

STATE OF FLORIDA
DEPARTMENT OF ECONOMIC OPPORTUNITY

HEINRICH BRACKER,

Petitioners,

v.

DEO CASE NO.: 19-199
DOAH CASE NO.: 18-003597GM

CEMEX CONSTRUCTION MATERIALS
FLORIDA, LLC; AND HERNANDO
COUNTY, FLORIDA,

Respondents.

_____ /

FILED
2019 MAY 24 PM 1:19
DIVISION OF
ADMINISTRATIVE HEARINGS

FINAL ORDER

This matter was considered by the Division of Community Development within the Florida Department of Economic Opportunity (“Department”) following the receipt of a recommended order (“Recommended Order”) issued by an Administrative Law Judge (“ALJ”) assigned to the matter by the Division of Administrative Hearings (“DOAH”).

Background

This is a proceeding to determine whether Comprehensive Plan Amendment 1702 (“CPAM 1702”)¹ to the Hernando County Comprehensive Plan (“Plan”) is “in compliance,” as defined in section 163.3184(1)(b), Florida Statutes (2017).² CPAM 1702, adopted by Ordinance 2018-12 on June 12, 2018, amends the Plan by changing the future land use map (“FLUM”) designation of

¹ Hernando County DEO Amendment No. 18-01ESR.

² References to the *Florida Statutes* are to the 2017 version, which was in effect on the date CPAM 1702 was adopted.

approximately 730 undeveloped acres within Hernando County. The FLUM designation of approximately 573 acres is changed from Residential to Mining, and the FLUM designation of approximately 156 acres is changed from Residential, with Regional Commercial Overlay, to Commercial.

On July 12, 2018, Heinrich Bracker (“Petitioner”) filed a petition for an administrative hearing, challenging whether CPAM 1702 is “in compliance,” as defined in section 163.3184(1)(b), Florida Statutes. Petitioner alleges that CPAM 1702: renders the Plan internally inconsistent, in violation of section 163.3177(2), Florida Statutes; fails to react in an appropriate way to the available data, as required by section 163.3177(1)(f), Florida Statutes; and fails to establish 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, as required by section 163.3177(1), Florida Statutes.

On July 16, 2018, Cemex Construction Materials Florida, LLC (“Cemex”), entered a Notice of Appearance as a Named Party. The Honorable Francine M. Ffolkes, the ALJ initially assigned to the case, granted Cemex full party status as a respondent on July 17, 2018. The final hearing was initially scheduled for September 18 through 21, 2018, however, the parties jointly filed a Motion for Continuance on September 13, 2018. The Motion for Continuance was granted and the hearing was rescheduled for October 30 through November 2, 2018. The case was subsequently transferred, and the Honorable Suzanne Van Wyk was assigned as the ALJ on September 26, 2018.

On October 26, 2018, the parties filed a Joint Pre-Hearing Stipulation, and the final hearing was held as rescheduled on October 30 through November 2, 2018, in Brooksville, Florida. The ALJ issued the Recommended Order on May 1, 2019, recommending the Department issue a final

order determining CPAM 1702 to be found in compliance. A copy of the Recommended Order is attached hereto as Exhibit "A." No exceptions to the Recommended Order were filed with the Department.

Role of the Department

Petitioner's challenge was filed pursuant to sections 120.569, 120.57(1), and 163.3184(5), Florida Statutes. The ALJ held a hearing and issued the Recommended Order, finding CPAM 1702 in compliance, and submitted the Recommended Order to the Department. The Department may determine that CPAM 1702 is in compliance and enter a final order to that effect, or determine that CPAM 1702 is not in compliance, and refer the Recommended Order and the Department's determination to the Administration Commission for final agency action. § 163.3184(5)(e), Fla. Stat.

The Department has received a record consisting of copies of the parties' pleadings, the documentary evidence introduced at the final hearing, and a six-volume transcript of the proceedings of the final hearing. The Department has reviewed the record and issues this Final Order in accordance with sections 120.57(1)(k)-(l) and 163.3184(5)(e), Florida Statutes.

