

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF COMMUNITY)
AFFAIRS,)
)
Petitioner,)
)
vs.) CASE NO. 91-6599DRI
)
NARBI INTERNATIONAL)
INVESTMENTS COMPANY, INC.)
and LAKE COUNTY,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the above matter was heard before the Division of Administrative Hearings by its duly designated Hearing Officer, Donald R. Alexander, on February 25 and 26, 1992, in Tavares, Florida.

APPEARANCES

For Petitioner: L. Kathryn Funchess, Esquire
2740 Centerview Drive
Tallahassee, Florida 32399-2100

For Respondent: Timothy P. Hoban, Esquire
Lake County 315 West Main Street
Tavares, FL 32778

For Respondent: Max Sabeti
Narbi 4063 Goldenrod Road
Suite 208
Winter Park, FL 32792

STATEMENT OF THE ISSUES

The issue is whether Lake County Ordinance No. 63-90 is consistent with the county comprehensive plan, county land development regulations and Chapter 28-26, Florida Administrative Code.

PRELIMINARY STATEMENT

This matter began on December 18, 1990, when respondent, Lake County (County), through its Board of County Commissioners, adopted Ordinance No. 63-90 which granted a request by respondent, Narbi International Investments Company, Inc. (Narbi), to rezone Narbi's property from an agricultural zoning classification to planned unit development for a proposed development to be known as Corinthian Park. The property is located within the Green Swamp, an area designated by statute as an Area of Critical State Concern. Thereafter, the ordinance, which is a development order, was sent to petitioner, Department

of Community Affairs (DCA), for its review pursuant to Chapter 380, Florida Statutes. On August 2, 1991, DCA filed its petition for appeal with the Florida Land and Water Adjudicatory Commission (FLWAC) alleging generally that the ordinance did not conform to the principles for guiding development for the Green Swamp Area of Critical State Concern, contravened the land use element of the County's Comprehensive plan, was inconsistent with section 696 of the County's land development regulations, and had been "rendered" by the County to DCA in an incomplete fashion as proscribed by Chapter 9J-1, Florida Administrative Code. On January 2, 1992, petitioner was granted leave to file an amended petition for appeal in order to make minor changes to paragraphs 12, 13, 20 and 21 of its petition.

The matter was referred by FLWAC to the Division of Administrative Hearings on October 14, 1991, with a request that a Hearing Officer be assigned to conduct a hearing. By notice of hearing dated November 7, 1991, a final hearing was scheduled for February 25 and 26, 1991, in Tavares, Florida.

At final hearing, the County presented the testimony of Greg Beliveau, a professional planner who was accepted as an expert in land use planning, Russell C. Melling, director of the County's environmental health care department, Michael D. Sims, a registered professional engineer and accepted as an expert in hydrology, geology, and related disciplines, Gregory K. Stubbs, head of the County's department of planning and development and accepted as an expert in the Lake County comprehensive plan and code, and James E. Barker, Jr., director of the County pollution control department and accepted as an expert in the Lake County code and special environmental matters. Also, it offered County exhibits 1-19. All exhibits were received into evidence. Respondent Narbi was represented by a director of the corporation, Max Sabeti, who was accepted as a qualified representative, and adopted the testimony and exhibits of the County. Also, it offered Narbi's exhibit 1 which was received into evidence. DCA presented the testimony of Maria D. Abadal, a DCA plan review administrator and accepted as an expert in land use and comprehensive planning, Michael D. McDaniel, a DCA community program administrator and accepted as an expert in land use planning and the administration of critical area use programs, Dr. Rodney S. Dehan, a DER groundwater program administrator and accepted as an expert in groundwater resource management, Edward J. Barranco, an HRS environmental specialist II and accepted as an expert in on-site sewage disposal systems and their impact, and Daniel M. Pennington, a DER planning manager and accepted as an expert in land use planning. Also, it offered exhibits 1-3 which were received into evidence.

The transcript of hearing (four volumes) was filed on March 16, 1992. At the request of the parties, the time for filing proposed findings of fact and conclusions of law was extended to April 14, 1992, and the same were filed by the DCA and County on April 14 and by Narbi on April 15, 1992. A ruling on each proposed finding has been made in the Appendix attached to this Recommended Order. By extending the time for filing proposed orders, the parties have agreed that the time limitations in Rule 28-5.402, Florida Administrative Code, for submitting this recommended order have been waived.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

A. Background

1. This controversy began when respondent, Narbi International Investments Company, Inc. (Narbi or applicant), made application with respondent, Lake County (County), to rezone a 108.5 acre tract of land from Agricultural to Planned Unit Development (PUD). The land lies one and one-half miles west of U. S. Highway 27 and just north of County Road 474 in the southeastern part of Lake County. It is also within the boundaries of the Green Swamp Area of Critical State Concern. The purpose of the rezoning was to allow Narbi to construct a residential development to be known as Corinthian Park.

