

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LOST TREE VILLAGE	)	
CORPORATION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 90-5021GM
	)	
INDIAN RIVER SHORES and THE	)	
DEPARTMENT OF COMMUNITY	)	
AFFAIRS,	)	
	)	
Respondents.	)	
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LOST TREE VILLAGE	)	
CORPORATION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 92-6784GM
	)	
CITY OF VERO BEACH and THE	)	
DEPARTMENT OF COMMUNITY	)	
AFFAIRS,	)	
	)	
Respondents.	)	
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RECOMMENDED ORDER

A formal hearing was held in these cases before Larry J. Sartin, a duly designated Administrative Law Judge of the Division of Administrative Hearings, on February 16 through 19, 1998, and August 17 through 21, 1998, in Vero Beach, Florida.

APPEARANCES

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### STATEMENT OF THE ISSUES

The issue in Case Number 90-5021GM is whether the Town of Indian River Shores' Comprehensive Plan adopted by Ordinance Number 386 is "in compliance," as defined in Section 163.3184(1), Florida Statutes.

The issue in Case Number 92-6784GM is whether the City of Vero Beach's Comprehensive Plan adopted by Ordinance 92-21 is "in compliance," as defined in Section 163.3184(1), Florida Statutes.

### PRELIMINARY STATEMENT

On February 20, 1990, the City of Vero Beach adopted a comprehensive plan pursuant to Chapter 163, Florida Statutes, by Ordinance 90-12. After a review of the comprehensive plan, the Department of Community Affairs found that the comprehensive plan was not "in compliance" as those terms are defined in Section 163.3184(1), Florida Statutes.

On April 18, 1990, the Department of Community Affairs filed a petition with the Division of Administrative Hearings. The matter was designated Case Number 90-2328GM. By Notice of Hearing entered May 16, 1990, the final hearing in Case Number 90-2328GM was scheduled for September 10-12, 1990.

On August 15, 1990, Lost Tree Village Corporation requested leave to intervene in Case Number 90-2328GM. The request was granted by order entered August 29, 1990.

On May 16, 1990, the Town of Indian River Shores adopted a comprehensive plan pursuant to Chapter 163, Florida Statutes, by Ordinance Number 386. After a review of the comprehensive plan, the Department of Community Affairs found the comprehensive plan to be "in compliance."

On July 13, 1990, Lost Tree Village Corporation filed a petition challenging the determination of the Department of Community Affairs that the Town of Indian River Shores' plan was "in compliance." The petition was filed with the Division of Administrative Hearings on August 13, 1990, and was designated Case Number 90-5021GM. A Notice of Hearing was entered August 29, 1990, scheduling the case for hearing.

The hearings scheduled in Case Numbers 90-2328GM and 90-5021GM were subsequently continued to give the parties an opportunity to settle their disputes. On September 29, 1990, a Stipulated Partial Settlement Agreement entered into by the Department of Community Affairs and the City of Vero Beach was filed in Case Number 90-2328GM. On June 1, 1992, the City of Vero Beach and the Department of Community Affairs filed a Stipulated Settlement Agreement in Case Number 90-2328GM. The terms of the settlement agreement were carried out by the City of Vero Beach by the adoption of remedial amendments on July 21, 1992. The City of Vero Beach remedial plan was subsequently determined by the Department of Community of Affairs to be "in compliance."

On or about November 4, 1992, Lost Tree Village Corporation filed a petition with the Department of Community Affairs challenging its determination that the City of Vero Beach remedial plan was "in compliance." That petition was filed with the Division of Administrative Hearings on November 10, 1992, and was designated Case Number 92-6784GM.

On December 21, 1992, all three cases were consolidated. At the request of the parties, the consolidated cases were placed in abeyance to give the parties an opportunity to attempt to eliminate their dispute through a sale of the property which is the subject of this dispute.

Efforts to sell the subject property ultimately failed and, on October 6, 1997, Lost Tree Village Corporation requested that a formal hearing be scheduled. That request was granted by an order entered October 16, 1997. The formal hearing was scheduled for February 16-20, and 23-24, 1998, by an Amended Notice of Hearing entered December 12, 1997.

Prior to the commencement of the formal hearing, Lost Tree Village Corporation filed amended petitions in Case Numbers 90-5021GM and 92-6784GM. On February 6, 1998, Lost Tree Village Corporation filed a Third Amended Petition in Case Numbers 90-5021GM and 92-6784GM. Portions of the Third Amended Petitions alleging that the Department of Community Affairs' proposed agency action was "arbitrary and capricious" were struck upon

consideration of a motion filed by the Department of Community Affairs.

On February 12, 1998, the parties filed an Amended Prehearing Stipulation. To the extent relevant, stipulated facts and conclusions of law included in the Amended Prehearing Stipulation have been included in this Recommended Order.

On February 13, 1998, an order was entered dismissing Case Number 90-2328GM. The dispute in that case was moot.

The final hearing commenced on February 16, 1998. On February 19, 1998, the hearing was continued at the request of the parties. The continuance was granted based upon a representation that the parties believed that they had tentatively settled their dispute.

After efforts to settle their dispute again failed, the formal hearing reconvened on August 17, 1998, and was completed August 21, 1998.

During the final hearing Lost Tree Village Corporation presented the testimony of Dennis Ragsdale, Robert Schoen, Kenneth Macht, John Potts, Charles Bayer, Lester Solin, Joseph Dorsky, Howard M. Landers, Michael Kiefer, Mike Dennis, Harold K. Pickering, and Fritz Gierhart. The testimony of Mr. Pickering was subsequently struck based upon an agreement of the parties. Lost Tree Village Corporation's Exhibits 1-6, 8-27, 29-34, 37-90, and 92-104, were accepted into evidence.

The Town of Indian River Shores offered the testimony of Eric J. Olsen and offered four exhibits. The exhibits were accepted into evidence.

The City of Vero Beach called no witnesses and offered no exhibits.

The Department of Community Affairs called no witnesses. Twenty-seven exhibits offered by the Department of Community Affairs were accepted into evidence.

A transcript of the hearing was ordered. The final volume of the transcript was filed with the Division of Administrative Hearings on October 16, 1998. Proposed orders were, therefore, required to be filed on or before November 4, 1998. A one-day extension for the filing of proposed orders was granted. Separate proposed orders were timely filed by all the parties except the City of Vero Beach.

Subsequent to the filing of proposed orders the City of Vero Beach filed Petitioner's Motion to Strike Portions of Respondent Department of Community Affairs' Proposed Recommended Order. The Department filed a response to the motion. After consideration of the pleadings, the motion to strike is hereby denied.

#### FINDINGS OF FACT

##### A. The Parties.

1. Petitioner, Lost Tree Village Corporation (hereinafter referred to as "Lost Tree") is a Florida corporation with its

principal place of business located at 1 John's Island Drive, Vero Beach, Indian River County, Florida.

2. Respondents, the Town of Indian River Shores (hereinafter referred to as the "Town"), and the City of Vero Beach (hereinafter referred to as the "City"), are municipal corporations located in Indian River County, Florida. The Town's southern boundary abuts the City's northern boundary.

3. The Town and the City are "local governments" for purposes of Chapter 163, Part II, Florida Statutes (hereinafter referred to as the "Act"). As local governments, the Town and the City were required by the Act to adopt comprehensive growth management plans for their respective jurisdictions.

4. Respondent, the Department of Community Affairs (hereinafter referred to as the "Department"), is an agency of the State of Florida. The Department is charged with responsibility for, among other things, the review of local government comprehensive plans and amendments thereto pursuant to the Act.

B. Standing.

5. Lost Tree owns real property which is located within the jurisdiction of the Town and the City, including portions of certain undeveloped islands located in the Indian River Lagoon which are the subject of the dispute in this proceeding.



6. Lost Tree made oral and written comments to the Town and the City during the adoption of the Town's and City's comprehensive growth management plans.

C. The Geographic Area of Indian River County.

7. Indian River County (hereinafter referred to as the "County") is located on the east coast of Florida. The County is abutted on the north by Brevard County, on the west by Osceola County, on the south by Okeechobee County and St. Lucie County, and on the east by the Atlantic Ocean.

8. North Hutchinson Island, a long, narrow barrier island (hereinafter referred to as the "Barrier Island"), stretches along the eastern portion of the County separating the mainland from the Atlantic Ocean. The water body between the mainland and the Barrier Island is known as the Indian River Lagoon.

9. The Town is located wholly on the Barrier Island.

10. The City is located immediately to the south and southwest of the Town, partly on the Barrier Island and partly on the mainland.

D. The Indian River Lagoon.

11. The Indian River Lagoon is a shallow lagoonal estuary bounded on the east by the Barrier Island and on the west by the mainland. On October 21, 1969, the Indian River - Malabar to Vero Beach Aquatic Preserve (hereinafter referred to as the "Preserve") was established by the Board of Trustees of the

Internal Improvement Trust Fund (hereinafter referred to as the "Board of Trustees").

12. The Florida Legislature ratified and expanded the Preserve by the enactment of the Florida Aquatic Preserve Act of 1975, Chapter 75-172, Laws of Florida (1975).

13. The Preserve runs from the northern boundary of the City to the town of Malabar in Brevard County, Florida. The portion of the Indian River Lagoon that is located within the boundary of the Town is part of the Preserve. The portion of the Indian River Lagoon located within the boundary of the City is not located within the Preserve.

14. The Indian River Lagoon is connected to the Atlantic Ocean by Sebastian Inlet in the north and Ft. Pierce Inlet in the south. Sebastian Inlet is located approximately 14 to 15 miles north of the City and the Town. Ft. Pierce Inlet is located approximately 15 to 20 miles to the south of the City and the Town. Due to these distances, the area of the Indian River Lagoon located in the Town and the City is not subject to much tidal flushing.

15. An Aquatic Preserve Management Plan was adopted by the Board of Trustees on January 21, 1986. Among other things, the plan includes the following major objective for the Preserve: "ensure the maintenance of an essentially natural condition and to restore and enhance those conditions which are not in a natural condition."

16. In 1987, the Florida Legislature designated the Indian River Lagoon System and its tributaries as a priority area for surface water improvement and management.

17. In 1988, the South Florida Water Management District and the St. Johns River Water Management District jointly adopted the Interim Surface Water Improvement and Management Plan (hereinafter referred to as the "Interim SWIM Plan"). In September 1989 the South Florida Water Management District and the St. Johns River Water Management District issued a Revised Surface Water Improvement and Management Plan.

