FLWAC
ITEM #3

SHUTTS & BOWEN LLP

100 Years of Service

SCOTT A. GLASS
(407) 835-6964 Direct Telephone
(407) 849-7264 Direct Facsimile

E-MAIL ADDRESS:
sglass@shutts.com

April 20, 2011

VIA FEDERAL EXPRESS

Barbara Leighty, Clerk
Florida Land & Water Adjudicatory Commission
Office of Policy & Budget
Executive Office of the Governor
Room 1802, The Capitol
Tallahassee, FL 32399-0001

Re: **Ginn-LA Marina, LLLP, Ltd, et al. v. Flagler County**
FLAWAC Case No.: APP-10-007

Dear Ms. Leighty:

In accordance with §120.57(1)(k), Fla. Stat. and Rule 42-2.019, F.A.C., I am enclosing herewith the original and once copy of Petitioners Exceptions to Recommended Order for filing in the above captioned matter. As reflected in the certificate of service, copies have been provided to all parties electronically and via first-class mail.

Thank you for your attention to this matter. If you have any questions or comments, please contact me at (407) 835-6967 or ymckay@shutts.com.

Sincerely,
SHUTTS & BOWEN LLP

Scott A. Glass

/ygm
Enclosures

FLORIDA LAND AND WATER ADJUDICATORY COMMISSION

GINN-LA MARINA, LLLP, LTD,
a Georgia limited liability partnership,
NORTHSHORE HAMMOCK LTD, LLLP,
a Georgia limited liability partnership; and,
; and, NORTHSHORE OCEAN HAMMOCK
INVESTMENT, LTD, LLLP,
a Georgia limited liability partnership,

Petitioners,

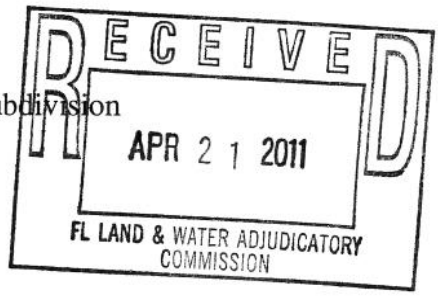
Case No.: APP-10-007

v.

FLAGLER COUNTY, a political subdivision of the State of Florida,

Respondent,

and



OCEAN HAMMOCK PROPERTY OWNERS ASSOCIATION, INC., THE HAMMOCK BEACH CLUB CONDOMINIUM ASSOCIATION, INC., MICHAEL M. HEWSON, AND ADMIRAL CORPORATION,

Intervenors /

PETITIONERS' EXCEPTIONS TO RECOMMENDED ORDER

Petitioners, Ginn-L.A. Marina, LLLP, LTD; Northshore Hammock LTD, LLLP; and, Northshore Ocean Hammock Investment, LTD, LLLP (collectively "Petitioners"), by and through their undersigned counsel, and in accordance with §120.57(1)(k), Fla. Stat. and Rule 106.217, F.A.C., submits the following exceptions to the Recommended Order of the Administrative Law Judge ("ALJ") in the above referenced proceeding dated April 6, 2011.

I. Case Background and Summary of the Law

The principal legal issue in this case is whether a Notice of Proposed Change ("NOPC") originally filed by the Petitioners in March, 2009, and subsequently twice-amended, seeking to

modify the Hammock Dunes Development of Regional Impact (the "DRI") Development Order (the "DO") should be approved. The NOPC was denied by the Board of County Commissioners of Flagler County (the "County") on April 5, 2010. While all parties agreed that the NOPC was not a substantial deviation and was consistent with the County's adopted Comprehensive Plan, the County denied the NOPC based on alleged unacceptable local impacts.

Section 380.07 gives an aggrieved party the right to appeal a local government decision related to developments of regional impact to the Florida Land and Water Adjudicatory Commission (the "Commission"). Not only does the Commission have the final decision-making authority with regard to DRI issues under Chapter 380, Fla. Stat., but the Commission is also given authority under §380.07, Fla. Stat., to consider and rule on local zoning issues related to a challenged DRI decision. *See, Battaglia Properties, Ltd. V. Florida Land and Water Adjudicatory Commission,* 629 So.2d 161 (Fla. 5th DCA 1991); *Coscan Florida, Inc. v. Metropolitan Dade County,* 586 So.2d 80 (Fla. 1st DCA 1991). Thus, for purposes of these proceedings the Commission is deemed the "Agency" with final decision-making authority.

The Commission originally referred Petitioners' NOPC Appeal to the Division of Administrative Hearings ("DOAH") on September 21, 2010. DOAH assigned the Honorable Donald R. Alexander, ALJ, to conduct a *de novo* hearing and submit a Recommended Order. Judge Alexander held a two and one-half day hearing in Bunnell, Flagler County, on December 15-17, 2010 (the "Hearing"). On April 6, 2011, he submitted his Recommended Order to the Commission for its consideration.

Pursuant to §120.57(1)(k), Fla. Stat. and Rule 106.217, F.A.C., the parties to the Hearing are entitled to submit exceptions to the ALJ's Recommended Order within fifteen days. In its

exceptions, a party may challenge both findings of fact and conclusions of law set forth in the Recommended Order. Specifically, §120.57(1)(l), Fla. Stat., states that an agency can reject or modify an ALJ's findings of fact if the agency determines that such findings "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." *See also Johnson v. Department of Management Servs.*, 962 So.2d 1038 (Fla. 1st DCA 2007).

While a certain degree of deference is owed to findings of "fact," as properly determined by the ALJ, no such deference is required with regard to the ALJ's conclusions of law. Specifically, §120.57(1)(l), Fla. Stat. allows an agency to reject or modify the conclusions of law over which it has substantive jurisdiction as long as such rejection or modification "is as or more reasonable than that which was rejected or modified." In interpreting the provisions of §120.57(1)(l), Florida courts have found that, "[w]hile an agency must state 'with particularity' why it is modifying or rejecting a hearing officer's findings of fact, no similar obligation exists with regard to conclusions of law." *Munch v. Dep't of Prof'l Regulation*, 592 So.2d 1136, 1142 (Fla. 1st DCA 1992) (quoting *Harloff v. City of Sarasota*, 575 So.2d 1324 (Fla. 2d DCA 1991)).

Finally, Florida courts have long recognized that a conclusion of law mistakenly placed in a findings of fact section does not make it a finding of fact. Thus, unlike a true finding of fact which can only be modified or rejected by the Commission if it is not supported by competent substantial evidence, a mischaracterized conclusion of law can be overturned by the Commission simply because the Commission recognizes it as incorrect. *Hernicz v. Dep't of Prof'l Regulation,* 390 So.2d 194, 195 (Fla. 1st DCA 1980) ("Nor was the Board's statement that appellant acted without authorization an improper 'additional' finding of fact, because it was not a finding of fact at all but a conclusion of law. It may have been inappropriate for the Board to

make such a conclusion in its findings-of-fact section, but misplacement of a conclusion of law does not metamorphose it into a finding of fact."); *Munch v. Dep't of Prof'l Regulation*, 592 So.2d 1136, 1142 (Fla. 1st DCA 1992).

II. Exceptions

Exception #1

Petitioners object to paragraph 29 of the Recommended Order wherein the ALJ finds as a "fact" that it is "logical and reasonable" to apply Planned Unit Development ("PUD") provisions from the Flagler County Land Development Code which were adopted well after the DRI DO was issued and despite plain language in the DO prohibiting such *ex post facto* application. Petitioners respectfully submit to the Commission that paragraph 29 is not a "finding of fact" at all, but is in reality a "conclusion of law," and, moreover, is an incorrect and unsupported conclusion of law. By applying an incorrect legal standard to the NOPC the ALJ has failed to comply with the essential requirements of law.

A "fact," as defined by *Black's Law Dictionary, West Publishing Co., (Fifth Edition, 1979),* is, "a thing done; an action performed or an incident transpiring; an event or circumstance; an actual occurrence; an actual happening in time or space or an event mental or physical; that which has taken place. *City of South Euclid v. Clapacs,* 6 Ohio Misc. 101, 213 N.E.2d 828, 832. A fact is either a state of things that is, an existence, or a motion, that is, an event. The quality of being actual; actual existence or occurrence." *Black's* goes on to make the following easily understood distinction between fact and law: "[l]aw is a principle; fact is an event. Law is conceived; fact is actual." Finally, *Blacks* states that, fact is "[a]n actual and absolute reality, as distinguished from mere supposition or opinion."

Consistent with the foregoing definition, the ALJ correctly found the following empirically provable facts to exist in paragraph 10 of the Recommended Order:

> (1) Section 17.6 (of the DRI DO) prescribes the PUD review procedures that apply to submitted development proposals.
>
> (2) The introductory language in section 17.6 states that '[t]his project shall be subject only to the following [PUD] review provisions which are an elaboration of the review provisions of Article X.
>
> (3) During the PUD review process, section 17.6 generally requires a pre-application conference by the applicant and County staff, the submission of a detailed site development plan which addresses specific issues set out in subsection 17.6(c), and approval (platting) of the site development plan leading to permitting.
>
> (4) Section 17.6 has not been changed or modified since the original DO was approved.

See, Recommended Order, ¶10. As true "facts," the validity of each of these statements is easily proved by evidence in the record.

Likewise, in paragraph 21 of the Recommended Order the ALJ makes two statements of actual fact. Specifically, the ALJ found as absolute fact that: (1) [s]ometime after it adopted the original DO, the County amended Article III of its LDC (Land Development Code) by adding and/or amending sections 3.04.00 through 3.04.04, which set forth processes and substantive criteria for the creation of new PUDs;" and, (2) "the 1984 DO was never amended to incorporate the new sections of the LDC by reference or to change the DO's PUD provisions to mirror those of the current LDC." *See, Recommended Order,* ¶21.

The ALJ also correctly found as "fact" in paragraph 28 of the Recommended Order that the Petitioners contend that the review of the NOPC should involve only two steps, to wit: (1) a determination that the NOPC is not a substantial deviation; and, (2) a determination that the proposed revisions in the NOPC are consistent with the Comprehensive Plan. The ALJ also correctly identified as fact that the Petitioners further contend that if the NOPC is not a

substantial deviation and is consistent with the Comprehensive Plan it should be approved, and any future development would be controlled by the PUD process specifically set forth in the existing DO. Whether Petitioners' contentions are correct or not, is an issue of law. That they raised these contentions in the hearing, however, is a "fact" easily discerned by a review of the record.

Unfortunately, even a cursory review of the Recommended Order reveals that, rather than limiting the so-called, "findings of fact" to actual facts, the ALJ has liberally, and erroneously, classified various speculation, hypotheses, theories and conclusions of law as being proven fact. As Abraham Lincoln famously said, "calling a tail a leg doesn't actually make it a leg." In this case, calling speculation and conclusions based on such speculation "facts" doesn't actually make them facts. While the Commission must defer to the ALJ's findings of fact that are actually facts, speculation and legal conclusions masquerading in paragraph 29 as facts are not entitled to the same deference, particularly inasmuch as they contravene long established and essential principals of law.

For example, in paragraph 29 the ALJ purports to find as a "fact" that, "the (NOPC review) process described by Petitioners (in their contentions as listed in paragraph 28) would normally apply were this not a unique NOPC requesting substantial revisions to the DO... ." Petitioners respectfully submit that is pure speculation or, at best, a conclusion of law. It is certainly not, however, a provable fact.

The ALJ follows the preceding statement of opinion by stating two actual and provable facts, to wit, that "[r]equests to redistribute uses on property subject to PUD zoning, or to amend the sketch plan for an approved PUD zoning, are normally treated by the County as a rezoning of the PUD, even if, as here, the property has previously been assigned PUD zoning," and, "[t]he

LDC labels this process as a 'reclassification' of the property, which triggers the consideration of other LDC criteria." *See, Recommended Order,* ¶29.

Petitioners' do not dispute the fact that the County may **normally** treat requests to redistribute uses on property subject to PUD zoning as a rezoning of the PUD. Nor do Petitioners dispute that this process is labeled as a "reclassification" in the LDC or that it may **normally** trigger consideration of other LDC criteria. Petitioners take strong exception, however, to the ALJ's next purported finding of fact, to wit, that, "[w]hen this occurs, a change to the PUD **must** go through the same type of process that the original adoption of the PUD went through." *Id. Emphasis added.* This statement is clearly and unequivocally a statement of the ALJ's conclusion that, despite the underlying actual facts set forth in paragraph 10, he is going to apply provisions of law that were adopted after the DRI DO was issued, not because this is what the facts and law require in this particular case, but instead because this is what the County does in most cases.

Not only has the ALJ erroneously presented a clear conclusion of law as a "fact" which would be entitled to deference from the Commission, but the error is compounded when this factually unsupported conclusion is used as the factual foundation for the next conclusion of law which, unfortunately, is also characterized in the Recommended Order as a finding of fact. Specifically, the ALJ states as a "fact" that the County has the legal authority to simply ignore the clear facts set forth in paragraph 10 of the Recommended Order and instead apply current PUD provisions which were adopted after the DO was issued, which were never incorporated by the parties into the DO, and which contravene the clear language of the DO. However, neither the actual facts nor the law support the ALJ's conclusion.

As previously stated, it is undisputed that §17.6 of the DO clearly states that, "[f]or purposes of compliance with the Flagler County Development and Subdivision Regulations and other development ordinances, this project for procedural purposes shall be treated as a 'Planned Unit Development' under Article X of those regulations. This project shall be subject **only** to the following review provisions … ." *Emphasis added.* It is also undisputed that this language was in the DO when Petitioners acquired their property and remains unchanged to this day.

A DRI DO is, in effect, a contract between the developer and the local government. The interpretation of written contracts is an issue of law. *Peacock Construction Co., Inc. v. Modern Air Conditioning, Inc.*, 353 So.2d 840, 842 (Fla. 1977); *DEC Elec., Inc. v. Raphael Const. Corp.*, 558 So.2d 427, 428 (Fla. 1990). In *Peacock*, the Florida Supreme Court stated:

> *Although it must be admitted that the meaning of language is a factual question, the general rule is that the interpretation of a document is a question of law rather than of fact. 4 Williston on Contracts, 3rd Ed., §616. If an issue of contract interpretation concerns the intention of the parties, that intention may be determined from the written contract,* ***as a matter of law****, when the nature of the transaction lends itself to judicial interpretation.*

353 So.2d at 842. *Emphasis added.*

In interpreting a written agreement, such as a development order, the court must first read the language actually used in the agreement by the parties. If that language is sufficiently clear, a court cannot indulge in construction or reinterpretation of a document's plain meaning. *Church & Tower of Fla. v. Bellsouth Telecommunications, Inc.*, 936 So.2d 40, 41 (Fla. 3d DCA 2006); *Nunez v. Westfield Homes of Fla.*, 925 So.2d 1108, 1111 (Fla. 2d DCA 2006); *Lambert v. Berkley South Condominium Ass'n, Inc.*, 680 So.2d 588, 590 (Fla. 4th DCA 1996). "It is axiomatic that the clear and unambiguous words of a contract are the best evidence of the intent of the parties." *Khosrow Maleki, P.A. v. M.A. Hahianpour, M.D., P.A.*, 771 So.2d 628 ,631 (Fla. 4th DCA 2000) (quoting *Murry v. Zynyx Mktg. Communications, Inc.*, 774 So.2d 714 (Fla. 3d

DCA 2000)). Moreover, "**it is never the role of a trial court to rewrite a contract to make it more reasonable for one of the parties** or to relieve a party from what turns out to be a bad bargain." *Barakat v. Broward County Housing Authority*, 771 So.2d 1193, 1195 (Fla. 4th DCA 2000). *Emphasis added.*

While this may not be a "normal" case for the County and while it may be politically inconvenient for the Board of County Commissioners, the language in the existing DO could not be any clearer. Section 17.6 of the DRI DO clearly states that, "[f]or purposes of compliance with the Flagler County Development and Subdivision Regulations and other development ordinances, this project for procedural purposes shall be treated as a 'Planned Unit Development' under Article X of those regulations. This project shall be subject **only** to the following review provisions ... ." (emphasis added). Moreover, Petitioners' substantive right to have its development plans reviewed solely in accordance with the provisions of the existing DO is a vested right.[1]

It is axiomatic that once a development of regional impact has been approved, the right to develop pursuant to the terms of the DRI's development order vests and such rights are not lost by subsequent changes in the law. *Bay Point Club, Inc., v. Bay County*, 890 So.2d 256 (Fla. 1st DCA 2004). In the instant case, the issuance of the DO vested the Hammock Dunes development with certain rights, among which was the right to have proposed amendments to the property's PUD development plan processed and reviewed **only** in accordance with the

[1] It should be noted that whether or not the County applied its Code PUD provisions to prior NOPCs is immaterial. Where the language of a DO is clear there is no need to look at past practices of the parties (or, in this case, the past practices of a party's predecessor in interest) to determine intent. While a court may look to an agency's prior interpretation and application of its own orders, codes and regulations, where the language of such documents is clear there is no need for a court to defer to such agency interpretation. *City of Coral Gables v. Tien*, 967 So.2d 963 (Fla. 3rd DCA 2007). "[A] court need not defer to an agency's construction or application of a statute if special agency expertise is not required, or if the agency's interpretation conflicts with the plain and ordinary meaning of the statute." *Florida Hosp. v. Agency for Health Care Admin.*, 823 So.2d 844, 848 (Fla. 1st DCA 2002).

provisions of Section 17.6 of the DO. The DRI was, in effect, vested against changes to the Code relating to PUD amendment processes and substantive criteria. Bay Point Club, 890 So.2d at 258.). Therefore, inasmuch as Petitioners have never asked to modify that specific right, it remains vested and neither the County for political reasons, nor the Commission on the ALJ's recommendation, may strip the Petitioners of their vested rights. *Id.* Therefore, as a matter of law, the County's current LDC provisions regarding PUD development cannot be applied to Petitioners NOPC and if Petitioners comply with the PUD review procedures set forth in the DO they will be deemed, also as a matter of law, to have complied with Flagler County Development and Subdivision Regulations and other development ordinances as clearly provided in the undisputed terms of the existing DO.