2. After certain modifications to the project were made, including a restructuring of the project to eighty single-family residential units, the County adopted Ordinance No. 63-90 on December 18, 1990, which granted the rezoning request. Because the ordinance is a "development order" (DO) within the meaning of Chapter 380, Florida Statutes, the County rendered a copy of the ordinance to petitioner, Department of Community Affairs (DCA), for its review. Concluding that the ordinance was inconsistent with the principles for guiding development in the Green Swamp Area of Critical State Concern as codified in Chapter 28-26, Florida Administrative Code, the Lake County Comprehensive Plan (plan) and the County land development regulations, and had been improperly "rendered" to DCA for its review, DCA filed a petition for appeal of development order with the Florida Land and Water Adjudicatory Commission (FLWAC). The petition was later amended in minor respects. At hearing, petitioner withdrew its contention that the order had been improperly rendered. In addressing the above issues, the parties have presented numerous expert witnesses. As might be expected, there is conflicting testimony on many of the issues. In resolving these conflicts, the undersigned has accepted the more credible and persuasive testimony, and the accepted testimony is embodied in the findings below.

B. The Parties

3. Petitioner has been designated as the state land planning agency charged with the responsibility of administering and enforcing the provisions of Chapter 380, Florida Statutes. It has the authority to appeal any development order issued in an area of critical state concern within forty-five days after the development order is rendered to the DCA. The appeal herein was timely filed.

4. The County is a political subdivision of the State of Florida and has the responsibility for issuing development orders for developments in unincorporated Lake County. Ordinance No. 63-90 is such a development order and is the subject of this appeal.

5. Narbi is the corporate owner and developer of certain real property in an unincorporated part of southeastern Lake County consisting of approximately 108.5 acres. The eighty-unit project will be known as Corinthian Park.

C. The Proposed Project and Adjacent Properties

6. From a geographical perspective, Narbi's property lies approximately twelve miles south of Clermont, Florida, or just north of the Polk County line, and less than five miles west of the boundaries of Reedy Creek Improvement District (Walt Disney World) and Orange County. The tract of land is odd-shaped with a small part fronting on the north side of County Road 474 and the remainder extending northward through a tract of undeveloped acreage, a small part of which is an abandoned, dead orange grove. Indeed, because of three hard freezes in a seven year period, the County has an abundance of former orange grove operations that are now available for development purposes, and Narbi

seeks to convert its property from agricultural purposes to a residential development. Except for the development described in the following finding of fact, the area is largely forests and wetlands, and the area surrounding Narbi's land is vacant.

7. Approximately one mile west of the project site and to the north of County Road 474 lie an asphalt plant and excavation fill area. Both of these activities predated the designation of the Green Swamp as an area of critical state concern. In addition, a corridor of development lies along U. S. Highway 27 to the east. However, that development sits on or near the Lake Wales Ridge, which is a high, dry sandy ridge on the eastern boundary of the Green Swamp area and out of the hydrologic basin of the Green Swamp. The development in that area includes another approved residential development project known as the Greater Groves Subdivision, which was given an approval by the DCA for 150,000 square feet of retail space and 445 homes having a density of 2.75 units per acre, a large, mixed-use tract of land known as South Lake Subdivision having 8,000 units and a DCA-approved density of 13 units per acre, a travel trailer park, a campground and travel trailer park, and migrant housing. In addition, there is a 900 acre project one mile west of Corinthian Park called the Ray Ranch development which is the subject of another DCA challenge. However, at the time of the final hearing, the parties were in the process of executing a settlement agreement, the terms of which are not of record. It is noted that there was no evidence that the Ray Ranch development or any other approved project was comparable in any respect to Corinthian Park or had the same physical characteristics as are found on Narbi's land and thus those developments have no precedential value in this proceeding.

8. The project is designed to have eighty single-family dwelling units on separate lots with a gross density of .74 units per acre. Prior to the approval of the rezoning, the site was zoned agricultural with a permitted density of one unit per five acres. Present plans call for each home, including driveways, to have a maximum 3,000 square feet. A central water system will serve the subdivision but individual septic tanks will be utilized for each home. Narbi proposes to construct the project in three phases consisting of 30, 27 and 23 lots, respectively. However, the third phase cannot be constructed until the County adopts a new stormwater management ordinance that meets the DCA's approval.

9. After the build out is completed, approximately forty-eight percent of the acreage, or fifty-two acres, including all wetlands on the property, will be dedicated to conservation, preservation, recreation and open space areas. At the same time, eight percent of the acreage will have impervious surfaces, roads and houses, while the remaining ninety-two percent will have pervious or noncovered areas.

10. Narbi's property contains 26.1 acres of wetlands and approximately ten acres within the 100 year flood plain. The only alteration to the flood plain will be one road crossing, and all water retention areas are to be located outside of the 100 year flood plain. In addition, stormwater runoff will be treated before going into the flood plain. The remainder of the property consists of pine flatwoods and uplands. The center of the property, which once contained a small orange grove, has been cleared. The features on this property are similar to those found on other property in the immediate area, all of which is zoned agricultural.

D. The Green Swamp and its Significance

11. In 1979, a part of an area known as the Green Swamp was designated by the legislature as an area of critical concern. As such, it is one of only four areas in the state given this designation. The area was accorded special protection because of its significance as a source of potable water, its function as a wildlife habitat and refuge, and its importance as a high recharge area for the Floridan Aquifer. The designated area covers approximately 900 square miles in parts of Lake and Polk Counties and consists largely of undeveloped forested and wetland areas. In addition, five major rivers originate in this portion of the State. It should be noted that all of the land in and around Narbi's project which lies west of U. S. Highway 27 is within the Green Swamp area.

