

**STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**CORINNE A. GARRETT,**

**Petitioner,**

**v.**

**GARBER HOUSING RESORTS, LLC, A  
FLORIDA LIMITED LIABILITY COMPANY,  
AND FLORIDA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,**

**Respondents.**

**OGC CASE NO. 19-0309**

**DOAH CASE NO. 19-3428**

**FINAL ORDER**

On September 11, 2019, an Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) submitted a Recommended Order of Dismissal (RO) to the Department of Environmental Protection (DEP or Department) in the above captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. No parties filed exceptions to the recommended order.

This matter is now before the Secretary of the Department for final agency action.

**BACKGROUND**

On March 27, 2019, the Department issued a Site Rehabilitation Completion Order (SRCO) to Respondent Garber Housing Resorts, LLC, (Garber Housing) after reviewing the "Limited Groundwater Assessment" conducted on May 9, 2018, which included a recommendation for Risk Management Option Level I, No Further Action (NFA) without Institution Controls.

On April 11, 2019, Connie A. Garrett (Garrett) filed a Request for Extension of Time to File Petition for Administrative Hearing. The Department granted the request on April 19, 2019. On May 9, 2019, Garrett timely filed a Petition for Administrative Hearing (the “Original Petition”) for the property located at 15743 and 15747 Old U.S. Highway 441, Tavares, Florida owned by Garber Housing. On July 18, 2019, the Division of Administrative Hearings (“DOAH”) dismissed the Original Petition for failure to comply with the requirements of Florida Administrative Code Rule 28-106.201. DOAH’s Order granted Garrett ten days to file an amended petition that complied with the requirements of Florida Administrative Code Rule 28-106.201 and did not contain the irrelevant or immaterial allegations as discussed in the Order. On July 23, 2019, Garrett filed an “Amended Petition.” On September 11, 2019, DOAH dismissed the Amended Petition, with prejudice, in the form of a Recommended Order of Dismissal for again failing to comply with the requirements of Florida Administrative Code Rule 28-106.201. No parties filed exceptions to the recommended order.

#### **THE RECOMMENDED ORDER OF DISMISSAL**

On September 11, 2019, DOAH dismissed the Amended Petition, with prejudice, in the form of a Recommended Order of Dismissal for again failing to comply with the requirements of Florida Administrative Code Rule 28-106.201. The ALJ found:

- The Amended Petition was legally insufficient because it did not contain allegations of the specific factual disputes of material fact, the ultimate facts that warrant reversal or modification of the Department’s proposed SRCO, and an explanation of how the alleged facts relate to the applicable rules or statutes; and
- The Amended Petition contains allegations that are not cognizable in this type of environmental administrative proceeding.

## **STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS**

Section 120.57(1)(l), Florida Statutes, forbids agency reviewing a recommended order from rejecting or modifying the findings of fact of an 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 on competent substantial evidence.” § 120.57(1)(l), Fla. Stat. (2019); *Charlotte Cty. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm’n*, 955 So. 2d 61, 62 (Fla. 1st DCA 2007). The term “competent substantial evidence” does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, “competent substantial evidence” refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm’n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996).

Accordingly, the Secretary may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See e.g., Rogers v. Dep’t of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep’t of Env’tl. Prot.*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cty. Sch. Bd.*, 652 So. 2d 894, 896 (Fla. 2d DCA 1995). The ALJ’s decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See e.g., Peace River/Manasota Reg’l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep’t of HRS*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm’n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983).

If the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing the Final Order. *See, e.g., Walker v. Bd. of Prof'l Eng'rs*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006); *Fla. Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Constr. Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc., v. Roberts*, 498 So. 2d 622, 623 (Fla. 1st DCA 1986). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., Fla. Power & Light Co. v. Siting Bd.*, 693 So. 2d 1025, 1026-1027 (Fla. 1st DCA 1997); *North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield v. Dep't of Health*, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1141-42 (Fla. 2d DCA 2001). However, the agency should not label what is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007). Thus, the agency's review of legal conclusions in a recommended order is restricted to those that concern matters within the agency's field of expertise or "substantive jurisdiction." *See, e.g., Charlotte Cty. v. IMC Phosphates Co.*, 18 So. 3d at 1088; *G.E.L. Corp. v. Dep't of Env'tl. Prot.*, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004).

