FINAL ORDER NO. DEO-21-035

STATE OF FLORIDA
DEPARTMENT OF ECONOMIC OPPORTUNITY

MAGALY L. GORDO,

Petitioner,

vs.

DOAH CASE NO.: 20-0190GM
DEO CASE NO.: 21-044

CITY OF SUNNY ISLES BEACH, FLORIDA, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA,

Respondent.

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FILED
DIVISION OF ADMINISTRATIVE HEARINGS
2021 DEC 13 PM 12: 13

FINAL ORDER

The Division of Community Development within the Florida Department of Economic Opportunity ("Department") considered this matter following the receipt of a recommended order ("Recommended Order").[1] The Administrative Law Judge ("ALJ") assigned to this matter by the Division of Administrative Hearings ("DOAH") issued the Recommended Order on September 3, 2021.

Background

This is a proceeding to determine whether the City of Sunny Isles Beach's ("City") comprehensive plan amendments adopted by Ordinance Nos. 2019-549 and 2019-550 ("Plan Amendments"), on December 19, 2019, are "in compliance," as defined in section 163.3184(1)(b), Florida Statutes (2020). The Plan Amendments provided text-based amendments that created a Town Center South District Overlay ("Town Center South"), a Town Center North District

[1] A copy of the Recommended Order is attached hereto as Exhibit "A."

Overlay ("Town Center North"), and adopted the density and intensity standards for the Town Center South. The Plan Amendments also amended the Future Land Use Map ("FLUM") to reflect the Town Center North and the Town Center South overlays and amended the land use designations for certain Town Center South properties.

On January 17, 2020, Magaly Gordo ("Petitioner") filed a petition for an administrative hearing challenging whether the Plan Amendments are "in compliance," as defined in section 163.3184(1)(b), Florida Statutes. Petitioner alleged that the Plan Amendments: (1) were not supported by relevant and appropriate data and analysis; (2) were internally inconsistent with the existing Comprehensive Plan; (3) failed to discourage urban sprawl; (4) created the Town Center South district as a new land use; and (5) should not have been reviewed under the state expedited review process. Prior to the hearing, Petitioner filed a notice striking the urban sprawl allegation.

A duly noticed final hearing was held as scheduled via Zoom before a duly designated ALJ on June 8-9, 2021.

On September 3, 2021, the ALJ issued the Recommended Order, recommending the Department issue a final order determining the Plan Amendments to be in compliance. On September 18, 2021, Petitioner timely filed exceptions to the Recommended Order. Subsequently, Respondent timely filed responses to Petitioner's exceptions to the Recommended Order on September 28, 2021. Petitioner's Exceptions and Respondent's Responses have been considered in this Final Order.

Role of the Department

Petitioner filed their challenge 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 Amendments are in compliance.

The Department may determine the Plan Amendments are in compliance and enter a final order to that effect or determine that the Plan Amendments are 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 received a record consisting of the documentary evidence introduced at the final hearing and a three-volume transcript of the proceedings of the final hearing. The Department 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., Great Am. Div. v. Unemployment. App. Comm'n*, 671 So. 2d 287, 289 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., Div. of Alcoholic Bev. & Tob.*, 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.; *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 may not 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 Petitioner's Exceptions to Recommended Order

(1) – Exception 1: Paragraph 14 of the Recommended Order (RO page 6)

In Exception 1, Petitioner takes exception to the finding of fact in paragraph 14 relating to the maximum density allowed for the Mixed-Use Business land use category. Petitioner alleges that the ALJ erroneously stated that the "maximum density for the Mixed-Use Business land use category was 85 du/acre" and that "all of the developed projects had densities that complied with the Comp Plan."

Pursuant to 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 1 fails to include a legal basis for rejecting or modifying any of thc ALJ's findings of fact.

Nonetheless, the Department finds there is competent substantial evidence in the record to support the ALJ's finding of fact. Hearing Transcript, Volume III, pages 298-300, 308, 313-314, and 331. Evidence is competent if it is admissible under the pertinent legal rules of evidence. *Scholastic Book Fairs, Inc.*, 671 So. 2d at 290 n.3. Evidence is substantial if there is "some (more than a mere iota or scintilla), real, material, pertinent, and relevant evidence . . . having definite probative value (that is, 'tending to prove') as to each essential element" of the claim. *Id.* It is not the place of the Department to "weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion." *Heifetz*, 475 So. 2d at 1281. Therefore, so long as competent substantial evidence supports the ALJ's findings of fact, the Department may not reject them to make alternative findings supported by evidence. *Lantz,* 16 So. 3d at 521. The Department finds the ALJ's finding of fact in paragraph 14 is supported by competent and substantial evidence.

To the extent Petitioner's exception argues that the finding of fact in paragraph 14 is an incorrect legal conclusion, the Department has considered Exception 1 and cannot substitute a legal conclusion as reasonable or more reasonable than that reached by the ALJ.

Exception 1 is DENIED.

(2) – Exception 2: Paragraph 22 of the Recommended Order (RO page 7)

In Exception 2, Petitioner takes exception to the finding of fact in paragraph 22 relating to the use of the term "maximum density." Petitioner alleges that the text-based amendment uses the term "base density," not "maximum density." Petitioner further alleges that there was not a maximum density because properties could receive increased densities through density bonuses and transferrable development rights ("TDRS"), which would far exceed 85 du/acres.

