

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: MELBOURNE SQUARE MALL)
DEVELOPMENT OF REGIONAL)
IMPACT, DEVELOPMENT ORDER) CASE NO. 91-4655DRI
AMENDMENT ISSUED BY MELBOURNE)
CITY COUNCIL.)
_____)

RECOMMENDED ORDER

Pursuant to notice, final hearing in the above-styled case was held in Melbourne, Florida, on February 27, 1992, before Robert E. Meale, Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

The parties were represented at the hearing as follows:

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For City of Melbourne:

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For Edward T. Pratt, III:

Patrick F. Healy
Potter, McClelland, et al.
P.O. Box 2523
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STATEMENT OF THE ISSUE

The issue in this case is whether the City of Melbourne properly determined that a proposed change to a development order to extend the buildout date for one outparcel within a regional mall DRI project is not a substantial deviation from the original development order.

PRELIMINARY STATEMENT

By Petition for Appeal dated May 24, 1991, the Department of Community Affairs initiated an appeal to the Florida Land and Water Adjudicatory Commission of a development order amendment issued by the City of Melbourne. Count I of the Petition alleges that Section 380.06(19)(c) provides that an extension of a buildout date of a development, or a phase of a development, by at least five years is presumed to create a substantial deviation subject to further development-of-regional- impact review. Count I alleges that the rebuttal of the presumption requires a traffic impact analysis of the entire uniform plan of development, not the single tract of property addressed by the subject amended development order. 1/

The Petition concludes with a request for a formal de novo administrative hearing and a final order from the Florida Land and Water Adjudicatory Commission denying development pursuant to the amended development order.

The City of Melbourne, which granted the amended development order, and Edward T. Pratt, III, who had applied for the amended development order, filed answers challenging the material contentions of the Petition.

At the hearing, the Department of Community Affairs called one witness and offered into evidence one exhibit. The City of Melbourne called one witness and offered into evidence nine exhibits. Edward T. Pratt, III, called three witnesses and offered into evidence 13 exhibits. All exhibits were admitted into evidence.

The transcript was filed March 31, 1992. Each party filed a proposed recommended order. All of the proposed findings of the parties are adopted or adopted in substance except as follows: Department of Community Affairs: 16 (unsupported by the evidence); 2/ City of Melbourne: 26-89 (recitation of evidence); 90-94 (subordinate); and 98-111 (unnecessary); Edward T. Pratt, III: 30, 60, and 63 (conclusion of law); and 64 (unnecessary and conclusion of law).

FINDINGS OF FACT

1. By Application for Development Approval (ADA) dated July 1, 1980, Edward J. DeBartolo Corporation applied for a development order for a development of regional impact (DRI). The project, which was identified as the Melbourne Square Mall, consisted of 146 acres on U.S. 192 near the western limits of the City of Melbourne. Melbourne Exhibit 1; Testimony of Peggy Braz.

2. The ADA states that the proposed mall would be developed in two phases. Phase I, which was planned to open in 1982, would consist of four major department stores and smaller specialty retail stores in an enclosed mall, which initially would consist of about 795,137 square feet of gross leasable area. Phase I would also consist of about 150,000 square feet of office park development between Hibiscus Boulevard and Main Crane Creek Canal and about 269,275 square feet of general commercial peripheral development. Melbourne Exhibit 1.

3. The ADA adds: "The project size is of sufficient size to permit expansion, if market conditions are favorable." Melbourne Exhibit 1, p. 3. Phase II, which, if undertaken, would be completed by 1984, would include another major department store of 125,000 square feet and the addition of 79,000

square feet to an existing department store. The total gross leasable area for both phases would then be about 1,418,412 square feet. Melbourne Exhibit 1.

4. Table 12.1 of the ADA, which is the Development Schedule, appears as follows:

PHASE	YEAR	ELEMENT	GROSS LEASABLE AREA
I	1982	Regional Mall	795,137 sq. ft.
II	1984	Mall Expansion	204,000 sq. ft.
Total Mall Development			999,137 sq. ft.
Tract 1	1982	Peripheral Development Commercial/Services	163,375 sq. ft.
Tract 2	1982	Peripheral Development Commercial/Services	105,900 sq. ft.
Tract 3	1982	Peripheral Development Office Park	150,000 sq. ft.
1982 Total Peripheral Development			419,275 sq. ft.