12. The Floridan Aquifer underlies the entire state except for the extreme northwestern corner. It serves as a source of drinking water for one-half of the state's population and thus constitutes the state's principal water supply aquifer. The Green Swamp is a source of recharge (or replenishment through the downward percolation of surface water into the aquifer) of the groundwater in the aquifer thereby allowing the aquifer to maintain its volume and high quality of water. A principal feature of the aquifer is a series of limestone formations which lie below the ground surface keeping the fresh water under pressure. The high point (potentiometric surface) of the pressure system occurs in the Green Swamp thus giving that area critical importance.

13. In the area around Narbi's project, there is a layer of sand overlying the aquifer. There is also a geologic fault that allows direct connection to the aquifer. This means that in this area there is direct recharge into the aquifer with very little filtration to remove contaminants. Even where a clay layer exists over the aquifer, it is not confining because it contains cracks, fissures, and outcroppings of limestone which allow direct contact into the aquifer. Moreover, clay soils do not retain organic compounds, but allow them to filter through to the aquifer. Thus, the aquifer is vulnerable to contamination found in runoff which percolates without filtration into the aquifer.

E. The Documents Governing this Controversy

14. The land use element of the comprehensive plan was originally adopted in February 1977 and has been amended from time to time. It applies within the unincorporated portions of the County. On November 5, 1985, the County adopted Ordinance 1985-19 which brought the plan into conformity with all state regulations regarding the Green Swamp Area of Critical State Concern, including the principles for guiding development. Those principles are codified in Chapter 28-26, Florida Administrative Code. It is noted that in 1986 the DCA determined that the 1977 plan, as amended through 1985, and the land development regulations, as amended through 1985, were in compliance with state law as they applied to those portions of the Green Swamp Area of Critical State Concern within Lake County. That approval is codified in Chapter 9J-8, Florida Administrative Code.

15. The conservation element to the plan was adopted on June 4, 1980, and sets forth various goals, objectives and policies "aimed at protecting the natural environment from misuse." There is also a compendium of land development regulations found in a document known as the Lake County Zoning Regulations, as amended 1988, which are relevant since they provide regulations governing the development of a PUD and include the zoning map which was changed

by virtue of the rezoning application. Effective July 9, 1991, the County adopted a new comprehensive plan. However, Narbi's rezoning request is subject to the old plan requirements.

F. Consistency with County Comprehensive Plan

16. According to the amended petition for appeal, as later clarified by the DCA, Ordinance No. 63-90 is inconsistent with the county comprehensive plan in two respects. First, DCA contends that the proposed residential density for Narbi's project is inconsistent with a land use element, three general plan policies and one objective set forth in the comprehensive plan. More specifically, it contends that the approved density contravenes the conservation subsection of the plan categories for residential uses, policies 4, 10 and 11 of the general plan policies, and objective 5 of the conservation element of the plan. All of these items were specifically incorporated into the plan to provide special protection to the Green Swamp Area of Critical State Concern. DCA also asserts that the ordinance is in conflict with Section 3.C. of the land use element (the Urban Containment Policy) in that the project would constitute or contribute to "leapfrogging and uncontrolled urban sprawl." These contentions are addressed separately below.

17. The conservation plan category for residential uses is found in section 4 of the land use element. In all, six plan categories were established to provide a range of residential density to be used in various categories of land use, including conservation areas. As is relevant here, the conservation element provides that county lands lying within the Green Swamp Area of Critical State Concern are determined to be of environmental value and should be "conserved". The conservation element goes on to define the term "conserve" to mean:

uses such as parks, agriculture, very low density residential which will not overly damage natural conditions, as well as, "no development" use.

The cited general plan policies are found in the land use plan element and were developed for the purpose of "implement(ing) the urban containment policy and to establish policies to develop the land use map, upon which the resulting zoning map will be based." Among them is policy 4 pertaining to residential development in the County. In 1985, the County amended policy 4 by adding subsection E. to provide that all residential development within the Green Swamp Area of Critical State Concern shall conform to the principles of guiding development. Those principles of guiding development are more fully discussed in a subsequent section of this Recommended Order. Also relevant is policy 10 requiring that the County give "full consideration . . . to environmental factors . . . as they pertain to land use" and that a conservation element be established. Finally, policy 11 recognizes agriculture as an important and necessary economic activity within the County, provides that adequate and appropriate water shall be reserved for its continuance, and provides further that urban development shall be discouraged in those portions of the County presently used as agriculture. The last item cited by the DCA is objective 5 of the conservation element which pertains to environmentally sensitive areas. It establishes a goal of preserving "those environmentally sensitive areas . . . in order to safeguard Lake County's natural resources for present and future residents."

18. The above cited provisions of the plan show clearly that the site of Narbi's project is considered to be an environmentally sensitive area which must be afforded special protection. The plan itself uses such terms as "very low density", "no development", "conserve" and "preserve" in describing the type of development to be allowed. At the same time, in order to comply with its plan, the County is obliged to give full consideration to environmental factors, discourage urban type development in portions of the county now zoned agricultural, and preserve sensitive areas for future residents.

