STATE OF FLORIDA
DEPARTMENT OF ECONOMIC OPPORTUNITY

PGSP NEIGHBORS UNITED, INC.,

Petitioner,

v.

DOAH CASE NO.: 20-4083GM
DEO CASE NO.: 21-012

CITY OF ST. PETERSBURG, FLORIDA

Respondent.

_____/

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 a small-scale amendment (the "Plan Amendment") to the City of St. Petersburg's Comprehensive Plan ("Plan") is "in compliance," as defined in section 163.3184(1)(b), Florida Statutes (2020).[1] The Plan Amendment, adopted by Ordinance 739-L on August 13, 2020, amends the Plan by changing the future land use map ("FLUM") designation of the subject property located at 635 64th Street South, St. Petersburg,

[1] References to the *Florida Statutes* are to the 2020 version, which was in effect on the date the Ordinance was adopted.

Florida. The Plan Amendment changes the future land use categories as follows: approximately 4.33 acres from "institutional" to "residential medium;" approximately 0.21 acres from "institutional" to "residential urban," and approximately 0.04 acres from "residential urban" to "residential medium."

On September 14, 2020, PGSP Neighbors United, Inc. ("Petitioner"), 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. Petitioner alleges that the Plan Amendment is internally inconsistent with the City's Comprehensive Plan, in violation of section 163.3177(2), Florida Statutes, and is unsupported by relevant and appropriate data, as required by section 163.3177(1)(f), Florida Statutes.

The case was scheduled and held for final hearing on November 17 and 18, 2020. The ALJ issued the Recommended Order on March 3, 2021, 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." On March 18, 2021, the Petitioner timely filed exceptions to the Recommended Order.

Role of the Department

Petitioner filed its challenge pursuant to sections 120.569, 120.57(1), and 163.3187, Florida Statutes. The ALJ held a hearing and issued the Recommended Order, recommending that the Department find the Plan Amendment in compliance. 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 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.*

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 Petitioner's Exceptions to Recommended Order

(A) Exception 1: Paragraphs 19-21 and 24-27

In Exception 1, Petitioner takes exception to findings of facts and conclusion of law contained in paragraphs 19-21 and 24-27 of the Recommended Order. Petitioner alleges the Recommended Order misinterprets the law, and as a result, erroneously determined the Plan Amendment is internally consistent with the Plan. Petitioner's Exception 1 argues the Recommended Order improperly relies on an LDR rather than the Comprehensive Plan to determine the allowable density on the subject property.

The Department finds there is competent substantial evidence in the record to support the ALJ's findings of facts relating to the allowable density on the subject property. Additionally, the ALJ's findings of fact that the Plan Amendment is consistent with the existing provisions of the Plan is supported by competent substantial evidence. 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 agency 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 findings of fact in paragraphs 19-21 and 24-27 of the Recommended Order.

To the extent Petitioner's exception argues the referenced paragraphs are incorrect legal conclusions, the Department has considered Exception 1 and cannot substitute a legal conclusion as reasonable as or more reasonable than that reached by the ALJ in paragraphs 19-21 and 24-27 of the Recommended Order. The findings of fact in the Recommended Order support the conclusion of law that the Petitioner failed to prove beyond fair debate that the Plan Amendment is internally inconsistent with the Plan.

Exception 1 is DENIED.

(B) Exception 2: Paragraphs 86-89

In Exception 2, Petitioner takes exception to findings of facts and conclusion of law contained in paragraphs 86-89 of the Recommended Order. Petitioner alleges the Recommended Order misinterprets the law and erroneously concludes the City relied upon professionally accepted data and analysis relating to the allowable density on the subject property. The Department finds there is competent substantial evidence in the record to support the ALJ's determination that the Plan Amendment is supported by relevant data and analysis. 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.* The City's witness testified to the data and analysis relied upon in consideration of the Plan Amendment. The ALJ weighed the testimony presented by both parties and determined the more credible evidence supported finding the City relied on appropriate data and analysis. 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 findings of fact in paragraphs 86-89.

To the extent the Petitioner's exception argues the referenced paragraphs are incorrect legal conclusions, the Department has considered Exception 2 and cannot substitute a legal conclusion as reasonable as or more reasonable than that reached by the ALJ. The findings of fact in the Recommended Order support the conclusion that the Petitioner did not prove beyond fair debate that the City failed to rely upon professionally accepted data and analysis.

Exception 2 is DENIED.