PHASE II (1984) Ultimate Project Devpt. 1,418,412 sq. ft. Melbourne Exhibit 1, p. 4.

5. Referring to Tracts 1, 2, and 3, the ADA states that these parcels, which contain 29, 2.1, and 16.4 acres, respectively:

have been reserved for the development of others of uses compatible with the mall development. The designated uses for these tracts as outlined in Table 12.1 have been assigned for assessment purposes only. It is assumed that individual developments within these tracts would be subject to additional local review in the future as specific projects are identified. The tentative uses shown, however, represent common uses found adjacent to regional mall developments. The trip generation potential of these peripheral development tracts has been included in the Transportation section of this application.

Melbourne Exhibit 1, p. 5.

6. Table 13.1 of the ADA shows that Tract 1, which, with Tracts 2 and 3, is under Phase I in this table, would generate 913 daily one-way vehicle trips. Melbourne Exhibit 1.

7. Map H of the ADA is the preliminary site plan. Map H depicts the main mall as bordered on the south by U.S. 192 (a/k/a New Haven Ave.), on the west by Evans Road, and on the north by the Main Crane Creek Canal. The only reference to Phase II on the preliminary site plan is for a future department store in the main mall area. Melbourne Exhibit 1, Map H.

8. Map H identifies the location of Tract III as north of the canal and adjacent to Hibiscus Boulevard. Tract III, which is designated as a 150,000 square foot office park, is at the eastern end of this triangular parcel that forms a point at its western end at Evans Road. Melbourne Exhibit 1, Map H.

9. Map H identifies three parcels as Tract I. These are all adjacent to, and west of, Evans Road. The most northerly parcel, which ends at the canal on the north, is designated as 29,500 square feet of commercial development. The most southerly tract, which ends at U.S. 192 at the south, is designated as 14,400 square feet of commercial development. The middle tract is designated as 109,475 square feet of strip commercial, including a supermarket, drug store, and movie theater. Melbourne Exhibit 1, Map H.

10. Map H identifies four parcels within Tract II. At the southeast corner of the mall is an 18,300 square foot parcel designated as commercial development. At the southwest corner of the mall, on the east side of Evans Road (across the street from the southernmost parcel of Tract I), is a 33,900 square foot parcel designated as commercial development. At the northwest corner of the mall, also on the east side of Evans Road, is a 32,000 square foot parcel designated as commercial development. This parcel is bounded on the north by the canal, on the east by a large retention pond, and on the south by an access road running the perimeter of the mall parking lot and connecting the mall to Evans Road. Melbourne Exhibit 1, Map H.

11. The fourth parcel of Tract II is the subject parcel, which is also known as Tract II-D. Map H designates Tract II-D as 21,700 square feet of commercial development. The parcel is located just south of the above-described access road. Tract II-D abuts the east side of Evans Road, across the street from the southern end of the northernmost parcel in Tract I and the northern end of the middle parcel in Tract I. Tract II-D, like all of the other parcels within Tracts located in the mall area, is separated from the mall by parking. Melbourne Exhibit 1, Map H.

12. On January 13, 1981, the City of Melbourne (Melbourne) issued a development order for the Melbourne Square DRI (DO). The DO imposes various development restrictions upon the property that is the subject of the ADA. These restrictions include the preservation of artifacts and maintenance of pre-development stormwater runoff, in terms of quantity and quality, into Crane Creek Canal. In addition, the DO requires Edward J. DeBartolo Corporation to construct various road and intersection improvements. Melbourne Exhibit 2.

13. The DO requires, as to outparcels:

All access to out-parcels on the site east of Evans Road [which includes Tract II-D], the tract west of Evans Road, and the tract north of the drainage canal will be reviewed and determined at the time of development of these parcels.

* * *

The City [will] enter into an agreement with the developer providing that signalization will be provided at the mall access points on Evans Road when traffic warrants are reached. Said signalization shall be provided by the developer at its expense.

Melbourne Exhibit 2, p. 5.