Even if the County's subsequently adopted PUD provisions were applicable, which they clearly were not, the ALJ further committed fatal error by incorrectly concluding that those procedures contemplate, "that a simultaneous NOPC/PUD review takes place, and the County is authorized to take into account the general issues of Public (sic) health, safety, and welfare described in sections 3.04.02.F.1. and 2., as well as any other sections in the article that may apply." *Recommended Order,* ¶29. In the ordinary course, a PUD application in Flagler County would be reviewed by staff, then by the Planning Board and, finally, by the Board of County Commissioners. However, Section 3.04.02.D. of the Code clearly provides:

> *Simultaneous DRI and PUD application review* ***(optional).*** *In cases where a proposed PUD must also obtain approval as a Development of Regional Impact (DRI) under the provisions of Chapter 380.06 Florida Statutes,* ***the developer may opt for simultaneous review*** *by the Flagler County Commission.* ***When the developer****, with the concurrence of the land owner(s),* ***requests simultaneous PUD and DRI review****, the public hearing required for the DRI application shall also serve as the public hearing provided under subsection 3.05.05C of this article. The time limits set by Florida Statutes for the review of a DRI shall be applicable and those set by this article for the review of land use amendments shall be waived.* ***The developer may*** *submit copies of the completed DRI*

> *application for development approval, including maps and exhibits, in fulfillment of the PUD reclassification application requirements, where applicable. All requirements of subsection 3.04.02A and 3.04.02B, however, shall be met.*

Emphasis added. Planning Director Mengel testified that **only an applicant, and not the County, may opt for simultaneous NOPC/PUD review**, and that Petitioners never requested simultaneous review of their NOPC. *See,* Tr., Vol. II, p. 175. That Petitioners never requested or acquiesced in simultaneous NOPC/PUD review is further supported by the undisputed facts that Petitioners did not submit a detailed site plan with its NOPC application and, in fact, has never decided on any specific plan of development for Cluster 35. *See,* Tr., Vol. I, pp. 58-60.

Thus, the ALJ's improperly characterized conclusion of law, to wit, that the County has the authority to ignore Petitioners vested rights and the plain and unequivocal language of the DO and instead apply a subsequently adopted change in the law to the NOPC simply because the ALJ believed the PUD procedures and substantive criteria adopted in the *ex post facto* ordinance to be, in his words, "the most logical" and "reasonable," exceeded the scope of the ALJ's authority. Accordingly, and for the foregoing reasons, Petitioners object to all those mischaracterized opinions and conclusions of law in paragraph 29 of the Recommended Order, including the ALJ's ostensible findings of fact that: (1) the County was entitled to conduct a simultaneous NOPC/PUD review; (2) that the County was authorized to take into account the substantive criteria set forth in sections 3.04.02.F.1. and 2., as well as any other provisions of the LDC adopted after issuance of the DO; (3) that the County may unilaterally apply its "normal" procedure in this case because other jurisdictions throughout the state use the same procedure and because the Petitioners' predecessors in interest apparently agreed to follow such procedure one time in 1998 when they requested a change to the DO. *See, Recommended Order,* ¶29.

Finally, in addition to objecting to paragraph 29 Petitioners object to all so-called findings of fact and to all conclusions of law set forth in the Recommended Order which stem from the unsupported conclusions and mischaracterized facts set forth in paragraph 29 including, but not limited to: ¶ 30 (bases its findings on the ALJ's prior conclusion that a simultaneous DRI/PUD review is authorized); ¶39 (applying Sections 3.04.02.F.1. and 2.); ¶¶40-45 (applying simultaneous PUD review without the request or consent of the NOPC applicant); ¶59 (concluding that Petitioners have the burden of demonstrating compliance with current LDC provisions related to PUD criteria); ¶60 (concluding as a matter of law that the County was entitled to ignore the plain language of the DRI DO and apply subsequently adopted LDC provisions to deny the NOPC); ¶63 (concluding as a matter of law that there are relevant provisions of the LDC applicable to the NOPC); and, ¶64 (concluding as a matter of law that the Petitioners have no vested rights to apply to amend the DO to create a new Cluster 35 as proposed).

Exception #2

Petitioners object to paragraph 36 of the "Findings of Fact" in that it actually sets forth not provable facts but instead presents speculation about possible future facts. Petitioners further object to paragraph 36 in that it utilizes such speculative non-facts as support for certain conclusions of law which are also mischaracterized as findings of "fact."

Paragraph 36 states, ostensibly as findings of "fact," that: "[t]he mass and scale of development that is authorized under the NOPC will dwarf the 16th Road park and marginalize the public beach access. Also, those persons occupying the new dwelling units in Cluster 35 (up to 561 units) will be concentrated directly at the intersection of the beach and the park. These

impacts, whether collectively or singularly, would change the pristine, rural character of the beachfront and park at 16th Road, which continues to exist despite the development in the DRI to date." Using these ersatz "facts" as justification, the ALJ concludes, "[t]herefore, the (proposed NOPC) revisions conflict with the (A1A Scenic Highway) corridor management plan and are inconsistent with the requirement in (Flagler County Comprehensive Plan Recreation and Open Space) policy 3-3 that the County support that plan."[2]

As previously stated, *Black's Law Dictionary, West Publishing Co.,(Fifth Edition, 1979)* defines "Fact" as:

> A thing done; an action performed or an incident transpiring; an event or circumstance; an actual occurrence; an actual happening in time or space or an event mental or physical; that which has taken place. *City of South Euclid v. Clapacs,* 6 Ohio Misc. 101, 213 N.E.2d 828, 832. A fact is either a state of things that is, an existence, or a motion, that is, an event. The quality of being actual; actual existence or occurrence.

For purposes of evidence, *Black's* further provides that **a fact is**:

> A circumstance, event or occurrence as it actually takes or took place; a physical object or appearance, as it usually exists or existed. **An actual and absolute reality, as distinguished from mere supposition or opinion.** A truth, as distinguished from fiction or error. "Fact" means reality of events or things the actual occurrence or existence of which is to be determined by evidence. *Peoples v. Peoples,* 10 N.C.App. 402, 179 S.E.2d 138, 141.

Emphasis added.

The ALJ committed reversible legal error in paragraph 36 in several regards. First, he fundamentally erred when he reached the legal conclusion, couched in terms of findings of fact,

---

[2] This statement, although located in the "Findings of Fact" section, is clearly a conclusion of law because it is an application of a specific provision of the County's Comprehensive Plan to Petitioner's NOPC application.

that approval of the NOPC would authorize any specific development. The clear and uncontroverted evidence in the record shows that approval of the NOPC would not actually authorize any specific development plan for the proposed Cluster 35. *See,* Tr. Vol. II, p. 194; Jt. Ex. 8, pp. 219-221, 235; Pet. Ex. 3, pp. 503, 522. In fact, the undisputed evidence shows that Petitioners did not even submit a development plan for review with its NOPC application. *See,* Tr., Vol. I, pp. 58-60. Instead of recognizing the fact that the NOPC in and of itself would not approve any actual development but would instead simply allow the Petitioners to submit subsequent site plans for County review, the ALJ appears to have assumed that the Petitioners would inevitably be allowed to build the tallest, densest, most obnoxious development it possibly could under the maximum development caps proposed in the NOPC. Thus, the ALJ found as "**fact**" that "[t]he mass and scale of development that is authorized under the NOPC **will** dwarf the 16th Road park and marginalize the public beach access." *Emphasis added.*

A review of the record, however, clearly shows that this finding of "fact" was pure speculation on the part of the ALJ. The record shows that approval of the NOPC would have simply authorized Petitioners to proceed to the next step and submit one or more conceptual site plans. *See,* Tr. Vol. II, p. 194; Jt. Ex. 8, pp. 219-221, 235; Pet. Ex. 3, pp. 503, 522. The record evidence also shows, again without dispute, that even if Petitioners received approval of the NOPC and thereafter submitted a site development plan calling for multiple 77 foot high buildings containing the maximum 561 dwelling units with a north-south orientation so as to block views, cast shadows and dwarf the park, the County would have no legal obligation to approve such plan. In fact, the undisputed testimony in the record shows that the County fully understood and acknowledged that approval of the NOPC did not authorize any development

whatsoever, but would merely set the parameters of what might be requested rather than guarantee what would be approved. *See,* Tr. Vol. II, p. 194.

While the ALJ certainly deserves a reasonable amount of deference in determining actual, *i.e.,* provable, facts, the ALJ does not have any more of a crystal ball available for determining future facts than the rest of us. In fact, not even the Petitioners have been able to predict what specific type, density or intensity of development they may ultimately propose as they are waiting on the market to let them know what the market wants. *See,* Tr., Vol. II, p. 184. Moreover, even when the market ultimately reveals to the Petitioners what will sell, Petitioners will not know if such development will be approved, or will even fit on the property after complying with required setbacks, buffering and other mitigation that will be applied in the PUD stage of the process to ensure compatibility with surrounding uses. In other words, until Petitioners go through the site plan review process no one really knows what can actually be developed on the proposed Cluster 35.

Until an actual development proposal is made the ALJ's prognostication about future development and how it might possibly impact the beach, the park, or 16th Road is premature speculation and not entitled to deference by the Commission. With no existing facts in the record as to what will ultimately be proposed, let alone approved, for development if the NOPC is approved, the ALJ's speculative "facts" are inadequate, as a matter of law, to support his conclusion that approval of the NOPC would violate Objective 3 and Policies 3-3 and 3-6 of the Recreation and Open Space Element of the Flagler County Comprehensive Plan as asserted in paragraphs 35 and 62 of the Recommended Order. Thus it was fatal error for the ALJ to conclude that the NOPC application conflicted with the County's Comprehensive Plan on the

basis of theoretically possible, but far from inevitable, potential impacts. *See,* JT. Ex. 7, p. 195, Tr. Vol.II, pp. 184-185.

The Commission should additionally reject the ALJ's legal conclusion of comprehensive plan inconsistency in paragraph 36 because it was not based on competent substantial evidence. While the County's witness, Anne Wilson, was recognized as an expert in real estate sales and scenic highway programs, she was not qualified as an expert in land planning or comprehensive plan issues. *See,* Tr., Vol. V, p. 561. The only competent substantial evidence in the Record regarding comprehensive plan consistency came from the following expert witnesses: Mr. Adam Mengel, the County's Planning Director; and Mr. Kenneth Metcalf, Petitioners' AICP certified expert witness.

Mr. Mengel personally reviewed the NOPC application in its various iterations and prepared multiple staff reports. *See,* Pet. Ex. 3, Jt. Ex. 8. Mr. Mengel concluded that the NOPC application was consistent with the County's Comprehensive Plan and that Cluster 35 would be compatible with existing development so long as the ultimate development thereof met the buffering and mitigation requirements of the LDC, which requirements were to be applied at site development plan review. *See,* Tr., Vol. II, pp. 175-178; JT Ex. 8, pp. 215-216, 219-221, 229; Pet. Ex. 3, pp. 521-522. The Board, which is the entity ultimately charged with implementing the County's Comprehensive Plan, agreed with Mr. Mengel's conclusion that the NOPC was consistent with the Comprehensive Plan. *See,* Jt. Ex. 10. Additionally, Mr. Metcalf testified that Petitioners' NOPC application was consistent with the Comprehensive Plan. *See,* Tr., Vol. II, pp. 255-256; *Recommended Order,* ¶33.

On the other hand, on cross-examination Ms. Wilson testified that she was admittedly not more familiar nor better qualified to interpret the County's Comprehensive Plan than either Mr. Mengel or the Board.[3] *See,* Tr., Vol. V., p. 595. Furthermore, there was no foundation for her testimony, accepted by the ALJ as fact, that Clearly, the only competent substantial evidence in the Record supports a conclusion that Petitioners' NOPC application was consistent with the County's Comprehensive Plan.

Furthermore, there is no competent evidence in the record that the A1A Scenic Highway Corridor Management Plan includes standards related to massing and proximity that establish a different test for compatibility with existing uses, such as the park, than the standards for ensuring compatibility that are set forth in Policies 13.1, 13.2, 13.3 and 13.5 of the Future Land Use Element of the Comprehensive Plan. Undisputed expert testimony in the record established that the NOPC is consistent with those policies and, inasmuch as comprehensive plans are required by statute to be internally consistent, unless competent evidence in the record proves otherwise it should be assumed that compliance with the compatibility standards of the Future Land Use Element means that it is more probable than not that the NOPC also complies with compatibility standards in the Recreation and Open Space Element.

Finally, there is no factual support in the record for the ALJ's characterization of the beachfront and park at 16th Road as being "pristine" and "rural." *The American Heritage*

---

[3] Petitioners also take exception to the ALJ's finding of fact in paragraph 34 of the Recommended Order that, "the County has expended more planning attention and funding to the 16th Road entryway to the beach than any other beach access road in the County." Presumably this finding was based on Ms. Wilson's testimony that 16th Road was intensely planned and received County funding. *See,* Tr. Vol V, pp. 573-574. This testimony does not actually support a finding that the County has expended more planning attention and funds on 16th Road than any other beach access road. Moreover, Ms. Wilson is not a County employee and was not qualified as an expert on County funding.

Dictionary of the English Language, 3rd *Ed.* (*Houghton Mifflin*, 1992) defines "pristine" as: "remaining in a pure state; uncorrupted by civilization," and "rural" as "of, relating to, or characteristic of the country." A review of the record shows that the 16th Road Park is essentially comprised of public restroom facilities and a public parking lot. *See,* Jt. Ex. 8, p. 15 (Bates p. 224); Pet. Ex. 4. The record also shows that 16th Road is one of the major roads serving a DRI approved for 4,400 residential dwelling units, many of which are concentrated in high-rise and mid-rise condominium towers in the core resort cluster. *See, Recommended Order,* ¶14; Pet. Ex. 4 and Pet. Ex. 5. Thus, the preponderance of competent substantial evidence in the Record demonstrates conclusively that the beachfront and park at 16th Road are neither pristine nor rural.

For all of the foregoing reasons, paragraph 36 of the Recommended Order should be rejected by the Commission in its entirety because the Comprehensive Plan relies on performance measures to ensure compatibility with the adjacent uses, including protection for the park.

Exception #3

Petitioners object to paragraph 37 of the Recommended Order in that it contains another clear conclusion of law which has been mislabeled as a finding of "fact." Not only is such conclusion of law not a "fact," the record reveals that it is not even supported by real "facts."

Specifically, the ALJ finds in paragraph 37 that, "the NOPC **allows** Petitioners to relocate 16th Road and the 16th Road park facilities further south," and that, "the dune cut at 16th road would have to be abandoned as an access point to the beach." *Emphasis added.* These so-called facts, however, are simply not supported by competent evidence in the record. First, the ALJ

himself recognized, as a fact, in paragraph 24 of the Recommended Order that the relocation of 16th Road would not be a *fait accompli* if the NOPC were approved. In describing the various changes to the DRI DO requested by the Petitioners in the NOPC the ALJ notes that they are seeking an amendment: "(d) modifying condition 4.4 to allow the relocation, **if necessary**, of 16th Road farther south to enlarge the construction area for the new units. ..." *See, Recommended Order,* ¶24. *Emphasis added.*

Second, a thorough review of the NOPC application and the record of its consideration shows that there is absolutely no competent evidence that it will be **necessary** to relocate 16th Road. There is no site plan in the record showing that 16th Road would need to be moved. In fact, as previously noted, Petitioners were not required to, and did not, submit any detailed site development plan with the NOPC application. *See,* Tr., Vol. I, p. 62. Thus, a conclusion that approval of the NOPC, without more, would automatically allow the unqualified relocation of 16th Road without a demonstration of necessity by Petitioners is baseless speculation. Moreover, even if there were any evidence whatsoever in the record to indicate that the Petitioners might truly desire to relocate 16th Road, it is undisputed that the County is not obligated by the mere approval of the NOPC to agree that such relocation would be **necessary** or otherwise obligated to approve any particular development plan simply because it falls within the realm of development scenarios that may be proposed consistent with the development parameters set forth in the NOPC.

Once the ALJ erroneously accepts as a "fact" that approval of the NOPC unconditionally allows the relocation of 16th Road, he further concludes that this **possible** relocation of 16th Road **might** require the relocation or reconfiguration of the 16th Road park facilities and **might** result in a relocation of public parking further from the beach, and **might** result in the closing or

relocation of the existing dune cut, and **might** result in construction of a dune walkover which **might** be less convenient for the public. After piling supposition on top of supposition on top of supposition the ALJ then concludes that approval of the NOPC would, with no doubt whatsoever, definitely "contravene (Recreation and Open Space) policy 3-6, which requires the County to improve recreational facilities without adversely affecting natural resources along the Scenic Corridor." *See, Recommended Order,* ¶37. Not only is this conclusion built on a foundation of speculation, it doesn't even logically follow inasmuch as the so-called supporting speculation all deals with inconveniencing the public rather than on actual impacts on natural resources.

Despite the total absence of evidence in the record of what, if anything, would ultimately be proposed or built if the NOPC were approved, the Recommended Order again concludes, based solely on speculation, that unless the NOPC is denied Petitioners will inevitably apply for, and the County will inevitably approve, a development plan that is aesthetically incompatible to the A1A Scenic Highway corridor and is environmentally degrading. There simply is no evidence to support such blatant speculation and the Commission should reject these so-called findings of fact.

Exception #4

Petitioners object to paragraph 38 of the Recommended Order which states, "[f]or the reasons stated above, the NOPC is inconsistent with objective 3 and policies 3-3 and 3-6 of the Recreation and Open Space Element of the Plan and in these respects is inconsistent with the County Plan." While purporting to be a finding of fact it is entirely self-evident that paragraph 38 is a conclusion of law. As a conclusion of law it is not entitled to deference by the

Commission and Petitioners respectfully suggest that, for those reasons previously mentioned, it would be correct and appropriate for the Commission to reject paragraph 38 of the Recommended Order in its entirety.

Exception #5

Petitioners object to paragraph 41 of the Recommended Order in that it includes findings of fact that are unsupported by competent substantial evidence in the Record and includes conclusions of law that have been erroneously characterized as findings of fact. Specifically, paragraph 41 states: "While the DRI is not fully built out, it is 26 years old and is substantially developed and platted. At this stage of development in the DRI, the residents of the area and the County have the right to rely on the stability of the Master Development Plan. Substantial changes to the Master Development Plan such as those proposed here **will likely** cause adverse impacts to residents owning property in the DRI and to the community as a whole." *Emphasis added.*

That portion of the paragraph that states that after 26 years the County and residents have a **right** to rely on the stability of the Master Development Plan is clearly a conclusion of law. The determination of what rights a party has is an issue of law which is based on an application of law to existing facts. Such a right cannot be awarded, *ipse dixit,* by simply pronouncing it to be a fact. Moreover, this particular conclusion of law is directly contravened by the ALJ's finding of fact in paragraph 12 of the Recommended Order which states: "Because DRIs generally take a substantial period of time to complete, the development plans are subject to periodic amendment in order to adjust to changing market conditions, financial conditions, and

other variables. This finding of fact was supported by the land use experts for the County and the Intervenors. *See,* Tr. Vol. IV, pp. 438, 528-9.

The balance of the so-called factual findings in paragraph 41, to wit, that the approval of the NOPC will likely cause adverse impacts to residents owning property within the DRI and to the community as a whole is based solely on conjecture, fails to identify such "likely adverse impacts," and is unsupported by the Record evidence.

The uncontested testimony and exhibits adduced at the Hearing, including the testimony of Petitioners' witness, Daniel Baker, and the County's Planning Director, show that Petitioners did not submit a detailed site development plan with its NOPC application, nor was it required to do so as part of the NOPC review process. *See,* Tr., Vol. I, pp. 58-62; Tr., Vol. II, pp. 183-184. There was no information included in the NOPC application or introduced at the Hearing about the development plan for Cluster 35 because Petitioners had not made that determination (nor were they required to at the NOPC application stage).

The proposed NOPC application simply requested to move existing residential entitlements from other areas of the DRI to the new Cluster 35 area, but such approval would not by itself entitle Petitioners to build any, let alone all, of the transferred units. Instead, Petitioners would be required to subsequently go through the detailed site plan review process that would establish how many units, if any, could actually be constructed, where they could be located on Cluster 35, etcetera. Even the County's expert witness, Ms. Wilson, testified that no development proposal for Cluster 35 had been made by Petitioners and that she believed some amount of development in Cluster 35 would be appropriate and not objectionable. *See,* Tr., Vol. V., pp. 595-596. The ALJ also failed to identify what "likely adverse impacts" would directly

arise from the approval, without more, of the NOPC application. This is perhaps understandable given that no actual development plan was proposed.

The ALJ's legal conclusion that Petitioners' NOPC would "likely cause adverse impacts to residents owning property in the DRI and to the community as a whole" is not supported by competence evidence in the record inasmuch as no actual development plan upon which conclusion could be based was ever submitted as part of the NOPC. Moreover, as discussed in Exception 10, *infra*, the Record evidence shows that the land uses being proposed by Petitioners actually already exist on the Cluster 35 property and there is no evidence in the record whatsoever that such uses have caused any adverse impacts whatsoever to residents owning property in the DRI or to the community as a whole. Therefore, the Commission should reject the ALJ's findings of fact in paragraph 41 because they are not supported by competent substantial evidence in the Record.

Exception #6

Petitioners object to paragraph 42 of the Recommended Order in that it includes findings that are unsupported by competent substantial evidence in the Record. Specifically, paragraph 42 states: "By contrast, the scale and intensity of development **permitted** by the NOPC **will** obstruct or eliminate ocean views of property owners, principally in Cluster 33 behind the golf course where several condominium buildings are now located. The evidence shows that these unit owners with an obstructed view can also expect a substantial loss (around 45 percent) in value of their properties." *Emphasis added.* These findings are based on the ALJ's speculation of what will inevitably be built if the NOPC is approved rather than on existant facts in the record. For example, on cross-examination the County's expert, Flagler County Property

Appraiser was asked if he looked at the legally permissible uses for the land proposed for Cluster 35 (*i.e.,* the land between the existing condos and the beach). In response he stated, "No, sir. I did not appraise anything to do with these specific units." *See,* Tr. Vol IV, p.449. Therefore, the Commission should reject the ALJ's findings as being unsupported by competent substantial evidence in the Record and for the same reasons as previously set forth herein with regard to unsupported speculation and conclusions of law that are based upon such speculation.

Additionally, even if they weren't based solely on speculation as to what might ultimately be built, the ALJ's conclusion that Petitioners cannot develop their property because it would block existing condominium units' views of the golf course or ocean, thereby decreasing the value of such units to their owners, is incorrectly based on an assumption that those unit owners have a valuable and enforceable legal right to such views. The record clearly demonstrates, however, that these unit owners did not bargain nor pay for a protected view corridor over Petitioners' property. In fact, the undisputed evidence proves the exact opposite. For example, the form contracts for the One Bedrooms at Hammock Beach Club Condominium and the Ocean Towers at Hammock Beach Condominium provided that:

> Although the Condominium is located in close proximity to a beach on the Atlantic Ocean and the Ocean Hammock Golf and Country Club, Dwelling Units in the Condominium may or may not have a view of the Atlantic Ocean and/or the Ocean Hammock Golf and Country Club. **Neither views of the Atlantic Ocean nor the Ocean Hammock Golf and Country Club nor any other view from the condominium or any Dwelling Unit are represented or guaranteed by Seller. ... . Any representation or warranty regarding views or the passage of light and air are expressly disclaimed by the Seller.**

See, Pet. Ex. 7, pp. 607, 623, 641; Pet. Ex. 9, p. 699. *Emphasis added.* There was no contrary evidence on this issue entered at the Hearing.

That the clear language of the contracts used within the DRI is competent evidence which may be relied upon by the Commission is demonstrated by the ALJ's reliance on other language in such contracts while disposing of the Intervenors' equitable estoppel claim. In paragraph 55 of the Recommended Order the ALJ states that "[a] review of the standard condominium purchase contracts used in the DRI shows, however, that the purchasers clearly acknowledged that they could not, and did not, rely on oral representations or representations contained in marketing materials," and therefore could not now claim to have reasonably relied on marketing material that asserted no new oceanfront condominiums would ever be built within the DRI.

Despite his reliance on the clear contract language in paragraph 55 of the Recommended Order, the ALJ simply ignored the clear contract language quoted above when making his findings in paragraph 42 relating to potentially lost ocean and golf course views. The Recommended Order offers no explanation whatsoever as to why one clear provision of a contract should be considered competent evidence and another clear provision of the same contract simply ignored. No court, nor ALJ, has the authority to selectively enforce only those contract provisions which support the conclusion they wish to reach. Allowing such to happen would deviate from the essential requirements of the law and acceptance of Paragraph 42 would, in effect, impose an equitable servitude on Petitioners' property for the monetary benefit of existing unit owners with no compensation being paid to the Petitioners. Such an uncompensated taking is beyond the jurisdiction of both the ALJ and the Commission. Petitioners respectfully request that the Commission reject paragraph 42 and all findings and conclusions in any way related thereto.

Exception #7

Petitioners object to paragraph 43 of the Recommended Order in that it includes findings that are unsupported by competent substantial evidence in the Record. Specifically, paragraph 43 states: "Likewise, **the relocation** of the existing access to the public beach and relocation of the public park **will** adversely impact the public since they will no longer have the ease of access to the beach and use of facilities the current park and beach access provide." *Emphasis added.* These findings are wholly speculative and unsupported by the Record evidence. For the reasons previously set forth herein with regard to such unsupported speculative "facts," Petitioners respectfully request that the Commission reject paragraph 43 of the Recommended Order and any other findings of "fact" or conclusions of law stemming therefrom.

Exception #8

Petitioner objects to paragraph 44 of the Recommended Order in that it includes findings that are unsupported by competent substantial evidence in the Record. Specifically, paragraph 44 states: "Given the mass and scale of development **that can occur** in the buffer area (golf course) between the ocean and the other DRI development, the new Cluster **will have** an adverse effect on adjacent Clusters. As such, the NOPC will not be compatible with adjacent land uses." *Emphasis added.* These findings clearly do not qualify as facts as they are based on speculation and conjecture as to future events.

Furthermore, the ALJ's conclusion of law in paragraph 44 that approval of the NOPC would be incompatible with existing development directly conflicts with, and is diametrically opposed to, his findings in paragraph 33 of the Recommended Order. In that paragraph, the ALJ found that Mr. Metcalf had testified that Petitioners' NOPC was consistent with Policies 13.1,

13.2, 13.3 and 13.5 of the Future Land Use Element of the County's Comprehensive Plan, and that his testimony in this regard was "undisputed". *Recommended Order,* ¶33. Those policies all mandate that development be compatible with existing adjacent and nearby development. Ergo, in order for the NOPC to be consistent with those policies, as found by the ALJ, the NOPC must be compatible with existing development. Again, this finding of fact by the ALJ (although it was really a conclusion of law) was undisputed. Nonetheless, a mere eleven paragraphs later the ALJ reaches the exact opposite conclusion when he applies the provisions of the subsequently adopted Land Development Code to his supposition of what the mass and scale of development might be, possibly, if the Petitioners apply for it, and if the County approves it. Not only is this conclusion based on unsupported "facts," but it also assumes that the LDC provisions are applicable and, if they are, that they prescribe a different standard of compatibility than those set forth in the comprehensive plan. In response, Petitioners would point out that the plain language of the DO preclude the application of these LDC provisions and, even if they could be applied, §163.3194(b) requires all land development regulations to be consistent with the adopted comprehensive plan and, in the event of any inconsistency, the provisions of the comprehensive plan will control. As previously stated, it is undisputed that, with regard to a proposed (*i.e.,* future) land use's compatibility with existing uses, the NOPC is consistent with the Comprehensive Plan's Future Land Use Element's compatibility requirements.

Finally, a review of the Hearing transcript shows that Mr. Metcalf testified that the County's Comprehensive Plan for compatibility purposes compared land uses to land uses. Mr. Mengel, the County's Planning Director, agreed with that compatibility analysis. *See,* Tr., Vol. II, pp. 172, 179-180. Mr. Metcalf further testified that the proposed residential uses in Petitioners' NOPC application were compatible to the surrounding residential uses on a land use

to land use basis, and therefore Petitioners' NOPC application was compatible with the County's Comprehensive Plan. *See,* Tr., Vol. II, pp. 255-256; Tr., Vol. III, p. 403. As such, the Commission should reject the ALJ's findings in paragraph 44 as being unsupported by competent substantial evidence and for those reasons previously set forth with regard to speculative "facts" and non-factually supported legal conclusions.

Exception #9

Petitioners object to paragraph 45 of the Recommended Order in that it represents a conclusion of law that is unsupported by the evidence in the Record. Specifically, paragraph 45 states: "Collectively, these considerations support a finding that the proposed development will adversely affect the orderly development of the County, and it will be detrimental to the use of adjacent properties and the general neighborhood." This statement, although located in the "Findings of Fact" section, is clearly a conclusion of law because it reflects a conclusion reached by the ALJ after application of specific provisions of the County's Code to Petitioners' NOPC. This conclusion is based on speculation and is unsupported by competent substantial evidence in the Record. Therefore, and for the other reasons previously provided herein, the Commission should reject paragraph 45 of the Recommended Order.

Exception #10

Petitioners object to paragraph 50 of the Recommended Order in that it represents a conclusion of law that should be rejected by the Commission because it is unsupported by competent evidence in the Record. Specifically, paragraph 50 states: "The most reasonable interpretation of those documents, as further explained by testimony at hearing, is that Petitioners' proposal to reallocate up to 561 dwelling units to the proposed Cluster 35 within the

golf course land and assign the 'Ocean Recreation Hotel' community type to that Cluster, is not a use permitted by section 14.5." This statement, although located in the "Findings of Fact" section, is clearly a conclusion of law inasmuch as it interprets the meaning and intent of specific contract terms. *Peacock Construction Co., Inc. v. Modern Air Conditioning, Inc.*, 353 So.2d 840, 842 (Fla. 1977); *DEC Elec., Inc. v. Raphael Const. Corp.,* 558 So.2d 427, 428 (Fla. 1990). As a conclusion of law the findings in paragraph 50 are not entitled to deference and the Commission is free to reject the same if it finds them to simply be incorrect. *Hernicz v. Dep't of Prof'l Regulation,* 390 So.2d 194, 195 (Fla. 1st DCA 1980)

The ALJ incorrectly concluded, as a matter of law, that Petitioners' NOPC proposal to reallocate 561 dwelling units to the Cluster 35 property for an Ocean Recreation Hotel community is not permitted by section 14.5 of the DO. The proposed Cluster 35 property currently contains the Lodge, which includes 20 hotel rooms, sit down restaurant, spa facilities, swimming pool, parking area, golf pro shop, locker rooms and office space. The uncontested testimony at the Hearing was that the Lodge hotel rooms, restaurant and other facilities have always been open to the public and did not require patrons to be playing golf on site. *See,* Tr., Vol. III, p. 346; Tr., Vol. I, pp. 57-58.

Petitioners' proposal to reallocate dwelling units to the Cluster 35 property for an Ocean Recreation Hotel community would not introduce any uses to the property that do not already exist with the Lodge. The fact that the Lodge and its ancillary facilities were constructed after Section 14.5 of the DO was already in effect clearly demonstrates that the County has already determined such uses to be permissible on the Cluster 35 property. Additionally, as has been established in great detail above, Petitioners' NOPC application did not include any specific site plan to show exactly what would be developed on the Cluster 35 property. As Mr. Baker

testified, the ultimate development of Cluster 35 could even be another golf-themed hotel similar to the existing Lodge. Tr., Vol. I, p.59. Therefore, the ALJ's legal conclusion that Petitioners' proposal to create Cluster 35 with an Ocean Recreation Hotel designation was not permitted by Section 14.5 of the DO is contrary to the competent substantial evidence in the record regarding the existing uses on the Cluster 35 property and should be rejected by the Commission.

Exception #11

Petitioners object to paragraph 51 of the Recommended Order in that it represents a conclusion of law that should be rejected by the Commission because it is unsupported by the evidence in the Record. Specifically, paragraph 51 states: "Given these considerations, Petitioners have no vested right under the current DO to develop the 12 acres for residential purposes and must request an amendment to section 14.5 in order to authorize another form of development. For this reason, the NOPC should be denied." This statement, although located in the "Findings of Fact" section, is clearly a conclusion of law because the ALJ has made a legal conclusion that Petitioners have no right under the DO to create a new Cluster 35 on their land and that the NOPC should be denied.

For the reasons outlined in greater detail in the exception to paragraph 50 above, the Commission should reject the ALJ's legal conclusions in paragraph 51. Additionally, the uncontested evidence in the Record shows that there was no prohibition in the DO to creating a new residential area, as was proposed by Petitioners in its NOPC application. In fact, the County's Planning Director and the Intervenors' land use expert, Ms. Linda Shelly, both testified at the Hearing that there was nothing in the DO prohibiting the creation of a new residential cluster or increasing the residential acreage in the Hammock Dunes DRI. *See,* Tr., Vol. II, pp.

182, 198-199; Tr., Vol. IV, pp. 438-439. In fact, the undisputed Record evidence shows that prior amendments to the DO have changed the number of residential clusters, reallocated approved residential units from one area to another, and changed the total residential acreage. *See,* Tr., Vol. II, pp. 198-199. Additionally, the evidence shows that plats can be vacated or amended, and there is nothing in the DO that prohibits the plats in the DO from being vacated or amended. *See,* Tr., Vol. IV, pp. 529-530. Based on the existing residential development on the Cluster 35 property with the Lodge and the Record evidence that new residential areas can be created and the total residential acreage increased, the ALJ's legal conclusions in paragraph 51 are simply incorrect and should be rejected by the Commission.

Exception #12

Petitioners object to paragraph 60 in the "Conclusions of Law" as being incorerct and unsupported by the evidence in the Record. Specifically, paragraph 60 states: "For the reasons previously found, the process and criteria used by the County are **reasonable and appropriate** and should be used in reviewing the NOPC." *Emphasis added.* As set forth in the "Statement of the Issues" section of the Recommended Order, the ALJ was required to determine "the **correct** proceedings and substantive criteria to be applied in reviewing Petitioners' proposed 'local' changes to the Hammock Dunes Development of Regional Impact (DRI) Development Order (DO)." *Emphasis added.* The ALJ was not charged with determining what procedures and substantive criteria he believed would be more reasonable or appropriate. For these reasons and those set forth in detail in the exception to paragraph 29 above, the Commission should reject the ALJ's legal conclusion contained in paragraph 60.

Exception #13

Petitioner objects to paragraph 62 in the "Conclusions of Law" as being incorrect and unsupported by the evidence in the Record. Specifically, paragraph 62 states: "For the reasons previously found, the evidence supports a conclusion that the NOPC revisions are not consistent with object 3 and policies 3-3 and 3-6 of the Recreation and Open Space Element of the Plan. Therefore, the NOPC does not satisfy the requirement in section 163.3194(1)(a) that the DO is consistent with the local comprehensive plan." For the reasons set forth in the exceptions to paragraphs 36, 37 and 38 above, the Commission should reject the ALJ's legal conclusion contained in paragraph 62.

Exception #14

Petitioner objects to paragraph 63 in the "Conclusions of Law" as being incorrect and unsupported by the evidence in the Record. Specifically, paragraph 63 states: "For the reasons previously found, the evidence supports a conclusion that the NOPC does not satisfy relevant portions of the LDC." For the reasons set forth in the exceptions to paragraphs 29, 41, 42, 43, 44 and 45 above, the Commission should reject the ALJ's legal conclusion contained in paragraph 63.

Exception #15

Petitioner objects to paragraph 64 in the "Conclusions of Law" as being incorrect and unsupported by the evidence in the Record. Specifically, paragraph 64 states: "For the reasons previously found, the evidence supports a conclusion that Petitioners have no vested right, either in the original DO, or subsequent amendments, to place up to 561 dwelling units on land now

subject to restrictions that limit the usage of the property to golf courses and other uses associated with golf club facilities, open space, parks, or recreational facilities if approved by the Board. Absent the amendment of section 14.5 of the DO, the proposed uses and development are barred by that provision." For the reasons set forth in the exceptions to paragraphs 50 and 51 above, the Commission should reject the ALJ's legal conclusion contained in paragraph 64.

III. Conclusion and Prayer for Relief

For the foregoing reasons, Petitioner objects to the Recommended Order entered by the ALJ in this matter and respectfully requests that the Florida Land and Water Adjudicatory Commission issue an Order rejecting the same and approving Petitioners' NOPC as submitted.

Respectfully submitted,

SHUTTS & BOWEN LLP
300 S. Orange Ave., Suite 1000
Orlando, Florida 32801-3373
Mailing Address: **Post Office Box 4956**
Orlando, Florida 32802-4956
Telephone: (407) 423-3200
Facsimile: (407) 425-8316

By: _____
Scott A. Glass, Esq.
Florida Bar No. 911364

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Exceptions to Recommended Order was furnished to the following counsel of record electronically and via U.S. Mail, postage prepaid, this 20th day of April, 2011: Wayne E. Flowers Lewis, Longman & Walker, P.A., Suite 150, 245 Riverside Avenue, Jacksonville, FL 32202; Isabelle C. Lopez, Quintairos, Prieto, Wood & Boyer, P.A., One Independent Drive, Suite 1650, Jacksonville, Florida 32202; Albert J. Hadeed, County Attorney, 1769 E. Moody Blvd., Bunnell, FL 32110; Ellen Avery-Smith, Esq., Rogers, Towers, P.A., 7 Waldo Street, St. Augustine, Florida 32084; Michael D. Chiumento, III, Esq., Chiumento & Guntharp, P.A, 145 City Place, Suite 301, Palm Coast, Florida 32164.

Scott A. Glass, Esq.

ORLDOCS 12144174 4

From: (407) 423-3200 Origin ID: ORLA
Scott Glass
Shutts & Bowen LLP
300 S. Orange Avenue, Suite 1000

Orlando, FL 32801

FedEx Express

J11151102250225

Ship Date: 20APR11
ActWgt: 0.5 LB
CAD: 2346749/WBUS0200

Delivery Address Bar Code

SHIP TO: (850) 487-7917 BILL SENDER
Ms. Barbara Leighty, Clerk
FL Land & Water Adjudicatory Commis
Office Of Policy & Budget Rm 1802
Executive Office Of The Governor
Tallahassee, FL 32399

Ref # 28990.0004-0335
Invoice #
PO #
Dept #

THU - 21 APR A2
PRIORITY OVERNIGHT

TRK# 7946 7264 7356
0201

DSR
32399
FL-US
TLH

XH TLHA

50DG3/26A8/7EEB

FOLD on this line and place in shipping pouch with **bar code and delivery address** visible

1. Fold the first printed page in half and use as the shipping label.
2. Place the label in a waybill pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.
3. Keep the second page as a receipt for your records. The receipt contains the terms and conditions of shipping and information useful for tracking your package.

Leighty, Barbara

From: Wayne Flowers [wflowers@llw-law.com]
Sent: Monday, May 02, 2011 4:37 PM
To: Leighty, Barbara
Subject: Flagler County's Response to Petitioners Exceptions to Recommended Order
Attachments: Respondent Flagler Co.'s Response to Petitioners' Exception to RO.pdf

Ms. Leighty: Attached is Flagler County's Response to Petitioners' Exceptions to Recommended Order, submitted for filing in FLAWAC Case No. APP-10-007. Note that I have stated the County's compliance with FLAWAC's policy on electronic filing.

<<Respondent Flagler Co.'s Response to Petitioners' Exception to RO.pdf>>

Wayne E. Flowers
Shareholder
Lewis, Longman & Walker, P.A.
245 Riverside Avenue, Suite 150
Jacksonville, Florida 32202
wflowers@llw-law.com
(t) 904.353.6410
(f) 904.353.7619
vCard | Website | Bio

STATE OF FLORIDA
FLORIDA LAND AND WATER ADJUDICATORY COMMISSION

GINN-LA, LLLP, LTD, A GEORGIA LIMITED LIABILITY PARTNERSHIP AUTHORIZED TO DO BUSINESS IN FLORIDA, NORTHSHORE HAMMOCK LTD., LLP, A GEORGIA LIMITED LIABILITY PARTNERSHIP AUTHORIZED TO DO BUSINESS IN FLORIDA; AND, NORTHSHORE OCEAN HAMMOCK ET AL,

Petitioners,

v.

DOAH Case No.: 10-9137DRI
FLAWAC Case No: APP-10-007

FLAGLER COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA,

Respondent,

and

OCEAN HAMMOCK PROPERTY OWNERS ASSOCIATION, INC., THE HAMMOCK BEACH CLUB CONDOMINIUM ASSOCIATION, INC., MICHAEL M. HEWSON, AND ADMIRAL CORPORATION,

Intervenors.
_____/

RESPONDENT FLAGLER COUNTY'S RESPONSE TO PETITIONERS' EXCEPTIONS TO RECOMMENDED ORDER

Comes now the Respondent, Flagler County, through the undersigned counsel and pursuant to Rule 28-106.217(3), files this response to the exceptions filed herein by Petitioners to the Recommended Order (hereinafter "RO") entered in this matter and shows the following:

PRELIMINARY STATEMENT

As a preliminary matter, FLAWAC is reminded of the standard of review provided by Florida law concerning action on exceptions to ROs and in deciding whether to adopt, modify, or reject an RO in whole or in part. Before FLAWAC can be compelled to rule on any exception, the party filing the exception must identify the legal basis for the exception and must include appropriate and specific citations to the record of the proceeding. Section 120.57(1)9(k), Florida Statutes.

Findings of Fact

A reviewing agency may not reject or modify findings of fact, 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. Section 120.57(1)(l), Florida Statutes. "Competent substantial evidence" is evidence sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. Perdue v. TJ Palm Assoc., Ltd, 755 So. 2d 660, 665-666 (Fla. 4th DCA 1999), quoting from and following DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957). The term "competent substantial evidence" refers to the existence of some quantity of evidence for each essential element of a finding and

to the legality and admissibility of that evidence. Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n., 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996).

An agency may not disturb a finding of fact supported by any competent substantial evidence from which the finding could be reasonably inferred. Freeze v. Dep't of Transp. 556 So. 2d 1204, 1205 (Fla. 5th DCA 1990); Berry v. Dep't of Envtl. Reg., 530 So. 2d 1019, 1022 (Fla. 4th DCA 1988). FLAWAC may not reweigh evidence admitted in the proceeding below, may not resolve conflicts in the evidence and may not judge the credibility of witnesses or otherwise interpret evidence anew. Save Anna Maria, Inc. v. Dep't of Transp., 700 So. 2d 113, 118 (Fla. 2d DCA 1997); Brown v. Criminal Justice Standards & Training Comm'n, 667 So. 2d 977, 979 (Fla. 4th DCA 1996). The standard is not whether the record contains evidence contrary to the findings of fact in the recommended order, but whether any competent substantial evidence supports each finding in issue. Florida Sugar Cane League v. State Siting Bd., 580 So. 2d 846, 851 (Fla. 1st DCA 1991).

Conclusions of Law

A reviewing agency's discretion with regard to conclusions of law in a RO is slightly broader than its discretion in dealing with findings of fact. An agency in its final order may reject or modify the conclusions of law over which it has

substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. Section 120.57(1)(l), Florida Statutes (emphasis added). An agency's responsibility to determine if substantial evidence supports an administrative law judge's ("ALJ") findings of fact may not be avoided merely by the agency labeling a finding of fact as a conclusion of law. Gross v. Dep't of Health, 819 So. 2d 997, 1001 (Fla. 5th DCA 2002). When rejecting or modifying a conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Section 120.57(1)(l), Florida Statutes (emphasis added).

All Findings of Fact and Conclusions of Law are Supported by the Record

As will be shown in more detail below, each of the findings of fact to which Petitioners take exception are amply supported by competent substantial evidence in the record; those findings of fact which Petitioners contend should be characterized as conclusions of law were properly treated by the Judge below as factual findings; alternatively, even if those findings of fact that Petitioners contend should have been characterized as

conclusions of law were so characterized, such conclusions are proper and correct; and finally, those conclusions of law to which Petitioners take exception are reasonable, correct and should not be overturned.

In responding to Petitioners' Exceptions below, references to the transcript of testimony taken at the final hearing will be designated by the letter "T." followed by the applicable page numbers. References to exhibits entered into evidence at the final hearing will be designated by the party offering the exhibit followed by the exhibit number.

Petitioners' Exception No. 1

Petitioners take exception to Paragraph 29 of the RO (a finding of fact), focusing on the portion of the paragraph finding that:

> While conflicting testimony was submitted on this issue, the more persuasive evidence supports a finding that these procedures and substantive criteria are the most logical and reasonable interpretation of the County's LDC and the DO, and they should be used in reviewing the NOPC.[1]

Petitioners argue that the foregoing statement is a conclusion of law and not a finding of fact. Petitioners make this argument to support the contention that FLAWAC has carte blanche to reject or modify the statement. This would then enable

[1] "LDC" refers to Land Development Code for Flagler County; "DO" refers to the Development Order for the Hammock Dunes Development of Regional Impact ("DRI"); and "NOPC" refers to the Notice of Proposed Change application that was the subject of the hearing below.

FLAWAC to adopt Petitioners' ultimate position (highlighted in Paragraph 28 of the RO) that the substantive criteria included in the County's LDC addressing modifications of existing Planned Unit Developments ("PUDs") may not be considered or applied in the circumstance of Petitioners' application. There are numerous findings of fact that are fully supported by competent substantial evidence from the record of the administrative hearing (addressed further below regarding other disputed findings of fact) from which the ALJ determined that the modification to the Master Development Plan ("MDP") for the DRI proposed by Petitioners in the NOPC did not comply with the relevant PUD criteria in the LDC. Labeling the finding quoted above from Paragraph 29 as a conclusion of law rather than a finding of fact is the only way Petitioners can avoid the damning facts determined by the ALJ regarding the impact of Petitioners' NOPC, if approved, on other residents within the DRI and within the neighborhood community surrounding the DRI. Respondent asserts that the sentence quoted above from Paragraph 29 is an ultimate finding of fact, supported by the other findings contained in Paragraph 29, all of which are supported by competent substantial evidence in the record of this proceeding.

The following summarizes findings of fact included in Paragraph 29 that lead to the ultimate finding quoted above, and cites the portions of the record supporting the finding(s):

- The instant NOPC application represents the first time in the 26 year history of the DRI that the developer requested creation of a new residential development cluster where residential development had never previously been authorized (a fact that was undisputed). (T. 208, 486, 532). Because this was the first time any such request was made in the history of the DRI, it was "unique," insofar as this DRI and DO are concerned.

- None of the constraints, processes or substantive criteria found in Sections 17.5 or 17.6, DO, are applicable where the developer of this DRI proposes to create a new development cluster where none has previously existed. (Jt. Ex. 1; T. 212-214, 381, 396-398, 429-431). Thus, the constraints, processes and substantive criteria that would "normally" be utilized to review a request for modification of the MDP do not exist or apply in this instance for review of this unique NOPC.

- The County's LDC provides at Section 1.02.02(2)(B), that where provisions of a DO for a DRI approved prior to adoption of the LDC conflicts with provisions of the LDC, the provisions of the DO will prevail. However, to the extent a previously issued DO does not conflict with the LDC, the provisions of the LDC apply to all development undertaken subsequent to enactment of the LDC. (Jt. Ex. 11). Because the DO provides no process or criteria for review of an NOPC of the type submitted by Petitioners in this instance, the processes and criteria included in the LDC do not conflict with the DO and pursuant to the express terms of the LDC would be applicable to this NOPC application. (Jt. Ex. 11; T. 382, 471, 472).

- The process element of Petitioners' unique NOPC application that is not specifically addressed in the DO, but is addressed in Section 1.02.02(2), LDC, includes the submission of a PUD sketch plan, and review of same by the County's Board of County Commissioners ("BCC"), applying the public health, safety and welfare criteria found in Section 3.04.02, LDC. (Jt. Ex. 11; T. 166, 168, 169). Consistent with the provisions of Section 1.02.02(2), LDC,

requests to redistribute uses on property or to amend a sketch plan for property subject to PUD zoning are handled as a rezoning of the property (although the LDC uses the term "reclassification" which is the same as rezoning). (T. 166, 168, 169).

- Consistent with the DO and the County's LDC, Petitioners' unique NOPC constitutes a rezoning of the existing underlying PUD zoning on the property. Expert testimony, established that this is the same process typically used by local governments with zoning authority throughout the state when dealing with modifications to PUDs within DRIs such as Petitioners' proposed modification. (T. 428, 432, 475, 476, 510, 533, 534.

- Residential development of the type proposed by Petitioners in Cluster 35 is prohibited by the DO (Jt. Ex. 1, Pg. 50; Jt. Ex. 9, Pgs. 560, 680-687; T. 283, 311, 463, 468, 534).

What Petitioners label as opinion or supposition in this instance is, in reality: 1) logical; 2) fact-based; and 3) supported by competent substantial evidence. As such, these findings may not be overturned by FLAWAC. Freeze v. Dep't of Bus. Reg., supra.

Given that the findings of fact in Paragraph 29 preceding and underlying the final sentence in the paragraph are supported by competent substantial evidence, the final sentence represents and is better described as an ultimate finding of fact that flows from the preceding underlying facts rather than as a conclusion of law. See, Pillsbury v. State, Dep't of Health and Rehab. Services, 744 So. 2d. 1040, 1042 (Fla. 2d DCA 1999)("While identified as conclusions which are legal in nature, the conclusions set forth as one and two above, which

the Department rejected, are actually ultimate findings of fact"); Bush v. Brogan, 725 So. 2d 1237, 1240 (Fla. 2d DCA 1999)("The Commission could alter the hearing officer's ultimate finding of fact only if it was not supported by competent substantial evidence").

Petitioners colorfully observe in Exception No. 1 that merely labeling a statement as a finding of fact does not make it a finding of fact, if it is in reality a conclusion of law. More frequently, courts have admonished agencies for doing what Petitioners ask FLAWAC to do in this instance--that is, re-characterize a finding of fact as a conclusion of law to enable the agency to change the outcome of a case as determined in an RO. See, e.g., Stokes v. State, Bd. of Professional Engineers, 952 So. 2d 1244, 1225 (Fla. 1st DCA 2007)(Erroneously labeling factual determination a conclusion of law does not make it so, and obligation of agency to honor hearing officer's findings of fact may not be avoided by categorizing a contrary finding as a conclusion of law).

The courts have recognized a distinction between those types of fact based conclusions that, if based on competent substantial evidence, may not be disturbed by a reviewing agency and conclusions of law over which agencies have greater (but not unlimited) discretion to review and modify. In Gross v. Dep't of Health, 819 So. 2d 997 (Fla. 5th DCA 2002), the court

describes the "deference rule" as it relates to an agency's authority to modify a finding of ultimate fact through re-characterizing the ultimate fact as a conclusion of law. The deference rule provides:

> Matters that are susceptible of ordinary methods of proof, such as determining the credibility of witnesses or the weight to accord evidence, are factual matters to be determined by the hearing officer. On the other hand, matters infused with overriding policy considerations are left to agency discretion. Id. at 1002.

In Gross, an ALJ made a factual finding that certain actions of a licensed physician done in connection with treatment of a patient who later died, did not violate a statutorily prescribed standard of care for physicians. The reviewing agency determined that this finding was a conclusion of law, and entered a final order with a legal conclusion that the actions of the physician did violate the applicable statutory standard of care.

Citing the deference rule, the appellate court in Gross determined that whether an individual violated a statute by breaching an applicable standard of care is a factual issue that is susceptible to ordinary methods of proof and is not an issue that is infused with policy considerations. Id. at 1003. As a consequence, the court reinstated the ultimate finding of the ALJ in the case, thereby reversing the agency re-

characterization of the finding as a conclusion of law.[2] Many other Florida cases have discussed the deference rule and determined that ultimate findings similar to the one included in Paragraph 29 of the RO in this case were susceptible to ordinary means of proof, and therefore are not conclusions of law. See for example, Pillsbury v. State, Dep't of Health and Rehab. Services, supra (upholding an Administrative Law Judges ("ALJ's") determination that certain actions of a child day care center licensee did not show or establish a willful pattern of noncompliance with agency regulations, and that past violations by licensee could not be considered in determining whether license could be revoked); Berry v. State, Dep't of Environmental Reg., 530 So. 2d 1019 (Fla. 4th DCA 1988) (upholding Hearing Officer's determination, based on expert testimony, that applicant for dredge and fill permit proved project would not exacerbate groundwater contamination and therefore provided reasonable assurance that rule based permit criteria was met); Packer v. Orange County School Board, 881 So. 2d 1204 (Fla. 5th DCA 2004) (upholding ALJ's determination that amount of force used by teacher against student was not excessive, that the use of force was not for an unlawful purpose and that the actions of the teacher did not constitute

[2] The ALJ's findings in Gross, were largely based on opinions of experts, which is frequently the case in administrative hearings and certainly expert opinions were relevant in the findings Petitioners complain about in the instant case. See Gross v. Dep't of Health, at 1004.

misconduct in office under the school board's policies); Bush v. Brogan, supra, (upholding ALJ's determination that actions of teacher did not constitute gross immorality or moral turpitude under state statute governing teacher behavior); Stokes v. Bd. of Professional Engineers, 952 So. 2d 1224 (Fla. 1st DCA 2007) (upholding ALJ's determination that actions of individual did not constitute practicing engineering without a license); Hoover v. Agency for Health Care Admin., 676 So. 2d 1380 (Fla. 3d DCA 1996)[3] (upholding Hearing Officer's determination that a physician's prescription writing practices did not violate the standard of care for physicians writing prescriptions); Kinney v. Dep't of State, 501 So. 2d 129 (Fla. 5th DCA 1987) (upholding Hearing Officer's determination that evidence did not show element of criminal intent on part of private detective and therefore did not violate statutory standard for licensing of private detectives).

In each of the foregoing cases, the agency asserted that the determination in issue (which the courts typically describe as an ultimate fact) was in fact a conclusion of law. The agency then concluded as a matter of law that the action under review did violate the statute or standard in issue. In each instance the reviewing court reversed the agency, holding that

[3] This is another case in which the ALJ's determination of ultimate fact was based largely on expert opinions.

the agency could not modify such findings where the findings were supported by competent substantial evidence (including expert opinions).

A final case that warrants discussion on this point is Deep Lagoon Boat Club Ltd. v. Sheridan, 784 So. 2d 1140 (Fla. 2d DCA 2001). In this case the Secretary of the Department of Environmental Protection reviewed a RO recommending denial of an environmental resource permit ("ERP"). A critical issue in the case was whether the doctrine of collateral estoppel applied which would preclude consideration of whether the project met the secondary impacts criteria included in the ERP rule. The ALJ in the RO found that the petitioner was not so precluded and then determined the permit applicant did not provide reasonable assurance that the project would not cause adverse secondary impacts.

The Secretary, although disagreeing with the ALJ's resolution of these issues, upheld the ALJ's determination citing amendments to Section 120.57(1)(l), Florida Statutes, approved by the Legislature in 1999. Effectively, the revised language in this section states that an agency may only reject or modify those conclusions of law "over which it [the agency] has substantive jurisdiction." The Secretary found, based on this added statutory language that:

> Without further judicial guidance, I am not convinced that the general legal principles involved in a determination of whether or not res judicata or collateral estoppel applies to a specific administrative proceeding are matters over which the Department has "substantive jurisdiction." Id. at 1143.

The appellate court agreed with the statement that the Secretary had no substantive jurisdiction over the applicability of res judicata or collateral estoppel.

FLAWAC has no special expertise as it relates to the County's LDC or the DO which Petitioners seek to amend through the NOPC. The decision regarding the applicability of criteria and procedures included in the LDC to the particular request made by Petitioners in the NOPC application were susceptible to ordinary means of proof and this issue is not infused with policy considerations. Further, as demonstrated above, the facts underlying the determination on this issue were supported by competent substantial evidence. For these reasons, FLAWAC does not have authority to alter the ALJ's ultimate finding of fact by re-characterizing it as a conclusion of law. Regardless, even if FLAWAC should view the statement in issue as a conclusion of law, FLAWAC does not have substantive jurisdiction over the County's LDC and therefore, does not have authority under Section 120.57(1)(l), Florida Statutes to amend or modify a conclusion of law regarding applicability of provision in the LDC.

Petitioners' proposition that a "DRI DO is, in effect, a contract between the developer and local government", has no basis in law, or in logic. Petitioners seem to forget that the abbreviation "DO" actually stands for Development *Order*, not Development Contract. The DRI DO is no more a contract than the Commission's Final *Order* will be in this matter when entered. No elaborate statutory construction is required to construe the intent and legal quality of a DRI DO. Florida Statutes 380.031(3) defines a development order as an *order* granting, denying, or granting with conditions an application for development permit. The granting or denying of an order is a judicial or quasi-judicial function, not an at-will offer and acceptance of contract terms.

In addition, Florida Statutes, Section 380.06(11), establishes the minimum requirements for a DRI impact notice by the local government and mandates that it, "hold a public hearing on the application in the same manner as for a rezoning". Florida law is well established that a rezoning consists of a quasi-judicial act of government. *See* Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993). Contracts, in contrast, are neither quasi-judicial acts nor subject to duly noticed public hearings. As to the nature of the act itself, the statutory mandates to local government at Section 380.06(15), Florida Statutes, are clearly those of adjudication,

at subsections: (a) "shall render a decision on the application", (b) "shall issue development orders concurrently", and (c) "[t]he development order shall include findings of fact and conclusions of law". Tellingly, Petitioners cite no statutory or case law authority in support of its assertion that a development order is not an order as its plain meaning indicates, but somehow merely a contract.

Petitioners also contend they did not consent to simultaneous DRI and PUD review pursuant to the terms of the LDC. The process utilized in this instance by the County was dictated by the nature of Petitioners' application, i.e., creation of a new residential development cluster within and existing PUD, at a location where such development is not designated in the MDP and not authorized in the DO. This necessarily required the County to make a reclassification/rezoning decision (invoking the substantive PUD criteria in the NOPC) at the same time it decided whether to approve the NOPC.[4] There is no other way the County could proceed on such a request without giving up its right to consider potential adverse impacts to health safety and welfare of its citizens.

[4] As the ALJ noted at Paragraph this is identical to the process that occurred when the developer amended the DO and MDP in 1998.

The simultaneous review contemplated by Section 3.04.02(D), LDC, would include the detailed site development plan step (which did not occur in this instance), not just the reclassification step. In this instance, in essence, the creation of the new cluster and accompanying NOPC for the DRI has to be created in the same way the existing PUD was created, that is through a rezoning process, which must occur in conjunction with action on the NOPC.

Petitioners' Exception No. 2

Petitioners take exception to portions of paragraph 36 of the RO (a finding of fact) contending that the ALJ's determinations are not fact based concerning the mass and scale of development that would be authorized under the NOPC; and the impact the buildings and the residents who would occupy them would have on the 16th Road park and on public beach access. These findings of the ALJ, Petitioners contend, are conclusions of law and are based on speculation. Because of these impacts, the ALJ found the development entitlements granted by the NOPC at the level proposed in the NOPC conflicts with the County's comprehensive plan provisions concerning the A1A Scenic Highway. Petitioners' argument is based on the contention that the NOPC application did not include a specific site development plan and the further contention that without a site development plan, it is not possible to make fact based determinations regarding how

an entitlement to 561 residential units on 12 acres of land at this location would impact the surrounding area.

Petitioners are correct that the NOPC application did not include a specific site development plan of the type that could be used for applications for building permits. Nevertheless, Petitioners' NOPC application, if approved, would entitle Petitioners to construct 561 residential units on the 12 acres in question. The intensity of development which would be authorized by the NOPC is significantly higher than now exists at the location of Cluster 35 and, indeed, is significantly more intense than any other completed development cluster in the DRI.[5] There is voluminous competent substantial evidence in the record, most if not all of it unrebutted, regarding how the level and intensity of development to which Petitioners would be entitled would impact the surrounding area. The following summarizes that evidence:

- Although the Petitioners agreed to limit the height of any residential buildings constructed in the new cluster to 77' (approximately 7 stories), the D.O. limits building height for the cluster to 12 stories. As a consequence, Petitioners would be entitled to construct non-residential buildings up to 12 stories in height. (Jt. Ex. 3, Pg. 118; T. 97).

- Even assuming all buildings in the new cluster are limited to 77' in height and further assuming that Petitioners

[5] The NOPC would authorize development at a density of 46.75 units per acre. (T. 618). The highest density for any cluster approved in the DRI is 20 units per acre and the highest density actually developed in the DRI is 15 units per acre.

limited the size of residential units to the equivalent of minimal hotel sized units (approximately 440 square feet), maximizing their entitlement on the 12 acre site would virtually cover the entire site with buildings. This evidence, presented by experts, was unrebutted at the hearing. (Resp. Ex. 9, Figures 2B, 2C, 3B, 3C, 4B, 4C; Int. Exs. 9, 10, 11). Realistically, it is unlikely Petitioners could actually fit 561 residential units on the site. (T. 493, 634, 635, 654).

- If Petitioners maximize the number of residential units the NOPC would entitle Petitioners to place on the site, the construction would obstruct or eliminate the ocean views of numerous property owners in the homes and condominiums located landward of the proposed new cluster. (Resp. Ex. 9, Figures 2B, 2C, 3B, 3C, 4B, 4C; Int. Exs. 9, 10, 11; T. 645, 641). At minimum such construction would block ocean views of all residential floors in the Towers and Beach Club Condominiums up to the 5th residential floor levels. (Id.).

- Uncontested data shows that comparable residential units adjacent to the newly proposed Cluster 35 without ocean views are valued 47% less than units with ocean views. Thus, it is reasonable to conclude that eliminating ocean views of the affected residents in Hammock Dunes will result in as much as a 47% loss in value if Petitioners are enabled to build residential buildings that eliminate ocean views of existing residents. (T. 443-447, 512).

- Evidence established that the intensity of construction to which Petitioner would be entitled, should the NOPC be approved, would both literally and figuratively overshadow the adjacent public beach and public park at 16th Road. (Resp. Exs. 6, 9, Figures 2B, 2C, 3B, 4B, 4C; Int. Exs. 9, 10, 11; T. 483-485, 525, 576, 577, 677, 678). Not only would the presence of the intense development the NOPC would entitle Petitioners to pursue impact the public beach and the 16th Road park, the concentration of people occupying the units, even if all 561 units cannot be fit on the site, given its location right at the intersection of the public park/access to the beach and the beach itself would detrimentally change the character of both. (T. 677, 678).

Petitioners argue that the County has no authority to consider and address the potential impacts of the development scenario to which Petitioners would be entitled through the NOPC, or in the alternative, that the County should have no interest in those potential impacts. Petitioners' arguments regarding the County's authority to limit Petitioners' ability to develop residential units in the proposed new cluster are highly inconsistent and contradictory. Petitioners contend that for purposes of reviewing its request to create a new cluster and reallocate units to that cluster--a request the County deems a rezoning, the County may only consider what is contained in the D.O. (particularly sections 17.5 and 17.6 thereof).

Yet, Petitioners state in Exception 2 (at pg. 14), that if Petitioners proposed, at the site development plan stage, a site plan that maximized residential development of the new cluster, causing the impacts the testimony showed would occur as a consequence, "the County would have no legal obligation to approve such a plan." As the ALJ found, supported by the evidence, and even as Petitioners' expert admitted, the DO, provides no substantive criteria for what can be built in a cluster for purposes of reviewing a site development plan. The MDP in conjunction with Section 17.5 of the DO does limit building height based on development type, sets the number of units allocated per cluster, designates the number of

developable acres in each cluster, but that is all. These limited constraints were all taken into consideration and applied for purposes of the expert testimony establishing the devastating impacts resulting from constructing up to 561 residential units on the new cluster. Where would the substantive requirements and criteria that would enable the County to say no to construction consistent with the entitlements approved in the NOPC come from if they are not in the DO? Would they come from the County's LDC, which Petitioners argue cannot be applied to them because it was not incorporated into the DO? If the criteria in the LDC apply to Petitioners when they go through site development plan review process, thus enabling the County to say no to development which maximizes Petitioners' entitlements as Petitioners contend, why do they not apply when the County reviews Petitioners' NOPC request which provides the entitlement platform on which the site development plan is built?

Regarding Petitioners' argument that no assessment of NOPC impacts can be made without a final site development plan, the mere fact that there may be additional levels of permitting, as indeed there are at every stage of development from the initial DRI approval through to the individual home building plan approval, does not alter the threshold determination regarding suitability, compatibility and consistency of the

proposal before the local government agency. Indeed, Flagler County must review the application in light of the potential maximum intensity such approval would vest in the project. As stated by the Florida Supreme Court, "a comprehensive plan only establishes a long-range maximum limit on the possible intensity of land use. See Brevard County v. Snyder, 627 So. 2d 469, 475 (Fla. 1993)

Thus, when Flagler County evaluates the impact of the proposed change to the document that serves both as the DO for the DRI and the zoning ordinance for this PUD, "(e)ven where a denial of a zoning application would be inconsistent with the plan, the local government should have the discretion to decide that the maximum development density should not be allowed provided the governmental body approves some development that is consistent with the plan and the government's decision is supported by substantial, competent evidence." *Id.*

This approach is consistent with Rule 9J-5.006, F.A.C., wherein Florida's Department of Community Affairs must evaluate local government's established standards for density and intensity of use for each land use category, and specifically in mixed-use categories, for the "percentage distribution among the mix of uses, or other *objective measurement*, and the density or *intensity* of *each use*." (emphasis added) *Id. at* (4.)(c). Petitioners' proposition that although their proposed change can

be mathematically calculated and converted into a maximum objective measurement of intensity, this maximum is not truly the maximum level of intensity that will occur on this site is nonsensical. Petitioners have applied for a specific objective measurement of intensity for the proposed new cluster 35, and this objective measurement of potential intensity is at issue. To be sure, a developer may submit less intense final plans at any stage of the permitting process, for reasons ranging from market conditions to site design. However, the ability to ultimately develop a less intense final product in no way minimizes the County's duty to review the current application based on the maximum intensity impacts that could be generated on the site if the amendment were granted. This is the nature of a land use "entitlement;" a vested right running with the land to an ascertainable maximum intensity of use.

Next in Exception 2, Petitioners contend that the ALJ's conclusions based on Respondent's expert, Anne Wilson, should be rejected because "she was not qualified as an expert in land planning and comprehensive plan issues."[6] The evidence regarding Ms. Wilson's training and experience demonstrated, without question, extensive knowledge and direct experience concerning the scenic highway program institution and planning processes

[6] Ms. Wilson was formally recognized as an expert in "real estate sales and marketing in the Hammock," and in "scenic highway planning and programs." (T. 560, 561, emphasis added).

both generally and specifically as they relate to the A1A Scenic Highway. (Resp. Ex. 15; T. 549, 554-560, 564-570). Ms. Wilson testified that her work in real estate required her to know how the County's comprehensive plan applies to property in the County. (T. 550). Ms. Wilson spearheaded the adoption of a scenic highway zoning overlay district by the County. (T. 566, 567). She also testified as to her familiarity with the Open Space and Recreation elements of the County's comprehensive plan. (T. 574). All of Ms. Wilson's experience in scenic highway planning and involvement in County land use planning and regulatory efforts more than qualified her to offer opinions concerning the consistency of the NOPC with the County's comprehensive plan elements regarding the A1A scenic highway.

More importantly, Petitioners offered no objections at the hearing to the opinions offered by Ms. Wilson in response to counsel for Respondent's questions regarding consistency of the NOPC with the applicable comprehensive plan provisions. When a party fails to object to evidence or testimony at the time the evidence or testimony is offered, any such objections are waived on appeal. Buchanan v. State, 575 So. 2d 704, 707, 708 (Fla. 3d DCA 1991); See also, Crumbley v. State, 876 So. 2d 599, 601. Petitioners are inviting FLAWAC to reweigh the evidence and to judge the credibility of witnesses, which it is not permitted to

do when entering its final order. Perdue v. T.J. Palm Assoc. Ltd., supra at 665.

Finally, Petitioners assert in Exception 2 that there is no factual evidence in the record supporting the ALJ's characterization of the beach and park at 16th Road as being "pristine" and "rural." Such testimony was offered by Respondent's witnesses Tillis and Wilson and also by Intervenor's witness Hewson. (T. 464-466, 484, 485, 638, 663, 576, 577). Because there is competent substantial evidence in the record supporting the ALJ's findings, they may not be disturbed by FLAWAC in entering its final order.[7]

Exception No. 3

Petitioners take exception to portions of Paragraph 37 of the RO (a finding of fact) contending that it is a conclusion of law rather than a finding of fact. The ALJ found in this paragraph that 16th Road would have to be relocated if the NOPC were granted, which would necessarily require relocation of the 16th Road park, leading to an ultimate fact that the relocation

[7] In Footnote 3, under Exception 2, Petitioners take issue with a finding in Paragraph 36 that the County has expended "more" planning attention and funding on the 16th Road entryway than any other in the County. The explicit question posed to Ms. Wilson by counsel at T. 573, 574 was "has any other roadway...received the attention that 16th Road has had from your program and from the funding and from the county government, etcetera? Ms. Wilson's answer was "No, 16th Road has been a major focus." The "no" response, by any interpretation of the English language means no other roadway received more funding or attention from the County than 16th Road—which is exactly the finding made by the ALJ. See also testimony of Robert Devore stating that 16th Road aesthetics and facilities are "by far superior to any other of the County developed parks" and access roads. T. 335, 336.

of the park would be inconsistent with the applicable provision of the County's comprehensive plan. Petitioners contend the findings are based on speculation because the NOPC does not guarantee Petitioners the right to move the road.

Prior to the hearing in this matter the parties entered into a stipulation. Paragraph 62 of that Stipulation, states the following:

> The Petitioners agree that for the purposes of the administrative hearing hereunder, they are seeking approval of the February 10, 1010 NOPC application and will not attempt to modify or amend the NOPC application during the hearing or at any other time during the pendency of this administrative appeal.

Joint Exhibit 7 is the February 10, 2010 application referred to in Paragraph 62 of the Pre-Hearing Stipulation. In the cover letter attached to the application (which is part of the application) Petitioners stated on the second page thereof (item number 5) thereof:

> (Modification of our original NOPC application): The Application proposes realignment of a portion of 16th Road (east of Hammock Dunes Parkway). This was a concern of numerous interested parties, as they explained to us during various meetings over the past few months. The proposed realignment allows for the residential use to be located on the north side of 16th Road, in order to alleviate concerns of possible view obstruction.
>
> The realignment of a portion of 16th Road would not occur <u>until the Applicant applied for a building permit for construction within Cluster 35</u>, and the Applicant will be required to provide comparable public parking and restroom facilities at the time the roadway is constructed, in order to provide

uninterrupted public access to the beach. (Emphasis added).

Note that the only condition Petitioners place on their proposal to move 16th Road and the associated park facilities is that it won't occur until Petitioners apply for a building permit. Thus, the application submitted by Petitioners and on which they affirmatively stipulated they would stand, if approved, would entitle them to relocate the road as soon as Petitioners apply for a building permit of any kind. How then can Petitioners argue that the ALJ's finding that "the NOPC allows Petitioners to relocate 16th Road and the 16th Road park facilities further south" is not supported by competent substantial evidence or that it is a conclusion of law rather than a finding of fact?

Petitioners state in the body of the NOPC application (Jt. Ex. 7) that "if the Applicant's future plans do not impact the current configuration of 16th Road or standard building setbacks, then realignment may not be required." Thus, any speculation regarding the fate of 16th Road and the park located there is not a matter of what Petitioners would be entitled to do (realign the road and relocate the park facilities) upon approval of the NOPC, but rather, is a matter of what Petitioners might choose to do after they obtain the entitlement. The additional findings regarding the impacts to the use of the beach and the

park by the public associated therewith are amply supported by competent substantial evidence. See Jt. Ex 7; T. 581, 582.

Finally, the ultimate fact that granting the entitlement to relocate 16th Road and relocation of the facilities associated with the park would contravene policy 3-6 of the County's comprehensive plan is a matter susceptible of ordinary methods of proof and it is not a matter infused with overriding policy considerations. Because this ultimate finding is supported by competent substantial evidence, it may not be reversed or modified. Gross v. Dep't of Health, supra.

Petitioners' Exception No. 4

Petitioners take exception to Paragraph 38 of the RO (a finding of fact). The ALJ's finding in Paragraph 38 summarizes the findings in Paragraphs 36 and 37 regarding the inconsistency of the NOPC with Policies 3-3 and 3-6 of the Recreation and Open Space elements of the County's comprehensive plan. For the reasons stated in response to Exceptions 2 and 3, the statement in Paragraph 38 is an ultimate fact. See Gross v. Dep't of Health, supra. The competent substantial evidence supporting the facts underlying this ultimate fact is cited in the responses to Exceptions 2 and 3 above.

Petitioners' Exception No. 5

Petitioners take exception to portions of Paragraph 41 (a finding of fact). Petitioners' objection focuses on the finding

that residents of the area and the County have a right to rely on the stability of the MDP for the DRI, and substantial changes to the MDP, such as those proposed in this instance, will likely cause adverse impacts to residents owning property in the DRI and to the community as a whole. Cited above, in response to Exceptions 1-4, are references to competent substantial evidence in the record of this proceeding supporting findings that:

- The NOPC will entitle Petitioners to development intensity at a level that would obstruct ocean views for existing property owners in the DRI, thereby causing declines in the value of the properties so impacted.

- The NOPC will entitle Petitioners to development intensity at a level that would literally and figuratively overrun and overshadow the existing public beach and public park at the end of 16th Road, adversely affecting both residents in the DRI and in the community as a whole.

- The NOPC will entitle Petitioners to relocate 16th Road and the park facilities at 16th Road, merely by Petitioner filing a building permit application. The resultant relocation of those facilities would alter, in a negative way, the public's use and enjoyment of the rural beach at this location.

- The NOPC would contravene elements of the County's comprehensive plan in relation to the A1A scenic highway, adversely impacting residents of the DRI and the community as a whole.

For reasons detailed in response to Exceptions 1-4 above, these are all findings the ALJ is entitled and empowered to make as findings of fact.

Regarding the facts supporting a basis for residents of the County and the area to be able to rely on the stability of the

MDP, the following summarizes competent substantial evidence in the record supporting this finding:

- Section 14.5 of the DO prohibits development of the type proposed by Petitioners on the golf course lands. (Jt. Ex. 1, T. 468-470).

- Consistent with the requirements of Section 14.5 of the DO, a final plat was recorded in 2001 for the Ocean Hammock golf course, which includes the lands where Petitioners propose to locate Cluster 35, that limits use of the lands described therein, in perpetuity to golf course uses, thereby prohibiting development of the type proposed by Petitioners on the golf course lands. (Int. Ex. 1, T. 283, 311, 463. 468, 534).

- Also consistent with Section 14.5 of the DO, deed restrictions have been recorded by the developer on the golf course lands, which include the lands Petitioners propose to use for Cluster 35 that also limit, in perpetuity the use of the lands described therein to golf course uses, thereby prohibiting development of the type proposed by Petitioners. (Int. Ex. 1, T. 283, 311, 463, 468, 534).

- Although all parcels in the DRI are not completely built out, all clusters in the DRI have been finally platted, thereby establishing as a matter of public record the extent of development that will occur in each cluster approved in the existing MDP. (T. 24., 120).

Without question, the foregoing establishes a factual basis, based on competent substantial evidence in the record, for the statement that residents of the County and the area have a basis for reliance on the stability of the MDP as it relates specifically to proposed Cluster 35 and the entire DRI generally.

Petitioners, once more, suggest that because they have not yet submitted a site development plan, any conclusions regarding

impacts associated with development of Cluster 35 are speculative. Any new residential development on the golf course is prohibited by Section 14.5 of the DO, the plat for the golf course and the deed restrictions thereon. Therefore, waiting for a development plan that may show some variation on the ultimate entitlement Petitioners would gain by approval of the NOPC is irrelevant. More importantly, the County cannot assume the Petitioners will voluntarily forego some portion of the entitlements they seek in the application through a site development plan to be submitted after Petitioners have already received critical development entitlements.

Petitioners' Exception No. 6

Petitioners take exception to Paragraph 42 of the RO (a finding of fact). The ALJ in this finding noted that the scale and intensity of development authorized by the NOPC would obstruct or eliminate ocean views of other residents in the DRI and those residents whose views were so affected could expect a substantial loss in the value of their properties. As with previous exceptions, Petitioners assert that the finding is based on speculation because no site development plan has yet been submitted by Petitioners. Petitioners also point to a provision in certain contracts between developers and owners of properties where the views would be obstructed or eliminated,

stating that those purchasers were not guaranteed ocean views by the seller of that real estate.

Petitioners' consistent position that any finding regarding potential impacts of development based on the level of development authorized by the NOPC, without simultaneous consideration of a construction-ready site development plan has been addressed above. For purposes of determining whether to approve the change to the DRI, the County has to assume the developer will seek to develop the new cluster to the maximum extent of the entitlement granted by the County. With regard to testimony of Flagler County Property Appraiser, James Gardner, Jr., (T. 440-453) demonstrating that obstruction/elimination of ocean views in the Hammock Dunes DRI diminishes property values, this testimony was based on data collected by Mr. Gardner on properties within the DRI.[8] The testimony was not based on speculation and thus, the finding concerning detrimental impacts to property values is supported by competent substantial evidence.

Whether or not residents owning properties whose values will be diminished by obstruction and elimination of ocean views have enforceable contractual rights to view corridors is irrelevant to the issue of whether, based on DO Section 14.5 and

[8] Mr. Gardner's analysis included examination of comparable values between condominiums with and without ocean views in the Cinnamon Beach condominium development in the residential cluster adjacent to Cluster 35 in the DRI. (T. 445, 446).

the related plat and deed restrictions covering the area proposed for Cluster 35, Petitioners have a right to erect structures that will cause property values to be diminished. The latter protections were negotiated by the County and incorporated into the DO for the protection of both citizens living in the DRI and residents of the County at large. Certainly the affected residents in the DRI, as suggested in response to Exception 5 above, should be able to reasonably assume the County would enforce the provision of the DO and the related plan and deed restrictions.

Neither does the ALJ's determination on the Intervenors' estoppel claim (related to a promotional video published by one of Petitioners' principals) have any bearing on the issue raised in this Exception. The ALJ merely determined that, based on the contract provision barring reliance on oral representations, Petitioners were not estopped from developing buildings in Cluster 35. As suggested above, Section 14.5 of the DO and the related plat and deed restrictions on the area where development is proposed are not oral representations given by the developer.

Petitioners' Exception No. 7

Petitioners take exception to Paragraph 43 of the RO (a finding of fact), wherein the ALJ finds that relocation of the existing public facilities at the 16th Road park will adversely impact the public's use and enjoyment of the beach and the park facilities.

The finding is supported by competent substantial evidence. (T. 581, 604, 605). Petitioners appear to be repeating the argument that because Petitioners have not yet submitted a detailed site development plan, evaluating Petitioners' NOPC request based on the assumption of maximum development consistent with the NOPC, renders findings regarding impacts associated with that assumption speculative. That argument has been addressed several times above in response to the preceding Exceptions.

Petitioners' Exception No. 8

Petitioners take exception to Paragraph 44 of the RO (a finding of fact), finding that the development that can occur as a consequence of the NOPC will cause adverse impacts on adjacent clusters and therefore will not be compatible with adjacent land uses. Petitioners repeat the argument regarding the finding being speculative because Petitioners have not yet submitted a detailed site development plan for approval. That argument has previously been addressed above.

Next Petitioners claim the portion of the finding stating the NOPC will not be compatible with adjacent land uses conflicts with the finding in Paragraph 33 of the RO. The testimony referenced in Paragraph 33 concerns comprehensive plan provisions and the supporting testimony of Petitioners' expert was simply that because both the proposed cluster and the surrounding clusters are residential type land uses, they do not

conflict with the comprehensive plan provision that addresses compatibility. The testimony concerning adverse impacts on adjacent clusters was extensive and references to the record where such evidence and testimony appears is cited above.

The determination regarding adverse impacts to residents in surrounding clusters was related to provisions of the LDC governing reclassification of PUDs. Such provisions prohibit approval of PUD reclassifications that adversely impact the orderly development of the County and that are detrimental to the use of adjacent property or the general neighborhood. This is a site specific determination (hence, the reason why a quasi-judicial hearing was conducted on the NOPC) and is not necessarily based on the zoning category assigned to one particular parcel versus an adjoining parcel. This is particularly true where the adjoining parcels/land uses have a mixed use designation such as PUD. Clearly the ALJ's use of "compatible" in the context of Paragraph 44 relates to the specific development proposed by Petitioners in the PUD that would be Cluster 35 versus the existing development in Cluster 33 and others adversely affected by the NOPC. As previously noted and referenced elsewhere herein, there is competent substantial evidence supporting the findings regarding adverse impacts to surrounding clusters.

Petitioners' Exception No. 9

Petitioners take exception to Paragraph 45 of the RO (a finding of fact) contending that it represents a conclusion of law rather than a finding of fact. Paragraph 45 is merely a summation of the preceding findings of fact relating to the adverse impacts that will be occasioned by development consistent with the entitlements the NOPC would afford Petitioners. It is in reality an ultimate fact. The ALJ's determination that the impacts that will result from approval of the NOPC will adversely affect the orderly development of the County and will be detrimental to the use of adjacent properties and the general neighborhood is a matter susceptible of ordinary means of proof. It is not a matter that involves overriding policy considerations, nor is it a matter for which FLAWAC has special expertise, therefore it is an ultimate fact appropriate for determination by the ALJ. Gross v. Dep't of Health, supra.

Petitioners' Exception No. 10

Petitioner takes exception to Paragraph 50 of the RO (a finding of fact), wherein the ALJ found that the most reasonable interpretation of Section 14.5 of the DO and the related plat and deed restrictions perpetually restricting allowable land uses on the golf course lands is that reallocating the 561 dwelling units to the new cluster and assigning the cluster the "Ocean Recreational" community type is not permitted by Section

14.5. Again Petitioners suggest this is a conclusion of law, not a finding of fact, is speculative and is not supported by competent substantial evidence.

Clearly there is competent substantial evidence in the record supporting this finding. (See Int. Ex. 1; T. 283, 311,463, 463, 468, 534). Petitioners cite three pages from the trial transcript it contends support their position. The fact that there may be testimony or evidence in the record that conflicts with the evidence and testimony relied on by the ALJ does not provide a basis for reversing a finding of fact. Save Anna Maria, Inc. v. Dep't of Transportation, supra. The ALJ is the sole judge of the credibility of the witnesses and the weight to be afforded the evidence.

Petitioners characterize the DO as a contract and cite two contract cases in support of their position that interpretation of the document is a pure legal issue. As noted earlier herein, a development order is not a contract -- it is a development order. Cited earlier herein are cases holding that where an issue is susceptible of ordinary means of proof, it is appropriate for an ALJ to make determinations of ultimate fact. The cases previously cited deal specifically with findings and determinations in an administrative setting and all post-date the cases cited by Petitioners. Clearly this finding is an appropriate one to be made by the ALJ and is supported by

competent substantial evidence and, thus, this exception should be denied.

Petitioners Exception No. 11

Petitioners take exception to Paragraph 51 of the RO (a finding of fact) contending it is a conclusion of law and not a finding of fact. The factual underpinnings for this finding are addressed in the response to Exception No. 10 above. In reality, Paragraph 51 is in the nature of a summation of the findings of fact reached earlier in the RO.

Petitioners argue that since witnesses testified that the DO does not preclude them from requesting the development rights requested in NOPC, that the ALJ's determination that Petitioners have no vested right to develop 561 residential units on the area proposed which is part of the golf course lands is incorrect. Petitioners arguably have the ability to make application to the County to amend the DO to permit them to build a replica of the World Trade Center on the Ocean Hammock golf course, but that doesn't mean they have a vested right to build such a structure. This is a preposterous argument.

Whether Petitioners have a vested right to create a new cluster where none was previously authorized under the DO, and to reallocate unused residential units to the new cluster is a matter susceptible to ordinary means of proof. This is not an issue infused with policy considerations and therefore was an

appropriate fact determination to be made by the ALJ. If Petitioners contend, as they seem to suggest in Exception 11 that they have vested rights to do what is proposed, where it is proposed, one must ask why they filed the application giving rise to this litigation?

Petitioners' Exception No. 12

Petitioners take exception to Paragraph 60 of the RO (a conclusion of law). This conclusion repeats the determination made in the findings of fact (addressed in response to Exception No. 1 above) that the criteria used by the County were reasonable and appropriate. For all the reasons set out in response to Exception No. 1, this conclusion is both factually and legally correct and should not be disturbed. Lagoon Boat Club Ltd. v. Sheridan, supra.

Petitioners' Exception No. 13

Petitioners take exception to Paragraph 62 of the RO (a conclusion of law) wherein the ALJ concluded that the NOPC was not consistent with the Recreation and Open Space elements of the comprehensive plan. The correctness of this conclusion and the evidence supporting it are both addressed above in response to Exceptions 2, 3, 4, and 5.

Petitioners' Exception No. 14

Petitioners take exception to Paragraph 63 of the RO (a conclusion of law) wherein the ALJ concludes that the NOPC

application does not comply with relevant substantive criteria in the County's LDC. The correctness of this conclusion and the evidence supporting it are both addressed above, primarily in response to Exceptions 1 and 2, but in some respects to all others as well.

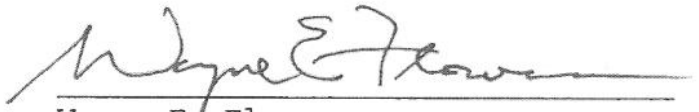
Petitioners' Exception No. 15

Petitioners' take exception to Paragraph 64 of the RO (a conclusion of law) wherein the ALJ concluded that Petitioners do not have a vested right to place up to 561 dwelling units at the location proposed in the NOPC, absent amendment of Section 14.5 of the DO. The correctness of this conclusion and the evidence supporting it are both addressed in the responses to Exceptions 1, 10, and 11 above.

WHEREFORE, Respondent prays the Commission will enter its Final Order denying each and every exception to the RO rendered on this matter, adopting the RO, thereby determining that the NOPC is not a substantial deviation; extending the expiration of the DO to February 28, 2012, by virtue of legislative action in 2007; approving reduction in residential units from 4,400 to 3,800; determining that the proposed revisions in the NOPC to create Cluster 35 and transfer 561 dwelling units to that Cluster are inconsistent with the objective and two policies of the County Comprehensive plan; determining that the New Master Development Plan (which creates Cluster 35 and transfers 541

units) is inconsistent with the criteria in LDC Sections 03.02.04.F.1 and 2.; and determining that Petitioners have no vested right to construct up to 561 dwelling units on 12 acres of land located in the Ocean Hammock Golf Course that is now platted and restricted in perpetuity for golf course purposes only.

Respectfully Submitted



Wayne E. Flowers
Florida Bar #207020
Lewis, Longman & Walker, P.A.
245 Riverside Ave. Suite 150
Jacksonville, Florida 32202
P: (904) 353-6410
F: (904) 353-7619

Isabelle C. Lopez
Florida Bar #089818
Quintairos, Prieto, Wood & Boyer, P.A.
1 Independent Drive Suite 1650
Jacksonville, Florida 32202
P: (904) 354-5500
F: (904) 354-5501

Albert J. Hadeed
County Attorney, Flagler County
Florida Bar #180906
1769 E. Moody Blvd. Suite 303
Bunnell, Florida 32110-5992
P: (386) 313-4005
F: (386) 313-4105

Attorneys for Respondent

STATEMENT OF COMPLIANCE

Pursuant to FLAWAC's policy on electronic filing, the undersigned represents that the original of the above Response will be retained by Flagler County for the duration of this proceeding and any subsequent appeal or subsequent proceeding in this case and the undersigned will produce it upon the request of other parties; and the undersigned will be responsible for any delay, disruption, or interruption of the electronic signals and accepts the full risk that the document many not be properly filed.

Wayne E. Flowers

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent, Flagler County's Response to Petitioners' Exceptions to Recommended Order was served by U.S. Mail, first class and by electronic mail to Scott Glass, Esquire, Shutts and Bowen, LLP, 300 S. Orange Avenue, Suite 1000, Orlando, Florida 32801-3373; Ellen Avery-Smith, Esq., Rogers, Towers, P.A., 100 Whetstone Place, Suite 100, St. Augustine, Florida 32086; and Michael D. Chiumento, III, Esq., Chiumento & Guntharp, P.A, 145 City Place, Suite 301, Palm Coast, Florida 32164 this 2nd day of May, 2011.

Wayne E. Flowers

Leighty, Barbara

From: Wayne Flowers [wflowers@llw-law.com]
Sent: Wednesday, July 06, 2011 4:56 PM
To: Leighty, Barbara
Subject: Respondent Flagler County's Notice of Supplemental Authority
Attachments: Respondent's Notice of Supplemental Authority.pdf

Ms. Leighty: Attached you will find a pleading entitled "Respondent Flagler County's Notice of Supplemental Authority." Would you please file this pleading in the Ginn-La, LLP, Ltd, et al. v. Flagler County FLAWAC proceeding. This is FLAWAC Case No. App-10-007. Thank you.

<<Respondent's Notice of Supplemental Authority.pdf>>

Wayne E. Flowers
Shareholder
Lewis, Longman & Walker, P.A.
245 Riverside Avenue, Suite 150
Jacksonville, Florida 32202
wflowers@llw-law.com
(t) 904.353.6410
(f) 904.353.7619
vCard | Website | Bio

STATE OF FLORIDA
FLORIDA LAND AND WATER ADJUDICATORY COMMISSION

GINN-LA, LLLP, LTD, A GEORGIA LIMITED LIABILITY PARTNERSHIP AUTHORIZED TO DO BUSINESS IN FLORIDA, NORTHSHORE HAMMOCK LTD., LLP, A GEORGIA LIMITED LIABILITY PARTNERSHIP AUTHORIZED TO DO BUSINESS IN FLORIDA; AND, NORTHSHORE OCEAN HAMMOCK ET AL,

Petitioners,

v.

DOAH Case No.: 10-9137DRI
FLAWAC Case No: APP-10-007

FLAGLER COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA,

Respondent,

and

OCEAN HAMMOCK PROPERTY OWNERS ASSOCIATION, INC., THE HAMMOCK BEACH CLUB CONDOMINIUM ASSOCIATION, INC., MICHAEL M. HEWSON, AND ADMIRAL CORPORATION,

Intervenors.
_____/

RESPONDENT FLAGLER COUNTY'S NOTICE OF SUPPLEMENTAL AUTHORITY

Respondent, Flagler County, hereby provides notice to the Florida Land and Water Adjudicatory Commission ("FLAWAC") of supplemental authority, relevant to the Commission's decision in the instant case, which was not in existence when Respondent submitted its response to Petitioners' exceptions to the

Recommended Order filed with the Commission in this matter and shows the following:

1. During the recently concluded 2011 session of the Florida Legislature, the Legislature passed and Governor Scott signed HB 7207, which among other things, amended §380.06(19)(f)5, Florida Statutes. Subsection (f) thereof, generally addresses the process to be followed by a local government in reviewing and acting on proposed changes to an existing development of regional impact ("DRI"). The relevant amendatory language appears in Subsection (f)5, which deals with a local government's determination as to whether a proposed change to a DRI requires further "development-of-regional-impact review." The amendatory language states:

> The local government may also deny the proposed change based on matters relating to local issues, such as if the land on which the change is sought is plat restricted in a way that would be incompatible with the proposed change, and the local government does not wish to change the plat restriction as part of the proposed change.

HB 7207 has been codified as Chapter 2011-139, Laws of Florida. Attached hereto as Exhibit "A" is the relevant portion of HB 7207 that includes the above quoted language.[1]

2. Also attached hereto as Exhibit "B" is a report from the Conference Committee of the Legislature to Senate President

[1] The entire bill is 349 pages long and covers a variety of amendments to Florida's growth management laws. Because of the length of the bill, the undersigned has only attached the 28 page section that includes the relevant amendment to § 380.06(19(f)5, Florida Statutes.

Haridopolos and House Speaker Cannon, summarizing the Committee's recommendation on the divergent versions of HB 7207 passed by the Senate and the House (which was adopted by both chambers and is now Chapter 2011-139, Laws of Florida). Regarding the amendatory language quoted in Paragraph 1 above the summary page in the report states: "Clarifies when a local government can reject a proposed change to a development of regional impact."

3. The new language placed in §380.06(19)(f)5, Florida Statutes through Chapter 2011-139, Laws of Florida, is both relevant and applicable in FLAWAC's entry of a final order in this matter. The Legislature's intent was clearly to clarify what was doubtful and to safeguard against misapprehension as to existing law. State v. Dickinson, 286 So. 2d 529, 531 (Fla. 1973); Wong v. Gonzalez & Kennedy, 719 So. 2d 937, 938 (Fla. 4th DCA 1998). A court, or in this case, FLAWAC, has a duty to consider subsequent legislation in arriving at a correct interpretation of a prior statute. Gamble v. State, 723 So. 2d 905, 906 (Fla. 5th DCA) 1999). To the extent there was any doubt concerning whether Respondent could, based on local (as opposed to regional) considerations, deny the instant request to amend the DRI under §380.06(19)(f)5, Florida Statutes, based on the existence of recorded plat restrictions on the golf course land that are incompatible with the request, the quoted language in

the amendment now makes it clear Respondent had legal authority to do so. Accordingly this clarification of the law should be considered by and incorporated in FLAWAC's Final Order in this matter.

