

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SARAH H. LEE, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 99-2215  
 )  
 ST. JOHNS RIVER WATER )  
 MANAGEMENT DISTRICT and )  
 WALDEN CHASE DEVELOPERS, LTD., )  
 )  
 Respondents. )  
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RECOMMENDED ORDER

Pursuant to notice, the above matter was heard before the Division of Administrative Hearings by its duly-designated Administrative Law Judge, Don W. Davis, on July 26-28, 1999, in St. Augustine, Florida.

APPEARANCES

For Petitioner, Sarah H. Lee:

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For Respondent, St. Johns River Water Management District:

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STATEMENT OF THE ISSUE

Whether the proposed Walden Chase development (the "Project"), is consistent with the standards and criteria for issuance of an Environmental Resource Permit ("ERP") as set forth in Rules 40C-4.301 and 40C-4.302, Florida Administrative Code.

PRELIMINARY STATEMENT

On January 22, 1999, Walden Chase Developers, Ltd. ("Walden Chase") applied to the St. Johns River Water Management District ("District") for a permit to construct and operate a surface water management system to serve 279 acres in St. Johns County (the "Permit"). Issuance of the Permit is subject to the ERP rules contained in Chapter 40C-4.301 (Conditions for Issuance of Permits) and 40C-4.302 (Other Conditions for Issuance of Permits), Florida Administrative Code (collectively, the "ERP Criteria").

On March 23, 1999, the District notified Petitioner of its intent to issue the Permit. On April 13, the District Governing Board held a public hearing to determine whether to issue the

Permit. After presentations by Petitioner, Applicant and District staff, the Board determined that the Project satisfied the ERP Criteria and affirmed its intent to grant.

On April 19, Petitioner filed a Petition for Administrative Hearing objecting to issuance of the Permit. On May 14, the District forwarded the case to the Division of Administrative Hearings, and the matter was subsequently set for final hearing on July 26-28, 1999.

In the Prehearing Stipulation, Petitioner alleges that Walden Chase has not provided reasonable assurance that the ERP Criteria have been met, and that therefore Walden Chase is not entitled to issuance of the ERP. Walden Chase and the District allege that the ERP Criteria have been met and that Walden Chase is entitled to issuance of the ERP, subject to certain general, special, and other conditions specified in the technical staff report.

At the final hearing Petitioner presented the testimony of three fact witnesses: Sarah H. Lee, Sarah Claire Lee, Helen Cortopassi, and two expert witnesses: Laurie MacDonald, an expert in wildlife zoology and conservation biology; and Linda Conway Duever, an expert in upland and wetland ecology, natural area evaluation and management, and conservation planning. Petitioner also presented testimony of two witness by deposition: Mark Brown, an expert in wetland ecology, wetland systems, ecological economics, site planning and environmental design, and

environmental impact assessment; and Paul Moler, an expert in wildlife biology, specifically reptiles and amphibians. In addition to the deposition, Petitioner presented an additional six exhibits. All exhibits were admitted without objection.

At the final hearing Walden Chase presented the testimony of one fact witness, Raymond O'Steen, and three expert witnesses: Doug Miller, an expert in civil engineering, including site layout, and in the permitting of surface water management systems; Ka Tai Peter Ma, an expert in civil engineering; and Byron Peacock, an expert in wetlands, wildlife ecology, and environmental permitting. Additionally, Walden Chase presented 42 exhibits.

At the final hearing the District presented three expert witnesses: Walter Esser, an expert in wetland and wildlife ecology, mitigation planning, wetland delineation, and ERP permitting and regulation; Everette Frye, an expert in water resource engineering and water management permitting; and Jeffrey Elledge, an expert in the permitting requirements and procedures at the Water Management District, water resource engineering, civil engineering, hydrology, water quality, and storm water management. The District also offered five exhibits; four exhibits were admitted without objection, and the fifth was not admitted pursuant to objection by Petitioner.

The Transcript of the final hearing was filed on August 6, 1999, and the parties were allowed ten days in which to submit

proposed recommended orders. Each party timely filed a Proposed Recommended Order.

### FINDINGS OF FACT

#### The Project

1. The Project will allow construction and operation of a proposed surface water management system ("System") designed to serve a 258-acre residential community and an adjacent 21-acre commercial out parcel (the "Project"). The Project is part of a larger proposed development, the "County Road 210 PUD," that contains additional areas that are not owned by Walden Chase and are not part of the Project.

2. The Project is located east of U.S. 1, a federal highway with average daily traffic of 16,500 cars per day; along the western boundary is light residential development. The northern boundary of the property is County Road 210, with daily traffic of about 8,500 cars per day. To the south is Nease High School, and to the east is Quail Ridge Farm subdivision ("Quail Ridge"), a major development, and Christ Episcopal Church. The Project property is bifurcated by a major overhead power line, including an associated fill road which runs through the middle of the property.

3. The Project consists of approximately 565 homes, a recreation area (including ball fields) located in the center of the Project, and the System. The Project is being developed by Walden Chase Developers, Ltd., a limited partnership formed in

1999 for the purpose of developing the Project. The budget for the Project is \$16,000,000, which is being financed through investors, equity, and an acquisition and development loan. Raymond O'Steen, president of Walden Chase's Managing Partner, Florida First Coast Development Corporation, testified that he is responsible for ensuring that the Project is constructed in compliance with the Permit conditions. To ensure such compliance, he will supervise construction, hire professional engineers to make monthly inspections, and cooperate with agency staff inspecting the Project. During construction, all construction equipment will be maintained to ensure that no oils and greases will be discharged into wetlands.

