STATE OF FLORIDA
DEPARTMENT OF ECONOMIC OPPORTUNITY

JONATHAN LIVINGSTON and
LAKSHMI GOPAL,

Petitioners,

and RIGHT SIZE SAN MARCO, INC.,
a Florida not-for-profit corporation,

Intervenor,

DOAH CASE NO.: 20-1594GM
DEO CASE NO.: 20-102
DEO FINAL ORDER NO.: 20-044

v.

CITY OF JACKSONVILLE, FLORIDA,

Respondent,

and

SOUTH JACKSONVILLE PRESBYTERIAN CHURCH, INCORPORATED, and HARBERT REALTY SERVICES, LLC,

Intervenors.

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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 Ordinance No. 2019-750-E (the "Plan Amendment") to the City of Jacksonville Comprehensive Plan ("Plan") is "in compliance," as defined in section 163.3184(1)(b), Florida Statutes (2019).[1] The Plan Amendment was adopted by Ordinance on February 25, 2020. The Plan Amendment was a small scale amendment pursuant to section 163.3187, Florida Statutes, which changed the future land use designation on a portion of the Subject Property from Residential Professional Institutional (RPI) to Community/General Commercial (CGC) and extended the City's Urban Priority Development Area to the property.

On March 26, 2020, Jonathan Livingston and Lakshmi Gopal ("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 is internally inconsistent with the City's Comprehensive Plan, in violation of section 163.3177(2), Florida Statutes; not based on relevant and appropriate data, as required by section 163.3177(1)(f), Florida Statutes; failed to react to data in an appropriate way; and failed to establish meaningful and predictable standards for the use and development of land.

The case was scheduled for, and a final hearing was held, on May 28 and 29, 2020, via Zoom video conference.

The ALJ issued the Recommended Order on August 10, 2020, recommending the Department issue a final order determining the Plan Amendment to be found in compliance. A copy of the Recommended Order is attached hereto as Exhibit "A." The petitioners timely filed exceptions to the Recommended Order on August 25, 2020.

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[1] References to the *Florida Statutes* are to the 2019 version, which was in effect on the date the Ordinance was adopted.

Role of the Department

Petitioners' challenge was filed pursuant to sections 120.569, 120.57(1), and 163.3187, 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. § 163.3187(5)(b), 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 163.3187, 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. § 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 38

In Exception 1, Petitioners take exception to finding of fact in paragraph 38, asserting the Recommended Order found that Petitioners' expert, Mr. Atkins, cited but did not analyze City Policy 1.1.20A. Exception 1 states it is not asking for reweighing of evidence, but more acknowledgment of Mr. Atkin's testimony.

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 the ALJ's findings are supported by competent and substantial evidence, the agency may not reject them to make alternative findings supported by evidence. *Lantz v. Smith*, 16 So. 3d 518, 521 (Fla. 1st DCA 2013). The Recommended Order states "Mr. Atkins, testified that he was familiar with Policy 1.1.20A, but did not explain how or why the Ordinance was internally inconsistent with Policy 1.1.20A. Instead, Mr. Atkins testified about data and analysis regarding Policy 1.1.21." The Exception does not clearly ask the

Department to reject or modify the existing finding of fact, but merely to acknowledge Mr. Atkins' testimony. The record reflects the testimony and exhibits introduced by the parties, and nothing the Department may state in the Final Order will modify, supersede, or acknowledge a particular point already existing within the record. Ultimately, the ALJ's finding of fact in paragraph 38 was supported by competent and substantial evidence.

The Department finds there is competent substantial evidence in the record to support the ALJ's finding of fact in paragraph 38.

Exception 1 is DENIED.

(B) – Exception 2: Paragraph 47

In Exception 2, Petitioners take exception to the finding of fact in paragraph 47 for a similar reason as set forth in Exception 1. Petitioners take exception to the ALJ's characterization of Mr. Atkins testimony and seek "a simple acknowledgment that testimony existed of record concerning Policy 1.1.20B of the City of Jacksonville Comprehensive Plan."

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 the ALJ's findings are supported by competent and substantial evidence, the agency may not reject them to make alternative findings supported by evidence. *Lantz v. Smith*, 16 So. 3d 518, 521 (Fla. 1st DCA 2013). The Recommended Order states "Petitioners and Right Size did not offer any evidence regarding the consistency of the Ordinance with Policy 1.1.20B and their expert did not offer any opinions or otherwise discuss consistency of the Ordinance with Policy 1.1.20B." The Exceptions do not clearly ask the Department to reject or modify the existing finding of fact, but merely to acknowledge that testimony existed of record concerning Policy 1.1.20B. The record reflects the testimony and exhibits introduced by the parties, and nothing the Department may state in the Final Order will

modify, supersede, or highlight a particular point already existing within the record. Ultimately, the ALJ's finding of fact in paragraph 47 was supported by competent and substantial evidence.

The Department finds there is competent substantial evidence in the record to support the ALJ's finding of fact in paragraph 47.

Exception 2 is DENIED.

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 City of Jacksonville Comprehensive Plan Amendment, adopted by 2019-750-E on February 25, 2020, is "in compliance," as defined in section 163.3184(1)(b), Florida Statutes. The Department adopts and incorporates the Recommended Order in its entirety in this Final Order.

Dated this 9th day of September, 2020.

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 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 indicated this 9th day of September, 2020.

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Agency Clerk
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