STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

GLENDA Q. MAHANEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	**OGC CASE NO. 19-0310**
	)	**DOAH CASE NO. 19-3429**
GARBER HOUSING RESORTS, LLC, A FLORIDA LIMITED LIABILITY COMPANY, AND FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	
_____/		

FINAL ORDER

On August 19, 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. Glenda Q. Mahaney (Mahaney) timely filed exceptions on September 3, 2019. DEP and Garber Housing Resorts, LLC (Garbor Housing) timely filed responses to Mahaney's exceptions on September 13, 2019.

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 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, Mahaney 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, Mahaney 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 Mahaney 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 30, 2019, Mahaney filed an "Amended Petition." On August 19, 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. On September 3, 2019, Mahaney filed Petitioner's Exceptions to Administrative Law Judge's Recommended Order Dated August 19, 2019. On September 13, 2019, Garber Housing and the Department filed their Responses in Opposition to Petitioner Glenda Mahaney's Exceptions to Administrative Law Judge's Recommended Order.

THE RECOMMENDED ORDER OF DISMISSAL

On August 19, 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 held:

- 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;

- Prior proceedings referenced in the Amended Petition were settled, closed, or finalized; thus, those final agency actions and/or final orders were not the subject of this administrative proceeding;
- The Amended Petition contains allegations that are not cognizable in this type of environmental administrative proceeding; and
- An administrative law judge in this type of proceeding does not have the authority to decide constitutional issues.

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 Envtl. 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 Envtl. 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.

RULINGS ON EXCEPTIONS

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So. 2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing,* 954 So. 2d 77 (Fla. 5th DCA 2007); *Fla. Dep't of Corrs.*, 510 So. 2d at 1124. When a party files no exceptions to certain findings of fact, the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coal. of Fla., Inc. v. Broward Cty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc. v. State of Fla., Agency for Health Care Admin.,* 847 So. 2d 540, 542 (Fla. 4th DCA 2003). However, even when exceptions are not filed, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. (2019); *Barfield,* 805 So. 2d at 112; *Fla. Public Emp. Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

Finally, in reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* § 120.57(1)(k), Fla. Stat. (2019). However, the 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." *Id.*

RULINGS ON MAHANEY'S EXCEPTIONS

Mahaney Exception No. 1: Paragraph 3, page 2, Legally Insufficient

Mahaney takes exception to the ALJ's finding in paragraph 3, page 2, that "The Amended Petition 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."

However, the ALJ's findings are a correct application of the law. Florida Administrative Code Rule 28-106.201(2) sets forth what must be included in a petition for a formal administrative hearing. Florida Administrative Code Rule 28-106.201(2)(d) requires petitions to include "[a] statement of all disputed issues of *material fact*" (emphasis added) or "[i]f there are none, the petition must so indicate." A material fact is a fact essential to the resolution of the legal questions raised in a case. *Cont'l Concrete, Inc.*, 758 So. 2d at 1217.

Florida Administrative Code Rules 28-106.201(2)(e) and (f) require a petition for an administrative hearing to include "specific facts" and "an explanation of how the alleged facts relate" to the rules and statutes petitioner contends require reversal of the agency action. *See P.F-G v. Dep't of Educ., Div. of Vocational Rehab.*, 252 So. 3d 304, 306 (Fla. 5th DCA 2018) (agency properly dismissed petition riddled with conclusory statements challenging unadopted rule) and *Brookwood Extended Care Center of Homestead, LLP v. Agency for Healthcare Admin.*, 870 So. 2d 834, 841 (Fla. 3d DCA 2003) ("non-specific allegations will no longer suffice"). "These requirements are not satisfied by an allegation such as 'the proposed project will adversely affect endangered species and rule 'x' prohibits activities that adversely affect endangered species.' Florida Administrative Code Rule 28-106.201(2) requires, in this example, that the petition identify the endangered species and explain how they will be adversely

affected." *Dimare Fresh, Inc. v. Mosaic Fertilizer, LLC & Dep't of Envtl. Prot.*, Case Nos. 17-0671 & 17-0672 (DOAH Feb. 9, 2017).

When an agency reviews a petition for administrative hearing, it must accept all the allegations as true. *See Mid-Chattahoochee River Users v. Fla. Dep't of Envtl. Prot.*, 948 So. 2d 794, 796 (Fla. Dist. Ct. App. 2006). Even accepting Mahaney's allegations as true, the ALJ held the Amended Petition failed to comply with Florida Administrative Code Rule 28-106.201(2).