In addition, agencies do not have jurisdiction to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with “factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations,” are not matters over which the agency has “substantive jurisdiction.” *See Martuccio v. Dep’t of Prof’l Regulation*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep’t of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); *Fla. Power & Light Co.*, 693 So. 2d at 1028. Evidentiary rulings are matters within the ALJ’s sound “prerogative . . . as the finder of fact” and may not be reversed on agency review. *See Martuccio*, 622 So. 2d at 609.

If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded, and the item treated as though it were a conclusion of law. *See, e.g., Battaglia Properties, Ltd., v. Fla. Land and Water Adjudicatory Comm’n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1994). However, neither should the agency label what is essentially an ultimate factual determination as a “conclusion of law” to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes*, 952 So. 2d at 1225.

### **CONCLUSION**

No exceptions to the findings of fact and conclusions of law of the Recommended Order were timely filed. Having considered the applicable law and being otherwise duly advised, it is

ORDERED that:

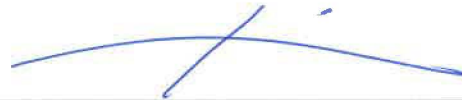
- A. The ALJ’s Recommended Order (Exhibit A) is adopted and incorporated by reference herein.
- B. DEP Site Rehabilitation Order for WCU Site ID: COM\_269860 is APPROVED.

## JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 1st day of <sup>November</sup>~~December~~ 2019, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION



NOAH VALENSTEIN  
Secretary

Marjory Stoneman Douglas Building  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52,  
FLORIDA STATUTES, WITH THE DESIGNATED  
DEPARTMENT CLERK, RECEIPT OF WHICH IS  
HEREBY ACKNOWLEDGED.

  
CLERK  
Deputy

11/1/19  
DATE

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by  
electronic mail to:

Rebecca E. Rhoden, Esq. Lowndes, Drosdick, Doster, Kantor & Reed, P.A. 215 North Eola Drive Orlando, FL 32802 <a href="mailto:Rebecca.rhoden@lowndes-law.com">Rebecca.rhoden@lowndes-law.com</a> <a href="mailto:Tara.tedrow@lowndes-law.com">Tara.tedrow@lowndes-law.com</a> <a href="mailto:Mcgregor.love@lowndes-law.com">Mcgregor.love@lowndes-law.com</a> <a href="mailto:litcontrol@lowndes-law.com">litcontrol@lowndes-law.com</a> <a href="mailto:lynn.elston@lowndes-law.com">lynn.elston@lowndes-law.com</a>	Lorrain. M. Novak, Esq. Department of Environmental Protection Office of General Counsel 3900 Commonwealth Blvd., MS 35 Tallahassee, FL 32399-3000 <a href="mailto:Lorraine.m.novak@FloridaDEP.gov">Lorraine.m.novak@FloridaDEP.gov</a>
Corinne A. Garrett 31304 Saunders Drive Tavares, FL 32778 <a href="mailto:corigarrett@comcast.net">corigarrett@comcast.net</a>	

this 1<sup>st</sup> day of November, 2019.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION

  
N. WEST GREGORY  
Senior Assistant General Counsel

3900 Commonwealth Blvd., M.S. 35  
Tallahassee, FL 32399-3000  
Telephone 850/245-2242  
email [West.Gregory@FloridaDEP.gov](mailto:West.Gregory@FloridaDEP.gov)

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CORINNE A. GARRETT,

Petitioner,

vs.

Case No. 19-3428

GARBER HOUSING RESORTS, LLC, A  
FLORIDA LIMITED LIABILITY  
COMPANY, AND FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,

Respondents.

\_\_\_\_\_ /

RECOMMENDED ORDER OF DISMISSAL

This cause came before the undersigned on the Respondent Garber Housing Resorts LLC's [Garber] Motion to Dismiss Petitioner Corinne A. Garrett's Amended Petition for Administrative Hearing (Amended Petition) filed on July 29, 2019. The Amended Petition challenged a Site Rehabilitation Completion Order (SRCO) issued by the Respondent Department of Environmental Protection (DEP) on March 27, 2019.

The Amended Petition was filed in response to the Order Dismissing Petition with Leave to Amend entered on July 18, 2019 (Order). The Order allowed the Petitioner to file an amended petition and directed that "such amended petition shall comply with the requirements of rule 28-106.201(2), and shall not contain the irrelevant and immaterial allegations discussed in



this Order." The Amended Petition is dismissed with prejudice for the following reasons.