19. In devising residential densities for various plan categories, the County has adopted the following guidelines:

Estate	1 unit per 3 or more acres
Low Density	1.1 - 2.75 units per acre
Medium	2.76 - 7.0 units per acre
High	7.1 - 15.0 units per acre

However, as noted earlier, the conservation element calls for "very low residential" density in lands to be "conserved", such as those in the Green Swamp area where Narbi's project will be located. As can be seen, there is no plan category for "very low residential", and this omission underpins in part the controversy between the parties. At hearing, the parties sharply differed on what gross density falls within the category of "very low residential". Since the plan defines "low density" residential as 1.1 to 2.75 units per acre, the County takes the position that anything below that level of density, including the proposed .74 units per acre for Narbi's project, would necessarily fall within the very low density category. Indeed, it has consistently interpreted the plan in this manner since the 1985 amendment was adopted.

20. The DCA contends that a density of .2 units per acre (or one unit per five acres) is consistent with the conservation element of the plan. This view is deemed to be more credible and reasonable since that element refers to parks, agricultural, very low density and no development uses as being appropriate for the Green Swamp area. This interpretation of the term "very low density" is also consistent with other portions of the plan in that only scattered, residential housing was contemplated in environmentally sensitive lands, the residential density for agricultural lands is one unit per five acres and thus this residential density would be consistent with the lands surrounding Narbi's project, and the DCA's suggested density is lower than the one unit per three acres approved for estates, a category that falls between regular residential and agricultural densities. It is also noted that a one unit per five acres density would be more compatible with the objective of safeguarding the County's natural resources for future residents, and the general policies of discouraging urban type development on lands now zoned agriculture, "conserving" protected lands, and giving "full consideration" to environmental factors. Therefore, it is found that Ordinance 63-90 is inconsistent with the conservation subsection of the plan categories, general plan policies 4, 10 and 11, and objective 5 of the conservation element of the plan.

21. The DCA also contends that the project would constitute or contribute to "leapfrogging and urban sprawl" and thus be violative of section 3.C. (urban containment policy) of the plan. That policy is found on page 1-12 of the land use element of the plan and provides in part as follows:

Only limited expansion shall be approved
beyond the current limits of any Urban Area
or Urban Compact Node until the gross

residential density of that existing Urban Area reaches two dwelling units per acre. Further, no urban development should be permitted unless the half section(s) in which it is situated be contiguous with the declared urban area. This limitation does not apply to agricultural uses requiring approval procedures, such as, conditional use permits and site plan approval in the agricultural zoning districts. The intent of this recommendation is to prevent "leapfrogging" and uncontrolled urban sprawl, but without creating an undesirably high density urban environment.

* * *

The urban containment policy then is the general framework upon which the Lake County Land Use Plan and the resultant implementative ordinances and policies are based. The Urban Containment Policy is based on limited growth in rural areas rather than on existing trends. Almost all proposed development is placed in or around existing urban areas, so that urban services and transportation facilities can be provided economically. Environmentally sensitive areas were avoided whenever possible as were agricultural areas. (Emphasis added)

The same policy goes on to establish ten criteria for the location of urban activities. Among them are two which provide that (a) urban development should be "clustered around existing communities" and (b) "areas for rural density residential development are limited to existing areas that have low agricultural potential." It is noted that the County has classified the existing development along U. S. Highway 27 to the east of the project site as being an urban compact node.

22. The County does not view the urban containment policy as being a barrier to the Narbi project for several reasons. First, it does not consider the project as being "urban development" within the meaning of the plan and thus believes the urban containment policy has no application. Second, in light of the high start-up costs for developing orange groves, which was the former use of a small part of the property, it sees no agricultural potential for the land. As to the first reason, the plan considers urban areas to be those areas in which residential use is more than one dwelling unit per gross acre. The plan does not have a similar provision for rural areas in terms of residential density. However, the County has historically interpreted its plan to mean that anything "non-urban" is rural. Since the plan defines the minimum threshold for residential low density in urban areas as being 1.1 units per acre, the County construes all development outside of urban areas to be rural or non-urban so long as the density is less than 1.1 units per acre. Thus, it considers the contention that the project constitutes urban sprawl to be misplaced. As to the second reason, the County foresees no agricultural potential in Narbi's property. Therefore, it views the project as being consistent with the criterion that "areas for rural density residential development are limited to existing areas that have low agricultural potential."

23. On page 1-3 of the land use element, the term "urban sprawl" is defined as "the scattering of generally low-intensive developments in suburban and rural areas." The plan goes on to state that urban sprawl "causes severe problems for local municipalities and the County," imposes a "heavy" financial burden on local jurisdictions for added services, and "yields a low return on a large capital investment" by extending public services through undeveloped lands to outlying developments. After recognizing these adverse impacts, the policy states that its intent is to "prevent 'leapfrogging' and uncontrolled urban sprawl" especially in "environmentally sensitive areas."

24. The County's definition of urban sprawl is similar in many respects to the definition used by DCA. Though the term is not defined by statute or agency rule, the agency has, on a case by case basis, utilized a nonrule policy of not favoring development orders which approve projects that constitute or contribute to urban sprawl. The DCA construes the term to mean a development pattern that is associated with scattered, low intensity, unplanned, uncontrolled development that is usually approved in what are generally rural areas. When this occurs, there is no coordination between such development and public facilities and services or the protection of natural resources. Put another way, urban sprawl results in the inefficient use of public services, higher costs to local government, and a lack of protection for natural resources. Thus, the policy used by DCA is rational, logical and persuasive and is supported by an adequate record foundation.