In addition, Mahaney attempts to insert new arguments and facts into her exceptions. The Department cannot consider any supplemental facts provided by Mahaney in her exceptions. *See Fla. Power & Light Co.*, 693 So. 2d at 1026–27 (holding, "[i]t is not proper for the agency to make supplemental findings of fact on an issue about which the hearing officer made no findings.")

The Department must accept ALJ's findings from Paragraph 3 because the ALJ correctly applied the law. Therefore, the exception is denied.

Mahaney Exception No. 2: Paragraph 4, page 2, Administrative Finality

Mahaney takes exception to the ALJ's finding in paragraph 4, page 2, that "The prior proceedings referenced in the Amended Petition were settled, closed, or finalized. Those final agency actions and/or final orders were not the subject of this administrative proceeding."

However, the ALJ's conclusions of law regarding "Administrative Finality" are supported by competent substantial evidence and are a correct application of the law. The ALJ correctly held that "[t]hose final agency actions and/or final orders are not the subject of this administrative proceeding" and cited to binding precedent that is within the jurisdiction of the ALJ to decide. *See FINR II, Inc. v. CF Indus., Inc.*, Case No. 11-6495 (Fla. DOAH Apr. 30,

2012; Fla. DEP June 6, 2012) (agency may only consider the proposed agency action and the statutes and rules applicable thereto).

Further, Mahaney attempts to insert new arguments and facts into her exceptions. The Department cannot consider any supplemental facts provided by Mahaney in her exceptions. *See Fla. Power & Light Co. v. State*, at 1026–27 (holding, "[i]t is not proper for the agency to make supplemental findings of fact on an issue about which the hearing officer made no findings.")

The Department must accept ALJ's findings from Paragraph 4 because the ALJ correctly applied the law. Therefore, the exception is denied.

Mahaney Exception No. 3: Paragraph 5, page 3, Irrelevant Issues: Negligence

Mahaney takes exception to the ALJ's finding in paragraph 5, page 3, that "The Amended Petition contains allegations that are not cognizable in this type of proceeding."

However, the ALJ's conclusions of law regarding "Irrelevant Issues" are a correct application of the law. Florida Administrative Code Rule 28-106.201(2)(d) requires petitions to include "[a] statement of all disputed issues of *material fact*" (emphasis added) or "[i]f there are none, the petition must so indicate." A material fact is a fact essential to the resolution of the legal questions raised in a case. *Cont'l Concrete, Inc.*, 758 So. 2d at 1217.

References to willful negligence, gross and willful misconduct, trespass, and nuisance are causes of action that are outside the jurisdiction of an administrative proceeding. *See, e.g.*, § 768.28, Fla. Stat. (2019); *Brown v. Solary*, 37 Fla. 102, 19 So. 161 (1896). When an agency reviews a petition for administrative hearing, it must accept all the allegations as true. *See Mid-Chattahoochee River Users v. Fla. Dep't of Envtl. Prot.*, 948 So. 2d at 796. Even accepting Mahaney's allegations as true, the ALJ held the Amended Petition raised irrelevant issues related

to willful negligence, gross and willful misconduct, trespass, and nuisance and determined those issues were irrelevant and outside of the agency's jurisdiction.

In addition, Mahaney attempts to insert new arguments and facts into her exceptions. The Department cannot consider any supplemental facts provided by Mahaney in her exceptions. *See Florida Power & Light Co.*, at 1026–27 (holding, "[i]t is not proper for the agency to make supplemental findings of fact on an issue about which the hearing officer made no findings.")

The Department must accept ALJ's findings from Paragraph 5 because the ALJ correctly applied the law. Therefore, the exception is denied.

Mahaney Exception No. 4: Paragraph 6, page 3, Irrelevant Issue: Property Boundary Disputes

Mahaney takes exception to the ALJ's finding in paragraph 6, page 3, that "Property boundary disputes are within the exclusive jurisdiction of circuit courts."

However, the ALJ's conclusions of law regarding property boundaries are supported by competent substantial evidence and are a correct application of the law. Florida Administrative Code Rule 28-106.201(2)(d) requires petitions to include "[a] statement of all disputed issues of *material fact*" (emphasis added) or "[i]f there are none, the petition must so indicate." A material fact is a fact essential to the resolution of the legal questions raised in a case. *Cont'l Concrete, Inc.*, at 1217.