Legally Insufficient

The Amended Petition did not cure the reasons for dismissal stated in the July 18, 2019, Order. The Amended Petition does not contain allegations of the specific factual disputes of material fact, the ultimate facts that warrant reversal or modification of the DEP's proposed SRCO, and an explanation of how the alleged facts relate to the applicable rules or statutes. See Fla. Admin. Code R. 28-106.201(2)(d), (e), (f).

The Amended Petition simply organizes the same allegations from the original petition under headings designed to mimic the requirements of Florida Administrative Code Rule 28-106.201(2). This approach does not render the allegations material and relevant with regard to the underlying factual bases for the proposed SRCO. See Brookwood Extended Care Ctr. of Homestead, LLP v. Ag. for Health Care Admin., 870 So. 2d 834 (Fla. 3d DCA 2003).

Rule 28-106.201(2)(b) states that a petition must contain "an explanation of how the petitioner's substantial interests will be affected by the agency determination." This means that the Petitioner must demonstrate how her substantial interests are affected by the DEP's proposed SRCO. This demonstration must show (1) that she will suffer injury-in-fact of sufficient

immediacy to entitle her to an administrative hearing, and (2) that her substantial injury is of a type or nature which the administrative proceeding is designed to protect. See Agrico Chem. Corp. v. Dep't of Env'tl. Reg., 406 So. 2d 478, 482 (Fla. 2d DCA 1981). The first showing relates to the degree of harm and the second to the nature of the harm. The Amended Petition alleges that the Petitioner "resides four residential lots west of [the subject property] and relies on a private drinking water well as the sole source of water for her home." The Amended Petition does not contain any allegations regarding how the proposed SRCO's determination that "conditions on the property have changed and improved" caused her to suffer an injury-in-fact when her property is located four residential lots away. See Vill. Park Mobile Home Ass'n v. Dep't of Bus. Reg., 506 So. 2d 426, 433 (Fla. 1st DCA 1987) (reflecting that the injury must be real and immediate, not conjectural or hypothetical); see also Metsch v. Univ. of Fla., 550 So. 2d 1149 (Fla. 3d DCA 1989) (unilateral interest or expectation does not rise to the level of a substantial interest).

#### Irrelevant Issues

The Amended Petition contains allegations that are not cognizable in this type of challenge to a proposed SRCO. For example, references in the Amended Petition to compliance with surface water standards in Lake Saunders, to potential storm

water runoff during development, and to Garber's intent to develop the subject properties are not relevant and material issues in this proceeding. See Taylor v. Cedar Key Special Water & Sewerage Dist., 590 So. 2d 481 (Fla. 1st DCA 1991) (reflecting that noncompliance with local land use restrictions and development plans are not a basis for denying an environmental approval); Save the St. Johns River v. St. Johns River Water Mgmt. Dist., 623 So. 2d 1193 (Fla. 1st DCA 1993) (reflecting that compliance with another agency's permitting program should not be litigated in this administrative proceeding).

Having reviewed the pleadings and being otherwise advised, it is

RECOMMENDED that the Department of Environmental Protection enter a final order of dismissal.

DONE AND ENTERED this 11th day of September, 2019, in Tallahassee, Leon County, Florida.



---

FRANCINE M. FFOLKES  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
[www.doah.state.fl.us](http://www.doah.state.fl.us)

Filed with the Clerk of the  
Division of Administrative Hearings  
this 11th day of September, 2019.

COPIES FURNISHED:

Lorraine Marie Novak, Esquire  
Department of Environmental Protection  
Douglas Building, Mail Station 35  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000  
(eServed)

Rebecca E. Rhoden, Esquire  
Lowndes, Drosdick, Doster,  
Kantor & Reed, P.A.  
215 North Eola Drive  
Orlando, Florida 32801  
(eServed)

Corinne A. Garrett  
31304 Saunders Drive  
Tavares, Florida 32778  
(eServed)

Lea Crandall, Agency Clerk  
Department of Environmental Protection  
Douglas Building, Mail Station 35  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000  
(eServed)

Noah Valenstein, Secretary  
Department of Environmental Protection  
Douglas Building  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000  
(eServed)

Justin G. Wolfe, General Counsel  
Department of Environmental Protection  
Legal Department, Suite 1051-J  
Douglas Building, Mail Station 35  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000  
(eServed)

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.