18. The Interim SWIM Plan provides the following description of the Indian River Lagoon system:

The lagoon system is a biogeographic transition zone, rich in habitats and species, with the highest species diversity of any estuary in North America (Gilmore, 1986). Approximately 2200 species have been identified in the lagoon system (Barile, 1987), 35 of which are listed as threatened or endangered. Species diversity is generally high near inlets and toward the south, and low near cities, where nutrient input, sedimentation, and turbidity are high and where large areas of mangroves and seagrasses have been lost. For biological communities and fisheries, seagrass and mangrove habitats are extremely important (Virnstein and Campbell, 1987). Much of the habitat loss has occurred as the result of the direct effects of shoreline development, navigational improvements, and marsh management practices.

The Interim SWIM Plan identifies the City as one of twelve priority problem areas.

19. The Board of Trustees imposed a moratorium in August 1989 on the use of sovereign, submerged lands adjacent to

unbridged, undeveloped coastal barrier islands. Rules 18-21.003 and 18-21.004, Florida Administrative Code, were subsequently amended by the Board of Trustees to preclude use of Public Trust lands by islands not connected by vehicular bridge with densities of less than one unit per five acres as of December 18, 1990. The policy and rules were unsuccessfully challenged by Lost Tree.

20. On January 4, 1991, the United States Environmental Protection Agency and the St. Johns River Water Management District signed a cooperative agreement to establish the Indian River Lagoon National Estuary Program.

D. The Indian River Lagoon Islands.

21. Located within the Indian River Lagoon and the boundaries of the Town and the City are a number of islands. Some of those islands are at the heart of the controversy in this proceeding.

Islands Located Wholly Within the Town:

22. Islands located wholly within the Town include John's Island, Gem Island, Hole in the Wall Island, North Sister Island, South Sister Island, Gifford Island, three islands referred to during the hearing as the "Inner Islands," one of a group of islands referred to during the hearing as the "Outer Islands," and a variety of smaller unnamed islands.

23. The islands referred to during the hearing as the "Inner Islands" consist of three islands located on the eastern side of the Indian River Lagoon closest to the Barrier Island.

These islands include USA Island, Alligator Island, and a third unnamed island (hereinafter referred to as the "Third Inner Island").

Islands Located Wholly Within the City:

24. Islands located wholly within the City include Little Prang Island, a small unnamed island located south of Little Prang Island, Fritz Island, one of the islands referred to during the hearing as the "Outer Islands," several small islands located near Fritz Island, and two islands designated "IR-32" and "IR-33."

25. The islands referred to in the hearing as the "Outer Islands" consist of four islands located to the west and south of the Inner Islands. The Outer Islands include an island designated as "IR-28," Fritz Island, "IR-29," and a fourth unnamed island (hereinafter referred to as the "Fourth Outer Island").

Islands Located Partly Within the Town and Partly Within the City:

26. Islands located partly in the Town and partly in the City include part of IR-28, IR-29, and the Fourth Outer Island. There is also a small unnamed island located to the east of the Fourth Outer Island. This unnamed island is similar in characteristics to the Inner and Outer Islands, except that it is much smaller.

E. The Inner Islands.

27. USA Island is the northernmost of the Inner Islands. USA Island is owned by Lost Tree.

28. USA Island is an undeveloped, unbridged island consisting of approximately 28.9 to 32 acres including uplands and wetlands above approximate mean high water. USA Island is depicted as consisting of 31.6 acres on a sketch of the area prepared for Lost Tree. See DCA Exhibit 8. All of USA Island is located within the Town.

29. The predominate soil type on USA Island is quartzipsamment, 0 to 5 per cent slope, according to the USDA Soil Survey for the area. Quartzipsamment is a sandy shell, quartz-like soil. This type of soil is classified as a "fill soil" and is recognized as an upland soil. Fill soil is commonly used and suitable for fill material for development.

30. The elevation of USA Island is generally below the 5' elevation according to the Riomar quadrangle (USGS 7.5 minute topographical, 1970 photo revision). According to the City's topographic data, there are three small areas above 5' while most of the island is below 4'.

31. All of USA Island is within Zone "AE" with a base flood elevation of 7' on the FEMA FIRM map.

32. Wildlife noted on USA Island include osprey, herons, and raccoons.

33. Vegetation on USA Island consists mainly of Brazilian pepper and Australian pine, both of which are considered exotic

and nuisance species. The island also has a mangrove fringe with the heaviest concentration of white and red mangroves located on the northern shore of the island.

34. The southernmost of the Inner Islands is named Alligator Island. Lost Tree owns all of Alligator Island except for a parcel located at the south of the island consisting of just over 28.2 acres.

35. Alligator Island is an undeveloped, unbridged island consisting of approximately 51.7 to 62.4 acres including uplands and wetlands above approximate mean high water. Lost Tree's ownership interest in Alligator Island is depicted as consisting of 50.16 acres on a sketch of the area prepared for Lost Tree. See DCA Exhibit 8. All of Alligator Island is located within the Town.

36. The predominate soil type on Alligator Island is quartzipsamment, 0 to 5 per cent slope, according to the USDA Soil Survey for the area.

37. The elevation of Alligator Island is generally below the 5' elevation according to the Riomar quadrangle (USGS 7.5 minute topographical, 1970 photo revision). According to the City's topographic data, there are nine small areas above 5' while most of the island is below 4'.

38. All of Alligator Island is within Zone "AE" with a base flood elevation of 7' on the FEMA FIRM map.

39. There are infrequent shoaled areas around the island with seagrasses.

40. A waterbody almost divides Alligator Island. There is also a lagoon on the southern portion of the island. These features result in a much larger shoreline.

41. Vegetation on Alligator Island consists of Brazilian pepper and Australian pine. The shoreline of the island is fringed with mangroves. The lagoon is partly shoaled and partly filled with mangrove.

42. Osprey have been observed using Alligator Island.

43. The Third Inner Island is an undeveloped, unbridged island consisting of approximately 7.3 to 8.6 acres including uplands and wetlands above approximately mean high water. It is depicted as consisting of 7.88 acres on a sketch of the area prepared for Lost Tree. See DCA Exhibit 8. The Third Inner Island is owned by Lost Tree, except for 0.3 acres located at the southern tip of the island. All of the Third Inner Island is located within the Town.

44. The predominate soil type on the Third Inner Island is quartzipsamment, 0 to 5 per cent slope, according to the USDA Soil Survey for the area.

45. The elevation of the Third Inner Island is generally below the 5' elevation according to the Riomar quadrangle (USGS 7.5 minute topographical, 1970 photo revision). According to the



City's topographic data, there are three small areas above 5' while most of the island is below 3'.

46. All of the Third Inner Island is within Zone "AE" with a base flood elevation of 7' on the FEMA FIRM map.

47. Wildlife noted on the Third Inner Island include osprey, and herons.

48. Vegetation on the Third Inner Island consists mainly of Brazilian pepper and Australian pine. The island also has a mangrove fringe.

F. The Outer Islands.

49. The northern most Outer Island is referred to as "IR-28" in the Indian River Spoil Island Management Plan. IR-28 consists of approximately 68 to just over 73 acres including uplands and wetlands above approximate mean high water. IR-28 is undeveloped and unbridged.

50. Most of IR-28 is located within the boundary of the Town. The northwest end of the island is located within unincorporated Indian River County and is owned by the United States government and the Florida Inland Navigation District (hereinafter referred to as "FIND"). The United States government and FIND own approximately 9.7 acres and 15.6 acres, respectively.

51. Located on the portion of IR-28 owned by FIND is a small park with a dock and two picnic tables.

52. A small portion of IR-28 located at the southwest end of the island is also owned by FIND. It is identified as part of MSA-IR-6-B on DCA Exhibit 8.

53. Lost Tree does own the remaining approximately 45 acres of IR-28. Lost Tree's ownership interest in IR-28 is depicted as consisting of 45.6 acres on a sketch of the area prepared for Lost Tree. See DCA Exhibit 8.

54. The predominate soil type on IR-28 is quartzipsamment, 0 to 5 per cent slope, according to the USDA Soil Survey for the area. There is an area of McKee mucky clay loam located near the middle of the island on the east side.

55. The elevation of IR-28 is generally below the 5' elevation according to the Riomar quadrangle (USGS 7.5 minute topographical, 1970 photo revision). According to the City's topographic data, most of the island is below 5'.

56. All of IR-28 is within Zone "AE" with a base flood elevation of 7' on the FEMA FIRM map.

57. Birds using IR-28 according to the Indian River County Spoil Island Management Plan include fourteen species total, including the American robin and brown pelican. Threatened, endangered, or species of special concern noted include the bald eagle, osprey, tricolor heron, and snowy egret. Herons have also been noted on IR-28.

58. Vegetation on IR-28 consists mainly of Brazilian pepper and Australian pine. The island also has a mangrove fringe

totaling in excess of 11 acres. A 0.3 acre marsh is located in the middle of the island on the east side. On the northern part of the island there is a 3.3 acre Boston fern field and there is a 1.85 acre meadow west of the fern field. Fifty-one species of terrestrial vegetation were documented on IR-28 in 1989.

Seagrasses covering 2.42 acres north, northeast, and west of the island have also been documented.

59. IR-29 is located to the south of IR-28 and the west of the Fourth Outer Island. All of IR-29 is owned by Lost Tree except for approximately 11 acres of the center of the island which is owned by FIND. Part of FIND's property is located within the City and part within the Town.

60. IR-29 is undeveloped and unbridged. It consist of approximately 59 to 62.6 acres including uplands and wetlands above approximate mean high water. Approximately 16 acres of the island are located within the Town and approximately 43 acres are located within the City.

61. The predominate soil type on IR-29 is quartzipsamment, 0 to 5 per cent slope, according to the USDA Soil Survey for the area. A 9.5 cm humus layer has been observed in non-spoil areas.

62. The elevation of IR-29 is generally below the 5' elevation according to the Riomar quadrangle (USGS 7.5 minute topographical, 1970 photo revision). According to the City's topographic data, most of the island is below 5'.

63. All of IR-29 is within Zone "AE" with a base flood elevation of 7' on the FEMA FIRM map.

64. Wildlife noted on IR-29 include thirteen bird species including listed species: osprey, great blue heron, belted kingfisher, brown pelican, and little blue heron.

65. Vegetation on IR-29 consists mainly of Brazilian pepper, Australian pine, and mangroves. A total of 61 species of terrestrial vegetation have been noted on the island, including prickly-pear cactus, a threatened species. A mangrove marsh exists at the southern end of the island. Mangroves also exist along the middle of the eastern shore of the island through a large part of the western shore.

66. An extensive shoal stretches from the north tip of the island to IR-28. This shoal has a large area of seagrasses. Seagrasses also exist along the western shore of the island.