14. Paragraph D of the DO provides that only the main mall area may be developed, including all of Tract II. 3/ Development of the remaining Tracts "shall not be allowed until submission and approval of an acceptable site plan." Melbourne Exhibit 2, p. 7.

15. The DO also provides that the development approval shall terminate if "substantial construction of the Regional Shopping Mall site (Parcel B [which is the land on which the mall Tract II are to be located]) is not commenced within one (1) year from the date of enactment." Id. The DO states: "Any substantial change to the proposed development shall be subject to approval by the Melbourne City Council." Id.

16. The incorporation of the buildout date in the DO is accomplished indirectly by the following statement:

1. That the development of the Melbourne Square Mall proceed according to the design specifications and site planning presented in the [ADA) and supplementary information provided by the applicant through October 17, 1980 .

Melbourne Exhibit 2, p. 4.

17. The DO has never been amended. Melbourne Exhibits 3 and 4. Edward J. DeBartolo Corporation or its agents or assigns completed all of the required transportation improvements except for signalization at mall access points on Evans Road. The signals, which were not required until traffic counts reached a certain level, evidently are not yet required. Testimony of Peggy Bray; Testimony of James Lee; Pratt Exhibit 12.

18. On June 14, 1985, Melbourne Peripheral Associates, conveyed the 2.425-acre Tract II-D 4/ to Edward T. Pratt, III, Trustee (Pratt). Pratt purchased Tract II-D to develop a Hampton Inn motel. Subsequently deciding not to pursue the project, Pratt, in October, 1989, inquired whether Melbourne Peripheral Associates would be interested in repurchasing it. Testimony of William D. Pratt.

19. Pratt was informed that a sale was contingent upon extending the now-expired DRI buildout date. Testimony of William D. Pratt. Pratt thereby discovered that Tract II-D was part of a DRI 5/ and that an amendment to the DO extending the buildout was necessary before Tract II-D could be developed. Testimony of William D. Pratt.

20. By 1992, the mall has been constructed, and Tract I, most of Tract II (but not Tract II-D), and part of Tract I had also been developed. Testimony of Peter Morton. However, most of the buildings, at least on the outparcels, have been underleased due to poor market conditions, and several buildings are now vacant. In general, the real estate market has been very poor for sometime and the prospects for the profitable rental or sale of these properties are not very good. Testimony of Peter Morton; Pratt Exhibit 1.

21. In trying to obtain an extension of the buildout date for the entire DRI project, Pratt contacted over a dozen owners of other parcels within the DRI

to ask if they would be willing to join in a request to extend the buildout date. Finding that most of the owners only wanted to sell their properties, Pratt failed to obtain the cooperation of any of the other owners in trying to extend the buildout date so that Pratt could, in effect, render its property marketable. Testimony of William D. Pratt.

22. Unable to proceed on a DRI-wide basis, Pratt elected to pursue an extension of the buildout date for Tract II- D only. On January 11, 1991, Pratt submitted to Melbourne a Notification of a Proposed Change to a Previously Approved DRI for Tract II-D (Notification). The Notification states: "The proposed change to the Melbourne Square Mall [DRI) relates solely to the out-parcel designated as Tract II-D and is limited to a request that the buildout date for the parcel be extended to December 31, 1993." Melbourne Exhibit 3, p. 3.

23. The Notification reports no change for the parcel in terms of floor space, parking spaces, number of employees, or external vehicle trips. The only change to Table 12.1 from the ADA is that, under "Phase," Tract II-D is shown separately from Tract 2 and Tract II-D is shown to be built out in 1993. The specific proposed amendment sought in the Notification is a buildout date of December, 1993, for Tract II-D. Melbourne Exhibit 3.

24. By requesting an extension of the buildout date for Tract II-D through 1993, Pratt, in effect, requested an extension of 11 years. The Notification asserts that any presumption of a substantial deviation due to the length of the proposed extension is rebutted by the transportation analysis attached to the Notification. The analysis indicates that the projected additional traffic from Tract II-D, if developed, would not adversely affect any roads and that the conditions in the DO continue to address adequately any traffic impacts. The Notification notes that about 37% of the approved total of 1,418,312 square feet of gross leasable area for the DRI has not yet been completed and that all mitigation conditions have been complied with.

