphasis added). The explicit recognition that a license may be granted for any purpose encompasses situations where a licensor, for any number of reasons, may wish to grant a limited or conditional license. Consistent with this basic principle, in *U.F., Inc., d/b/a Ultimate Fantasy Lingerie v. Dep't of Revenue*, the Division found that a lingerie store that made much of its revenue by allowing patrons to request, for a fee, to have models model selected pieces of lingerie in a segregated portion of the store, was granting a taxable license to those patrons. Whether Petitioner there exerted any control over the show was "immaterial." DOAH Case No. 02-686 at par. 59, (June 14, 2002), *adopted in relevant part in U.F., Inc., d/b/a Ultimate Fantasy Lingerie v. Dep't of Revenue*, DOR Case No. 02-6-FOF (Sep. 12, 2002), *aff'd per curiam U.F., Inc., v. Dep't of Revenue*, 856 So.2d 1002 (Fla. 2d DCA 2003).

Second, the recommended legal conclusion in Finding of Fact 32 is inconsistent with well-established common law precedent on the meaning of "license" in the real property context, which is closely aligned with the statutory and regulatory definitions referenced above. *See* Restatement (First) of Property §§ 512 (defining a license in real property in relevant part as "an interest in land

in the possession of another which (a) entitles the owner of the interest to a use of the land, and (b) arises from the consent of the one whose interest in the land used is affected thereby...") and 516 (noting in relevant part that the extent of the license is fixed by the terms of the consent which creates it); *Turner v. Fla. State Fair Authority*, 974 So.2d 470, 473 (Fla. 2nd DCA 2008) (stating that a "license does not confer an interest in the land but merely gives the licensee the authority to do a particular act on another's land"); *Keane v. President Condo. Ass'n*, 133 So.3d 1154, 1156 (Fla. 3rd DCA 2014) (recognizing that "a license ... merely gives one the authority to do a particular act on another's land."); *Satin v. Hialeah Race Course, Inc.*, 65 So.2d 475, 476 (Fla. 1953) (noting that conditional licenses to enter on land can include restrictions on what the licensee can do on that land and whether the licensee can delegate the privilege to third parties).

The history of the term "license" in the real property context reveals no authority to suggest that limiting the scope of a license by imposing conditions on the licensee defeats the license. Indeed, the case law is clear that licensors can impose conditions on the use of a license. This is consistent with the basic tenet of property law that, of the proverbial bundle of sticks that comprises a fee simple interest, an owner can decide to transfer as much or as little of her interest in the property as she wishes, including by subjecting a license to restrictions and conditions. *See Jabour v. Toppino*, 293 So.2d 123, 126-127 (Fla. 3rd DCA 1974) (holding that a licensor can revoke a license for a violation of the conditions placed on that license); *Herschberg v. Florida Power & Light Co.*, 137 So.2d 834 (Fla. 3rd DCA 1962) (recognizing a license that was revocable on the condition that it interfered with the licensor's planned use of a property).

Finally, if the Department were to ignore the plain meaning of the word "license" as it is defined in chapter 212, Florida Statutes, by adopting the "issues of control" analysis set out in the Recommended Order, it could constitute an unadopted rule and run afoul of the statutory

requirement that agencies refrain from implementing generally applicable rules except by the proper rulemaking procedure. *See* sections 120.52(16) and 120.56(4), Florida Statutes.

The Department therefore rejects Finding of Fact 32 as set out in the Recommended Order, and substitutes the following in its stead:

> 32. At hearing, the Department's representative, Mr. Zych, stated that an analysis as to whether a particular arrangement constitutes a license to use real property may examine control, such as control over access to and placement or the machines, products, and money. For the purposes of taxes provided for in chapter 212, Florida Statutes, a "license" is "the granting of a privilege to use or occupy a building or a parcel of real property for any purpose." Section 212.02(10)(i), Florida Statutes.

Finding of Fact 34 states in full:

> 34. GBR provided an important service to the schools in order that the schools meet federal dietary guidelines. GBR was able to provide the service only because of a competitive ITB process. The goal of the bids was to obtain a vendor service for the sale of products to students in conformity with federal dietary guidelines, not to enter into a license for the use of real property.