25. There are three types of urban sprawl: leapfrog development, strip development, or single use pattern of development. Leapfrog development is described in the record as being a spot zone type of development in which vacant areas have been bypassed, and where a single development exists in an outlying area that is not contiguous or connected to an existing residential pattern. It is also a land use that is incompatible with the surrounding land uses. In this case, the Corinthian Park project falls within the category of leapfrog development.

26. Applying the above considerations to the project in question, it is found that the project is inconsistent with the plan's urban containment policy. More specifically, the project falls within the definition of leapfrogging and urban sprawl as defined by the plan and DCA, and most importantly, the County's urban containment policy specifically recommends that this type of growth be "avoided whenever possible" in environmentally sensitive areas. In making this finding, the undersigned has rejected the County's contention that the proposed subdivision is non-urban development and has accepted the DCA testimony which establishes that a level of density no greater than one unit per five acres is properly considered rural density. Therefore, the development is properly characterized as urban. Next, while the land probably has little potential for agricultural purposes as the County suggests, that consideration is but one of many in the determination of whether the project violates the urban containment policy. When weighed against the admonitions that there be "only limited expansion . . . beyond the current limits of an . . . urban compact node", that the purpose of the policy is to "prevent 'leapfrogging' and uncontrolled urban sprawl", that there be "limited growth in rural areas", and that such growth be "avoided whenever possible" in environmentally sensitive areas, it is found that Ordinance 63-90 is in contravention of Section 3.C. of the plan.

G. Consistency With Land Development Regulations

27. This issue involves allegations by the DCA that the proposed increase in residential density for the project is incompatible with subsection 696.20B.

of the zoning code and that the site alteration criteria in Rule 28-28.28.008(7), Florida Administrative Code, have not been met. The latter allegation has been categorized as a land development regulation issue since such regulations, if properly enacted, should require compliance with chapter 28-28. In addition, the County has cited section 696.13 of the zoning code as authorizing the approval of the rezoning application. Findings regarding the validity of these allegations are set forth below.

28. Paragraph B.1. of Section 696.20 provides the following criterion for residential density in a PUD:

1. Density. The criteria for establishing the residential gross density (not including natural water bodies) shall be:
 - a. Compatibility with other zoning districts in the vicinity of subject property with adopted densities in the Lake County Land Use Element of the comprehensive plan.

DCA contends that the approved density for Narbi's project is in violation of the above criterion. As noted earlier, the authorized (adopted) residential density for agricultural zoning is one unit per five acres. All of the land surrounding the site of the project is now zoned agricultural. Thus, with a proposed density of .74 units per acre, the project will be inconsistent with the adopted density for the surrounding lands as proscribed by subsection 696.20B.

29. Even though the County's land development regulations do not specifically require compliance with Rule 28-28.008(7)(a), Florida Administrative Code, Ordinance 63-90 must still meet its requirements. That rule pertains to site alteration limitations in the Green Swamp area with the aim of preserving the natural drainage capabilities of major soil associations. The rule limits the amount of site alteration to the following percentages of the area of each association within any given total site:

Upland association	60%
Pine flatwood association	25%
Wetland association	10%

In other words, only ten percent of wetlands, twenty-five percent of pine flatwoods, and sixty percent of the uplands can be disturbed. The remainder of the area must remain in its natural state.

30. As now proposed, the project exceeds the criteria for pine flatwoods and upland areas by some twenty acres. That is to say, Narbi proposes to develop approximately twenty acres of pine flatwoods and upland areas that should remain undisturbed under the rule criteria. All of the excess acreage is related to phase 3 of the project which, assuming the County prevails in this action, is still on hold until the County adopts a stormwater drainage ordinance meeting DCA's approval. It is noted, however, that even after the approval of an ordinance, there is no guarantee that this would cause DCA to waive the requirements of the rule.

31. Section 696.13 of the zoning code prescribes a four-step process for a developer to secure final plat approval and construct a PUD. In general terms, these steps are rezoning, preliminary plat or preliminary plan, construction

drawings, and final plat. As of the time of hearing, Narbi had only completed the first of the four steps. Later on in the process, Narbi will be required to give the County more detailed engineering and technical data regarding the project, and it will not be allowed to complete construction of the project until the final plat is approved and recorded. The County suggests that since phases 1 and 2 of the project meet the site alteration criteria for both flatwood areas and uplands, Narbi should be allowed to proceed with construction of the project as to those two phases, but not allowed to complete phase 3 until the stormwater drainage ordinance is approved and Narbi can demonstrate compliance with the rule and other criteria through more detailed information.

32. Besides the fact that it would be difficult, if not impossible, to revoke the zoning once Narbi had completed two of the three phases of the project, the criteria in rule 28-28.008(7)(a) are applied to the entire project, and not just on a phase by phase basis. Thus, to demonstrate compliance with the rule, an applicant must show compliance with the site alteration criteria for the total project. In addition, approval of the stormwater drainage ordinance by itself does not necessarily mean that the rule criteria will be waived. Therefore, it is found that Ordinance 63-90 is incompatible with section 696.20 of the land development regulations and rule 28-28.008(7)(a).