An administrative proceeding is not the proper forum to resolve real property issues such as disputed boundary and riparian rights lines and encroachment issues. That power is reserved for the circuit courts. *See* Art. V, § 20(c)(3), Fla. Const.; § 26.012(2)(g), Fla. Stat,; *Miller v. State, Dep't of Envtl. Regulation*, 504 So. 2d 1325, 1327 (Fla. 1st DCA 1987); *Buckley v. Dep't of Health & Rehab. Servs.*, 516 So. 2d 1008, 1009 (Fla. 1st DCA 1987). When an agency reviews a petition for administrative hearing, it must accept all the allegations as true. *See Mid-*

Chattahoochee River Users, at 796. Even accepting Mahaney's allegations as true, the ALJ held the Amended Petition raised property boundary disputes in this proceeding and determined those issues were irrelevant and outside of the agency's jurisdiction.

In addition, Mahaney attempts to insert new arguments and facts into her exceptions. The Department cannot consider any supplemental facts provided by Mahaney in her exceptions. *See Florida Power & Light Co.*, at 1026–27 (holding, "[i]t is not proper for the agency to make supplemental findings of fact on an issue about which the hearing officer made no findings.")

The Department must accept ALJ's findings from Paragraph 6 because the ALJ correctly applied the law. Therefore, the exception is denied.

Mahaney Exception No. 5: Paragraph 7, page 3, Irrelevant Issue: Enforcement Actions

Mahaney takes exception to the ALJ's finding in paragraph 7, page 3, that "[T]his proceeding is not an enforcement action. Thus, past complaints about alleged air, water, and solid waste violations are not at issue in this proceeding."

However, the ALJ's conclusions of law regarding enforcement issues are a correct application of the law. Florida Administrative Code Rule 28-106.201(2)(d) requires petitions to include "[a] statement of all disputed issues of *material fact*" (emphasis added) or "[i]f there are none, the petition must so indicate." A material fact is a fact essential to the resolution of the legal questions raised in a case. *Cont'l Concrete, Inc.*, at 1217.

A third party (who is not the agency charged with enforcement) may not bring an administrative cause of action for enforcement of agency action as part of challenging a separate agency action. *See, e.g., Morgan v. Dep't of Envtl. Prot.*, 98 So. 3d 651 (Fla. 3d DCA 2012); *Lane v. Int'l Paper Co. & Dep't of Envtl. Prot.*, 24 F.A.L.R. 262, 267 (Fla. Dep't of Envtl. Prot. 2001). When an agency reviews a petition for administrative hearing, it must accept all the

allegations as true. *See Mid-Chattahoochee River Users*, at 796. Even accepting Mahaney's allegations as true, the ALJ held the Amended Petition attempted to raise enforcement action issues in this proceeding and those issues were irrelevant and outside of the scope of this proceeding.

In addition, Mahaney attempts to insert new arguments and facts into her exceptions. The Department cannot consider any supplemental facts provided by Mahaney in her exceptions. *See Florida Power & Light Co.*, at 1026–27 (holding, "[i]t is not proper for the agency to make supplemental findings of fact on an issue about which the hearing officer made no findings.")

The Department must accept ALJ's findings from Paragraph 7 because the ALJ correctly applied the law. Therefore, the exception is denied.

Mahaney Exception No. 6: Paragraph 8, page 4, Irrelevant Issue: Land Use Regulations

Mahaney takes exception to the ALJ's finding in paragraph 8, page 4, that "References to alleged non-compliance with Lake County land use regulations, including flooding issues and stormwater runoff issues, are not relevant in this proceeding."

However, the ALJ's conclusions of law regarding land use regulations are a correct application of the law. Florida Administrative Code Rule 28-106.201(2)(d) requires petitions to include "[a] statement of all disputed issues of *material fact*" (emphasis added) or "[i]f there are none, the petition must so indicate." A material fact is a fact essential to the resolution of the legal questions raised in a case. *Cont'l Concrete, Inc.*, at 1217. The Department may not deny environmental permits based on alleged noncompliance with local regulation. *See Council of Lower Keys v. Charley Toppino & Sons, Inc.*, 429 So. 2d 67, 68 (Fla. 3d DCA 1983); *Taylor v. Cedar Key Special Water and Sewerage District,* 590 So. 2d 481 (Fla. 1st DCA 1991). When an agency reviews a petition for administrative hearing, it must accept all the allegations as true. *See*

Mid-Chattahoochee River Users, at 796. Even accepting Mahaney's allegations as true, the ALJ held the Amended Petition attempted to raise compliance with local land use regulations in this proceeding and those issues were irrelevant and outside of the scope of this proceeding.

In addition, Mahaney attempts to insert new arguments and facts into her exceptions. The Department cannot consider any supplemental facts provided by Mahaney in her exceptions. *See Florida Power & Light Co.*, at 1026–27 (holding, "[i]t is not proper for the agency to make supplemental findings of fact on an issue about which the hearing officer made no findings.")