The first sentence of Finding of Fact 34 is not supported by competent substantial evidence. A review of the record reveals no evidence to suggest that provision of the vending machines by Petitioner was required for the schools to meet federal dietary guidelines, or that without the vending machines the schools would run afoul of those guidelines. That school board invitations to bid required any vending services to comply with federal dietary guidelines does not establish that schools needed those vending services "in order that the schools meet federal dietary guidelines."

The final sentence of Finding of Fact 34 is similarly unsupported by competent substantial evidence, and additionally constitutes a departure from the essential requirements of law. It is directly contradicted by Finding of Fact 8, which in pertinent part states that where GBR had written agreements directly with schools, "GBR [was] granted a license to install vending

machines on school property in exchange for a commission." The sentence is also incompatible with the statutory definition of the term "license," and appears to be predicated on a false dichotomy between a contract that entails the provision of some service and there being a license in real property. Under the plain language of section 212.02(10)(i), Florida Statutes, a license can exist regardless of the purpose for which permission to occupy or use real property is granted. *See also S & W Air Vac Systems, Inc. v. Dep't of Revenue*, 697 So.2d 1313 (Fla. 5th DCA 1997) (finding that taxable licenses to use real property were granted by convenience store and gas station owners to company that installed coin operated machines to provide car air and vacuuming services).

Additionally, because the analysis of whether there was a license or not in the Recommended Order focuses on "issues of control" rather than on the elements of a license set out in section 212.02(10)(i), Florida Statutes, Finding of Fact 34 is predicated on an inappropriate test to determine whether a license exists. The application of an inappropriate test that is inconsistent with applicable statutes is a departure from the essential requirements of law, and justifies rejection of this factual finding. *See Surf Works, LLC v. City of Jacksonville Beach*, 230 So.3d 925, 930 (Fla. 1st DCA 2017) (holding that a circuit court's application of incorrect law to uphold the city council's actions constituted a departure from the essential requirements of law); *Rinker Materials Corp. v. North Miami*, 286 So.2d 552 (Fla. 1973) (granting a petition for a writ of certiorari and quashing a district court opinion for a failure to apply the plain and ordinary meaning of a municipal ordinance).

To the extent that Finding of Fact 34 declares that a contract that entails the provision of a service necessarily precludes the existence of a license to occupy or use real property, this finding

of fact also contains a conclusion of law. Because such a conclusion directly contradicts the applicable statutory definition of "license," it is rejected as unreasonable.

The Department therefore rejects Finding of Fact 34 as set out in the Recommended Order, and substitutes the following in its stead:

> 34. GBR was able to furnish, install, stock, and maintain vending machines on school property only because of a competitive ITB process.

Finding of Fact 35 states in full:

> 35. Although GBR characterized the payouts to the schools on its tax returns and general ledgers as commissions and equivalent space fees, and GBR controls some aspects of the arrangements, the facts adduced at hearing demonstrate that the substance of the arrangement is in the nature of a service contract. In sum, given the totality of the circumstances and under the unique facts of this case, the undersigned concludes as an issue of fact, that the arrangement between GBR and the schools boards and schools is in the nature of a service, and not a license to use real property. (*sic*)

Finding of Fact 35 is in part unsupported by competent substantial evidence and is a departure from the essential requirements of law. As with Finding of Fact 34, Finding of Fact 35 is directly contradicted by Finding of Fact 8, which recognizes that there were explicit grants of licenses to GBR by those schools with which it has a direct written agreement. As with Finding of Fact 34, Finding of Fact 35 is founded on the erroneous assumption that a contract that entails the provision of services precludes the existence of a license to occupy or use real property. Finally, and as is evident from the repeated references to "issues of control" in the Findings of Fact section and an absence of any reference in the Recommended Order to the elements of a "license" set out in section 212.02(10)(i), Florida Statutes, Finding of Fact 35 applies an incorrect test to determine whether or not licenses were granted to GBR, and so departs from essential requirements of law.