H. Consistency with Chapter 28-26

33. The Florida Cabinet, sitting as the Administration Commission, has promulgated Chapter 28-26, Florida Administrative Code, which defines the boundaries of the Green Swamp Area of Critical State Concern and provides principles for guiding development within that area. These principles are designed to conserve and protect the natural environmental resources and public facilities within the designated area and ecologically linked areas and apply to all development within the critical area. The principles contain eleven objectives which are codified as paragraphs (a) through (k) of rule 28-26.003(1).

34. Relevant to this proceeding are the objectives in paragraphs (a)-(d) and (g) of rule 28-26.003(1), which seek to "minimize the adverse impacts of development on resources of the Floridan Aquifer, wetlands and flood-detention areas", "(p)rotect . . . ground water and surface water which are necessary for the protection of resources of state and regional concerns", "(p)rotect the water available for aquifer recharge", "(p)rotect the functions of the Green Swamp Potentiometric High of the Floridan Aquifer", and "(p)rotect . . . existing ground and surface-water quality." By its appeal, DCA asserts that Ordinance 63-90 is in violation of each of those objectives and thus is inconsistent with the comprehensive plan which has adopted these objectives. The validity of this allegation turns on whether the use of individual septic tanks for each home in the subdivision will adversely affect the groundwater quality of the Green Swamp, and whether the project itself will negatively impact the groundwater and the Floridan Aquifer. In resolving these factual issues, the undersigned has discounted the County's contention that because it is prohibited by special act from regulating wastewater facilities with an average flow of less than 1200 gallons per day, and residential septic tanks have a much lower average daily flow, the County had no authority to deny the rezoning request on the ground septic tanks would be used at each home site. This is because the County has far wider authority under its plan to disapprove a project because of an applicant's failure to comply with chapter 28-26.

35. The development order requires that, as a prerequisite to obtaining a building permit, the applicant meet the minimum requirements for septic tanks

pursuant to Chapter 10D-6, Florida Administrative Code. That chapter, which is administered by the Department of Health and Rehabilitative Services (HRS), provides minimum construction standards for septic tanks on a statewide basis, except for the Florida Keys. Under this chapter, an applicant must obtain a permit from HRS to install a septic tank. It should be noted that these statewide standards are construction standards and not performance-based standards for monitoring environmental degradation. In addition, the standards do not take into account environmentally-sensitive lands such as those having an Area of Critical State Concern designation. Thus, it is found that the chapter 10D-6 requirements are primarily intended to protect the public health as opposed to the environment.

36. On-site sewage disposal systems are made up of two components: the septic tank component and the soil infiltrative component. The tank is nothing more than a holding tank designed to (a) separate solids and floatable materials contained in domestic wastewater and (b) allow anaerobic digestion of the organic materials by anaerobic type organisms. The remaining clear effluent then exits the tank into the soil infiltrative process, which is a network of drain pipes placed in a twelve-inch layer of gravel. The network is more commonly referred to as the drain field. The drain field distributes the effluent evenly throughout that area of land. It is then treated by the soils. After traveling through the soils, the effluent eventually enters the groundwater table. Because the drain field provides the only treatment to the effluent after it leaves the tank, it is important that the soils in which the drain fields are placed have good soil hydraulic conductivities and that the distance from the pipes to the groundwater table be adequate.

37. In the project area where the tanks are to be placed, the water table will be only ten inches below the bottom of the drain field system. In addition, the sands in that area are Immokalee, Myakka and Placid sands and are considered either moderately or severely limited for on-site sewage disposal systems. This is because those types of sand allow the effluent to percolate through the soil more quickly than other types of soil and thus the effluent receives very little treatment prior to entering the groundwater.

38. Contaminants such as nitrogen, phosphorus, toxic biodegradable and non-biodegradable organic compounds are often present in domestic wastewater and, because of the soil composition and water table elevation, could be expected to enter the groundwater from the septic tanks.

39. Chapter 10D-6 does not provide for follow-up inspections by HRS for residential septic tank systems. An inherent problem with the use of septic tanks is that property owners fail to properly maintain their septic tank systems. As a general rule, maintenance is undertaken only when the organic loading to the system has been substantial enough to make it back up in the home. In addition, a septic tank failure can go undetected long enough for the introduction of contaminants into the groundwater.

40. Although Narbi has agreed to modify its plans and to install 1,000 gallon septic tanks and water savers for toilets and showers to reduce the loading rate in each home to 333 gallons per day rather than the average of 450, there will still be unacceptable levels of contaminants entering the groundwater without adequate treatment. This is true even if the tanks are constructed in accordance with chapter 10D-6. Therefore, it is found that Ordinance 63-90 is inconsistent with the plan in that the adverse impacts caused by the use of individual septic tanks in the density proposed for the project will result in a

violation of the objectives in paragraphs (a) through (d) and (g) of rule 28-26.003(1).

41. The DCA also asserts that the project itself will negatively impact the groundwater and the Floridan Aquifer. As noted earlier, the project sits on the eastern edge of the Green Swamp Area of Critical State Concern. A geologic fault found beneath the surface of the ground allows direct connection to the Floridan Aquifer. At the same time, there is no confining clay layer overlying the aquifer, and the soil in the project area is of the type that provides very little filtration to harmful contaminants which percolate through the soil and into the groundwater.