If the Department rejects or modifies a conclusion of law or interpretation of an administrative rule, then the Department must state with particularity its reasons for such rejection or modification. § 120.57(1)(l), Fla. Stat. If the Department rejects or modifies a finding of fact, then the Department must state with particularity that the finding was not based upon competent substantial evidence or that the proceedings on which the finding was based did not comply with essential requirements of law. *Id.*

Standard of ReviewFindings of Fact

Section 120.57(1)(l), Florida Statutes, prescribes that in its issuance of a final order, the Department may not reject or modify the findings of fact of the ALJ “unless the agency first determines from a review of the entire record, and states with particularity in the 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.” Evidence is competent if it is admissible under the pertinent legal rules of evidence. *Scholastic Book Fairs, Inc. v. Unemplmt. App. Comm'n*, 671 So. 2d 287, 290 n.3 (Fla. 5th DCA 1996). Evidence is substantial if there is “some (more than a mere iota or scintilla) real, material, pertinent, and relevant evidence (as distinguished from ethereal, metaphysical, speculative or merely theoretical evidence or hypothetical possibilities) having definite probative value (that is, ‘tending to prove’) as to each essential element” of the claim. *Id.* The Department is “not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion.” *Heifetz v. Dep't of Bus. Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). “If the ALJ's findings of fact are supported by competent, substantial evidence, the agency cannot reject them even to make alternate findings that are also supported by competent, substantial evidence.” *Lantz v. Smith*, 106 So. 3d 518, 521 (Fla. 1st DCA 2013). The Department may reject findings of fact if the proceedings on which the findings were based did not comply with the essential requirements of law. *See* § 120.57(1)(l), Fla. Stat., and *Dept. of Corrections v. Bradley*, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987). In this context, Florida’s First District Court of Appeal has characterized a failure “to comply with the essential requirements of the law” as “a procedural irregularity.” *Beckett v. Dep't of Fin. Servs.*, 982 So. 2d 94, 102 (Fla. 1st DCA 2008)

(ruling that the agency erred by concluding that the ALJ had failed to comply with the essential requirements of the law “[b]ecause there has been no suggestion of a procedural irregularity”).

Conclusions of Law

Section 120.57(1)(l), Florida Statutes, authorizes the Department to reject or modify a conclusion of law over which the agency has substantive jurisdiction. § 120.57(1)(l), Fla. Stat.; *Barfield v. Dep't of Health*, 805 So. 2d 1008, 1010 (Fla. 1st DCA 2001). If the Department rejects or modifies any of the ALJ's conclusions of law, then the Department must state with particularity its reasons for rejecting or modifying the conclusion, 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. The Department is not permitted to reject or modify a finding that is substantially one of fact simply by treating the finding as a legal conclusion. *See Abrams v. Seminole Cnty. Sch. Bd.*, 73 So. 3d 285, 294 (Fla. 5th DCA 2011). Additionally, a rejection or modification of a conclusion of law may not form a basis for rejection or modification of a finding of fact. § 120.57(1)(l), Fla. Stat.

Adoption of the Recommended Order

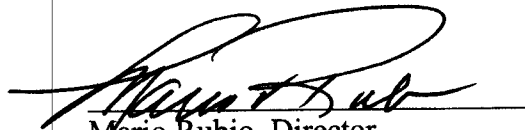
The Department has reviewed the Recommended Order and concludes that all findings of fact therein were based upon competent substantial evidence in the record. The Department finds that the proceedings on which the findings of fact were based complied with the essential requirements of law.

The Department has reviewed the ALJ's conclusions of law and finds that all conclusions of law within the Department's substantive jurisdiction are reasonable. The Department does not have any substitute conclusions of law that would be as or more reasonable than the ALJ's conclusions of law.

ORDER

Based on the foregoing, the Department determines that Hernando County Comprehensive Plan Amendment 1702, adopted by Ordinance 2018-12 on June 12, 2018, is “in compliance,” as defined in section 163.3184(1)(b), Florida Statutes. The Department adopts the Recommended Order in its entirety as the Department’s Final Order.

Dated this 23 day of May, 2019.

A handwritten signature in black ink, appearing to read 'Mario Rubio', written over a horizontal line.

Mario Rubio, Director
Division of Community Development
Florida Department of Economic Opportunity

NOTICE OF RIGHT TO APPEAL

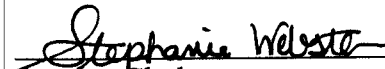
THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION UNDER CHAPTER 120, FLORIDA STATUTES. A PARTY WHO IS ADVERSELY AFFECTED BY FINAL AGENCY ACTION IS ENTITLED TO JUDICIAL REVIEW IN ACCORDANCE WITH SECTION 120.68, FLORIDA STATUTES, AND FLORIDA RULES OF APPELLATE PROCEDURE 9.030(B)(1)(c) AND 9.110.

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(2), 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.

CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that the original of the foregoing Final Order has been filed with the undersigned Agency Clerk, and that true and correct copies have been furnished to the following persons by the methods indicated this 23rd day of May, 2019.



Agency Clerk
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