The Department must accept ALJ's findings from Paragraph 8 because the ALJ correctly applied the law. Therefore, the exception is denied.

Mahaney Exception No. 7: Paragraph 9, page 4, Irrelevant Issue: Federal Regulations

Mahaney takes exception to the ALJ's finding in paragraph 9, page 4, that "This state administrative proceeding is also not the proper forum in which to allege violations of federal laws, such as the Clean Water Act."

However, the ALJ's conclusions of law regarding federal regulations are a correct application of the law. Florida Administrative Code Rule 28-106.201(2)(d) requires petitions to include "[a] statement of all disputed issues of *material fact*" (emphasis added) or "[i]f there are none, the petition must so indicate." A material fact is a fact essential to the resolution of the legal questions raised in a case. *Cont'l Concrete, Inc.*, at 1217. Alleged violations of federal environmental laws are beyond the jurisdiction of the Florida Administrative Procedures Act, unless those federal laws have been incorporated by reference into state statutes or administrative rules. *See Curtis v. Taylor*, 648 F.2d 946, 948 (5th Cir. 1980); *Metro. Dade Cty. v. Coscan Fla., Inc.*, 609 So. 2d 644, 650 (Fla. 3d DCA 1992). When an agency reviews a petition for administrative hearing, it must accept all the allegations as true. *See Mid-Chattahoochee River*

Users, at 796. Even accepting Mahaney's allegations as true, the ALJ held the Amended Petition attempted to raise compliance with federal regulations in this proceeding and those issues were irrelevant and outside of the scope of this proceeding.

In addition, Mahaney attempts to insert new arguments and facts into her exceptions. The Department cannot consider any supplemental facts provided by Mahaney in her exceptions. *See Florida Power & Light Co.*, at 1026–27 (holding, "[i]t is not proper for the agency to make supplemental findings of fact on an issue about which the hearing officer made no findings.")

The Department must accept ALJ's findings from Paragraph 9 because the ALJ correctly applied the law. Therefore, the exception is denied.

Mahaney Exception No. 8: Paragraph 10, page 4, Constitutional Issues

Mahaney takes exception to the ALJ's finding in paragraph 10, page 4, that "[A]n administrative law judge in this type of proceeding does not have the authority to decide constitutional issues."

However, the ALJ's conclusions of law regarding constitutional issues are a correct application of the law. Administrative agencies lack the power to consider or determine constitutional issues. *See Fla. Hosp. v. Agency for Health Care Admin.*, 823 So. 2d 844, 849 (Fla. 1st DCA 2002); *Carrollwood State Bank v. Lewis*, 362 So.2d 110, 113–14 (Fla. 1st DCA 1978) (holding that the administrative process cannot resolve a constitutional attack on a statute, rule or regulation). When an agency reviews a petition for administrative hearing, it must accept all the allegations as true. *See Mid-Chattahoochee River Users*, at 796. Even accepting Mahaney's allegations as true, the ALJ held the Petition attempted to raise constitutional issues in this proceeding and those issues are outside of the authority of the ALJ.

In addition, Mahaney attempts to insert new arguments and facts into her exceptions. The Department cannot consider any supplemental facts provided by Mahaney in her exceptions. *See Florida Power & Light Co.*, at 1026–27 (holding, "[i]t is not proper for the agency to make supplemental findings of fact on an issue about which the hearing officer made no findings.")

The Department must accept ALJ's findings from Paragraph 10 because the ALJ correctly applied the law. Therefore, the exception is denied.

Mahaney Exception No. 9: Paragraph 11, page 5, titled "Recommended Order"

Mahaney takes exception to the ALJ's finding in paragraph 11, page 5, that recommends an order of dismissal.

However, the ALJ's conclusions of law regarding the recommended order are a correct application of the law. The ALJ made several findings and applied the law accordingly as described above.

In addition, Mahaney attempts to insert new arguments and facts into her exceptions. The Department cannot consider any supplemental facts provided by Mahaney in her exceptions. *See Florida Power & Light Co.*, at 1026–27 (holding, "[i]t is not proper for the agency to make supplemental findings of fact on an issue about which the hearing officer made no findings.")

The Department must accept ALJ's findings from Paragraph 11 because the ALJ correctly applied the law. Therefore, the exception is denied.

CONCLUSION

Having considered the applicable law in light of the rulings on the above Exceptions, 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 November, 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.