42. Nitrates are contaminants that are generated from a variety of sources, including human beings and warm-blooded animals. A large amount of nitrates can be expected to be generated in the project area thereby causing contamination of the groundwater. Although it is possible to filter nitrates through complex and expensive technology, the applicant has not proposed this curative measure. It should be noted that soils by themselves do not adequately filter nitrates out of the runoff.

43. There are also 26.1 acres of wetlands on Narbi's property. Because of the interaction between the surface water and groundwater, it is possible over the long-term for the contaminants and runoff to adversely impact the wetlands. A lowering of the groundwater quality will indirectly lower the quality of the wetlands water or its base flow.

44. Once contaminants enter the groundwater, they have a very long residence time. This is because the groundwater is a protected confined medium, not subject to the sun's ultraviolet radiation nor oxidation by air, and it has a very stable PH. Although Narbi has proposed to have stormwater runoff designed to meet the Outstanding Florida Waters (OFW) criteria, this in itself is insufficient to assure that the groundwater will not be harmed. Given these considerations, it is found that Ordinance 63-90 violates the plan in that the project will cause a violation of the objectives in paragraphs (a) through (d) and (g) of rule 28-26.003(1).

I. Conditions Under Which the Project Can be Approved

45. The evidence supports a finding that if the proposed density of the project is downsized to one unit per five acres, and all other provisions in the plan are satisfied, as well as the site alteration criteria in rule 28-28.008(7)(a), the rezoning application may be approved.

CONCLUSIONS OF LAW

46. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Subsection 120.57(1), Florida Statutes (1991).

47. In application proceedings for developments of regional impact, the burden is on the State to show that an adverse impact will result if the project as proposed goes forward. The Babcock Co. v. State, Land & Water Adjudicatory Commission, 558 So.2d 76 (Fla. 1st DCA 1990) rev. dismiss, 567 So.2d 434 (Fla. 1990). Once that burden is met, the burden of proof shifts to the applicant (and County) to prove that its curative measures are adequate. However, as was done here, it is entirely appropriate to order the applicant and County to have

the burden of going forward initially. *Young v. State*, Department of Community Affairs and FLWAC, 567 So.2d 2 (Fla. 3rd DCA 1990).

48. This controversy involves an appeal by the DCA under Subsection 380.07(2), Florida Statutes (1991) of a development order and land development regulation (Ordinance No. 63-90) issued in an area of critical state concern. As such, all proposed development activities must be "in accordance with (chapter 380)". Subsection 380.05(16), F. S. (1991). Under Subsection 380.07(4), Florida Statutes (1991) the undersigned's responsibility is to prepare a recommended order for the Florida Land and Water Adjudicatory Commission recommending the granting or denying of permission to develop pursuant to chapter 380 and any conditions or restrictions that may be appropriate.

49. In its appeal, as amended, the DCA contends that the development order is not consistent with the (a) County comprehensive plan, (b) County land development regulations and Rule 28-28.008(7)(a), Florida Administrative Code, and (c) principles for guiding development within the Green Swamp area as codified in Chapter 28-26, Florida Administrative Code. The more credible and persuasive evidence supports a conclusion that (a) Ordinance 63-90 is inconsistent with the conservation element of the plan categories, general plan policies 4, 10 and 11, objective 5 of the conservation element of the plan, and the urban containment policy of the plan (section 3.C); (b) Ordinance 63-90 is inconsistent with section 696.20 of the land development regulations and Rule 28-28.008(7)(a), Florida Administrative Code; and (c) Ordinance 63-90 is inconsistent with the objectives set forth in paragraphs (a) through (d) and (g) of Chapter 28-26, Florida Administrative Code, also known as the principles for guiding development within the Green Swamp Area of Critical State Concern. Therefore, it is concluded that the County's approval of Ordinance 63-90 should be rescinded and the prior zoning on the property reinstated. It is further concluded that in the event the developer agrees to use a project density of no more than one unit per five acres and otherwise shows compliance with all provisions within the plan and rule 28-28.008(7)(a), it may proceed with its development.

50. In reaching the above conclusions, the undersigned has given thoughtful consideration to the contentions raised by the County and Narbi. Most, if not all, turn on the issue of the credibility of the witnesses, which issue has been resolved in the DCA's favor. While some of the County's positions might well stand muster under normal circumstances, it should be recognized that the land sought to be developed here is one of four areas in the state with an area of critical state concern designation. As such, it is to be accorded the highest protection due to its importance as the source of drinking water for millions of the State's residents. With this in mind, once the DCA established the adverse impact that would result if the project as proposed went forward, the burden shifted to Narbi and the County to prove that their curative measures were adequate. Having failed to do so, Narbi's request for rezoning must fail.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is recommended that the Florida Land and Water Adjudicatory Commission enter a final order rescinding approval of Ordinance 63-90; that the order state that Narbi International Investments Company, Inc. may develop the project if it reduces the density to one unit per five acres and otherwise shows compliance with all provisions in the plan and rule 28-28.008(7)(a); and that Lake County

be directed to properly administer and enforce its land development regulations in accordance with chapter 380.