The Department finds competent and substantial evidence in the record to support that the

text-based amendments uses the term "base density," not "maximum density." Hearing Transcript, Volume III, pages 306-309, 317-319 and Joint Exhibits 5 and 17. Paragraph 22 is amended as follows:

> The text-based amendments also provided for density and intensity in the Town Center South overlay for the first time. Specifically, the base density was established at 75 du/acre, and the intensity was established with a base of 3.5 FAR and a maximum of 5.2 FAR. There were the same as the LDRs.

To the extent Petitioner's exception argues that the finding of fact in paragraph 22 is an incorrect legal conclusion, the Department has considered Exception 2, as amended, and cannot substitute a legal conclusion as reasonable or more reasonable than that reached by the ALJ.

Exception 2 is ACCEPTED as to the ALJ's reference to maximum density and DENIED to the extent Petitioner argues that change would impact any legal conclusions of the ALJ.

(3) – Exception 3: Paragraph 51 of the Recommended Order (RO page 12)

In Exception 3, Petitioner takes exception to the finding of fact in paragraph 51. Petitioner alleges that the ALJ erroneously relied upon the finding that there was no increase in density beyond what the prior Comprehensive Plan allowed.

The Department finds there is competent substantial evidence in the record to support the ALJ's finding of fact. Hearing Transcript, Volume III, pages 340-341. Evidence is competent if it is admissible under the pertinent legal rules of evidence. *Scholastic Book Fairs, Inc.*, 671 So. 2d at 290 n.3. Evidence is substantial if there is "some (more than a mere iota or scintilla), real, material, pertinent, and relevant evidence . . . having definite probative value (that is, 'tending to prove') as to each essential element" of the claim. Id. It is not the place of the Department to "weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion." *Heifetz*, 475 So. 2d at 1281. Therefore, so long as competent

substantial evidence supports the ALJ's findings of fact, the Department may not reject them to make alternative findings supported by evidence. *Lantz*, 16 So. 3d at 521. The Department finds competent substantial evidence supports the ALJ's finding of fact in paragraph 51.

To the extent Petitioner's exception argues that the finding of fact in paragraph 51 is an incorrect legal conclusion, the Department has considered Exception 3 and cannot substitute a legal conclusion as reasonable or more reasonable than that reached by the ALJ.

Exception 3 is DENIED.

(4) – Exception 4: Paragraphs 48, 49, 50, 51, 52, and 56 of the Recommended Order (RO pages 12-14)

In Exception 4, Petitioner takes exception to the findings of fact in paragraphs 48, 49, 50, 51, 52, and 56. Petitioner alleges that the ALJ erroneously relied on the 2016 SLOSH map as the best available data. Petitioner further alleges that the ALJ erroneously found that an evaluation of hurricane evacuation impacts was not required because the Plan Amendments did not increase density beyond that allowed in the existing Comprehensive Plan.

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.

Nonetheless, the Department finds there is competent substantial evidence in the record to support the ALJ's finding of fact. Hearing Transcript, Volume II, pages 174-175, 184-189 and Volume III, pages 340-341. The Department cannot determine that the proceedings on which the findings were based failed to comply with the essential requirements of the law.

To the extent Petitioner's exception argues that the finding of facts in paragraphs 48, 49, 50, 51, 52, and 56 is an incorrect legal conclusion, the Department has considered Exception 4 and cannot substitute a legal conclusion as reasonable or more reasonable than that reached by the ALJ.

Exception 4 is DENIED.

Remainder of the Recommended Order

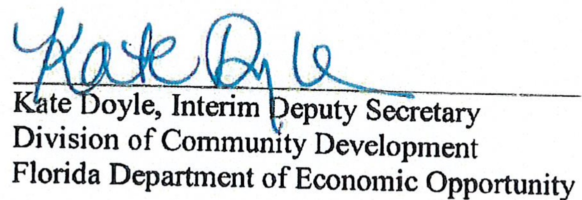
The Department has reviewed the remainder of the Recommended Order and concludes that all findings of fact therein were based on competent substantial evidence in the record. The Department finds that the proceedings on which the findings of fact were based complied with the essential requirements of the 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 is "in compliance," as defined in section 163.3184(1)(b), Florida Statutes. The Department adopts and incorporates the Recommended Order, as amended, into the Department's Final Order.

Dated this 29th day of November 2021.



Kate Doyle, Interim Deputy Secretary
Division of Community Development
Florida Department of Economic Opportunity

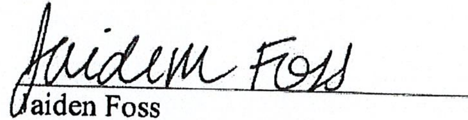
NOTICE OF RIGHT TO JUDICIAL REVIEW

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 DEPARTMENT'S AGENCY CLERK, 107 EAST MADISON STREET, CALDWELL BUILDING, MSC 110, TALLAHASSEE, FLORIDA 32399-4128, AGENCY.CLERK@DEO.MYFLORIDA.COM, WITHIN THIRTY (30) CALENDAR DAYS AFTER THE DATE OF THE FINAL AGENCY ACTION. A DOCUMENT IS FILED WITH THE AGENCY CLERK 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 APPROPRIATE DISTRICT COURT OF APPEAL. THE NOTICE OF APPEAL MUST BE ACCOMPANIED BY THE FILING FEE SPECIFIED IN SECTION 35.22, FLORIDA STATUTES.

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 29th day of November 2021.



Jaiden Foss
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