Finally, to the extent Finding of Fact 35 makes conclusions of law 1) that licenses to use real property and contracts that entail the provision of services are mutually exclusive; and 2) that

"issues of control" have to be considered in determining whether a license has been granted for the purposes of chapter 212, Florida Statutes, as opposed to the elements set out by the Legislature in section 212.02(10)(i), Florida Statutes, those conclusions are rejected as unreasonable. The Department's conclusion that section 212.02(10)(i), Florida Statutes sets forth the applicable definition of "license" for the purposes of chapter 212, Florida Statutes, and that a license exists whenever a privilege is granted "to use or occupy a building or a parcel of real property for any purpose" is more reasonable than the "issues of control" test proposed in the Recommended Order.

The Department therefore rejects Finding of Fact 35 as set out in the Recommended Order, and substitutes the following in its stead:

> 35. GBR characterized the payouts to the schools on its tax returns and general ledgers as commissions and equivalent space fees, and GBR controls some aspects of the vending arrangements. There is no dispute that under the arrangements, schools provided GBR with the privilege of using and occupying parcels of real property, i.e. schools, for a specific purpose, namely the provision of vending services. Under the plain language of section 212.02(10)(i), Florida Statutes, GBR was granted licenses with respect to the use of those parcels of real property in which the respective schools are located.

CONCLUSIONS OF LAW

The Department may reject or modify the Conclusions of Law over which it has substantive jurisdiction if the Department can state with particularity why a substituted or revised conclusion of law is as, or more, reasonable that the conclusion of law that was rejected or modified. Section 120.57(1)(l), Florida Statutes; *Barfield v. Dep't of Health, Board of Dentistry*, 805 So.2d 1008 (Fla. 1st DCA 2001).

Under the applicable standard, the Department adopts Conclusions of Law 36-39 and 48[2]. The Department rejects the remainder of the Conclusions of Law as less reasonable than the conclusions adopted by the Department, for the reasons set forth below.

Conclusion of Law 40 states in full:

> 40. GBR thereafter demonstrated by a preponderance of the evidence that the B03 assessment is incorrect. The Department's B03 assessment is based on the allegation that GBR has been granted a license to use real property.

As the Department apparently conceded in its Exceptions to the Recommended Order, the challenged assessment was calculated under the incorrect assumption that GBR owned all the vending machines at issue, inconsistently with rule 12A-1.044(5)(a), Fla. Admin. Code. Although this rule has been recently invalidated and is now subject to an appeal, at the time the assessment was issued the rule was in force and effect. The Department would therefore have been bound by the rule at the time the proposed assessment was issued. *See Marrero v. Department of Professional Regulation*, 622 So.2d 1109, 1112 (Fla. 1st DCA 1993) (stating that an agency "is bound to comply with its own rules until they have been repealed or otherwise invalidated"). The Department concedes in its exceptions to the Recommended Order that under the referenced rule GBR would not have been liable for taxes on a license to use real property for those vending machines that were not actually owned by GBR, which constitute approximately 60 percent of the vending machines upon which the proposed assessment was based. The Department also concedes

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[2] Conclusion of Law 48 asserts in part that the Department's reliance on rule 12A-1.044(5)(a), Fla. Admin. Code, was incorrect because that rule has been invalidated in consolidated DOAH Case No.: 18-4475RX. That decision is currently pending on appeal. The Department's adoption of Conclusion of Law 48 is not a recognition that the order invalidating rule 12A-1.044(5)(a), Fla. Admin. Code was correctly decided – it is only a recognition that at the time of the filing of this Final Order, the decision invalidating the rule is in force and effect.

in its exceptions that the actual breakdown of revenues for machines owned by GBR, versus those it merely supplied and operated, was not established at the hearing.

To the extent that Conclusion of Law 40 rests on the previously rejected premises that no license was granted to GBR based on the "issues of control" analysis recommended in Findings of Fact 32, 34, and 35, that portion of the conclusion is rejected as less reasonable than the following, for the reasons set forth in the discussion about those findings of fact.

