

STATE OF FLORIDA
DEPARTMENT OF ECONOMIC OPPORTUNITY

DAVID ANDERSON, KEATH CUYLER,
MITCHELL GOLDBERG, AND RONALD
NEWMARK,

Petitioners,

v.

DEO CASE NO.: 19-006
DOAH CASE NO.: 18-004203GM

IBIS ROAD INVESTORS, LLC; AND
SARASOTA COUNTY, FLORIDA,

Respondents.

FILED
2019 APR 16 PM 12:46
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 Amendment Number 2017-B ("Plan Amendment") to the Sarasota County Comprehensive Plan ("Plan"), adopted by Ordinance 2018-006 (the Ordinance) on July 11, 2018, is "in compliance," as defined in section 163.3184(1)(b), Florida Statutes (2018).¹

¹ References to the *Florida Statutes* are to the 2018 publication unless otherwise noted.

On August 8, 2018, David Anderson, Keath Cuyler, Mitchell Goldberg, and Ronald Newmark ("Petitioners"), filed a petition for an administrative hearing challenging the Plan Amendment, alleging the Ordinance is not "in compliance," as defined in section 163.3184(1)(b), based on two provisions of section 163.3177, Florida Statutes. On August 20, 2018, the ALJ granted an unopposed motion to intervene made by Ibis Road Investors, LLC (Ibis Road), and granted Ibis Road full party status as a respondent. On October 15, 2018, the Petitioners filed a Notice of Striking Issue "II," which limited the scope of their challenge to whether the Ordinance renders the County's Comprehensive Plan internally inconsistent, in violation of section 163.3177(2), Florida Statutes. On November 28, 2018, the parties filed a joint pre-hearing stipulation. On December 4, 2018, the Petitioners filed Notice of Striking references to Policy VOS 2.5, which further limited the scope of their challenge.

The final hearing was held on December 4 and 5, 2018, in Sarasota, Florida. At the hearing, Petitioner David Anderson, through counsel, voluntarily dismissed himself as a petitioner. Counsel for Ibis Road reserved the right to request attorneys' fees and costs. Anderson's dismissal as a petitioner was granted and later memorialized by Order Dismissing Petitioner David Anderson, rendered on December 7, 2018. On December 28, 2018, Ibis Road filed a motion for attorneys' fees and costs, to which Petitioners responded on January 2, 2019. On February 20, 2019, the ALJ issued the Recommended Order, recommending that the Department issue a final order determining that the Plan Amendment be found in compliance. The ALJ incorporated a ruling on the Motion for Attorneys' Fees and Costs into the Recommended Order (Paragraphs 54-56 and 67-69). A copy of the Recommended Order is attached hereto as Exhibit "A."

On March 7, 2019, Respondent Ibis Road timely filed Exceptions to the Recommended Order. The exceptions related to the ALJ's finding that Ibis Road is not entitled to recover its

attorneys' fees and costs. On March 14, 2019, Respondent Ibis Road filed a Dismissal of Exceptions to Recommended Order.

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 the Plan Amendment in compliance, and submitted the Recommended Order to the Department. The Department may 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 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 two-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 Review

Findings 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. Section 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. Section 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. Section 120.57(1)(l), Fla. Stat.

Adoption of the Recommended Order

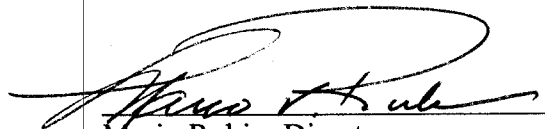
The Department has reviewed the Recommended Order and concludes that all findings of fact therein were based upon competent substantial evidence in the record. The Department finds that the proceedings on which the findings of fact were based complied with the essential requirements of law.

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 the Plan Amendment to the Sarasota County Comprehensive Plan, adopted by Ordinance 2018-006 on July 11, 2018, is "in compliance," as defined in section 163.3184(1)(b), Florida Statutes. The Department adopts the Recommended Order (attached hereto as Exhibit "A") in its entirety as the Department's Final Order.

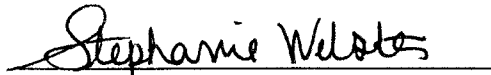
Dated this 15 day of April, 2019.

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

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

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 15th day of April, 2019.



Agency Clerk
Florida Department of Economic Opportunity
107 East Madison Street, MSC 110
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By U.S. Mail

The Honorable Francine M. Ffolkes
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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.