STATE OF FLORIDA
DEPARTMENT OF ECONOMIC OPPORTUNITY

MARK MORGAN AND JYETTE NIELSEN,

Petitioners,

vs.

CITY OF MIRAMAR, FLORIDA,

Respondent,

UNIVISION RADIO FLORIDA, LLC,

and LENNAR HOMES, LLC,

Intervenors.

_____/

DEO CASE NO.: 19-210
DOAH CASE NO.: 18-6103GM

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 the City of Miramar Comprehensive Plan Amendment ("Plan Amendment"), adopted by Ordinance No. 19-01 on October 17, 2018, is "in compliance," as defined in section 163.3184(1)(b), Florida Statutes (2018).[1] The Plan Amendment

[1] References to the *Florida Statutes* are to the 2018 version, which was in effect on the date the Plan Amendment was adopted.

changes the future land use designation of a 120-acre parcel from "Rural Residential" to "Irregular (3.21) Residential."

On November 16, 2018, Mark Morgan and Jyette Nielsen ("Petitioners") filed a petition for an administrative hearing, challenging whether the Plan Amendment is "in compliance," as defined in section 163.3184(1)(b), Florida Statutes. Petitioners allege that the Plan Amendment renders the Plan internally inconsistent, in violation of section 163.3177(2), Florida Statutes.

On December 3, 2018, Univision Radio Florida, LLC, filed an Unopposed Motion for Leave to Intervene, which was granted by the ALJ on December 4, 2018. On December 5, 2018, Lennar Homes, LLC, filed an Unopposed Motion for Leave to Intervene, which was granted by the ALJ on December 11, 2018.

The final hearing was initially scheduled for February 4 through 7, 2019, however, the parties jointly filed a Motion for Continuance of Final Hearing on January 16, 2019. The Motion for Continuance was granted on January 24, 2019, and the hearing was rescheduled for March 5 through 8, 2019. The hearing was held as rescheduled in Miramar, Florida on March 5 through 7, 2019.

On June 26, 2019, the ALJ issued the Recommended Order, recommending the Department issue a final order determining that the Plan Amendment is in compliance. A copy of the Recommended Order is attached hereto as Exhibit "A." On July 11, 2019, Petitioners timely filed exceptions with the Department. Respondent and Intervenors timely filed joint exceptions with the Department on July 11, 2019, and subsequently filed a joint response to Petitioners' exceptions on July 22, 2019.

Role of the Department

Petitioners' 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, recommending that the Department determine the Plan Amendment to be in compliance.

Upon receipt of the Recommended Order, the Department may determine 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 three-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 on competent substantial evidence or that the proceedings on which the finding was based did not comply with essential requirements of law. *Id.*

Pursuant to section 120.57(1)(k), Florida Statutes, the Department must issue an explicit ruling on each exception. The Department is not required to rule on an exception that does not clearly identify the disputed portion of the Recommended Order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record. § 120.57(1)(k), Fla. Stat.

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. § 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.

Rulings on Petitioners' Exceptions to Recommended Order

(A) – Exception 1: Paragraph 13 and Footnote 4 of the Recommended Order (RO pages 7, 24)

In Exception 1, Petitioners take exception to the ALJ's finding of fact in paragraph 13 and footnote 4, related to the FLUM designation of "Irregular (3.21) Residential." Petitioners argue that this land use designation does not exist within the text of the Comprehensive Plan, rendering the FLUE Map internally inconsistent with the FLUE text because no text amendment was filed to add "Irregular (3.21) Residential" as a land use designation in the FLUE text, goals, objectives, or policies. Pursuant to section 120.57(1)(k), Florida Statutes, an "agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page

number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." Exception 1 fails to include a legal basis for rejecting or modifying any of the ALJ's findings of fact.

Nonetheless, the Department has considered the matters raised under Exception 1 and finds that the ALJ's findings of fact were supported by competent substantial evidence. As pointed out by Respondent and Intervenors in their Joint Response to Petitioners' Exceptions, the change of the FLUM designation was stipulated to as an undisputed statement of fact in the Joint Prehearing Stipulation. Additionally, the Department cannot determine that the proceedings on which the findings were based failed to comply with the essential requirements of law.