25. By letter dated March 6, 1991, the East Central Florida Regional Planning Council opined that the Notification had rebutted the presumption of a substantial deviation that arises due to the length of the requested buildout extension. The letter notes that the traffic analysis "showed that this development level [proposed for Tract II-D) did not contribute a significant amount of traffic to the adjacent roadway system nor did it create adverse impacts." Melbourne Exhibit 4.

26. By letter dated February 12, 1991, the Department of Community Affairs (DCA) objected to the proposed extension of the buildout. The letter states:

[DCA] considers a buildout extension for a single tract of land which exceeds the original buildout date for the project to be an extension to total project buildout. Although [Pratt) has provided a traffic analysis as evidence to rebut the presumption, it does not address a buildout extension for the entire . . . DRI. . .

Melbourne Exhibit 5.

27. Following public hearings, Melbourne issued the First Amendment to DRI Order for Melbourne Square Mall on April 9, 1991. Finding that Tract II-D was

not vested and was thus subject to Melbourne's comprehensive plan, Melbourne determined that the buildout extension could be limited to Tract II-D, rather than extend to the entire project. Acknowledging the need to consider the cumulative impacts of requested changes to the DO, the First Amendment states that this is the first such change and Pratt has rebutted the statutory presumption of a substantial deviation. Melbourne Exhibit 6.

28. The First Amendment orders that the request for an "extension of the buildout date for Tract II-D until December 31, 1993 is hereby approved subject to the following conditions":

1. This First Amendment . . . shall be applicable only to Tract II-D . . . , and this amendment shall expire on December 31, 1993. Consequently, physical development on site must be initiated after rendition of this amendatory development order and prior to December 31, 1993.

2. Development on Tract II-D shall be subject to the Melbourne Comprehensive Plan, as amended from time to time.

3. Development on Tract II-D with regard to concurrency management shall be subject to the provisions of the Comprehensive Plan and Chapter 3, Appendix D, Melbourne City Code, all as amended from time to time. To the extent said chapter may be inconsistent, if at all, with Rule 9J-5.0055, Florida Administrative Code, Rule 9J-5.0055 shall prevail.

4. Development on Tract II-D shall be subject to all City land development regulations, as amended from time to time

5. Table 12.1 of the [ADA] is amended as follows. [What follows is Table 12.1 with Tract II-D shown separately with a buildout date of "12/31/93" for "peripheral development commercial/services" and "21,700 square feet." The other entries are unchanged.)

6. An annual report regarding Tract II-D pursuant to Section 380.06(15) and (18), Florida Statutes, and Rule 9J-2.025, Florida Administrative Code, shall be submitted by no later than January 31 of each year . The contents of the annual report shall be as set forth in Rule 9J-2.025(7) . . . and shall be filed with the agencies set forth in said rule. 6/

7. Monitoring of compliance of this amendment to the [DO] shall be accomplished by the City's Development Department, and the Planning and Zoning Administrator shall be the person charged with administering the monitoring and compliance program. Monitoring shall be accomplished by review of the annual report, pre-development site plan review, and concurrency management.

Melbourne Exhibit 6 pp. 9-10.

29. The position of DCA in this case is based on its policy of interpreting the provisions of Chapter 380 so as to avoid a piecemeal approach to the review of DRI applications. DCA's policy is to ensure that all developments that involve a single unified plan of development are treated as a single development. Testimony of J. Alexander Magee.

30. If Tract II-D were built out by 1993 as a shopping center, which represents a worse-case scenario from a traffic-generating standpoint, the resulting traffic would have no significant impact upon affected roads. Testimony of James Lee.

31. The development of Tract II-D by 1993 as a shopping center or office building would not be inconsistent with the Melbourne comprehensive plan. In particular, Pratt has agreed to subject Tract II-D to the Melbourne comprehensive plan and not claim exemption from the provisions of the plan in reliance upon any vesting provisions contained in the plan or available at law. Melbourne Exhibits 6 and 8; Pratt Exhibit 13.

32. The proposed development of Tract II-D and the extension of the proposed buildout date through 1993 does not represent a substantial deviation. Ultimate Finding of Fact.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes.)

34. A "development of regional impact . . . means any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county." Section 380.06(1).