67. The Fourth Outer Island is located to the south of IR-28 and the east of IR-29. All of the Fourth Outer Island is owned by Lost Tree.

68. The Fourth Outer Island is undeveloped and unbridged. It consist of approximately 47 to 51 acres including uplands and wetlands above approximate mean high water. Approximately 23 acres of the island are located within the Town and approximately 24 acres are located within the City.

69. The predominate soil type on the Fourth Outer Island is quartzipsamment, 0 to 5 per cent slope, according to the USDA Soil Survey for the area.

70. The elevation of the Fourth Outer Island is generally below the 5' elevation according to the Riomar quadrangle (USGS 7.5 minute topographical, 1970 photo revision). According to the City's topographic data, most of the island is below 5'.

71. All of the Fourth Outer Island is within Zone "AE" with a base flood elevation of 7' on the FEMA FIRM map.

72. Wildlife noted on the Fourth Outer Island include osprey and herons.

73. Vegetation on the Fourth Outer Island consists mainly of Brazilian pepper, Australian pine, and mangroves. Mangroves exist in clusters along the shore of the island. No seagrasses were observed around the island.

74. The southern most Outer Island is named Fritz Island. Fritz Island consists of approximately 58.6 to 64.7 acres. Fritz Island is located wholly within the City's boundary. Fritz Island is undeveloped and unbridged.

75. Lost Tree owns approximately 28.8 to 32.1 acres of the northern portion of Fritz Island and approximately 4.8 to 5.7 acres of the southern tip of Fritz Island.

76. Located between the two portions of Fritz Island owned by Lost Tree is a parcel of approximately 15.8 acres owned by private interests.

77. The remainder of the island, approximately 10.7 acres located on the western side of the island, is owned by FIND.

78. The predominate soil type on Fritz Island is quartzipsamment, 0 to 5 per cent slope, according to the USDA Soil Survey for the area.

79. The elevation of Fritz Island is generally below the 5' elevation according to the Riomar quadrangle (USGS 7.5 minute topographical, 1970 photo revision). According to the City's topographic data, most of the island is below 5'.

80. All of Fritz Island is within Zone "AE" with a base flood elevation of 7' on the FEMA FIRM map.

81. Wildlife noted on Fritz Island include osprey and herons.

82. Vegetation on Fritz Island consists mainly of Brazilian pepper, Australian pine, and mangroves. A large shoal is located along the south western side of the island. Extensive seagrasses exist in this area.

G. Other Islands Located Within the Town: John's Island, Gem Island, Hole in the Wall Island, North Sister Island, South Sister Island, Gifford Island.

83. Gem Island is already approved for development by Lost Tree as a private residential neighborhood with 40 lots. Gem Island is located north of the Inner and Outer Islands.

84. Johns Island was developed by Lost Tree beginning in 1968 as an exclusive, private "club" development with

approximately 1,600 dwelling units, three golf courses, and other amenities.

85. Hole in the Wall Island, North Sister Island, South Sister Island, and Gifford Island are all undeveloped and unbridged islands with very similar characteristics to the Inner and Outer Islands. The most significant difference between these islands and the Inner and Outer Islands is that they are all significantly smaller islands.

H. Other Islands Located Within the City: Little Prang Island, IR-32, IR-33 and Other Small Islands.

86. Little Prang Island, IR-32, IR-33, and several other small islands located within the City are all undeveloped and unbridged islands with very similar characteristics to the Inner and Outer Islands. The most significant difference between these islands and the Inner and Outer Islands is that they are all significantly smaller islands.

87. Prang Island had already been issued preliminary plat approval at the time the City adopted the City's comprehensive plan. Therefore, the City did not believe that it could reduce the already approved development of the island through the land use designation for the island adopted in the City's plan.

I. The Adoption of the Town's Comprehensive Plan.

88. In an effort to comply with the Act, the Town developed a draft of a comprehensive plan (hereinafter referred to as the "Town's Draft Plan") and submitted it to the Department for

review in November 1988. The Inner Islands and the portion of the Outer Islands located within the Town's jurisdiction were designated "LD" or "Low Density Residential Development" on the Future Land Use Map (hereinafter referred to as the "FLUM") of the Town's Draft Plan.

89. Pursuant to Policy 1-2.1.2 of the Future Land Use Element of the Town's Draft Plan, the density allowed for property designated as "LD" or "Low Density Residential Development" was a maximum of up to 3 dwelling units per acre.

90. In September 1989, the Town developed a revised plan (hereafter referred to as the "Town's Transmittal Plan") and transmitted it to the Department for review pursuant to the Act. The Town's Transmittal Plan did not change the land use designation or density of use for the Inner Islands or the Outer Islands within the Town's jurisdiction.

91. The Department, following its review of the Town's Transmittal Plan, issued an Objections, Recommendations, and Comments Report (hereinafter referred to as an "ORC").

92. Following discussions with the Department, the Town revised the Town's Transmittal Plan and adopted the Town of Indian River Shores Comprehensive Plan (hereinafter referred to as the "Town's Adopted Plan"), by Ordinance Number 386, on May 16, 1990.

93. The Town's Adopted Plan was found by the Department to be "in compliance" as required by the Act. The Department caused



Notice of Intent of its determination to be published on July 13, 1990, in the Vero Beach Press-Journal.

94. Between the time that the Town adopted the Town's Transmittal Plan and the Town's Adopted Plan, Lost Tree submitted a preliminary plat application to the Town proposing development of the Inner Islands at a density of approximately 1 unit per acre. Opposition to the proposed development arose in the Town and Lost Tree's proposed development was denied in April 1990.

95. The Town designated the Inner Islands and the portion of the Outer Islands located within the Town as "RC/ESI" or "Residential Conservation/Environmentally Sensitive Islands," with a density of 1 unit per 5 acres.

J. The Adoption of the City's Transmitted Comprehensive Plan.

96. As required by the Act, the City developed a proposed comprehensive plan which it adopted in September 1989 for transmittal to the Department for review (hereinafter referred to as the "City's Transmittal Plan").

97. The City's Transmittal Plan designated most of the portion of the Outer Islands located within its jurisdiction as "RL" or "Residential Low". The portion of the Outer Islands within the City's jurisdiction not designated "RL" in the City's Transmittal Plan was designated "CV" or "Conservation." Those portions of the Outer Islands designated "CV" were in public ownership.

98. The area of the mainland to the west of the Outer Islands which abutted the Indian River Lagoon and an area known as Cache Cay located to the east of the Outer Islands were also designated "RL." Immediately to the east of Fritz Island, the portion of the barrier island abutting the Indian River Lagoon was designated "RH" or "Residential High," with a density of up to fifteen units per acre.

99. At the time of the City's consideration of the City's Transmittal Plan, zoning for the Outer Islands within its jurisdiction allowed density of approximately 4.3 units per acre.

100. Pursuant to Policy 1.1 of the Future Land Use Element of the City's Transmittal Plan the density allowed for "RL" property was from 0 to 5 units per acre

101. The Department, following its review of the City's Transmittal Plan, issued an ORC.

102. Among other things, the ORC contained an objection to the density of development allowed on the Outer Islands within the City's jurisdiction:

26. 9J-5.006(3)(c)7

The residential densities established on the islands within the Indian River Lagoon are not consistent with the environmental characteristics of these islands as noted in the Conservation Element. Furthermore, the City has not included any data which show that these islands are needed to accommodate residential development or their ability to support any type of development.

Recommendation

Revise the Future Land Use Map to remove the residential densities designated on these islands. These islands should be designated as conservation.

103. The ORC also contained an objection to the inventory and analysis of estuarine pollution:

4. 9J-5.012(2)(d)

The inventory and analysis of estuarine pollution conditions does not include an assessment of the impact of the development and redevelopment proposed in the Future Land Use Element upon water quality, circulation patterns and the accumulation of contaminants in sediments. The analysis also does not address the impacts of the development of Prang and Fritz islands on estuarine pollution.

Recommendation

Expand the data and analysis to include the impact of development and redevelopment proposed by the Future Land Use Element on estuarine conditions.

104. Finally, the ORC contained the following objection to the residential designation for islands located in the Indian River Lagoon for inconsistency with rules calling for the protection of wetlands, wildlife habitat, and environmentally sensitive areas:

17. 9J-5.013(2)(c)(6).

The City has designated a number of the islands in the Indian River Lagoon for residential development. The analysis of existing natural resources (page 6-2) states that these islands contain viable wetland communities and wildlife habitats, especially for birds, fishes and other animal wildlife. These islands are also located in the Federal Emergency Management Agency (FEMA) special flood hazard zones and are currently without infrastructure. The designation of these

islands for residential development is inconsistent with 9J-5.006(3)(b)5., 9J-5.006(3)(c)1., 9J-5.006(3)(c)6. and 9J-5.012(3)(b)1., 9J-5.012(3)(b) 6 and 7., 9J-5.012(3)(c) 3, 4, and 7 F.A.C., which call for the protection of remaining coastal wetlands, wildlife habitats and environmentally sensitive areas.

#### Recommendation

Revise the land use designations on the islands within the Indian River Lagoon to be consistent with their environmental conservation characteristics and value and to protect lives and property from natural hazards. A conservation designation is recommended.

105. Essentially, the Department concluded that data and analysis supplied by the City did not support residential development of islands in the Indian River Lagoon when the City's need for future growth was considered and the environmental characteristics and location of the islands were taken into consideration. The City's planning director did not agree with the foregoing objections and the recommendation of the Department that undeveloped islands in the Indian River Lagoon should be designated "Conservation."

106. Following the issuance of the Department's ORC, the City adopted a comprehensive plan by Ordinance 90-12, on February 20, 1990 (hereinafter referred to as the "City's Adopted Plan").

107. The designation of portions of the Outer Islands located within the City as "RL" was retained in the City's Adopted Plan. The City's Adopted Plan did not designate the Outer Islands as "environmentally sensitive." Nor did the City's

Adopted Plan contain any prohibition against erecting bridges to undeveloped islands located with the Indian River Lagoon.

108. The Department determined that the City's Adopted Plan was not "in compliance. On April 8, 1990, the Department filed a petition with the Division of Administrative Hearings. The petition was designed Case Number 90-2328GM.

K. Modification of the City's Zoning of the Outer Islands.

109. At the time that the City was considering the adoption of the City's comprehensive plan the City modified the zoning of the Outer Islands in response to citizen efforts to prevent the development of the Outer Islands.

110. In December 1989 the City adopted two ordinances: 89-80 and 89-81. Ordinance 89-80 established a new single-family residential zoning district designated as "R1AAA." Densities were limited to 1 unit per 2 acres in R1AAA zoned districts. Ordinance 89-81 provided for the transfer of development rights in R1AAA zoned districts.