Exception 1 is DENIED.

(B)– Exception 2: Paragraphs 19-22, 61-62 of the Recommended Order ("Lennar Permitting") (RO pages 8-9, 17)

In Exception 2, Petitioners take exception to the ALJ's finding of facts related to Lennar Permitting. Petitioners provide citations to the transcript of the final hearing to support the exception. The Department cannot reweigh the evidence or judge credibility of witnesses. *See Heifetz*, 475 So. 2d at 1281. Exception 2 is denied to the extent that it requests the Department to modify or reject findings by reweighing evidence and testimony presented to the ALJ.

Additionally, section 120.57(1)(k), Florida Statutes, provides that an "agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." Exception 2 fails to include a legal basis for rejecting or modifying any of the ALJ's findings of fact.

Nonetheless, the Department has considered Petitioners' Exception 2 and finds that the ALJ's findings of fact related to Lennar Permitting were supported by competent substantial

evidence and the Department cannot determine that the proceedings on which the findings were based failed to comply with the essential requirements of law.

Exception 2 is DENIED.

(C) – Exception 3: Paragraphs 26, 28, 29, 32 of the Recommended Order (RO pages 10, 11)

In Exception 3, Petitioners take exception to the findings of fact related to the purpose of the FLUE Goal. Pursuant to section 120.57(1)(k), Florida Statutes, an "agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." Exception 3 fails to include a legal basis for rejecting or modifying any of the ALJ's findings of fact and fails to identify a specific citation in the record.

Nonetheless, the Department has considered Petitioners' Exception 3 and finds that the findings of fact related to the FLUE Goal were supported by competent substantial evidence. The Department cannot determine that the proceedings on which the findings were based failed to comply with the essential requirements of law.

Exception 3 is DENIED.

(D) – Exception 4: Paragraph 34 of the Recommended Order (RO page 12)

In Exception 4, Petitioners take exception to the ALJ's finding of fact related to whether Petitioners' argued that the subject property should be converted to a nature preserve, or otherwise placed in conservation use. Instead, Petitioners state that they argued whether the Plan Amendment was consistent with the FLUE Goal of "conserving the natural environment" within the City of Miramar. Pursuant to section 120.57(1)(k), Florida Statutes, an "agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not

include appropriate and specific citations to the record." Exception 4 fails to include a legal basis for rejecting or modifying any of the ALJ's findings of fact. Additionally, Exception 4 fails to include specific citations to the record to support Petitioners' position.

Nonetheless, the Department has considered Petitioners' Exception 4 and finds that the ALJ's finding of fact was supported by competent substantial evidence. The Department cannot determine that the proceedings on which the findings were based failed to comply with the essential requirements of law.

Exception 4 is DENIED.

(E) – Exception 5: Paragraph 45 of the Recommended Order (RO page 13)

In Exception 5, Petitioners take exception to the ALJ's finding of fact that the Petitioners' argument failed to consider non-residential development that may be as intense as residential or uses that require fewer improvements but may still be destructive to wetlands on the basis that the examples "fire station" and "horses and cattle ranching" provided by the ALJ are speculative. The Department cannot reweigh the evidence presented to the ALJ. *See Heifetz*, 475 So. 2d at 1281. Exception 5 is denied to the extent that it requests the Department to modify or reject findings by reweighing evidence and testimony presented to the ALJ. Additionally, Exception 5 fails to include a legal basis for rejecting or modifying any of the ALJ's findings of fact and fails to include specific citations to the record to support Petitioners' position.

Nonetheless, the Department has considered Petitioners' Exception 5 and finds that the ALJ's finding of fact was supported by competent substantial evidence. The Department cannot determine that the proceedings on which the findings were based failed to comply with the essential requirements of law.

Exception 5 is DENIED.