(C) Exception 3: Paragraphs 38, 41, 45, 62-64, 81, 90, and 92

In Exception 3, Petitioner takes exception to findings of fact and conclusions of law contained in paragraphs 38, 41, 45, 62-64, 81, 90, and 92 of the Recommended Order. Petitioner alleges the Recommended Order misinterprets the law and, as a result, erroneously concludes the Plan Amendment is not internally inconsistent with Plan Policy LU 3.4.

The Department finds there is competent substantial evidence in the record to support the ALJ's findings of facts relating to the Plan Amendment's consistency with Policy LU 3.4. (E.g.,

trans. pgs. 79-81, 135-136, 178-208 Nov. 17, 2020). 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.* The City's witness testified to the Plan Amendment's consistency with Comprehensive Plan Policy LU 3.4. (E.g., trans. pgs. 178-208 Nov. 17, 2020). The ALJ weighed the testimony of the City's witnesses with the Petitioner's witness and determined the more credible evidence supported finding the Plan Amendment is consistent with the 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 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 findings of fact in paragraphs 38, 41, 45, 62-64, 81, 90, and 92.

To the extent the Petitioner's exception argues the referenced paragraphs are incorrect legal conclusions, the Department has considered Exception 3 and cannot substitute a legal conclusion as reasonable as or more reasonable than that reached by the ALJ. The findings of fact in the Recommended Order support the conclusion that the Petitioner did not prove beyond fair debate that the Plan Amendment is internally inconsistent with the Plan.

Exception 3 is DENIED.

(D) Exception 4: Paragraphs 40-42 and 44

In Exception 4, Petitioner takes exception to findings of facts and conclusion of law contained in paragraphs 40-42 and 44 of the Recommended Order. Specifically, the Petitioner

alleges the ALJ failed to make a finding relating to a "limited variation in net density" in determining the Plan Amendment's consistency with Policy LU 3.4.

The Department finds there is competent substantial evidence in the record to support the ALJ made necessary findings of fact in determining the consistency of the Plan Amendment and Policy LU 3.4. Both the Petitioner and the City presented witnesses who testified to the Plan Amendment's consistency with Comprehensive Plan Policy LU 3.4. (E.g., trans. pgs. 79-81, 135-136, 178-208 Nov. 17, 2020). The ALJ weighed these testimonies and determined the more credible evidence supported a finding of consistency between the Plan Amendment and Policy LU 3.4.

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 findings of fact in paragraphs 40-42 and 44.

To the extent the Petitioner's exception argues the referenced paragraphs are incorrect legal conclusions, the Department has considered Exception 4 and cannot substitute a legal conclusion as reasonable as or more reasonable than that reached by the ALJ. The findings of fact in the Recommended Order support the conclusion that the Petitioner did not prove beyond fair debate

that the Plan Amendment is inconsistent with Policy LU 3.4.

Exception 4 is DENIED.

(E) Exception 5: Paragraphs 55 and 56

In Exception 5, Petitioner takes exception to findings of facts contained in, and conclusions of law derived from, paragraphs 55 and 56 of the Recommended Order relating to how Petitioner's witness, Charles Gauthier, calculated the allowable density for the subject property. Petitioner argues the ALJ mischaracterized the amount of information Gauthier reviewed in formulating his opinion, and as a result, may have erroneously concluded the City relied on appropriate data and analysis. The Department finds there is competent substantial evidence in the record to support the ALJ's findings of facts related to witness testimony (E.g., trans. pg. 131, Nov. 17, 2020).

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.* The record reflects the ALJ accepted and considered the testimony of Charles Gauthier as an expert witness for Petitioners. (E.g., trans. pgs. 48–152, Nov. 17, 2020). The record also reflects the ALJ weighed the testimony of each witness presented by the Petitioner and the City, and determined the more credible evidence supported a finding that the Plan Amendment was supported by relevant and appropriate data. 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 findings of fact in paragraphs 55 and 56.

To the extent the Petitioner's exception argues the referenced paragraphs are incorrect legal conclusions, the Department has considered Exception 5 and cannot substitute a legal conclusion as reasonable as or more reasonable than that reached by the ALJ. The findings of fact in the Recommended Order support the conclusion that the Petitioner did not prove beyond fair debate that the City failed to rely upon professionally accepted data and analysis.

Exception 5 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 St. Petersburg Comprehensive Plan Amendment, adopted by Ordinance 739-L on August 13, 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 1 day of April, 2021.

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 indicted this 19th day of April, 2021.

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