Respectfully Submitted

Wayne E. Flowers
Florida Bar #207020
Lewis, Longman & Walker, P.A.
245 Riverside Ave. Suite 150
Jacksonville, Florida 32202
P: (904) 353-6410
F: (904) 353-7619

Isabelle C. Lopez
Florida Bar #089818
Quintairos, Prieto, Wood & Boyer, P.A.
1 Independent Drive Suite 1650
Jacksonville, Florida 32202
P: (904) 354-5500
F: (904) 354-5501

Albert J. Hadeed
County Attorney, Flagler County
Florida Bar #180906
1769 E. Moody Blvd. Suite 303
Bunnell, Florida 32110-5992
P: (386) 313-4005
F: (386) 313-4105

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent, Flagler County's Notice of Supplemental Authority was served by U.S. Mail, first class and by electronic mail to Scott Glass, Esquire, Shutts and Bowen, LLP, 300 S. Orange Avenue, Suite 1000, Orlando, Florida 32801-3373; Ellen Avery-Smith, Esq., Rogers, Towers, P.A., 100 Whetstone Place, Suite 100, St. Augustine, Florida 32086; and Michael D. Chiumento, III, Esq., Chiumento & Guntharp, P.A, 145 City Place, Suite 301, Palm Coast, Florida 32164 this 6th day of July, 2011.

Wayne E. Flowers

subject to mandatory reclamation under part II of chapter 211. The master reclamation plan when amended by the Department of Environmental Protection shall be consistent with local government plans prepared pursuant to the Community ~~Local Government Comprehensive~~ Planning ~~and Land Development Regulation~~ Act.

Section 53. Subsection (10) of section 380.031, Florida Statutes, is amended to read:

380.031 Definitions.—As used in this chapter:

(10) "Local comprehensive plan" means any or all local comprehensive plans or elements or portions thereof prepared, adopted, or amended pursuant to the Community ~~Local Government Comprehensive~~ Planning ~~and Land Development Regulation~~ Act, as amended.

Section 54. Paragraph (d) of subsection (2), paragraph (b) of subsection (6), paragraph (g) of subsection (15), paragraphs (b), (c), (e), and (f) of subsection (19), subsection (24), paragraph (e) of subsection (28), and paragraphs (a), (d), and (e) of subsection (29) of section 380.06, Florida Statutes, are amended to read:

(2) STATEWIDE GUIDELINES AND STANDARDS.—

(d) The guidelines and standards shall be applied as follows:

1. Fixed thresholds.—

a. A development that is below 100 percent of all numerical thresholds in the guidelines and standards shall not be required to undergo development-of-regional-impact review.

b. A development that is at or above 120 percent of any numerical threshold shall be required to undergo development-of-regional-impact review.

c. Projects certified under s. 403.973 which create at least 100 jobs and meet the criteria of the Office of Tourism, Trade, and Economic Development as to their impact on an area's economy, employment, and prevailing wage and skill levels that are at or below 100 percent of the numerical thresholds for industrial plants, industrial parks, distribution, warehousing or wholesaling facilities, office development or multiuse projects other than residential, as described in s. 380.0651(3)(c)~~, (d),~~ and (f)~~(h),~~ are not required to undergo development-of-regional-impact review.

2. Rebuttable presumption.—It shall be presumed that a development that is at 100 percent or between 100 and 120 percent of a numerical threshold shall be required to undergo development-of-regional-impact review.

(6) APPLICATION FOR APPROVAL OF DEVELOPMENT; CONCURRENT PLAN AMENDMENTS.—

(b) Any local government comprehensive plan amendments related to a proposed development of regional impact, including any changes proposed under subsection (19), may be initiated by a local planning agency or the developer and must be considered by the local governing body at the same time as the application for development approval using the procedures provided for local plan amendment in s. 163.3187 ~~or s. 163.3189~~ and applicable local ordinances, without regard to ~~statutory or~~ local ~~ordinance~~ limits on the frequency of consideration of amendments to the

local comprehensive plan. ~~Nothing in~~ This paragraph does not ~~shall be deemed to~~ require favorable consideration of a plan amendment solely because it is related to a development of regional impact. The procedure for processing such comprehensive plan amendments is as follows:

1. If a developer seeks a comprehensive plan amendment related to a development of regional impact, the developer must so notify in writing the regional planning agency, the applicable local government, and the state land planning agency no later than the date of preapplication conference or the submission of the proposed change under subsection (19).

2. When filing the application for development approval or the proposed change, the developer must include a written request for comprehensive plan amendments that would be necessitated by the development-of-regional-impact approvals sought. That request must include data and analysis upon which the applicable local government can determine whether to transmit the comprehensive plan amendment pursuant to s. 163.3184.

3. The local government must advertise a public hearing on the transmittal within 30 days after filing the application for development approval or the proposed change and must make a determination on the transmittal within 60 days after the initial filing unless that time is extended by the developer.

4. If the local government approves the transmittal, procedures set forth in s. 163.3184(4)(b)-(d) ~~(3)-(6)~~ must be followed.

5. Notwithstanding subsection (11) or subsection (19), the local government may not hold a public hearing on the application for development approval or the proposed change or on the comprehensive plan amendments sooner than 30 days from receipt of the response from the state land planning agency pursuant to s. 163.3184(4)(d)~~(6)~~. ~~The 60-day time period for local governments to adopt, adopt with changes, or not adopt plan amendments pursuant to s. 163.3184(7) shall not apply to concurrent plan amendments provided for in this subsection.~~

6. The local government must hear both the application for development approval or the proposed change and the comprehensive plan amendments at the same hearing. However, the local government must take action separately on the application for development approval or the proposed change and on the comprehensive plan amendments.

7. Thereafter, the appeal process for the local government development order must follow the provisions of s. 380.07, and the compliance process for the comprehensive plan amendments must follow the provisions of s. 163.3184.

(15) LOCAL GOVERNMENT DEVELOPMENT ORDER.—

(g) A local government shall not issue permits for development subsequent to the buildout date contained in the development order unless:

1. The proposed development has been evaluated cumulatively with existing development under the substantial deviation provisions of subsection (19) subsequent to the termination or expiration date;

2. The proposed development is consistent with an abandonment of development order that has been issued in accordance with the provisions of subsection (26);

3. The development of regional impact is essentially built out, in that all the mitigation requirements in the development order have been satisfied, all developers are in compliance with all applicable terms and conditions of the development order except the buildout date, and the amount of proposed development that remains to be built is less than 40 ~~20~~ percent of any applicable development-of-regional-impact threshold; or

4. The project has been determined to be an essentially built-out development of regional impact through an agreement executed by the developer, the state land planning agency, and the local government, in accordance with s. 380.032, which will establish the terms and conditions under which the development may be continued. If the project is determined to be essentially built out, development may proceed pursuant to the s. 380.032 agreement after the termination or expiration date contained in the development order without further development-of-regional-impact review subject to the local government comprehensive plan and land development regulations or subject to a modified development-of-regional-impact analysis. As used in this paragraph, an "essentially built-out" development of regional impact means:

a. The developers are in compliance with all applicable terms and conditions of the development order except the buildout date; and

b.(I) The amount of development that remains to be built is less than the substantial deviation threshold specified in paragraph (19)(b) for each individual land use category, or, for a multiuse development, the sum total of all unbuilt land uses as a percentage of the applicable substantial deviation threshold is equal to or less than 100 percent; or

(II) The state land planning agency and the local government have agreed in writing that the amount of development to be built does not create the likelihood of any additional regional impact not previously reviewed.

The single-family residential portions of a development may be considered "essentially built out" if all of the workforce housing obligations and all of the infrastructure and horizontal development have been completed, at least 50 percent of the dwelling units have been completed, and more than 80 percent of the lots have been conveyed to third-party individual lot owners or to individual builders who own no more than 40 lots at the time of the determination. The mobile home park portions of a development may be considered "essentially built out" if all the infrastructure and horizontal development has been completed, and at least 50 percent of the lots are leased to individual mobile home owners.

(19) SUBSTANTIAL DEVIATIONS.—

(b) Any proposed change to a previously approved development of regional impact or development order condition which, either individually or cumulatively with other changes, exceeds any of the following criteria shall constitute a

substantial deviation and shall cause the development to be subject to further development-of-regional-impact review without the necessity for a finding of same by the local government:

1. An increase in the number of parking spaces at an attraction or recreational facility by 15 ~~10~~ percent or 500 ~~330~~ spaces, whichever is greater, or an increase in the number of spectators that may be accommodated at such a facility by 15 ~~10~~ percent or 1,500 ~~1,100~~ spectators, whichever is greater.

2. A new runway, a new terminal facility, a 25-percent lengthening of an existing runway, or a 25-percent increase in the number of gates of an existing terminal, but only if the increase adds at least three additional gates.

~~3. An increase in industrial development area by 10 percent or 35 acres, whichever is greater.~~

~~4. An increase in the average annual acreage mined by 10 percent or 11 acres, whichever is greater, or an increase in the average daily water consumption by a mining operation by 10 percent or 330,000 gallons, whichever is greater. A net increase in the size of the mine by 10 percent or 825 acres, whichever is less. For purposes of calculating any net increases in size, only additions and deletions of lands that have not been mined shall be considered. An increase in the size of a heavy mineral mine as defined in s. 378.403(7) will only constitute a substantial deviation if the average annual acreage mined is more than 550 acres and consumes more than 3.3 million gallons of water per day.~~

3.~~5.~~ An increase in land area for office development by 15 ~~10~~ percent or an increase of gross floor area of office

development by 15 ~~10~~ percent or 100,000 ~~66,000~~ gross square feet, whichever is greater.

4.~~6.~~ An increase in the number of dwelling units by 10 percent or 55 dwelling units, whichever is greater.

5.~~7.~~ An increase in the number of dwelling units by 50 percent or 200 units, whichever is greater, provided that 15 percent of the proposed additional dwelling units are dedicated to affordable workforce housing, subject to a recorded land use restriction that shall be for a period of not less than 20 years and that includes resale provisions to ensure long-term affordability for income-eligible homeowners and renters and provisions for the workforce housing to be commenced prior to the completion of 50 percent of the market rate dwelling. For purposes of this subparagraph, the term "affordable workforce housing" means housing that is affordable to a person who earns less than 120 percent of the area median income, or less than 140 percent of the area median income if located in a county in which the median purchase price for a single-family existing home exceeds the statewide median purchase price of a single-family existing home. For purposes of this subparagraph, the term "statewide median purchase price of a single-family existing home" means the statewide purchase price as determined in the Florida Sales Report, Single-Family Existing Homes, released each January by the Florida Association of Realtors and the University of Florida Real Estate Research Center.

6.~~8.~~ An increase in commercial development by 60,000 ~~55,000~~ square feet of gross floor area or of parking spaces

provided for customers for 425 ~~330~~ cars or a 10-percent increase ~~of either of these~~, whichever is greater.

~~9. An increase in hotel or motel rooms by 10 percent or 83 rooms, whichever is greater.~~

7.~~10.~~ An increase in a recreational vehicle park area by 10 percent or 110 vehicle spaces, whichever is less.

8.~~11.~~ A decrease in the area set aside for open space of 5 percent or 20 acres, whichever is less.

9.~~12.~~ A proposed increase to an approved multiuse development of regional impact where the sum of the increases of each land use as a percentage of the applicable substantial deviation criteria is equal to or exceeds 110 percent. The percentage of any decrease in the amount of open space shall be treated as an increase for purposes of determining when 110 percent has been reached or exceeded.

10.~~13.~~ A 15-percent increase in the number of external vehicle trips generated by the development above that which was projected during the original development-of-regional-impact review.

11.~~14.~~ Any change which would result in development of any area which was specifically set aside in the application for development approval or in the development order for preservation or special protection of endangered or threatened plants or animals designated as endangered, threatened, or species of special concern and their habitat, any species protected by 16 U.S.C. ss. 668a-668d, primary dunes, or archaeological and historical sites designated as significant by the Division of Historical Resources of the Department of State.

The refinement of the boundaries and configuration of such areas shall be considered under sub-subparagraph (e)2.j.

The substantial deviation numerical standards in subparagraphs 3., 6., and ~~5., 8.,~~ 9.~~, and 12.~~, excluding residential uses, and in subparagraph 10. ~~13.~~, are increased by 100 percent for a project certified under s. 403.973 which creates jobs and meets criteria established by the Office of Tourism, Trade, and Economic Development as to its impact on an area's economy, employment, and prevailing wage and skill levels. The substantial deviation numerical standards in subparagraphs 3., 4. 5., 6., ~~7., 8.,~~ 9., ~~12.,~~ and 10. ~~13.~~ are increased by 50 percent for a project located wholly within an urban infill and redevelopment area designated on the applicable adopted local comprehensive plan future land use map and not located within the coastal high hazard area.

(c) An extension of the date of buildout of a development, or any phase thereof, by more than 7 years is presumed to create a substantial deviation subject to further development-of-regional-impact review.

1. An extension of the date of buildout, or any phase thereof, of more than 5 years but not more than 7 years is presumed not to create a substantial deviation. The extension of the date of buildout of an areawide development of regional impact by more than 5 years but less than 10 years is presumed not to create a substantial deviation. These presumptions may be rebutted by clear and convincing evidence at the public hearing

held by the local government. An extension of 5 years or less is not a substantial deviation.

2. In recognition of the 2011 real estate market conditions, at the option of the developer, all commencement, phase, buildout, and expiration dates for projects that are currently valid developments of regional impact are extended for 4 years regardless of any previous extension. Associated mitigation requirements are extended for the same period unless, before December 1, 2011, a governmental entity notifies a developer that has commenced any construction within the phase for which the mitigation is required that the local government has entered into a contract for construction of a facility with funds to be provided from the development's mitigation funds for that phase as specified in the development order or written agreement with the developer. The 4-year extension is not a substantial deviation, is not subject to further development-of-regional-impact review, and may not be considered when determining whether a subsequent extension is a substantial deviation under this subsection. The developer must notify the local government in writing by December 31, 2011, in order to receive the 4-year extension.

For the purpose of calculating when a buildout or phase date has been exceeded, the time shall be tolled during the pendency of administrative or judicial proceedings relating to development permits. Any extension of the buildout date of a project or a phase thereof shall automatically extend the commencement date of the project, the termination date of the development order,

the expiration date of the development of regional impact, and the phases thereof if applicable by a like period of time. ~~In recognition of the 2007 real estate market conditions, all phase, buildout, and expiration dates for projects that are developments of regional impact and under active construction on July 1, 2007, are extended for 3 years regardless of any prior extension. The 3-year extension is not a substantial deviation, is not subject to further development-of-regional-impact review, and may not be considered when determining whether a subsequent extension is a substantial deviation under this subsection.~~

(e)1. Except for a development order rendered pursuant to subsection (22) or subsection (25), a proposed change to a development order that individually or cumulatively with any previous change is less than any numerical criterion contained in subparagraphs (b)1.-10.~~1.-13.~~ and does not exceed any other criterion, or that involves an extension of the buildout date of a development, or any phase thereof, of less than 5 years is not subject to the public hearing requirements of subparagraph (f)3., and is not subject to a determination pursuant to subparagraph (f)5. Notice of the proposed change shall be made to the regional planning council and the state land planning agency. Such notice shall include a description of previous individual changes made to the development, including changes previously approved by the local government, and shall include appropriate amendments to the development order.

2. The following changes, individually or cumulatively with any previous changes, are not substantial deviations:

a. Changes in the name of the project, developer, owner, or monitoring official.

b. Changes to a setback that do not affect noise buffers, environmental protection or mitigation areas, or archaeological or historical resources.

c. Changes to minimum lot sizes.

d. Changes in the configuration of internal roads that do not affect external access points.

e. Changes to the building design or orientation that stay approximately within the approved area designated for such building and parking lot, and which do not affect historical buildings designated as significant by the Division of Historical Resources of the Department of State.

f. Changes to increase the acreage in the development, provided that no development is proposed on the acreage to be added.

g. Changes to eliminate an approved land use, provided that there are no additional regional impacts.

h. Changes required to conform to permits approved by any federal, state, or regional permitting agency, provided that these changes do not create additional regional impacts.

i. Any renovation or redevelopment of development within a previously approved development of regional impact which does not change land use or increase density or intensity of use.

j. Changes that modify boundaries and configuration of areas described in subparagraph (b)11.~~14.~~ due to science-based refinement of such areas by survey, by habitat evaluation, by other recognized assessment methodology, or by an environmental

assessment. In order for changes to qualify under this sub-subparagraph, the survey, habitat evaluation, or assessment must occur prior to the time a conservation easement protecting such lands is recorded and must not result in any net decrease in the total acreage of the lands specifically set aside for permanent preservation in the final development order.

k. Any other change which the state land planning agency, in consultation with the regional planning council, agrees in writing is similar in nature, impact, or character to the changes enumerated in sub-subparagraphs a.-j. and which does not create the likelihood of any additional regional impact.

This subsection does not require the filing of a notice of proposed change but shall require an application to the local government to amend the development order in accordance with the local government's procedures for amendment of a development order. In accordance with the local government's procedures, including requirements for notice to the applicant and the public, the local government shall either deny the application for amendment or adopt an amendment to the development order which approves the application with or without conditions. Following adoption, the local government shall render to the state land planning agency the amendment to the development order. The state land planning agency may appeal, pursuant to s. 380.07(3), the amendment to the development order if the amendment involves sub-subparagraph g., sub-subparagraph h., sub-subparagraph j., or sub-subparagraph k., and it believes the

change creates a reasonable likelihood of new or additional regional impacts.

3. Except for the change authorized by sub-subparagraph 2.f., any addition of land not previously reviewed or any change not specified in paragraph (b) or paragraph (c) shall be presumed to create a substantial deviation. This presumption may be rebutted by clear and convincing evidence.

4. Any submittal of a proposed change to a previously approved development shall include a description of individual changes previously made to the development, including changes previously approved by the local government. The local government shall consider the previous and current proposed changes in deciding whether such changes cumulatively constitute a substantial deviation requiring further development-of-regional-impact review.

5. The following changes to an approved development of regional impact shall be presumed to create a substantial deviation. Such presumption may be rebutted by clear and convincing evidence.

a. A change proposed for 15 percent or more of the acreage to a land use not previously approved in the development order. Changes of less than 15 percent shall be presumed not to create a substantial deviation.

b. Notwithstanding any provision of paragraph (b) to the contrary, a proposed change consisting of simultaneous increases and decreases of at least two of the uses within an authorized multiuse development of regional impact which was originally

approved with three or more uses specified in s. 380.0651(3)(c), (d), and (e)~~, and (f)~~ and residential use.

6. If a local government agrees to a proposed change, a change in the transportation proportionate share calculation and mitigation plan in an adopted development order as a result of recalculation of the proportionate share contribution meeting the requirements of s. 163.3180(5)(h) in effect as of the date of such change shall be presumed not to create a substantial deviation. For purposes of this subsection, the proposed change in the proportionate share calculation or mitigation plan shall not be considered an additional regional transportation impact.