RECOMMENDED this 4th day of May, 1992, in Tallahassee, Florida.

DONALD R. ALEXANDER
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of May, 1992.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 91-6599DRI

Petitioner:

1. Accepted in finding of fact 3.
2. Accepted in finding of fact 4.
3. Accepted in finding of fact 5.
- 4-5. Accepted in finding of fact 8.
6. Accepted in finding of fact 11.
7. Accepted in finding of fact 8.
- 8-9. Accepted in findings of fact 14 and 15.
10. Accepted in finding of fact 11.
- 11-12. Accepted in finding of fact 7.
13. Accepted in findings of fact 29 and 30.
14. Partially accepted in finding of fact 6.
15. Accepted in finding of fact 30.
16. Accepted in finding of fact 19.
17. Accepted in finding of fact 20.
18. Accepted in finding of fact 17.
- 19-20. Accepted in finding of fact 20.
21. Accepted in finding of fact 24.
- 22-24. Accepted in finding of fact 25.
25. Rejected as being unnecessary.
- 26-27. Accepted in finding of fact 21.
28. Accepted in finding of fact 23.
- 29-30. Accepted in finding of fact 26.
31. Rejected as being unnecessary.
32. Accepted in finding of fact 31.
- 33-36. Accepted in finding of fact 12.
- 37-40. Accepted in finding of fact 13.
- 41-42. Accepted in finding of fact 42.
43. Accepted in finding of fact 41.
44. Accepted in finding of fact 44.
45. Rejected as being unnecessary.
46. Accepted in finding of fact 43.
- 47-51. Accepted in finding of fact 44.
- 52-54. Accepted in finding of fact 37.

55. Accepted in finding of fact 38.
- 56-57. Accepted in finding of fact 35.
- 58-60. Accepted in finding of fact 39.
61. Rejected as being unnecessary.
- 62-63. Accepted in finding of fact 40.

Respondent County:

1. Accepted in finding of fact 5.
2. Accepted in finding of fact 4.
3. Accepted in finding of fact 3.
4. Accepted in finding of fact 11.
5. Accepted in finding of fact 14.
6. Rejected as being unnecessary.
- 7-8. Accepted in finding of fact 2.
9. Accepted in finding of fact 8.
10. Partially accepted in finding of fact 9. The remainder is rejected. See finding of fact 43.
11. Accepted in finding of fact 44.
- 12-13. Accepted in finding of fact 10.
- 14-15. Accepted in finding of fact 9.
- 16-20. Accepted in finding of fact 20.
21. Rejected as being contrary to the more credible evidence.
22. Accepted in finding of fact 30.
23. Rejected as being contrary to the more credible evidence.
24. Accepted in finding of fact 11.
25. Accepted in finding of fact 13.
26. Accepted in finding of fact 34.
27. Rejected as being unnecessary.
28. Partially accepted in finding of fact 40.
29. Accepted in finding of fact 35.
30. Rejected as being contrary to the more credible evidence.
- 31-32. Rejected as being unnecessary.
33. Rejected as being irrelevant.
- 34-35. Rejected as being contrary to the more credible evidence.
36. Rejected as being unnecessary.
37. Rejected as being irrelevant.
38. Accepted in finding of fact 40.
39. Partially accepted in finding of fact 40. The remainder has been rejected as being contrary to the more credible evidence.
40. Accepted in finding of fact 40.
41. Rejected as being contrary to the more credible evidence.
42. Partially accepted in finding of fact 44.
- 43-52. Rejected since the testimony of witness Dehan has been accepted on this issue.

Respondent Narbi:

1. Rejected as being irrelevant.
2. Rejected as being contrary to the more credible evidence.
3. Rejected as being unnecessary.
- 4-7. Rejected as being contrary to the more credible evidence.
- 8-9. Rejected as being irrelevant for the reasons cited in finding of fact 7.
10. Partially accepted in finding of fact 19. The last sentence is rejected as being contrary to the more credible evidence.
- 11-12. Rejected as being contrary to the more credible evidence.
13. Rejected as being irrelevant.

14. Partially accepted in finding of fact 24. The last sentence is rejected as being contrary to the more credible evidence.
15. Rejected as being contrary to the more credible evidence.
16. Accepted in finding of fact 31.
- 17-18. Rejected as being irrelevant.
19. The first sentence is rejected as being contrary to the more credible evidence. The second sentence is accepted in finding of fact 44.
20. Rejected as being unnecessary.
21. Accepted in finding of fact 8.
22. Rejected as being contrary to the more credible evidence.
23. Rejected as being irrelevant.
24. Rejected as being contrary to the more credible evidence.
25. Accepted in finding of fact 40.
- 26-29. Rejected as being contrary to the more credible evidence.
30. Rejected as being irrelevant.
- 31-32. These matters were considered in evaluating the testimony of the witnesses.

COPIES FURNISHED:

Douglas M. Cook, Director
Land and Water Adjudicatory Commission
The Capitol, PL-05
Tallahassee, FL 32399-0001

L. Kathryn Funchess, Esquire
2740 Centerview Drive
Tallahassee, FL 32399-2100

Timothy P. Hoban, Esquire
315 West Main Street
Tavares, FL 32778

Max Sabeti
4063 Goldenrod Road
Suite 208
Winter Park, FL 32792

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. 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.