Lea Crandall 11-1-19
CLERK DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by U.S. Mail to:

Glenda Q. Mahaney
PO Box 123
Mount Dora, FL 32756

and by electronic mail to:

Rebecca E. Rhoden, Esq. Lowndes, Drosdick, Doster, Kantor & Reed, P.A. 215 North Eola Drive Orlando, FL 32802 Rebecca.rhoden@lowndes-law.com Tara.tedrow@lowndes-law.com Mcgregor.love@lowndes-law.com litcontrol@lowndes-law.com lynn.elston@lowndes-law.com	Lorrain. M. Novak, Esq. Department of Environmental Protection Office of General Counsel 3900 Commonwealth Blvd., MS 35 Tallahassee, FL 32399-3000 Lorraine.m.novak@FloridaDEP.gov

this 1st day of November, 2019.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GLENDA Q. MAHANEY,

Petitioner,

vs. Case No. 19-3429

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 Glenda Q. Mahaney's Amended Petition for Administrative Hearing [Amended Petition] filed on August 2, 2019. The Petitioner filed a response on August 13, 2019.

The Amended Petition challenges a Site Rehabilitation Completion Order (SRCO) issued by the Respondent Department of Environmental Protection (Department) on March 27, 2019. The Amended Petition was filed in response to the Order Dismissing Petition with Leave to Amend (Order) entered July 18, 2019. The Order allowed the Petitioner to file an amended petition and directed that any "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 outlined 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 Department'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); Brookwood Extended Care Ctr. of Homestead, LLP v. Ag. for Health Care Admin., 870 So. 2d 834 (Fla. 3d DCA 2003).

Administrative Finality

The prior proceedings referenced in the Amended Petition were settled, closed, or finalized. Those final agency actions and/or final orders are not the subject of this administrative proceeding. See FINR II, Inc. v. CF Indus., Inc., Case No. 11-6495 (Fla. DOAH Apr. 30, 2012; Fla. DEP June 6, 2012)(agency may only consider the proposed agency action and the statutes and rules applicable thereto). Thus, compliance with those final orders is not at issue in this proceeding.

Irrelevant Issues

The Amended Petition contains allegations that are not cognizable in this type of environmental administrative proceeding. For example, references to willful negligence, gross and willful misconduct, trespass, and nuisance are causes of action that are outside the jurisdiction of an administrative proceeding. See, e.g., § 768.28, Fla. Stat. (2019); Brown v. Solary, 37 Fla. 102, 19 So. 161 (1896).

Property boundary disputes are within the exclusive jurisdiction of circuit courts. See Miller v. Dep't of Bus. Reg., 504 So. 2d 1325, 1327 (Fla. 1st DCA 1987)(Circuit courts have exclusive jurisdiction to adjudicate all actions involving the title and boundaries of real property. Administrative agencies do not, by their nature, have jurisdiction to decide issues inherent in private property impacts.); Hageman v. Carter, 17 F.A.L.R. 3684, 3690 (Fla. Dep't of Envtl. Prot. 1995)("The circuit courts of this state have exclusive jurisdiction over 'all actions involving titles or boundaries or right of possession of real property.' See Art. V, Sec. 20(c)(3), Fla. Const.; Section 26.012(2)(g), Florida Statutes.").

Also, this proceeding is not an enforcement action. Thus, past complaints about alleged air, water, and solid waste violations are not at issue in this proceeding. A third party (who is not the agency charged with enforcement) is not

authorized to bring an administrative cause of action for enforcement of agency action as part of challenging a separate agency action. See, e.g., Morgan v. Dep't of Envtl. Prot., 98 So. 3d 651 (Fla. 3d DCA 2012); Lane v. Int'l Paper Co. & Dep't of Envtl. Prot., 24 F.A.L.R. 262, 267 (Fla. Dep't of Envtl. Prot. 2001).

References to alleged non-compliance with Lake County land use regulations, including flooding issues and stormwater runoff issues, are not relevant 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).

This state administrative proceeding is also not the proper forum in which to allege violations of federal laws, such as the Clean Water Act. See Curtis v. Taylor, 648 F.2d 946, 948 (5th Cir. 1980); Metro. Dade Cty. v. Coscan Fla., Inc., 609 So. 2d 644, 650 (Fla. 3d DCA 1992).

Constitutional Issues

In addition, an administrative law judge in this type of proceeding does not have the authority to decide constitutional issues. See Fla. Hosp. (Adventis Health) v. Ag. for Health Care Admin., 823 So. 2d 844 (Fla. 1st DCA 2002).

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 19th day of August, 2019, in Tallahassee, Leon County, Florida.

FRANCINE M. FFOLKES
Administrative Law Judge
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this 19th day of August, 2019.

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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.