111. The R1AAA zoning district was established by the City to "make specific development requirements that recognize the significance of land without infringing on the property owner's constitutional rights" through the creation of a new property classification which the City labeled "environmentally significant." The City created the category of "environmentally significant" in recognition of the fact that the Outer Islands have some significant environmental features.

112. On June 5, 1990, the City adopted Ordinance 90-30. Pursuant to this ordinance the City rezoned the undeveloped islands within its jurisdiction located in the Indian River Lagoon R1AAA.

113. In addition to rezoning the Outer Islands, the City adopted Ordinance 90-15 on February 24, 1990. This ordinance provides the following prohibition on establishing bridgeheads:

No property shall be used as bridgehead property for an island that is undeveloped as of the date of this ordinance when said use shall have for its purpose the connection with any public right-of-way in the city of Vero Beach. Further, if said property is not within the City's jurisdiction but is immediately contiguous thereto, the city shall prohibit, by the erection of barriers, any connection with the city right-of-way.

114. Ordinance 90-15 was adopted after residents along Silver Shores Road on the Barrier Island expressed concern about the use of right-of-way at the end of the road to access the Inner Islands.

L. The City's Remedial Comprehensive Plan.

115. Subsequent to the filing of the Department's request for hearing on the City's Adopted Plan, the Department and the City entered into a Stipulated Settlement Agreement.

116. Among other things, the City agreed to add Policy 5.6 to the City's Future Land Use Element. Policy 5.6 prevents the use of bridgeway property to connect an undeveloped island with City right-of-way.

117. On July 21, 1992, consistent with the Stipulated Settlement Agreement, the City adopted a remedial plan by Ordinance 92-21 (hereinafter referred to as the "City's Remedial Plan"). Pursuant to the City's Remedial Plan, the Outer Islands were designated as "ES" or "Environmentally Significant." The permissible density for property designated "ES" was lowered to 0.2 units per acre (one unit per five acres).

118. On November 4, 1992, the Department caused a Cumulative Notice of Intent finding the City's Remedial Plan to be "in compliance" to be published in the Vero Beach Press-Journal.

M. The Town's Treatment of the Lagoon Islands in the Town's Adopted Plan.

119. The FLUM and Chapter 1 of the Town's Adopted Plan implement the Future Land Use Element of the Town's Adopted Plan as required by Section 163.3177(6), Florida Statutes. The FLUM and the objectives and policies of Chapter 1 of the Town's Adopted Plan create land use designations for all property within the Town and set qualitative standards to be applied in allocating future land uses to Town property.

120. The Inner Islands and the portion of the Outer Islands located within the Town are designated "RC/ESI" or "Residential Conservation/Environmentally Sensitive Islands" on the FLUM. See Map I-1 of FLUM. Pursuant to Policy 1-1.1.3, the Town

established a maximum density of "up to one (1) residential unit per 5 gross acres" for environmentally sensitive islands.

121. All other undeveloped islands located in the Indian River Lagoon within the jurisdiction of the Town area are also designated "RC/ESI."



122. Objective 1-2.6 of the Town's Plan sets out the Town's objective regarding the use of "environmentally sensitive lands" and "isolated islands":

OBJECTIVE 1-2.6: CONSERVING ENVIRONMENTALLY SENSITIVE LANDS AND ISOLATED ISLANDS. The Future Land Use Map series I-4 through I-11 identify the general location of conservation resources including hydric soils (McKee Mucky clay loam, and Kesson muck); the Indian River estuarine system; flood plain areas; mangrove areas; coastal marshes; functional wetlands; the Atlantic Ocean beach and dune system, including the high hazard area; and sites of historic or archaeological significance pursuant to s9J-5.006(4)(b), F.A.C. In addition, hydric hammocks and mixed hardwood swamp are identified as wetlands which shall be protected. These areas are not sufficiently large or distinct to be accurately mapped in the Plan, but shall be considered and mapped during the development review process in order to assure technically sound assessment of wetland boundaries, transition zones, and uplands as defined in the Town wetland protection ordinance.

Similarly, the on-site assessments shall identify upland sub-areas within the environmentally sensitive areas which may have very limited development potential. Such uplands shall be deemed developable upon the owner/applicant's demonstration that roadway improvements and other requisite infrastructure can be made available concurrent with the impacts of the proposed new development as set forth in the Town's concurrency management procedures. All such infrastructure shall meet adopted levels of service (LOS) standards and shall not reduce the LOS of existing infrastructure below the adopted minimum standards.

The Future Land Use Maps I-1 to I-3 designate areas with extensive wetland systems as well as the hurricane high hazard area as environmentally sensitive (ES). In addition, isolated islands within the Indian River Lagoon having extensive mangrove fringe, coastal marsh, and/or functional wetlands are also identified as environmentally

sensitive islands (ESI). General performance criteria and procedures for regulating development within these areas are incorporated

in this section. These areas are allocated a designation of "Residential Conservation" as explained below:

. . . .

123. To further the Town's objective concerning "isolated islands" the town adopted the following policy:

Policy 1-2.6.2: Management Policy for Residential Conservation/Environmentally Sensitive Island (RC/ESI). The Future Land Use Map allocates a "residential conservation/environmentally sensitive island" designation to environmentally sensitive isolated islands within the corporate limits which currently do not have access and/or have not received approval for access to the mainland of the Town. These islands are not only environmentally sensitive but also lack available or anticipated future public infrastructure or requisite protective and emergency services.

- a. Development Restrictions and Management Techniques. The development restrictions and management techniques identified for lands designated "Residential Conservation/Environmentally Sensitive (RC/ES) in Policy 1-2.6.1 (a-e) shall apply to isolated islands, excepting that density on areas designated ISE shall have a maximum density of one (1) unit per five (5) acres.
- b. Additional Performance Criteria. In addition to the provisions cited in paragraph "a" above, no development shall be approved unless a subdivision plat has been submitted which incorporates the following prerequisite conditions prior to issuance of a development order or permit:
  - A plan for vehicular access to the main barrier island shall receive approval from all applicable government agencies and the Town of Indian River Shores.
  - Plans for the provision of requisite public infrastructure and emergency protective

services, i.e., police, fire and ambulance shall be approved by the Town of Indian River Shores.

- Proof of compliance with all applicable regulations and permitting procedures of the Federal, State and local environmental agencies shall be approved.

124. The Town also adopted the following as part of Policy 1-1.1.6 of the Town's Adopted Plan in an effort to protect wetlands on islands in the Indian River Lagoon:

No development shall occur on unbridged islands within the Indian River Lagoon pursuant to Policy 1-2.6.2. Unless [sic] the federal and state permitting agencies having jurisdiction approve road and bridge permits required to establish satisfactory access and grant dredge and fill permits, then in such case Policy 1-2.6.2 cites performance standards which provide a management approach that allows for the reasonable use of such isolated islands assuming compliance with all other applicable laws and ordinances. The policy mandates approval of the road and bridge permits by the state and/or federal agencies having jurisdiction prior to granting of final Town plan approvals, development orders, or permits.

125. Johns Island and Gem Island are designated "LD" or "Low Density Residential Development" on the FLUM. See Map I-2 of the FLUM. Density for "LD" property is limited to 3 units per gross acre. Johns Island and Gem Island were designed "LD" consistent with the fact that development had already begun or been approved on these islands.

N. Lost Tree's Challenge to the Town's Adopted Plan.

126. Lost Tree has challenged the following provisions of the Town's Adopted Plan to the extent that they designate the

portion of the Inner Islands and the Outer Islands owned by Lost Tree as "RC/ESI":

- a. Section 1-2, "Future Land Use Map," page 1-12, and, in particular, Map I-1 of the FLUM;
- b. Objective 1-2.6;
- c. Policy 1-2.6.2; and
- d. Policy 6-1.9.1. This policy merely provides that the Town will implement the Land Use Element to the extent that it "incorporates implementing policies for managing environmentally sensitive lands identified on the Future Land Use Map." It does not designate any lands as "RC/ESI."

127. In particular, Lost Tree has alleged in the Amended Prehearing Stipulation that the foregoing provisions of the Town's Adopted Plan creating the "RC/ESI" land use designation are not "in compliance" for the following reasons:

- They are inconsistent with Section 163.3177(6)(g)3, F.S.
- They are inconsistent and uncoordinated with other provisions of the comprehensive plan which identify Lost Tree's lands as predominantly "upland" or "nonwetland," including Data Inventory and Analysis, Map 1-12 (page 1-32), Map V-2 (page 5-4), and Goals Objectives and Policies, Map 1-4 (page 1-16) and Map 1-11 (page 1-23);
- They are not clearly based on appropriate data because Lost Tree's islands are not environmentally sensitive lands;
- [They] are inconsistent with Policy 6-1.7.3 (page 6-7);
- They are not based on appropriate data and analysis accompanying the Plan;
- They ignore the mandate in Section 187.201(15)(a), F.S.;

- They fail to designate all property within the scope of the definition of environmentally significant land as environmentally significant on the FLUM, making the Plan internally inconsistent.

128. Lost Tree has challenged the following provisions of the Town's Adopted Plan to the extent that they establish a density of 1 residential unit per 5 acres for land designated "RC/ESI":

- a. Policy 1-1.1.3;
- b. Objective 1-2.6; and
- c. Policy 1-2.6.2.

129. In particular, Lost Tree has alleged in the Amended Prehearing Stipulation that the foregoing provisions of the Town's Adopted Plan establishing the density for "RC/ESI" designated property are not "in compliance" for the same reasons that Lost Tree has argued that the provisions creating the "RC/ESI" designation are not "in compliance."

130. Finally, Lost Tree has challenged the following provisions of the Town's Adopted Plan to the extent that they prohibit development unless state and federal agencies having jurisdiction over necessary roads and bridges approve the permits required to bridge small channels which separate the portion of the Inner Islands and the Outer Islands owned by Lost Tree from the Barrier Islands:

- a. Policy 1-1.1.6;
- b. Objective 1-2.6; and

c. Policy 1-2.6.2.

131. In particular, Lost Tree has alleged in the Amended Prehearing Stipulation that the foregoing provisions of the Town's Adopted Plan are not "in compliance" for the following reasons:

- They are not based on appropriate data as required by Section 163.3177(8) & (10)(e) and Rules 9J-5.005(2)(a) and (c), F.A.C.;
- They are not based on surveys, studies and data regarding the character of the undeveloped land in order to determine its suitability for use as required by Section 163.3177(6)(a) and Rule 9J-5.006(2)(a);
- They are not based upon appropriate data and analysis accompanying the Plan as required by Sections 163.3177(8) and 163.3177(10)(e), F.S. and Rule 9J-5.005(2)(a) and (2)(c);
- They ignore the mandate in Section 187.201(15)(a), F.S.;
- They fail to designate all property within the scope of the definition of environmentally significant land as environmentally significant on the FLUM, making the Plan internally inconsistent.

Lost Tree also alleged that the foregoing policies are inconsistent with two policies which are not actually a part of the Town's Adopted Plan. That allegation is, therefore, without merit.

O. Lost Tree's Challenge to the Town's "RC/ESI" Land Use Designation and Density.

132. The challenge to the designation of the Inner Islands and the portion of the Outer Islands located within the Town's jurisdiction of "RC/ESI" is largely based upon Lost Tree's conclusion that the environmental characteristics of the islands do not justify classifying them as "environmentally sensitive."



133. The use of the designation "Environmentally Sensitive Islands" alone is of little significance. The Town could have just as easily designated the islands as simply "Undeveloped Islands." What is significant is the limitation on the density allowable for the "RC/ESI" designation. In reality, it is the density which Lost Tree has attempted to prove is not justified by the environmental features and other characteristics of the islands.

134. While the evidence proved that there may be other more environmentally sensitive areas, the evidence also proved that there are environmentally important features of the Inner and Outer Islands which may reasonably be taken into consideration by the Town in designating the land use category and the allowable density for the islands. Those environmental considerations include the location of the islands within the Preserve, the existence of mangroves and wetlands on the islands, the use of the islands by osprey, herons, brown pelicans, and other birds, the location of the islands within the 100 year flood plain, and the high susceptibility of the islands to hurricane impacts.

135. The existing environmental features of the islands alone would justify the Town's selected name for the land use designation for the islands and the resulting allowable density. The Town's decision was also based, however, on the fact that the islands do not have any immediately available access or transportation linkage.

136. There was ample data and analysis to support the Town's conclusion concerning the environmental features of the Inner and Outer Islands. There was also ample data and analysis to support the Town's conclusion that there was no immediately available access or transportation link to the islands.

137. The data and analysis submitted by the Town to the Department in support of the Town's Adopted Plan included several documents dealing with the Preserve. These documents include the following documents: "The Sebastian Inlet - Ft. Pierce Inlet Barrier Island: A Profile of Natural Communities, Development Trends, and Resource Management Guidelines," Office of Environmental Services, Florida Game & Fresh Water Fish Commission (November 1982); "Surface Water Improvement and Management (SWIM) Plan for the Indian River Lagoon, (September 1994/September 1989); "Management Plan and Implementation Strategy for the Indian River Lagoon Systems," Marine Resource Council, Florida Institute of Technology (March 1987); "Proceedings of the Indian River Resources Symposium: The Indian River Lagoon," The Marine Resources Council of East Central Florida (June 1985); "Indian River - Malabar to Vero Beach Aquatic Preserve Management Plan," Bureau of Historic and Environmental Land Management, Division of Recreation and Parks, Department of Natural Resources (January 21, 1986); "1988 Florida Water Quality Assessment 305(b) Technical Appendix," Department of Environmental Regulation (July 1988); "Soil Survey of Indian

River County, Florida," U.S. Department of Agriculture, Soil Conservation Service (January 1987); "Indian River Lagoon: Spoil Island Management Plan," Nancy Brown-Peterson and Ross W. Evans, Bureau of Aquatic Preserves, Division of State Lands, Florida Department of Natural Resources (undated); U.S.G.S. Quadrangle Sheets -- Vero Beach Quadrangle and Riomar Quadrangle. These documents were also relied upon by the City.

138. Additional information relied upon only by the Town is set out in the Data Inventory and Analysis (Petitioner's Exhibit 45) of the Town's Adopted Plan. This data includes: Existing Land Use Map Series: Soils and Topography (pages 1-32 to 1-34); Existing Land Use Map Series: 100 Year Floodplain (pages 1-29 to 1-30); Existing Land Use Map Series: Land Uses Within Adjacent Jurisdictions (pages 1-28 to 1-30); a series of maps depicting conservation resources (pages 5-4 to 5-5.1); a discussion of wildlife habitat (page 5-7 to 5-8); a discussion of endangered, threatened, and special concern species (page 5-15 to 5-16); a map of wetland resources (pages 6-3 to 6-6); maps of marine grass beds (pages 1-27 and 6-9); and a consideration of the impacts of hurricanes (page 1-21).

139. The Data Inventory and Analysis for the Town's Adopted Plan also includes a discussion of the Inner and Outer Islands found on pages 1-20 to 1-21 of the Data Inventory and Analysis portion of the Town's Adopted Plan. While the statement concerning the consideration of "historical" wetland elevations

is incorrect, the statement, when considered as a whole, supports the Town's decision to reduce the density of development allowed on the Inner and Outer Islands. The statement is hereby adopted into this Recommended Order by reference.

140. The source documents and other data and analysis accepted into evidence during the hearing of these cases do not focus on the Inner and Outer Islands. Instead, they focus on the general conditions of the Indian River Lagoon and the surrounding area, and the need to protect the area. These documents support the Town's concern about the location of the Inner and Outer Islands in the Preserve. To the extent that the data and analysis does deal specifically with the Inner and Outer Islands, it supports the findings of fact concerning the characteristics of the Inner and Outer Islands made in this Recommended Order.

141. The data and analysis supports the Town's designation of the Inner and Outer Islands on the FLUM and the density of land use allowed by the Town's Adopted Plan. While the data and analysis does not support the Town's treatment of the Inner and Outer Islands solely based upon their location within the Preserve, the data and analysis supports a conclusion that the location of the islands, the specific environmental characteristics of the islands, and the lack of accessibility to the islands taken together justify the Town's land use designation of the Inner and Outer Islands.

142. The maps of the Town's Adopted Plan cited by Lost Tree as reflecting inconsistent treatment of Lost Tree's islands on the FLUM are maps that show the existence of seagrass beds, wetlands, conservation areas, and shoreline mangroves. None of these maps indicate anything contrary to the Town's land use designation for the Inner or Outer Islands.

143. Policy 6-1.7.3, titled "Removal of Undesirable Exotic Vegetation," is part of the Conservation Element of the Town's Adopted Plan and provides the following:

The Town shall amend the adopted Tree and Mangrove Protection Ordinance to require that, prior to the issuance of a certificate of occupancy for a new development, the owner/applicant shall remove all nuisance and invasive exotic vegetation.

144. Although there are nuisance and invasive exotic vegetation on the Inner and Outer Islands, nothing in the Town's land use designation of the Inner and Outer Islands is inconsistent with Policy 6-1.7.3. Policy 6-1.7.3 continues to apply equally to the development of the Inner and Outer Islands at 1 unit per 5 acres as it would at a higher density.

145. Section 187.201, Florida Statutes, is the State Comprehensive Plan. Section 187.201(15)(a), Florida Statutes, establishes the following State Goal:

(a) Goal.--Florida shall protect private property rights and recognize the existence of legitimate and often competing public and private interests in land use regulations and other government action.

146. The Town's land use designation of the Inner and Outer Islands, while limiting the extent of development on the islands, does not ignore Section 187.201(15)(a), Florida Statutes. The Town took into consideration the interest of owners of undeveloped islands in the Indian River Lagoon to develop their property and the need to protect the environmental assets of

those islands. The Town gave full consideration to private property interests.

147. Finally, the evidence failed to prove that the treatment of the Inner and Outer Islands in the Town's Adopted Plan is inconsistent with the treatment of other similar property within the Town's jurisdiction. At best the evidence proved that there are some islands, e.g., Hole in the Wall Island, that have more extensive environmental features and that there are some environmentally important islands that are not being protected, e.g., John's Island. The islands designated "RC/ESI" have a range of environmental features, all of which justify the Town's land use designation despite the fact that the islands included in the category are not "identical." Those islands for which development is being allowed, on the other hand, are distinguishable from the island designated "RC/ESI." John's Island and Gem Island already have a transportation link to the Barrier Island and have already been approved for development and/or are already under development.

P. Lost Tree's Challenge to Policy 1-1.1.6 of the Town's Adopted Plan; Bridge Access Requirement.

148. Lost Tree's challenge to Policy 1-1.1.6, Objective 1-2.6, and Policy 1-2.6.2 of the Town's Adopted Plan simply repeats its challenge to Objective 1-2.6 and Policy 1-2.6.2. In reality, this challenge only raises new issues concerning Policy 1-1.1.6 of the Town's Adopted Plan.

149. Policy 1-1.1.6 of the Town's Adopted Plan prohibits development on unbridged islands until two conditions are met: (a) all permitting necessary to provide bridge access are obtained; and (b) the conditions of Policy 1-2.6.2 of the Town's Adopted Plan are met.

150. While it is not impossible to develop unbridged islands in the Indian River Lagoon without providing bridge access, such development does create development planning problems for a governmental body. First, there is the difficulty of providing necessary emergency services which citizens expect their local governments to provide: fire and police protection. While it is true that such services can be provided, it is also true that they cannot be provided as easily as other areas where road access is readily available.

151. Secondly, unbridged islands are more difficult to evacuate in case of a hurricane. Data and analysis available to the Town supports a concern for the safety of any citizens that might occupy unbridged islands located in the Indian River Lagoon. The available information supports a conclusion that evacuation of islands located within the Indian River Lagoon would be required even in the event of the lowest category hurricane.

152. Existing data and analysis concerning the impacts of hurricanes on low-lying areas and the difficulty of providing emergency services to unbridged, isolated islands support the



Town's decision to limit development of unbridged islands in the Indian River Lagoon until adequate access to the islands was arranged if such access could be provided. The evidence, however, proved that access to the Inner and Outer Islands located within the Town's jurisdiction cannot be provided by bridge. Consequently, the Town, by requiring that the islands be bridged as a condition precedent to development, has effectively eliminated Lost Tree's ability to develop the islands. The available data and analysis does not support such a prohibition.

153. Policy 1-1.1.6 of the Town's Adopted Plan, by effectively eliminating Lost Tree's ability to develop the unbridged islands, conflict with Section 187.201(15)(a), Florida Statutes, quoted, supra. Policy 1-1.1.6 is, in effect, an absolute bar to development.

154. Finally, the evidence failed to prove that the treatment of the Inner and Out Islands in Policy 1-1.1.6 of the Town's Adopted Plan is inconsistent with the treatment of other similar property within the Town's Jurisdiction.

Q. The City's Treatment of the Lagoon Islands in the City's Remedial Plan.

155. Section 1.3.0 of the City's Remedial Plan recognizes that the FLUM illustrates the location of eleven land use classifications established in Table 1.8 of the City's Remedial Plan. One of those land use classifications is "Environmentally Significant" or "ES":

Islands, riverfront, environmentally sensitive,  
and lands adjacent to environmentally sensitive.

156. Section 1.3.2.2 of the City's Remedial Plan provides  
the following definition of "Environmentally Significant":

"Environmentally significant" land shall be  
defined as property having one or more of the  
following characteristics: undeveloped islands,  
undeveloped waterfront; environmentally  
sensitive; immediately adjacent to  
environmentally sensitive land or undeveloped  
waterfront; flora and fauna typically associated  
with wetlands; or a habitat for rare, threatened  
or endangered species or species of special  
concern.

Environmentally sensitive lands shall include  
areas meeting one or more of the following  
criteria:

. . . .

f) Undeveloped islands within the Indian River  
Lagoon;

. . . .

157. The FLUM of the City's Remedial Plan designates five  
islands within the City's jurisdiction as "ES," including parts  
of Fritz Island, the Fourth Outer Island, IR-29, Little Prang  
Island, and an island located immediately to the south of Prang  
Island. Prang Island is designated "RL" (Residential Low, with a  
density range of 0 to 5 units per acre). Two other islands  
located between two bridges within the City's jurisdiction are  
designated "CV" (Conservation). "CV" is also the designation for  
the southwest part of Fritz Island and the northern part of IR-29  
located in the City.

158. Objective 5 of the Future Land Use Element of the City's Remedial Plan provides the following:

Upon adoption of the Comprehensive Plan, the City will act to protect and preserve identified environmentally sensitive areas and resources in the community, and to promote responsible site development through new land development regulations and standards established by 9/1/90.

159. Among the Policies adopted by the City to carry out Objective 5 of the Future Land Use Element, the City's Plan includes the following:

5.3 Future development on undeveloped islands in the Indian River lagoon will be limited to residential densities not exceeding 0.2 unit per new acre, and a transfer of development rights (TDR) procedure will be established by 9/1/90 to facilitate transferal of development to other locations in the City.

. . . .

5.6 No property shall be used as a bridgehead property for an island that is undeveloped when said use shall have for its purpose the connection with any public right-of-way in the City of Vero Beach. Further, if said property is not within the City's jurisdiction but is immediately contiguous thereto, the City shall prohibit, by the erection of barriers, any connection with the City right-of-way.

5.7 Prior to March 1, 1992, the land Development Regulations will be amended to include development criteria for lands designated Environmentally Significant. The development criteria shall include the following:

- Site plan approval shall be required.
- No fill or regrading of the property shall be allowed except to establish required road elevations and for driveways, unless the environmental assessment shows that fill or regrading will not adversely affect the environment and fill is available on site. Driveways shall not exceed road elevations.
- An environmental assessment shall be required to be prepared by a qualified professional. The assessment shall address any rare, threatened or endangered plants

and animals and their habitats. The environmental assessment shall be considered in the site plan review process.

- A minimum of 80% of the site shall be held in open space and landscaped with native and/or drought tolerant vegetation as outlined in the Landscape and Tree Protection Ordinance.
- Structures will be reviewed on a site-by-site basis. The location of any structure will be so as to minimize potential impacts on any rare, threatened or endangered plants or animals and their habitats that are identified in the environmental assessment.
- Minimum lot sizes will be two (2) acres with a reduction to one (1) acre on the mainland and five (5) acres with a reduction to one unit per two and one-half (2.5) acres on islands using Transfer Development Rights, provided that the lot size reduction does not create adverse environmental impacts and provided that the net density shall not be greater than 0.5 units per acre on the mainland and 0.2 units per acre on islands. Further, transfer of density from the mainland to an island shall not occur. All review criteria above will be applicable to sites where density is transferred.

Policy 8.2 of the Conservation Element of the City's Remedial Plan is virtually identical to Policy 5.7 of the Future Land Use Element of the Plan.

R. Lost Tree's Challenge to the City's Remedial Plan.

160. Lost Tree has challenged the City's Remedial Plan to the extent that the FLUM designates the portion of the Outer Islands owned by Lost Tree as "ES."

161. In particular, Lost Tree has alleged in the Amended Prehearing Stipulation that the FLUM's designation of its property as "ES" is not "in compliance" for the following reasons:

- The designation is not based upon appropriate data as required by Section 163.3177(8) and (10)(e), F.S., and Rule 9J-5.002(a) [sic] & (c), F.A.C.;
- The designation is not based upon surveys, studies and data regarding the area and the character of undeveloped land in order to determine its suitability for use pursuant to Section 163.3177(6)(a), F.S., and Rule 9J-5.006(2)(b);
- The designation is not based upon appropriate data and analysis accompanying the Plan pursuant to Sections 163.3177(8) and (10)(e), and Rules 9J-5.005(2)(a) and (2)(c) so as to make the Plan internally inconsistent contrary to Section 163.3177(2) and 9J-5.005(5)(a);
- The designation is inconsistent with Policy 5.1 and 8.1, contrary to Section 163.3177(2), F.S., and Rule 9J-5.005(5)(a);
- The designation is contrary to any applicable requirements of Section 187.201(15)(a), F.S.;
- The designation is inconsistent with Section 163.3177(6)(g)3, F.S.;
- The FLUM fails to designate all property within the scope of the definition of environmentally significant land as environmentally significant on the FLUM, making the Plan internally inconsistent in contravention of Section 163.3177(2), F.S., and Rule 9J-5.005(a);
- The designation discourages rather than encourages the use of innovative land development regulations such as clustered development, contrary to Rule 9J-5.006(3)(b)9.

162. Lost Tree has challenged the following provisions of the City's Remedial Plan to the extent that they establish a density and development criteria for land designated "ES":

- a. Policy 5.3 of the Future Land Use Element;
- b. Policy 5.7 of the Future Land Use Element; and
- c. Policy 8.2 of the Conservation Element.

163. In particular, Lost Tree has alleged in the Amended Prehearing Stipulation that the foregoing provisions of the City's Remedial Plan establishing the density and development criteria for "ES" designated property are not "in compliance" for the following reasons:

- The policies are not based upon appropriate data as required by Section 163.3177(8) and (10)(e), F.S., and Rule 9J-5.005(2)(a) and (2)(c);
- The policies are not based upon surveys, studies and data regarding the area and the character of undeveloped land in order to determine its suitability for use as required by Section 163.3177(6)(a), F.S., and Rule 9J-5.006(2)(a);
- The policies are not clearly supported by appropriate data and analysis accompanying the Plan as required by Sections 163.3177(8) and (10)(e), F.S., and Rules 9J-5.005(2)(a) and (2)(c);
- The Policies contravene applicable requirements of Section 187.201(15)(a), F.S.;
- The policies are inconsistent with Section 163.3177(6)(g)3, F.S.;
- The policies impermissibly discourage the use of innovative land development regulations such as clustered development, contrary to Rule 9J-5.006(3)(b)10.

164. Finally, Lost Tree has challenged Policy 5.6 of the City's Remedial Plan.

165. In particular, Lost Tree has alleged in the Amended Prehearing Stipulation that Policy 5.6 of the City's Remedial Plan is not "in compliance" for the following reasons:

- it is inconsistent with Section 163.3177(3)(a), F.S.;
- it is inconsistent with Section 163.3177(4)(a), F.S.;
- it is inconsistent with any applicable requirements of Section 187.201(18)(b)1, F.S.;
- it is inconsistent with Intergovernmental Coordination Element Goal 8.4.0 and Traffic Circulation Element Goal 2.6.0 and Objective 5;
- it is contrary to Section 163.3177(2), F.S., and Rule 9J-5.005(5)(a);
- it is contrary to any applicable requirement of Section 187.201(15)(a), F.S.;
- it is not based on appropriate data and analysis as required by Section 163.3177(8) and (10)(e), F.S., and Rules 9J-5.005(2)(a) and (2)(c).

S. Lost Tree's Challenge to the City's "ES" Land Use Designation and the Density and Development Criteria for "ES" Property.

166. Like Lost Tree's challenge to the Town's Adopted Plan, the challenge to the City's land use designation for the Outer Islands located within the City's jurisdiction of "ES" is largely based upon Lost Tree's conclusion that the environmental characteristics of the islands do not justify classifying them as "environmentally significant."

167. What name is given to the land use designation for the Outer Islands, however, is of little significance. Again, what



is really at issue is the limitation on the density of use for property designated "ES."

168. The same findings of fact concerning the environmental importance of the Inner Islands and the portion of the Outer Islands located within the Town's jurisdiction apply to the portion of the Outer Islands located within the City's jurisdiction. Those findings of fact are hereby incorporated by reference.

169. Some of the same documents relied upon by the City to support the limitation on the density of development on the Outer Islands were also relied upon by the Town. See finding of fact 137. Other data was cited by the City in its Adopted Plan as "References Cited" and throughout the plan itself. Lost Tree's witnesses failed to consider all of the data and analysis relied upon by the City.

170. The data and analysis available to the City concerning the environmental characteristics of undeveloped islands located within the City's jurisdiction, like the islands located within the Town's jurisdiction, support the City's decision to limit the density of development on undeveloped islands. While the City's density designation for undeveloped islands changed significantly from the City's Transmittal Plan to the City's Remedial Plan, the evidence failed to prove that the data and analysis relied upon by the City from the beginning did not support a range of densities. More importantly, the evidence failed to prove that

the density ultimately agreed to in the Remedial Plan is not within the range of densities supported by the data and analysis.

171. The designation of some undeveloped islands as "ES" was not proved to be "inconsistent" with any other provision of the City's Remedial Plan. In particular, Policy 5.1 of the Future Land Use Element and Policy 8.1 of the Conservation Element.

172. Policy 5.1 of the Future Land Use Element provides:

Environmentally sensitive areas and resources, both natural and historic, will be defined and mapped through cooperative arrangements with Indian River County and cognizant state and regional agencies, which arrangements the City will seek to establish by 3/31/91.

173. Policy 8.1 of the Conservation Element provides:

By March 31, 1991, the City, through cooperative efforts with Indian River County and cognizant state and regional agencies, shall determine environmentally sensitive lands within the City and maintain a map of these lands in the City Planning Department. The City Land Development Regulations (to be adopted by September 1, 1990) shall address protection standards for the lands. The criteria for identifying environmentally sensitive lands shall evaluate, at a minimum, the following:

1. Endangered or threatened wildlife or marine life habitats.
2. Threatened or endangered vegetative species.
3. Tidal flow pattern.
4. Hydric soils.
5. 100-year flood zones.
6. Aquifer recharge potential.
7. Beach and dune conditions.
8. Unique habitat characteristics.

174. Nothing in Policy 5.1 of the Future Land Use Element or Policy 8.1 Conservation Element is inconsistent with the designation of "ES" property pursuant to the FLUM.

175. As for the development criteria of Policies 5.3 and 5.7 of the Future Land Use Element, and Policy 8.2 of the Conservation Element, the data and analysis available to, and relied upon by, the City supports these policies.

176. Lost Tree failed to prove that the "ES" land use designation and its density and development criteria are inconsistent with Section 187.201(15)(a), Florida Statutes. The City considered the interest of owners of undeveloped islands in developing their property and balanced that interest with the need to protect the environmental assets of those islands. The City did so by allowing development on the islands and the use of transferable development rights.

177. Lost Tree also failed to prove that the "ES" land use designation and its density and development criteria are inconsistent with Section 163.3177(6)(g)3, Florida Statutes. That provision sets out requirements that must be included in any coastal management element of a plan. Nothing in the challenged policies is inconsistent with those requirements.

178. Lost Tree failed to prove that the "ES" land use designation and its density and development criteria are inconsistent with the treatment of other similar property within the City's jurisdiction. The evidence proved, at best, that there are some islands within the City's jurisdiction that are more environmentally significant and some that are just as significant that are not afforded the same protection. Those

islands that are included in the "ES" land use designation are all within a range of environmentally significant islands that the City may protect. Similar islands that are not included in the "ES" land use designation and, therefore, may be developed, had already been approved for development and are vested properties. They could not, therefore, be included in the "ES" designation.

179. Finally, Lost Tree failed to prove the "ES" land use designation and its density and development criteria discourage, rather than encourage, the use of innovative land development regulations such as clustered development.

T. Lost Tree's Challenge to Policy 5.6 of the Future Land Use Element; No Bridge-Heads.

180. Policy 5.6 of the Future Land Use Element prevents the use of any property located within the City as a bridgehead to connect any undeveloped island with the Barrier Island or the mainland. As a result of this policy, access by bridge to any undeveloped island within the City's jurisdiction is prohibited. Access will have to be obtained by boat or some other means.

181. The policy also eliminates the use of any property in the jurisdiction of the City to access undeveloped islands within the jurisdiction of the Town.

182. Unlike the Town's policy of prohibiting development on the Inner and Outer Islands unless bridge access is provided, the City's policy does not prevent all development of islands within

its jurisdiction. Therefore, the findings of fact concerning the data and analysis that support limiting the building of bridges to undeveloped islands made, supra, support the City's policy.

183. While the City's policy impacts the developability of islands located within the Town, it is the Town's policy of requiring bridge access before development can proceed on the islands which is not supported by data and analysis and not the City's no-bridgehead policy.

184. The evidence also failed to prove that the City's no-bridgehead policy is inconsistent with any provision of the State Comprehensive Plan since the City's policy does not effectively prohibit development of the islands.

U. Ownership of the Inner and Outer Islands.

185. Lost Tree's challenge in these cases was specifically limited to the challenged provisions of the Town's Adopted Plan and the City's Remedial Plan to the extent those provisions apply to Lost Tree's ownership interest in the Inner and Outer Islands.

186. The evidence failed to prove the precise extent to which Lost Tree actually owns the Inner and Outer Islands. The evidence was, however, sufficient to prove that Lost Tree owns at least a part of each of the Inner and Outer Islands.

187. The evidence was also sufficient to prove the impact of the challenged provisions of the Towns' Adopted Plan and the City's Remedial Plan on the islands as a whole. That impact, therefore, necessarily will also apply to the parts of the

islands which are owned by Lost Tree. In other words, to the extent that the evidence proved how the challenged provisions apply to the entire "pie," it necessarily proved how the challenged provisions apply to Lost Tree's "slice of the pie," whatever slice it may own.

V. Developability of the Inner and Outer Islands.

188. The evidence proved that the Inner and Outer Islands do not have any features that would prevent their development. Steps can be taken to protect mangroves, wetlands, any non-exotic vegetation, and the surrounding waters. Infrastructure can be provided with or without bridge access to the islands. Stormwater impacts may be mitigated through proper planning. Docks which may be constructed along the islands can also be limited in order to reduce impacts. Finally, hurricane evacuation of the islands can be provided.

189. Existing Town and City laws provide for protection of mangroves, wetlands, and non-exotic vegetation. State and federal laws also provide protection for environmental features such as wetlands and the waters of the Indian River Lagoon. The Florida Department of Environmental Protection and the St. Johns River Water Management District regulate stormwater permitting in an effort to mitigate impacts on the Indian River Lagoon.

190. The foregoing facts, however, only prove, at best, that a local government may not be able to prevent all development of property that would potentially have an impact on

the Indian River Lagoon unless there are compelling reasons to do so. Those facts do not support a finding that local governments, such as the Town and the City, may not impose stricter standards than have existed in the past and that are currently imposed by the state or federal governments in order to reduce the impacts of development even further. Those facts simply support the Town's and City's conclusion that development of unbridged islands in the Indian River Lagoon should be limited.

#### CONCLUSIONS OF LAW

##### A. Jurisdiction.

191. The Division of Administrative Hearings has jurisdiction of the parties to, and the subject matter of, this proceeding. Sections 120.57(1) and 163.3184(9), Florida Statutes (1997).

##### B. Standing.

192. Any "affected person" may participate in proceedings challenging proposed plans and plan amendments under the Act. Sections 163.3184(9) and (10), Florida Statutes (1997).

193. The terms "affected person" are defined in Section 163.3184(1)(a), Florida Statutes (1997):

(a) "Affected person" includes the affected local government; persons owning property, residing, or owning or operating a business within the boundaries of the local government



whose plan is the subject of the review . . . .  
Each person, other than an adjoining local government, in order to qualify under this definition, shall also have submitted oral or written comments, recommendations, or objections to the local government during the period of time beginning with the transmittal hearing for the plan or plan amendment and ending with the adoption of the plan or plan amendment.

194. The evidence in these cases proved that Lost Tree owns property located in the Town and the City. The evidence also proved that Lost Tree made oral and written comments to the Town and City during the period of time beginning with the transmittal hearing for the Town's Transmittal Plan and the City's Transmittal Plan and ending with the adoption of the Town's Adopted Plan and City's Adopted Plan.

195. Lost Tree proved that it had standing to institute and participate in this proceeding.

196. The evidence also proved that the Town, City, and the Department had standing to participate in this proceeding.

C. Burden and Standard of Proof.

197. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue in any proceeding before the Division of Administrative Hearings. Young v. Department of Community Affairs, 625 So. 2d 831 (Fla. 1993); Antel v. Department of Professional Regulation, 522 So. 2d 1056 (Fla. 5th DCA 1988); and Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

198. Sections 163.3184(9) and (10), Florida Statutes (1997), impose the burden of proof on the person challenging a local government's adopted comprehensive plan. Therefore, Lost Tree had the burden of proof in this proceeding. See Young v. Department of Community Affairs, 626 So. 2d 831 (Fla. 1993).

199. Two standards of proof are established under the Act. Which standard applies depends upon whether the proceeding arises after a determination of the Department that a plan or plan amendment is, or is not, "in compliance." In these cases, the Department ultimately determined that the Town's Adopted Plan and the City's Remedial Plan were in compliance. Therefore, Section 163.3184(9), Florida Statutes (1997), determines the standard of proof. See Section 163.3184(15)(f)1, Florida Statutes.

200. Section 163.3184(9), Florida Statutes (1997), establishes the following standard of proof:

[T]he local plan or plan amendment shall be determined to be in compliance if the local government's determination of compliance is fairly debatable.

Lost Tree was required to prove "beyond fair debate" that the challenged provisions of the Town's Adopted Plan and the City's Remedial Plan are not in compliance.

201. The terms "fairly debatable" are not defined in the Act or the rules promulgated thereunder. The Supreme Court of Florida recently opined, however, that the fairly debatable standard under the Act is the same as the common law "fairly debatable" standard applicable to decisions of local governments

acting in a legislative capacity. In Martin County v. Yusem, 690 So. 2d 1288, at 1295 (Fla. 1997), the Court opined:

The fairly debatable standard of review is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety.

Quoting from City of Miami Beach v. Lachman, 71 So. 2d 148, 152 (Fla. 1953), the Court stated further:

An ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity.

690 So. 2d at 1295. The Court cautioned, however:

even with the deferential review of legislative action afforded by the fairly debatable rule, local government action still must be in accord with the procedures required by chapter 163, part II, Florida Statutes, and local ordinances.

Id.

D. The Ultimate Issue: Are the Challenged Plan Provisions "In Compliance."

202. The ultimate issue in these cases is whether the challenged provisions of the Town's Adopted Plan (the FLUM land use designation for the Inner and Outer Islands, Objective 1-2.6, Policies 1-2.6.2, 6-1.9.1, 1-1.1.3 and 1-1.1.6) and the City's Remedial Plan (the FLUM land use designation for the Outer Islands, and Policies 5.3, 5.6, 5.7 and 8.2) are "in compliance."

203. The terms "in compliance" are defined in Section 163.3184(1)(b), Florida Statutes (1997), as follows:

(b) "In compliance" means consistent with the requirements of ss. 163.3177, 163.3178, and 163.3191, with the state comprehensive plan, with the appropriate strategic regional policy plan, and with chapter 9J-5, Florida Administrative Code, where such rule is not inconsistent with chapter 163, part II.

204. A determination of whether a plan amendment is "in compliance" must be based upon a consideration of the comprehensive plan in its entirety, including any amendments thereto. Department of Community Affairs v. Lee County, 12 FALR 3755 (Fla. Admin. Comm. 1990).

E. Lost Tree's Allegations.

205. The issues which may be considered in this proceeding are limited to those issues alleged in Lost Tree's amended petitions for hearing. See Sections 120.569 and 120.57(1), Florida Statutes; Rule 60Q-2.004(3)(d), Florida Administrative Code; and Heartland Environmental Council, Inc. v. Department of Community Affairs, 96 E.R.F.A.L.R. 185 (Department of Community Affairs 1996).

206. Lost Tree has alleged that the provisions of the Town's Adopted Plan and the City's Remedial Plan that it has challenged are not "in compliance" because they are inconsistent with the following provisions of the Act identified in Section 163.3184(1)(b), Florida Statutes:

a. Section 163.3177(6)(a), Florida Statutes, because the challenged provisions are not based on surveys, studies, and data regarding the character of the undeveloped land in order to determine its suitability for use;

b. Section 163.3177(8) and (10)(e), Florida Statutes, because the plans are not clearly based upon appropriate data and analysis accompanying the plans;

c. Section 163.3177(2), Florida Statutes, because the plans are internally inconsistent;

d. Section 163.3177(6)(g)3, Florida Statutes, because the plans do not provide for the orderly and balanced utilization, consistent with sound conservation principles, of all living and nonliving coastal zone resources;

- e. Section 163.3177(3)(a), Florida Statutes; and
- f. Section 163.3177(4)(a), Florida Statutes.