(F) – Exception 6: Paragraphs 46, 47, and 48 of the Recommended Order (RO page 14)

In Exception 6, Petitioners take exception to findings of fact relating to the City's consideration of development on wetlands in partnership with the County. Pursuant to section 120.57(1)(k), Florida Statutes, an "agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." Exception 6 fails to include a legal basis for rejecting or modifying any of the ALJ's findings of fact. Additionally, Exception 6 fails to include specific citations to the record to support Petitioners' position.

Nonetheless, the Department has considered Petitioners' Exception 6 and finds that the ALJ's finding of fact was supported by competent substantial evidence. The Department cannot determine that the proceedings on which the findings were based failed to comply with the essential requirements of law.

Exception 6 is DENIED.

(G) – Exception 7: Paragraph 54 of the Recommended Order (RO page 16)

In Exception 7, Petitioners take exception to the ALJ's finding of fact that the first sentence of CE Policy 7.3 is "precatory and direction-setting." Pursuant to section 120.57(1)(k), Florida Statutes, an "agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." Exception 7 fails to include a legal basis for rejecting or modifying any of the ALJ's findings of fact.

The Department cannot reweigh the evidence presented to the ALJ. *See Heifetz*, 475 So. 2d at 1281. Exception 7 is denied to the extent that it requests the Department to modify or reject findings by reweighing evidence and testimony presented to the ALJ.

Nonetheless, the Department has considered Petitioners' Exception 7 and finds that the ALJ's finding of fact was supported by competent substantial evidence. The Department cannot determine that the proceedings on which the findings were based failed to comply with the essential requirements of law.

Exception 7 is DENIED.

(H) – Exception 8: Paragraph 60 of the Recommended Order (RO page 17)

In Exception 8, Petitioners take exception to findings of fact relating to whether Petitioners' argument is relevant to a determination of whether the Plan Amendment is consistent with CE Policy 7.3. Petitioner takes exception because "petitioners' expert opined that the wetlands could be restored and protected on site in order to minimize the impacts on wetlands occurring on site to the greatest degree and extent practicable as required by FLUE Policy 6.10 and CE Policy 7.3." The Department cannot reweigh the evidence or judge the credibility of witnesses. *See Heifetz*, 475 So. 2d at 1281. Exception 8 is denied to the extent that it requests the Department to modify or reject findings by reweighing evidence and testimony presented to the ALJ.

Pursuant to section 120.57(1)(k), Florida Statutes, an "agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." Exception 8 fails to include a legal basis for rejecting or modifying any of the ALJ's findings of fact and does not include specific citations to the record reflecting where Petitioners' expert opined.

Nonetheless, the Department has considered Petitioners' Exception 8 and finds that the ALJ's finding of fact was supported by competent substantial evidence and the Department cannot determine that the proceedings on which the findings were based failed to comply with the essential requirements of law.

Exception 8 is DENIED.

(I) – Exception 9: Paragraphs 69, 73, 80 of the Recommended Order (RO pages 18-19, 21-22)

In Exception 9, Petitioners take exception to conclusions of law in paragraphs 69, 73, and 80 of the Recommended Order on the basis that the ALJ's conclusions of law relating to whether the Plan Amendment is "in compliance" apply agency deference in violation of the Florida Constitution. Petitioners cite to Article V, Section 21 of the Florida Constitution, which provides that "[i]n interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo."

The Department is unable to reject or modify an ALJ's conclusions of law on a constitutional basis because the subject matter does not fall within the Department's substantive jurisdiction. *See Barfield,* 805. So. 2d at 1010-13. However, the present action was brought pursuant to section 163.3184, which provides in part, "[i]n challenges filed by an affected person, the comprehensive plan or plan amendment shall be determined to be in compliance if the local government's determination of compliance is fairly debatable." To the extent the Department has considered the matter raised under Exception 9, the Department finds that the ALJ's conclusions of law in the paragraphs cited in Exception 9 relating to whether the Plan Amendment is "in compliance," including the ALJ's application of the fairly debatable standard, are reasonable. Furthermore, the Department does not have substitute conclusions that are as or more reasonable.

Exception 9 is DENIED.

Rulings on Respondent's and Intervenors' Joint Exceptions to Recommended Order

(A) – Exception 1: Preliminary Statement of the Recommended Order, Joint Exhibits

In Exception 1, Respondent and Intervenors take exception to a statement in the

preliminary statement of the recommended order that identifies the joint exhibits admitted into evidence at the final hearing. The Department has considered the matter raised under Exception 1 and finds the competent and substantial evidence supports that Joint Exhibits 98 and 99 were admitted into evidence at the final hearing. *See* Hearing Transcript, Volume I, page 128.

Exception 1 is ACCEPTED.

(B) – Exception 2: Preliminary Statement of the Recommended Order, Intervenors' Exhibits

In Exception 2, Respondent and Intervenors take exception to the preliminary statement of the recommended order because it does not identify Intervenors' Exhibits 89 and 92 as being admitted into evidence at the hearing. Pursuant to section 120.57(1)(k), Florida Statutes, an "agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." Exception 2 fails to include a legal basis for the exception and fails to identify a specific citation in the record to show Intervenors' Exhibit 89 was admitted into evidence.

To the extent the Department has considered the matters raised under Exception 2, the Department finds the competent and substantial evidence supports that Intervenors' Exhibit 92 was entered into evidence. *See* Hearing Transcript, Volume III, page 429. Although pages 324 and 325 in Volume II of the hearing transcript indicate that Intervenors' called Charles Gauthier as a witness and the witness' testimony summarized a document identified as "Joint 89" at the final hearing, the transcript does not reflect that this document was admitted into evidence by the ALJ as Intervenors' Exhibit 89.

Exception 2 is ACCEPTED as to Intervenors' Exhibit 92 and DENIED as to Exhibit 89.

(C) – Exception 3: Paragraph 58 of the Recommended Order

In Exception 3, Respondent and Intervenors take exception to the finding of fact related to the ALJ's application of Policy 7.3 to Petitioners' position as not being supported by competent and substantial evidence. Additionally, Respondent and Intervenors request that Paragraph 58 be modified to reflect their own application of the policy to Petitioner's position. The Department has considered the matter and finds that the findings of fact in paragraph 58 were based on competent substantial evidence in the record. Further, the proceedings on which the findings were made complied with the essential requirements of law.

Exception 3 is DENIED.

Remainder of the Recommended Order

The Department has reviewed the remainder of the Recommended Order and concludes that all findings of fact therein were based on 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 City of Miramar Comprehensive Plan Amendment, adopted by Ordinance No. 19-01 on October 17, 2018, is "in compliance," as defined in section 163.3184(1)(b), Florida Statutes. The Department adopts the Recommended Order, as modified by Respondent's and Intervenors' Joint Exceptions 1 and 2 as

the Department's Final Order.

Dated this 23 day of September, 2019.

Brian McManus, Chief of Staff
Florida Department of Economic Opportunity

NOTICE OF RIGHT TO JUDICIAL REVIEW

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 JUDICIAL REVIEW OF THIS FINAL AGENCY ACTION, A NOTICE OF APPEAL MUST BE FILED WITH THE APPROPRIATE DISTRICT COURT OF APPEAL WITHIN THIRTY (30) CALENDAR DAYS AFTER THE DATE THE FINAL AGENCY ACTION WAS FILED BY THE AGENCY CLERK. THE NOTICE OF APPEAL MUST BE ACCOMPANIED BY THE FILING FEE SPECIFIED IN SECTION 35.22, FLORIDA STATUTES. A COPY OF THE NOTICE OF APPEAL MUST ALSO BE FILED WITH THE DEPARTMENT'S AGENCY CLERK, 107 EAST MADISON STREET, CALDWELL BUILDING, MSC 110, TALLAHASSEE, FLORIDA 32399-4128, AGENCY.CLERK@DEO.MYFLORIDA.COM. A DOCUMENT IS FILED WHEN IT IS RECEIVED. THE NOTICE OF APPEAL MUST BE SUBSTANTIALLY IN THE FORM PRESCRIBED BY FLORIDA RULE OF APPELLATE PROCEDURE 9.900(A).

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 indicted this 24th day of September, 2019.

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