35. DRI review normally concludes with the issuance of the development order. However, certain changes may result in additional DRI review. Section 380.06(19) (a) provides:

Any proposed change to a previously approved development which creates a reasonable likelihood of additional regional impact, or any type of regional impact created by the change not previously reviewed by the regional planning agency, shall constitute a substantial deviation and shall cause the

development to be subject to further [DRI] review.

36. As applicable to this case, the key phrases in Section 380.06(19)(a) are those that define "substantial deviation" and the final clause, which indicates what happens when a proposed change rises to the level of a "substantial deviation."

37. First, a "substantial deviation" is any proposed change that creates a reasonable likelihood of additional regional impact or any type of regional impact not previously reviewed by the regional planning agency. The likelihood of additional regional impact is relevant to this case. The latter definition is inapplicable, as the regional planning council considered the regional traffic impact of the original ADA.

38. Second, if the proposed change meets the definition of a "substantial deviation," then "the development" is subject to further DRI review. It is unnecessary in this case to determine whether "the development" refers to the entire DRI project or only the proposed change.

39. The change proposed by Pratt and allowed by Melbourne does not constitute a substantial deviation from the DO and ADA. Pratt seeks an 11-year extension for the buildout of Tract II-D. The length of the extension creates a statutory presumption of a substantial deviation, pursuant to Section 380.06(19)(c), which provides:

An extension of the date of buildout of a development, or any phase thereof, by 5 or more years shall be presumed to create a substantial deviation subject to further development-of-regional-impact review. An extension of the date of buildout, or any phase thereof, of 3 years or more but less than 5 years shall be presumed not to create a substantial deviation. These presumptions may be rebutted by clear and convincing evidence at the public hearing held by the local government. . .

40. Pratt has rebutted the statutory presumption. The meaning of "[a]ny proposed change" in Section 380.06(19)(a) is unambiguous. The proposed change is not the entire DRI project, as altered by the proposed change; the proposed change is the proposed change only.

41. The focus upon the proposed change itself, rather than the entire project, is evident in Section 380.19(b). This section clearly requires consideration of the proposed change in light of the incremental increase the change represents, say, as to land area or gross floor area in the case of office development. In the case of office space, a proposed change satisfies the criteria of a substantial deviation if the change would increase the land area by the greater of 5% or 6 acres or would increase the gross floor area by the greater of 5% or 60,000 square feet.

42. There is one exception to the focus upon the proposed change. Under Section 380.06(19)(b), the proposed change may be aggregated, but not with the entire DRI development. In determining the significance of the proposed change,

its impact must be considered in conjunction with the cumulative impacts of all other changes from the original DRI development.

43. The task, then, in deciding whether a proposed change is a substantial deviation is to evaluate the impact of the proposed change itself. Here, Pratt seeks an 11-year buildout extension for a tract of less than 2.4 acres involving office or retail space of about 21,700 square feet surrounded by a large regional mall that was initially approved to consist of 1,418,412 square feet. Tract II-D represents about 1.5% of the total leasable area initially approved by the DO. About 1,020,053 square feet of retail and office space was actually constructed so Tract II-D represents about 2% of this amount.

44. DCA argues unconvincingly that the proposed change can be nothing less than the entire DRI project. This is not what Pratt seeks or what Melbourne has approved. Nothing would have prevented the treatment of each of these Tracts as separate phases in the ADA and DO. As long as the separation of "developments" is not intended to circumvent DRI review by avoiding thresholds, no aggregation rule is required to ensure that the unified plan of development is reviewed. Phases of a DRI do not necessitate piecemeal review.

45. In effect, Tract II-D has become Phase III of the project. Nothing in the letter or spirit Chapter 380 supports DCA's argument that Melbourne cannot extend the buildout for Tract II-D without thereby extending the buildout for the remaining undeveloped portion of the mall DRI project. Nothing in the First Amended DO implies that subsequent proposed changes will automatically be granted or that the cumulative impacts from such proposed changes will not be weighed in light of the proposed change obtained by Pratt.