207. Lost Tree has alleged that the provisions of the Town's Adopted Plan and the City's Remedial Plan that it has challenged are not "in compliance" because they are inconsistent with the following provisions of the State Comprehensive Plan:

- a. Section 187.201(15)(a), Florida Statutes, because the plans fail to protect private property rights and fail to recognize the existence of legitimate and often competing public and private interests in land use regulations and other government action; and

- b. Section 187.201(18)(b)1, Florida Statutes.

F. Consistency with the Act--Suitability.

208. Section 163.3177(6)(a), Florida Statutes, requires that all comprehensive growth management plans include a future land use element designating the future general distribution, location, and extent of use of land within a local government's jurisdiction for the following purposes:

. . . residential uses, commercial uses, industry, agriculture, recreation, conservation, education, public buildings and grounds, other public and private uses of land. . . . The proposed distribution, location, and extent of the various categories of land use shall be shown on a land use map or map series which shall be supplemented by goals, policies, and measurable objectives. Each land use shall be defined in terms of the types of uses included and specific standards for the density or intensity of use. The future land use plan shall be based upon surveys, studies, and data regarding the area, including the amount of land required to

accommodate future growth; the projected population of the area; the character of undeveloped land; the availability of public services; and the need for redevelopment, including the renewal of blighted areas and the elimination of nonconforming uses which are inconsistent with the character of the community.  
. . . [Emphasis added].

209. The evidence in these cases proved that the Town and the City adopted appropriate FLUM designations for non-vested, undeveloped Inner and Outer Islands within their jurisdiction. These islands are undeveloped, mangrove-fringed, flood prone, and located within the Indian River estuary. They provide habitat for some listed species. See Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1974); Taylor v. North Palm Beach, 659 So. 2d 1167 (fla. 4th DCA 1995); and Riveria Beach v. Shillingburg, 659 So. 2d 1177 (Fla. 4th DCA 1995).

210. Lost Tree failed to prove beyond fair debate that the Town's and City's land use designations for undeveloped islands in which Lost Tree owns an interest are inconsistent with Section 163.3177(6)(a), Florida Statutes. Lost Tree also failed to prove beyond fair debate that the Town's and City's established densities and development criteria for the Inner and Outer Islands are inconsistent with Section 163.3177(6)(a), Florida Statutes.

G. Consistency with the Act--Sound Conservation.

211. Section 163.3177(6)(g)3, Florida Statutes, requires that local governments which must include a coastal management

element in their plans must take into account the following objective:

3. The orderly and balanced utilization and preservation, consistent with sound conservation principles, of all living and nonliving coastal zone resources.

212. Lost Tree failed to prove beyond fair debate that the Town's or the City's land use designations for the Inner and Outer Islands within their jurisdictions are inconsistent with Section 163.3177(6)(g)3, Florida Statutes. Lost Tree also failed to prove beyond fair debate that the Town's and City's established densities and development criteria for the Inner and Outer Islands are inconsistent with Section 163.3177(6)(g)(3), Florida Statutes.

H. Consistency with the Act--Data and Analysis.

213. Section 163.3177(8), Florida Statutes, provides:

All elements of the comprehensive plan shall be based upon data appropriate to the element involved. Surveys and studies utilized in the preparation of the comprehensive plan shall not be deemed a part of the comprehensive plan unless adopted as a part of it. . . .

214. Section 163.3177(10)(e), Florida Statutes, provides:

It is the Legislature's intent that support data or summaries thereof shall not be subject to the compliance review process, but the Legislature intends that goals and policies be clearly based on appropriate data. The department may utilize support data or summaries thereof to aid in its determination of compliance and consistency. The Legislature intends that the department may evaluate the application of a methodology utilized in data collection or whether a particular methodology is professionally accepted. However, the department



shall not evaluate whether one methodology is better than another. Chapter 9J-5, F.A.C., shall not be construed to require original data collection by local governments; however, local governments are not to be discouraged from utilizing original data so long as methodologies are professionally accepted.

215. Rule 9J-5.005(2), Florida Administrative Code, requires that, in order for a plan provision to be "based" upon appropriate data, the local government must "react to it in an appropriate way and to the extent necessary indicated by the data available on that particular subject at the time of adoption of the plan." The data must also be the "best available" data "collected and applied in a professionally acceptable manner." Rule 9J-5.005(2)(a)-(c), Florida Administrative Code.

216. The evidence in these cases proved that the land use designations, conditions for development, and densities established by the Town and the City for undeveloped, unvested islands within their jurisdictions were based upon appropriate and adequate data and analysis. All land, including undeveloped islands, has a range of densities that a local government may consider. In these cases, the evidence proved that data and analysis concerning undeveloped, unvested islands located within the Indian River estuary are characterized by environmental features which a local government should consider in deciding the appropriate range of density to be allowed on the islands. While Lost Tree desires to develop the islands at a greater density, the evidence failed to prove that the Town's and City's decision

to limit the density to one unit per five acres was not supported by existing data and analysis.

217. The evidence also failed to prove beyond fair debate that the bridgehead policy of City was not supported by adequate and appropriate data and analysis.

218. The evidence did prove, however, that the Town's Policy 1-1.1.6 requiring that bridge access be provided to the Inner and Outer Islands before they can be developed in any manner is not supported by data and analysis. While there is adequate data and analysis to limit the development of the Inner and Outer Islands, there is not data and analysis supporting an effective prohibition on development. Policy 1-1.1.6 of the Town's Adopted Plan is inconsistent with the requirements of Sections 163.3177(8) and (10)(e), Florida Statutes.

I. Consistency with the Act--Internal Consistency.

219. Section 163.3177(2), Florida Statutes, provides:

(2) Coordination of the several elements of the local comprehensive plan shall be a major objective of the planning process. The several elements of the comprehensive plan shall be consistent, and the comprehensive plan shall be economically feasible.

See also Rule 9J-5.005(5)(a), and 9J-5.109(3), Florida Administrative Code.

220. The evidence in these cases failed to prove that any of the provisions of the Town's Adopted Plan or the City's Remedial Plan are inconsistent internally with any other provision of those plans.

J. Consistency with the Act--Capital Improvements.

221. Section 163.3177(3)(a), Florida Statutes, provides the following:

(3)(a) The comprehensive plan shall contain a capital improvements element designed to consider the need for and the location of public facilities in order to encourage the efficient utilization of such facilities . . . .

222. Lost Tree argued that the City's no-bridgehead policy, Policy 5.6, is contrary to this provision. The evidence failed to support this argument.

K. Consistency with the Act--Coordination of Plans.

223. Section 163.3177(4)(a), Florida Statutes, provides the following:

(4)(a) Coordination of the local comprehensive plans with the comprehensive plans of adjacent municipalities, the county, adjacent counties, or the region . . . . To that end, in the preparation of a comprehensive plan or element thereof, and in the comprehensive plan or element as adopted, the governing body shall include a specific policy statement indicating the relationship of the proposed development of the area to the comprehensive plans of adjacent municipalities, the county, adjacent counties, or the region and to the state comprehensive plan, as the case may require and as such adopted plans or plans in preparation shall exist.

224. Lost Tree has contended that the City's Remedial Plan is inconsistent with the foregoing provision because of the inclusion of the no-bridgehead policy, Policy 5.6. The evidence failed to support this contention. The City's Remedial Plan includes provisions consistent with Section 163.3177(4)(a), Florida Statutes. Nothing the in Section 163.3177(4)(a), Florida

Statutes, or any other provision of the Act requires that the City adopt a plan that ensures that development may proceed in a certain manner in another adjacent community. In this case, the deficiency is not with the City's no-bridgehead policy; the deficiency is in the Town's effective prohibition of development of the Inner and Outer Islands by requiring that development proceed only after bridge access is provided to the islands.

L. Consistency with the State Comprehensive Plan.

225. The State Comprehensive Plan is codified in Section 187.201, Florida Statutes. Lost Tree has alleged that the provisions of the Town's Adopted Plan and the City's Remedial Plan that it has challenged in this proceeding are not consistent with Section 187.201(15)(a), Florida Statutes:

(15) PROPERTY RIGHTS.--

(a) Goal.--Florida shall protect private property rights and recognize the existence of legitimate and often competing public and private interest in land use regulations and other government action.

226. The evidence failed to prove that either the Town or the City failed to take into consideration this goal of the State Comprehensive Plan except to the extent that the Town has adopted Policy 1-1.1.6 prohibiting development of the Inner and Outer Islands unless bridge access to the islands is provided.

227. Lost Tree has also alleged that Policy 5.6 of the City's Remedial Plan is inconsistent with Section 187.201(18)(b)1, Florida Statutes:

(18) PUBLIC FACILITIES.--

. . . .

(b) Policies.--

1. Provide incentives for developing land in a way that maximizes the uses of existing public facilities.

228. The evidence failed to prove how the City's prohibition on the use of bridgehead within its jurisdiction is inconsistent with this provision.

M. Chapter 9J-5, Florida Administrative Code.

229. Lost Tree's allegations concerning inconsistencies with Chapter 9J-5, Florida Administrative Code, did not raise any issues substantially different from the allegations concerning inconsistencies with the portions of the Act the rules were adopted to implement.

230. Lost Tree failed to prove beyond fair debate that any provision of the Town's Adopted Plan, except Policy 1-1.1.6, or the City's Remedial Plan are inconsistent with Chapter 9J-5, Florida Administrative Code.

N. Conclusion.

231. The evidence in these cases failed to prove beyond fair debate that the Town's Adopted Plan or the City's Remedial Plan is not "in compliance" as defined in Section 163.3184(1)(b), Florida Statute, except for Policy 1-1.1.6 of the Town's Adopted Plan.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Administration Commission enter a Final Order finding the Town's Adopted Plan, except for Policy 1-1.1.6, to be "in compliance." IT IS FURTHER

RECOMMENDED that the Administration Commission find Policy 1-1.1.6 of the Town's Adopted Plan to be not "in compliance." IT IS FURTHER

RECOMMENDED that the Administration Commission find the City's Remedial Plan to be "in compliance."

DONE AND ENTERED this 19th day of February, 1999, in Tallahassee, Leon County, Florida.

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LARRY J. SARTIN  
Administrative Law Judge  
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this 19th day of February, 1999.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case. See Section 163.3184(9)(b), Florida Statutes (1997).