(f)1. The state land planning agency shall establish by rule standard forms for submittal of proposed changes to a previously approved development of regional impact which may require further development-of-regional-impact review. At a minimum, the standard form shall require the developer to provide the precise language that the developer proposes to delete or add as an amendment to the development order.

2. The developer shall submit, simultaneously, to the local government, the regional planning agency, and the state land planning agency the request for approval of a proposed change.

3. No sooner than 30 days but no later than 45 days after submittal by the developer to the local government, the state land planning agency, and the appropriate regional planning agency, the local government shall give 15 days' notice and schedule a public hearing to consider the change that the developer asserts does not create a substantial deviation. This

public hearing shall be held within 60 days after submittal of the proposed changes, unless that time is extended by the developer.

4. The appropriate regional planning agency or the state land planning agency shall review the proposed change and, no later than 45 days after submittal by the developer of the proposed change, unless that time is extended by the developer, and prior to the public hearing at which the proposed change is to be considered, shall advise the local government in writing whether it objects to the proposed change, shall specify the reasons for its objection, if any, and shall provide a copy to the developer.

5. At the public hearing, the local government shall determine whether the proposed change requires further development-of-regional-impact review. The provisions of paragraphs (a) and (e), the thresholds set forth in paragraph (b), and the presumptions set forth in paragraphs (c) and (d) and subparagraph (e)3. shall be applicable in determining whether further development-of-regional-impact review is required. The local government may also deny the proposed change based on matters relating to local issues, such as if the land on which the change is sought is plat restricted in a way that would be incompatible with the proposed change, and the local government does not wish to change the plat restriction as part of the proposed change.

6. If the local government determines that the proposed change does not require further development-of-regional-impact review and is otherwise approved, or if the proposed change is

not subject to a hearing and determination pursuant to subparagraphs 3. and 5. and is otherwise approved, the local government shall issue an amendment to the development order incorporating the approved change and conditions of approval relating to the change. The requirement that a change be otherwise approved shall not be construed to require additional local review or approval if the change is allowed by applicable local ordinances without further local review or approval. The decision of the local government to approve, with or without conditions, or to deny the proposed change that the developer asserts does not require further review shall be subject to the appeal provisions of s. 380.07. However, the state land planning agency may not appeal the local government decision if it did not comply with subparagraph 4. The state land planning agency may not appeal a change to a development order made pursuant to subparagraph (e)1. or subparagraph (e)2. for developments of regional impact approved after January 1, 1980, unless the change would result in a significant impact to a regionally significant archaeological, historical, or natural resource not previously identified in the original development-of-regional-impact review.

(24) STATUTORY EXEMPTIONS.—

(a) Any proposed hospital is exempt from ~~the provisions of~~ this section.

(b) Any proposed electrical transmission line or electrical power plant is exempt from ~~the provisions of~~ this section.

(c) Any proposed addition to an existing sports facility complex is exempt from ~~the provisions of~~ this section if the addition meets the following characteristics:

1. It would not operate concurrently with the scheduled hours of operation of the existing facility.

2. Its seating capacity would be no more than 75 percent of the capacity of the existing facility.

3. The sports facility complex property is owned by a public body prior to July 1, 1983.

This exemption does not apply to any pari-mutuel facility.

(d) Any proposed addition or cumulative additions subsequent to July 1, 1988, to an existing sports facility complex owned by a state university is exempt if the increased seating capacity of the complex is no more than 30 percent of the capacity of the existing facility.

(e) Any addition of permanent seats or parking spaces for an existing sports facility located on property owned by a public body prior to July 1, 1973, is exempt from ~~the provisions of~~ this section if future additions do not expand existing permanent seating or parking capacity more than 15 percent annually in excess of the prior year's capacity.

(f) Any increase in the seating capacity of an existing sports facility having a permanent seating capacity of at least 50,000 spectators is exempt from ~~the provisions of~~ this section, provided that such an increase does not increase permanent seating capacity by more than 5 percent per year and not to exceed a total of 10 percent in any 5-year period, and provided

that the sports facility notifies the appropriate local government within which the facility is located of the increase at least 6 months prior to the initial use of the increased seating, in order to permit the appropriate local government to develop a traffic management plan for the traffic generated by the increase. Any traffic management plan shall be consistent with the local comprehensive plan, the regional policy plan, and the state comprehensive plan.

(g) Any expansion in the permanent seating capacity or additional improved parking facilities of an existing sports facility is exempt from ~~the provisions of~~ this section, if the following conditions exist:

1.a. The sports facility had a permanent seating capacity on January 1, 1991, of at least 41,000 spectator seats;

b. The sum of such expansions in permanent seating capacity does not exceed a total of 10 percent in any 5-year period and does not exceed a cumulative total of 20 percent for any such expansions; or

c. The increase in additional improved parking facilities is a one-time addition and does not exceed 3,500 parking spaces serving the sports facility; and

2. The local government having jurisdiction of the sports facility includes in the development order or development permit approving such expansion under this paragraph a finding of fact that the proposed expansion is consistent with the transportation, water, sewer and stormwater drainage provisions of the approved local comprehensive plan and local land development regulations relating to those provisions.

Any owner or developer who intends to rely on this statutory exemption shall provide to the department a copy of the local government application for a development permit. Within 45 days of receipt of the application, the department shall render to the local government an advisory and nonbinding opinion, in writing, stating whether, in the department's opinion, the prescribed conditions exist for an exemption under this paragraph. The local government shall render the development order approving each such expansion to the department. The owner, developer, or department may appeal the local government development order pursuant to s. 380.07, within 45 days after the order is rendered. The scope of review shall be limited to the determination of whether the conditions prescribed in this paragraph exist. If any sports facility expansion undergoes development-of-regional-impact review, all previous expansions which were exempt under this paragraph shall be included in the development-of-regional-impact review.

(h) Expansion to port harbors, spoil disposal sites, navigation channels, turning basins, harbor berths, and other related inwater harbor facilities of ports listed in s. 403.021(9)(b), port transportation facilities and projects listed in s. 311.07(3)(b), and intermodal transportation facilities identified pursuant to s. 311.09(3) are exempt from ~~the provisions of~~ this section when such expansions, projects, or facilities are consistent with comprehensive master plans that are in compliance with ~~the provisions of~~ s. 163.3178.

(i) Any proposed facility for the storage of any petroleum product or any expansion of an existing facility is exempt from ~~the provisions of~~ this section.

(j) Any renovation or redevelopment within the same land parcel which does not change land use or increase density or intensity of use.

(k) Waterport and marina development, including dry storage facilities, are exempt from ~~the provisions of~~ this section.

(l) Any proposed development within an urban service boundary established under s. 163.3177(14), which is not otherwise exempt pursuant to subsection (29), is exempt from ~~the provisions of~~ this section if the local government having jurisdiction over the area where the development is proposed has adopted the urban service boundary, has entered into a binding agreement with jurisdictions that would be impacted and with the Department of Transportation regarding the mitigation of impacts on state and regional transportation facilities~~, and has adopted a proportionate share methodology pursuant to s. 163.3180(16)~~.

(m) Any proposed development within a rural land stewardship area created under s. 163.3248 ~~163.3177(11)(d) is exempt from the provisions of this section if the local government that has adopted the rural land stewardship area has entered into a binding agreement with jurisdictions that would be impacted and the Department of Transportation regarding the mitigation of impacts on state and regional transportation facilities, and has adopted a proportionate share methodology pursuant to s. 163.3180(16)~~.

(n) The establishment, relocation, or expansion of any military installation as defined in s. 163.3175, is exempt from this section.

(o) Any self-storage warehousing that does not allow retail or other services is exempt from this section.

(p) Any proposed nursing home or assisted living facility is exempt from this section.

(q) Any development identified in an airport master plan and adopted into the comprehensive plan pursuant to s. 163.3177(6)(k) is exempt from this section.

(r) Any development identified in a campus master plan and adopted pursuant to s. 1013.30 is exempt from this section.

(s) Any development in a detailed specific area plan which is prepared and adopted pursuant to s. 163.3245 ~~and adopted into the comprehensive plan~~ is exempt from this section.

(t) Any proposed solid mineral mine and any proposed addition to, expansion of, or change to an existing solid mineral mine is exempt from this section. A mine owner will enter into a binding agreement with the Department of Transportation to mitigate impacts to strategic intermodal system facilities pursuant to the transportation thresholds in 380.06(19) or rule 9J-2.045(6), Florida Administrative Code. Proposed changes to any previously approved solid mineral mine development-of-regional-impact development orders having vested rights is not subject to further review or approval as a development-of-regional-impact or notice-of-proposed-change review or approval pursuant to subsection (19), except for those applications pending as of July 1, 2011, which shall be governed

by s. 380.115(2). Notwithstanding the foregoing, however, pursuant to s. 380.115(1), previously approved solid mineral mine development-of-regional-impact development orders shall continue to enjoy vested rights and continue to be effective unless rescinded by the developer. All local government regulations of proposed solid mineral mines shall be applicable to any new solid mineral mine or to any proposed addition to, expansion of, or change to an existing solid mineral mine.

(u) Notwithstanding any provisions in an agreement with or among a local government, regional agency, or the state land planning agency or in a local government's comprehensive plan to the contrary, a project no longer subject to development-of-regional-impact review under revised thresholds is not required to undergo such review.

(v) ~~(t)~~ Any development within a county with a research and education authority created by special act and that is also within a research and development park that is operated or managed by a research and development authority pursuant to part V of chapter 159 is exempt from this section.

If a use is exempt from review as a development of regional impact under paragraphs (a)-(u) ~~(a)-(s)~~, but will be part of a larger project that is subject to review as a development of regional impact, the impact of the exempt use must be included in the review of the larger project, unless such exempt use involves a development of regional impact that includes a landowner, tenant, or user that has entered into a funding agreement with the Office of Tourism, Trade, and Economic

Development under the Innovation Incentive Program and the agreement contemplates a state award of at least $50 million.

(28) PARTIAL STATUTORY EXEMPTIONS.—

(e) The vesting provision of s. 163.3167(5) ~~(8)~~ relating to an authorized development of regional impact does ~~shall~~ not apply to those projects partially exempt from the development-of-regional-impact review process under paragraphs (a)-(d).

(29) EXEMPTIONS FOR DENSE URBAN LAND AREAS.—

(a) The following are exempt from this section:

1. Any proposed development in a municipality that has an average of at least 1,000 people per square mile of land area and a minimum total population of at least 5,000 ~~qualifies as a dense urban land area as defined in s. 163.3164~~;

2. Any proposed development within a county, including the municipalities located in the county, that has an average of at least 1,000 people per square mile of land area ~~qualifies as a dense urban land area as defined in s. 163.3164~~ and ~~that~~ is located within an urban service area as defined in s. 163.3164 which has been adopted into the comprehensive plan; ~~or~~

3. Any proposed development within a county, including the municipalities located therein, which has a population of at least 900,000, that has an average of at least 1,000 people per square mile of land area ~~which qualifies as a dense urban land area under s. 163.3164~~, but which does not have an urban service area designated in the comprehensive plan; or

4. Any proposed development within a county, including the municipalities located therein, which has a population of at least 1 million and is located within an urban service area as

defined in s. 163.3164 which has been adopted into the comprehensive plan.

The Office of Economic and Demographic Research within the Legislature shall annually calculate the population and density criteria needed to determine which jurisdictions meet the density criteria in subparagraphs 1.-4. by using the most recent land area data from the decennial census conducted by the Bureau of the Census of the United States Department of Commerce and the latest available population estimates determined pursuant to s. 186.901. If any local government has had an annexation, contraction, or new incorporation, the Office of Economic and Demographic Research shall determine the population density using the new jurisdictional boundaries as recorded in accordance with s. 171.091. The Office of Economic and Demographic Research shall annually submit to the state land planning agency by July 1 a list of jurisdictions that meet the total population and density criteria. The state land planning agency shall publish the list of jurisdictions on its Internet website within 7 days after the list is received. The designation of jurisdictions that meet the criteria of subparagraphs 1.-4. is effective upon publication on the state land planning agency's Internet website. If a municipality that has previously met the criteria no longer meets the criteria, the state land planning agency shall maintain the municipality on the list and indicate the year the jurisdiction last met the criteria. However, any proposed development of regional impact not within the established boundaries of a municipality at the

time the municipality last met the criteria must meet the requirements of this section until such time as the municipality as a whole meets the criteria. Any county that meets the criteria shall remain on the list in accordance with the provisions of this paragraph. Any jurisdiction that was placed on the dense urban land area list before the effective date of this act shall remain on the list in accordance with the provisions of this paragraph.

(d) A development that is located partially outside an area that is exempt from the development-of-regional-impact program must undergo development-of-regional-impact review pursuant to this section. However, if the total acreage that is included within the area exempt from development-of-regional-impact review exceeds 85 percent of the total acreage and square footage of the approved development of regional impact, the development-of-regional-impact development order may be rescinded in both local governments pursuant to s. 380.115(1), unless the portion of the development outside the exempt area meets the threshold criteria of a development-of-regional-impact.

(e) In an area that is exempt under paragraphs (a)-(c), any previously approved development-of-regional-impact development orders shall continue to be effective, but the developer has the option to be governed by s. 380.115(1). A pending application for development approval shall be governed by s. 380.115(2). ~~A development that has a pending application for a comprehensive plan amendment and that elects not to continue development-of-regional-impact review is exempt from~~

~~the limitation on plan amendments set forth in s. 163.3187(1) for the year following the effective date of the exemption.~~

Section 55. Subsection (3) and paragraph (a) of subsection (4) of section 380.0651, Florida Statutes, are amended to read:

380.0651 Statewide guidelines and standards.—

(3) The following statewide guidelines and standards shall be applied in the manner described in s. 380.06(2) to determine whether the following developments shall be required to undergo development-of-regional-impact review:

(a) *Airports.*—

1. Any of the following airport construction projects shall be a development of regional impact:

a. A new commercial service or general aviation airport with paved runways.

b. A new commercial service or general aviation paved runway.

c. A new passenger terminal facility.

2. Lengthening of an existing runway by 25 percent or an increase in the number of gates by 25 percent or three gates, whichever is greater, on a commercial service airport or a general aviation airport with regularly scheduled flights is a development of regional impact. However, expansion of existing terminal facilities at a nonhub or small hub commercial service airport shall not be a development of regional impact.

3. Any airport development project which is proposed for safety, repair, or maintenance reasons alone and would not have the potential to increase or change existing types of aircraft activity is not a development of regional impact.

THE FLORIDA LEGISLATURE

ADOPTED MAY 0 6 2011

May 5, 2011

The Honorable Mike Haridopolos
President of the Senate

The Honorable Dean Cannon
Speaker, House of Representatives

Dear Mr. President and Mr. Speaker:

Your Conference Committee on the disagreeing votes of the two houses on HB 7207, 1st Eng., same being:

An act relating to trust funds.

having met, and after full and free conference, do recommend to their respective houses as follows:

1. That the Senate recede from its Amendment 1.
2. That the Senate and House of Representatives adopt the Conference Committee Amendment attached hereto, and by reference made a part of this report.

EXHIBIT B

Managers on the part of the Senate

J. Alexander, Chair

Joe Negron, Vice Chair

Thad Altman

Lizbeth Benacquisto

Michael S. "Mike" Bennett

Ellyn Setnor Bogdanoff

Oscar Braynon II

Larcenia J. Bullard

Charles S. "Charlie" Dean, Sr.

Nancy C. Detert

Miguel Diaz de la Portilla

Paula Dockery

Greg Evers

Mike Fasano

Anitere Flores

Don Gaetz, At Large

Rene Garcia

Andy Gardiner, At Large

Alan Hays

Anthony C. "Tony" Hill, Sr.

Dennis L. Jones, D.C.

Arthenia L. Joyner

Jack Latvala

Evelyn J. Lynn

Gwen Margolis

Bill Montford

Jim Norman

Steve Oelrich

Nan H. Rich, At Large

Garrett Richter

Jeremy Ring

Maria Lorts Sachs

David Simmons

Gary Siplin, At Large

Christopher L. "Chris" Smith

Eleanor Sobel

Ronda Storms

John Thrasher, At Large

Stephen R. Wise

Managers on the part of the House of Representatives

Denise Grimsley, Chair

Charles S. "Chuck" Chestnut IV, At Large

Ritch Workman, At Large

Carlos Lopez-Cantera, At Large

William L. "Bill" Proctor, At Large

Franklin Sands, At Large

Robert C. "Rob" Schenck, At Large

Will W. Weatherford, At Large

Gary Aubuchon, Lead House Manager

Dorothy L. Hukill, At Large

John Legg, At Large

Seth McKeel, At Large

Darryl Ervin Rouson, At Large

Ron Saunders, At Large

William D. Snyder, At Large

SUMMARY OF CONFERENCE COMMITTEE ACTION
May 5, 2011

The Conference Committee Amendment for HB 7207, 1st Eng., relating to growth management, provides for the following:
The growth management conference bill:

- Makes concurrency for parks and recreation, schools, and transportation facilities optional for local governments.
- Applies and revises the expedited comprehensive plan amendment process statewide.
- Deletes the requirement that comprehensive plans be financially feasible.
- Deletes the twice a year limitation on comprehensive plan amendments.
- Revises the small scale amendment process.
- Specifies that population projections should be a floor for requisite development except for areas of critical state concern.
- Allows additional planning periods for specific parts of the comprehensive plan.
- Abolishes 9J-5 (DCA's growth management regulations and incorporates certain provisions into the bill).
- Removes many of the state specifications and requirements for optional elements in the comprehensive plan, but allows local governments to continue to include optional elements.
- Expands and revises the optional sector plan process.
- Reduces the requirements of the evaluation and appraisal process.
- Revises the rural land stewardship program.
- Restricts the state's ability to interpret joint planning agreements.
- Clarifies and broadens the window for permit extensions.
- Creates a 4-year development of regional impact permit extension.
- Removes industrial areas, hotels/motels, and theaters from the list of developments of regional impact.
- Creates an exemption from the DRI process for mining projects and allows those mines to enter into agreements with the Department of Transportation.
- Adds a new 2-year permit extension, but caps the maximum extension at 4 years.
- Prohibits local governments from having referenda for local comprehensive plan amendments.
- Encourages planning innovation technical assistance.
- Sunsets the Century Commission in two years.
- Clarifies requirements for adopting criteria to address compatibility of lands relating to military installations.
- Allows a certain plan amendment to be readopted by a local government without being resubmitted to the state land planning agency.
- Clarifies when a local government can reject a proposed change to a development of regional impact.
- Encourages adaptation strategies.
- Requires DOT to study the proportionate share calculation.
- Allows DCA to have procedural issues on their website.

The effective date of this bill is upon becoming law.