The Department therefore rejects Conclusion of Law 40, and substitutes the following conclusion as more reasonable:

> 40. GBR thereafter demonstrated by a preponderance of the evidence that the B03 assessment is incorrect. Under the specific facts of this case, the Department's B03 assessment is based on the incorrect premise that GBR owned all the vending machines that it installed and operated in the schools. The Department has since conceded that GBR does not own all the vending machines subject to the assessment, and that the Department did not present evidence or otherwise establish what proportion of the revenues, on which the assessment was based, were derived from machines owned by GBR.

Conclusions of Law 41-47 continue the discussion of issues of control for the purposes of determining whether a license was granted. Because that analysis is inherently flawed, and was rejected by the Department as explained in the discussion about Findings of Fact 32, 34, and 35, Conclusions of Law 41-47 are rejected in toto as unreasonable. It bears pointing out that the Recommended Order relies on *Lloyd Enterprises, Inc., v. Dep't of Revenue*, 651 So.2d 735 (Fla. 5th DCA 1995) to support its recommended conclusion that a license was not granted in this matter. In *Lloyd*, the issue was whether a concession, granted by a county to allow certain vendors to engage in business on a beach subject to restrictions, constituted a license to use real property under chapter 212, Florida Statutes. The court in *Lloyd* held there was no license because the county was acting pursuant to a mandate adopted in its Home Rule Charter, which required the county "to define, protect, and enforce" the public's preexisting right to access and enjoy the beach.

Lloyd at 737. The Recommended Order's reliance on *Lloyd* is misplaced. The county in *Lloyd* had no possessory interest in the beach and had no authority to grant any license to that property. *Lloyd* at 741 (Sharp, W., concurring specially); *see also IPC Sports v. Dep't of Revenue*, 829 So.2d 330, 335 (Fla. 3rd DCA 2002) (pointing out that the county referenced in *Lloyd* "did not own the beaches upon which the beach vendors engaged in their activities and could not prohibit vendors from engaging in business on the beaches."). Indeed, there was nothing in the concession contract, beyond the portion of the beach at issue to which a concession was to apply, that was not contained in the ordinance. *Lloyd* at 737. The rationale of *Lloyd* was limited by the very specific facts that are not present here. It was therefore not reasonable to rely on *Lloyd* to determine whether the arrangements between the schools and GBR at issue in this matter encompassed licenses to use or occupy real property.

Conclusion of Law 49 states in full:

> 49. Even if the rule were valid, however, the Department's assessment was based on the incorrect premise that GBR owned all of the vending machines. The evidence adduced at the hearing demonstrates that GBR did not own the beverage machines, which constitutes 60 percent of the machines. Given that GBR did not own those machines, rule 12A-1.044 would be inapplicable to 60 percent of the monies ultimately taxed as a license for the use of real property.

(endnote omitted).

The Department's exception to this Conclusion of Law points out that the fact that 60 percent of the machines were not owned by GBR does not mean that 60 percent of the revenues from which the assessment was calculated are necessarily attributable to those machines – the actual proportion could be higher or lower. Because the substance of the exception was incorporated into the substituted Conclusion of Law 40, which is as, or more, reasonable than Conclusion of Law 49, Conclusion of Law 49 is redundant and rejected in whole.

Accordingly, it is ORDERED that the Department's B03 assessment against GBR is withdrawn.

DONE AND ENTERED in Tallahassee, Leon County, Florida this 24th day of May, 2019.

STATE OF FLORIDA
DEPARTMENT OF REVENUE

Andrea Moreland

ANDREA MORELAND
DEPUTY EXECUTIVE DIRECTOR

NOTICE OF RIGHT TO JUDICIAL REVIEW

Any party to this Order has the right to seek judicial review of the Order pursuant to Section 120.68, Florida Statutes, by filing a Notice of Appeal pursuant to Rule 9.110 Florida Rules of Appellate Procedure, with the Agency Clerk of the Department of Revenue in the Office of the General Counsel, P.O Box 6668, Tallahassee, Florida 32314-6668 [FAX (850) 488-7112], **AND** by filing a **copy** of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. **The Notice of Appeal must be filed within 30 days from the date this Order is filed with the Clerk of the Department.**

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