46. In this case, clear and convincing evidence rebuts the presumption that the proposed change sought by Pratt and approved by Melbourne represents a substantial deviation from the original DO. A key fact is the small size of Tract II-D relative to the remainder of the mall DRI project. The traffic analysis reconfirms that the development of Tract II-D will not have a reasonable likelihood of a regional impact. Significantly, the development of Tract II-D is subject to the Melbourne comprehensive plan and land development regulations, including those requiring that public facilities, such as roads, be in place concurrent with the impact of development. Although extra-jurisdictional traffic impacts typically are ignored by a local government's comprehensive plan, and are ignored by Melbourne's plan, the DRI process in this case has provided adequate assurances in terms of transportation impacts.

RECOMMENDATION

Based on the foregoing, it is hereby

RECOMMENDED that the Florida Land and Water Adjudicatory Commission enter a final order dismissing the appeal of the Department of Community Affairs to the First Amended Development Order issued by the City of Melbourne with regard to the Melbourne Square Mall.

ENTERED this 25th day of June, 1992, in Tallahassee, Florida.

ROBERT E. MEALE
Hearing Officer
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of June, 1992.

ENDNOTES

1/ Count II of the Petition alleges that the amended development order does not ensure that public transportation facilities will be efficiently used, in violation of Section 380.06(12)(a)4.

Count III of the Petition alleges that the amended development order is inconsistent with the State Comprehensive Plan and State Land Development Plan, in violation of Section 380.06(14).

The resolution of the issues raised in Count I permits consideration of the impacts resulting from the development of Tract II-D only. This precludes the possibility that DCA could prevail on Counts II and III.

DCA did not abandon the issues raised in Counts II and III. However, it appears, based on the evidence presented and the absence of any discussion of this issue in the Department's proposed recommended order, that DCA recognized the interrelationship between Count I, on the one hand, and Counts II and III, on the other hand. The broad-scale considerations implicit in determining whether public transportation facilities are efficiently used and whether development is consistent with state plans are ordinarily not involved in the development of a 21,700 square foot office building or retail store located on an outparcel at a regional mall. For these reasons, the issues in Counts II and III are not addressed.

2/ See first sentence of second paragraph on second page of Melbourne Exhibit 6.

3/ Parcel A in the DO is about 16.44 acres. Parcel B is about 111.02 acres. Parcel C is about 18.92 acres. The last page of the ADA divides the property into three parts. The main part is about 112 acres north of U.S. 192, east of Hollywood Blvd., and south of the Main Crane Creek Canal. The second part is about 24 acres on the west side of Hollywood Blvd, bordered by U.S. 192 to the south and the canal to the north. The third part is about 15 acres north of the canal, east of Hollywood Blvd., and south of Hibiscus Blvd. Map C of the ADA indicates that Hollywood Blvd. is or was the name of the road that, once it crossed U.S. 192 and proceeded north, became Evans Rd. It is thus clear that the DO excludes, absent another site plan, development approval for all of Tracts I and III.

4/ The deed describes the parcel in question, although it identifies the parcel as Tract II-E.

5/ The deed, which is executed by Edward J. DeBartolo as a general partner, does not mention the ADA or DO. The deed only prohibits the grantee from constructing buildings or other improvements without first obtaining written approval from the grantor or its consultant, Edward J. DeBartolo Corporation. Pratt Exhibit 3. Neither the ADA nor the DO was recorded in the public records. Pratt Exhibit 7.

However, avoiding various factual and legal issues, such as constructive notice, Pratt has not asserted the issue that Tract II-D should be removed from the DO due to lack of notice.

6/ Rule 9J-2.025(7) requires an annual report, which assists in monitoring the project.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

ALL PARTIES HAVE THE RIGHT TO SUBMIT WRITTEN EXCEPTIONS TO THIS RECOMMENDED ORDER. ALL AGENCIES ALLOW EACH PARTY AT LEAST 10 DAYS IN WHICH TO SUBMIT WRITTEN EXCEPTIONS. SOME AGENCIES ALLOW A LARGER PERIOD WITHIN WHICH TO SUBMIT WRITTEN EXCEPTIONS. YOU SHOULD CONTACT THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE CONCERNING AGENCY RULES ON THE DEADLINE FOR FILING EXCEPTIONS TO THIS RECOMMENDED ORDER. ANY EXCEPTIONS TO THIS RECOMMENDED ORDER SHOULD BE FILED WITH THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE.