FINAL ORDER NO. AC-21-001

STATE OF FLORIDA
ADMINISTRATION COMMISSION

JACQUELINE ROGERS, CYNTHIA COLE, ANN BENNETT, AND THERESA BLACKWELL,

Petitioners,

v.

ESCAMBIA COUNTY,

Respondent.
_____/

AC Case No. ACC-20-001
DOAH Case No. 19-1153GM

FINAL ORDER

This cause came before the Governor and Cabinet, sitting as the Administration Commission ("Commission"), on February 2, 2021, for consideration of the Recommended Order entered pursuant to section 163.3184, Florida Statutes, in the Division of Administrative Hearings ("DOAH"), Case No. 19-1153GM ("Recommended Order"). This proceeding followed a challenge to a comprehensive plan amendment adopted by the Escambia County Board of County Commissioners ("Board") on February 7, 2019. After receipt of the Recommended Order from DOAH, the Commission is charged with taking final agency action regarding whether the comprehensive plan amendment is "in compliance." § 163.3184(5)(d), Fla. Stat.[1] For the reasons explained below, the Commission determines that Escambia County Comprehensive Plan Amendment CPA 2018-02 is not "in compliance" with Florida law.

[1] " 'In compliance' means consistent with the requirements of ss. 163.3177, 163.3178, 163.3180, 163.3191, 163.3245, and 163.3248, with the appropriate strategic regional policy plan, and with the principles for guiding development in designated areas of critical state concern and with part III of chapter 369, where applicable." § 163.3184(1)(b), Fla. Stat.

I. BACKGROUND

On February 7, 2019, Escambia County adopted Comprehensive Plan Amendment CPA 2018-02 ("Plan Amendment"), adopted by Ordinance 2019-09, which strikes Future Land Use Policy 3.1.5 ("FLU 3.1.5") from the County's Comprehensive Plan. Prior to being stricken, FLU 3.1.5 provided that "[t]o protect silviculture, agriculture, and agriculture-related activities, Escambia County will not support the establishment of new rural communities." The Plan Amendment thus deletes the County's policy direction to oppose establishment of new rural communities within the County.

On March 6, 2019, Petitioners filed a Petition with DOAH challenging the Plan Amendment pursuant to section 163.3184. Petitioners alleged that the Plan Amendment: (1) renders the existing Comprehensive Plan internally inconsistent, contrary to section 163.3177(2); (2) fails to discourage urban sprawl, as required by section 163.3177(6)(a)9.; and (3) is not based upon relevant and appropriate data and an analysis by the local government, as required by section 163.3177(1)(f).

A final hearing was originally scheduled for July 30, 2019, but was continued to October 30, 2019, following the resignation of Respondent's initial counsel in this matter. The DOAH Administrative Law Judge ("ALJ") conducted a pre-hearing conference with the parties on October 14, 2019, and the parties filed a pre-hearing stipulation on October 23, 2019.

The DOAH hearing was held on October 30, 2019. On January 9, 2020, following the hearing, the ALJ issued a Recommended Order concluding that Petitioners did not prove beyond fair debate that the Plan Amendment either rendered the existing Comprehensive Plan internally inconsistent or failed to discourage urban sprawl, but that Petitioners had proven beyond fair debate that the Plan Amendment was not supported by relevant and appropriate data and an

analysis thereof. Ultimately, the ALJ concluded that Escambia County Comprehensive Plan Amendment CPA 2018-02 was not "in compliance," as that term is defined by section 163.3184(1)(b), Florida Statutes.

Neither Petitioners nor Respondent filed any exceptions to the Recommended Order with the Commission as authorized by section 120.57(1)(k), Florida Statutes. Any exceptions were due within fifteen (15) days from the date of the recommended order. *Id.*

On February 2, 2021, Petitioners and Respondent appeared before the Commission and presented their arguments. This Final Order follows.

II. STANDARD OF REVIEW OF RECOMMENDED ORDER

Chapter 120 of the Administrative Procedure Act provides that the Commission must adopt the ALJ's Recommended Order, except under certain defined circumstances. *See Miami-Dade Cty. v. Dep't of Cmty. Affairs*, 54 So. 3d 633, 634 (Fla. 1st DCA 2011) ("The scope of the Administration Commission's review of the ALJ's recommended order is limited by the provisions of section 120.57(1)(l), Florida Statutes."). The Commission has limited authority to reject or modify the ALJ's findings of fact:

> The agency may not reject or modify the findings of fact 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.

§ 120.57(1)(l), Fla. Stat. "Competent substantial evidence" means "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred" or such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Campbell v. Dep't of Transportation*, 267 So. 3d

541, 546 (Fla. 1st DCA 2019) (quoting *Heifetz v. Dep't of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985)).

In reviewing the findings of fact within the Recommended Order, the Commission's consideration is expressly restricted to the record established in the administrative proceedings below. *See Fox v. Treasure Coast Reg'l Planning Council*, 442 So. 2d 221, 227 (Fla. 1st DCA 1983) ("[W]hen fact-finding functions have been delegated to a hearing officer, the Commission must rely in its determinations upon the record developed before the hearing officer."). The weight given to conflicting evidence is a matter reserved for the ALJ, as the trier of fact, and may not be reconsidered by the Commission. *See Cenac v. Fla. State Bd. of Accountancy*, 399 So. 2d 1013, 1016 (Fla. 1st DCA 1981) ("The hearing officer in an administrative proceeding is the trier of fact, and he or she is privileged to weigh and reject conflicting evidence."). Thus, the Recommended Order is to be afforded great deference because "[i]t is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." *Heifetz*, 475 So. 2d at 1281.

The Commission "may reject or modify the conclusions of law over which it has substantive jurisdiction." § 120.57(1)(l), Fla. Stat. If the Commission rejects or modifies a conclusion of law, it "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 or more reasonable than that which was rejected or modified." *Id.*

The label assigned to a statement in the Recommended Order is not dispositive as to whether it is a finding of fact or a conclusion of law. *See J.J. Taylor Companies, Inc. v. Dep't of Bus. & Prof'l Regulation, Div. of Alcoholic Beverages & Tobacco*, 724 So. 2d 192, 193 (Fla. 1st

DCA 1999) ("Erroneously labeling what is essentially a factual determination a 'conclusion of law,' whether by the hearing officer or the agency does not make it so, and the obligation of the agency to honor the hearing officer's findings of fact may not be avoided by categorizing a contrary finding as a 'conclusion of law.' " (citation omitted)). Therefore, conclusions of law labeled as findings of fact, and vice versa, will be appropriately considered by the Commission based upon the statement itself, and not the label assigned.

III. SUMMARY OF COMPLIANCE DETERMINATION

The ALJ properly assigned the burden of proof to Petitioners and correctly applied the "preponderance of the evidence" standard required for this proceeding. *See* § 163.3184(5)(c)1., Fla. Stat. ("In 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."); § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence . . . and shall be based exclusively on the evidence of record and on matters officially recognized.").

As explained previously, Petitioners alleged that the Plan Amendment: (1) renders the existing Comprehensive Plan internally inconsistent, contrary to section 163.3177(2); (2) fails to discourage urban sprawl, as required by section 163.3177(6)(a)9.; and (3) is not based upon relevant and appropriate data and an analysis by the local government, as required by section 163.3177(1)(f).[2]

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[2] As to the first two allegations, the ALJ found that the preponderance of the evidence does not support a finding that the Plan Amendment creates internal inconsistencies in the existing Comprehensive Plan or fails to discourage urban sprawl. Accordingly, the ALJ concluded that Petitioners did not prove beyond fair debate that the Plan Amendment created any internal inconsistencies with the cited provisions of the Plan or failed to discourage urban sprawl. The Commission determines that the ALJ's findings of fact with respect to these two specific

In its findings of fact, the ALJ found with respect to the third allegation that although the agenda items for the hearings held on the County's Plan Amendment include a generalized reference to "changing needs within the County," the County offered no data at the DOAH hearing to establish such changing needs. The ALJ further found that, in effect, the County offered no data or analysis as the DOAH hearing to support the Plan Amendment. The ALJ thus found that the preponderance of the evidence supports a finding that the Plan Amendment is not supported by any relevant data or an analysis thereof.

In its conclusions of law, the ALJ concluded that "[a]ll . . . plan amendments shall be based upon relevant and appropriate data and an analysis by the local government" under section 163.3177(1)(f) and that therefore the Plan Amendment at issue had to be supported by at least some data and an analysis. However, the ALJ concluded that the County provided no data or analysis to support its Plan Amendment. Accordingly, the ALJ concluded that Petitioners proved beyond fair debate that the Plan Amendment is not supported by data and analysis.

The Commission has considered the record in its entirety, including the ALJ's Recommended Order, the transcript from the DOAH hearing, and the parties' DOAH exhibits. Based on its review, the Commission determines in its Final Order that the ALJ's findings of fact are supported by competent substantial evidence in the record. The Commission further determines that the ALJ's conclusions of law are a reasonable application of the law to the facts. As such, the Commission determines that the Plan Amendment is not "in compliance" with

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allegations are supported by competent substantial evidence in the record, and that the ALJ's conclusions of law regarding the same are a reasonable application of Florida law.

Florida law because the County failed to base its Plan Amendment "upon relevant and appropriate data and an analysis" as required by section 163.3177(1)(f).[3]

IV. CONCLUSION

The Commission hereby adopts the ALJ's findings of fact and conclusions of law in the Recommended Order. Upon review of the entire record and the Recommended Order, the Commission determines that Escambia County Comprehensive Plan Amendment CPA 2018-02, adopted by Ordinance No. 2019-09 on February 7, 2019, is not "in compliance" with Florida law.

V. REMEDIAL ACTION AND SANCTIONS

Pursuant to section 163.3184(8)(a), Florida Statutes, the Commission directs the Board to take the following remedial action:

Within sixty (60) days from the date of issuance of this Final Order, the Board is directed to rescind Escambia County Ordinance No. 2019-09, adopted on February 7, 2019, which adopted Comprehensive Plan Amendment CPA 2018-02. The Board shall notify the Secretary of

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[3] Respondent argued before the Commission that the Plan Amendment was supported by data and analysis presented at the DOAH hearing in the form of the County's two witnesses. Within its Recommended Order, the ALJ rejected the testimony of one of those witnesses as unreliable and unpersuasive, and essentially found that the testimony of the other witness did not support the County's position. The Commission determines that it is not authorized to second-guess the ALJ's credibility determination regarding the first witness, and that the ALJ's findings of fact regarding the testimony of both witnesses are supported by competent substantial evidence. The Commission therefore declines to address whether the County waived this argument after the deadline for filing exceptions expired, *see Couch v. Comm'n on Ethics*, 617 So. 2d 1119, 1124 (Fla. 5th DCA 1993), or whether its argument is consistent with the plain language of the relevant statutory provision, *see* § 163.3177(1)(f), Fla. Stat. ("*To be based on data* means *to react to it in an appropriate way and to the extent necessary* indicated by the data available on that particular subject *at the time of adoption of the plan or plan amendment at issue*." (emphasis added)).

the Commission of the action of rescinding Ordinance No. 2019-09 within ten (10) days from the date of rescission.

The Commission notes that it is not its role to pass judgment on the policy merits of the Plan Amendment. This Final Order does not prohibit the Board from reenacting the Plan Amendment based upon relevant and appropriate data and analysis.

The Commission declines to exercise its discretion to impose sanctions in this proceeding pursuant to section 163.3184(8)(b), Florida Statutes.

DONE AND ORDERED this 16th day of March, 2021.

CHRISTOPHER SPENCER, Secretary
Administration Commission

FILED with the Clerk of the Administration Commission this 16th day of March, 2021.

Clerk, Administration Commission

NOTICE OF RIGHTS

"A party who is adversely affected by final agency action is entitled to judicial review." § 120.68(1)(a), Fla. Stat. Pursuant to Florida Rule of Appellate Procedure 9.110, judicial review shall be invoked by filing a Notice of Appeal within thirty (30) days of the rendition of the Final Order with the Clerk of the Commission, Office of Policy and Budget, Executive Office of the Governor, The Capitol, Room 1802, Tallahassee, Florida 32399-0001; and by filing a copy of the Notice of Appeal with the Clerk of the appropriate District Court of Appeal, accompanied by the applicable filing fees.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to the following persons by United States mail, electronic transmission, or hand delivery this 16th day of March, 2021.

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Clerk, Administration Commission

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