4. The long-term maintenance entity will be the Walden Chase Homeowners Association, Inc. (the "HOA"). The HOA has authority to: (i) operate and perform routine custodial maintenance of the surface water management system; (ii) establish rules and regulations; (iii) assess the cost of operation and maintenance, and enforce the collection of such assessment; and (iv) exist in perpetuity. If the HOA is dissolved, then operating responsibility will be transferred to a suitable entity acceptable to the District.

5. Walden Chase has entered into an agreement with the owner of the 21-acre commercial out parcel (which is to be served by the System), whereby the owner of that outparcel will pay a

pro-rata share of the operation and maintenance costs.

Cross-easements have been recorded to that effect.

6. The outfall from the storm water management system is through a ditch to the east of the Project. Walden Chase has legal authority to use that ditch. The ditch will be maintained by HOA.

7. No septic tanks are planned for the Project.

#### The Surface Water Management System

8. The System is primarily a wet detention type of storm water treatment system, composed of a series of interconnected lakes that discharge at the southeastern portion of the property. Wet detention systems contain ponds with permanent pools of water with structures limiting discharge from the System so that pollutants from the storm water gradually settle out. The System was designed to capture 2.5 inches of runoff from the impervious area.

9. The receiving bodies of water for the System are Twelve Mile Swamp and Durbin Creek, which are classified as Class III waters, pursuant to Rule 61-400, Florida Administrative Code. Neither Durbin Creek nor Twelve Mile Swamp are classified as Outstanding Florida Waters, pursuant to Rule 62-4.242(2), Florida Administrative Code. The System does not discharge to a land-locked lake.

10. The System is designed to accommodate a 25-year/24-hour storm. The System is designed to provide replacement storage

within 14 days following a storm event. The System is not located within a 10-year flood plain, nor within a flood way. The System has been designed so that it will not cause a reduction in the 10-year flood plain, nor will it cause a net reduction in flood conveyance capabilities within a flood way.

11. To ensure that the System will not cause sediment transport, the outfall ditch is lined with concrete, and a sediment pond will be constructed at the end of the ditch to collect any type of sand or silt. Additionally, the banks of the System will be stabilized and will be seeded and mulched to prevent erosion. A detailed erosion and sediment control plan has been incorporated in the design, including the use of silt fencing and hay bales during construction.

12. The parties stipulated that:

excluding backyard swales and the diversion of storm water from Quail Ridge subdivision . . . the system is designed in accordance with Rule 40C-42.026(4), Fla. Admin. Code, the design criteria for wet detention systems.

13. In addition to the wet detention component of the System, water quality treatment is provided by draining storm water run-off from the backyards, across vegetative natural buffers, and then into wetlands. The width of vegetative natural buffers needed to provide the required water quality treatment was calculated using the District's required methodology. Based on these calculations, vegetative natural buffers of a minimum of 15 feet and an average of 25 feet are provided around all



wetlands which will remain on site. On two wetlands, larger buffers of 25.65 feet will be provided to ensure adequate water quality treatment. These buffers are consistent with the calculated requirements for vegetative natural buffers.

#### Diversion of Surface Waters

14. The run-off from approximately 47 acres currently discharges onto the Walden Chase property from Quail Ridge, the subdivision located to the east of the Project. Currently, the water discharges from the Quail Ridge storm water treatment pond into a ditch located in the power line easement which bifurcates the Walden Chase property. Under current conditions, the Quail Ridge pond does not discharge into the wetland systems on-site.

15. After development, the Quail Ridge discharge will be diverted into a large wetland system on-site which extends over and onto Petitioner's property ("Wetland 8"). This diversion will replace surface water from 42 acres that currently discharge into Wetland 8, but after development, will be re-routed through the Project's System. The run-off volume directed to Wetland 8 will be approximately the same after development as pre-development conditions. The surface water hydrology of the wetland system will also be maintained.

16. The diversion of the Quail Ridge discharge does not require modification of the Quail Ridge storm water system, but rather, only modification of the drainage patterns on the Project site. The diversion will provide flood control benefits to Quail

Ridge because the outfall from the Quail Ridge storm water treatment pond will be improved. Even if the diversion were not to take place, there will be no adverse impacts to the hydrology of Wetland 8 because that wetland is primarily hydrated through groundwater sources. If the diversion were not to take place, Walden Chase would monitor Wetland 8 to ensure that the hydrology was not adversely affected, and institute appropriate remedial measures if necessary to protect its functions and values.

17. The System will also divert some surface waters that currently drain into other wetlands located on the Project site. The diversion will redirect the flow of water into treatment ponds to meet the ERP Criteria for water quality treatment. The run-off from portions of the houses and the back yards will continue to drain into the wetlands. The impacts from any diversion should be minimal because the wetlands are primarily hydrated through rainfall and the presence of groundwater under the wetlands. To ensure that the diversion will not significantly adversely affect the wetlands, Walden Chase will monitor the wetlands on-site; if there is significant adverse effect experienced, then Walden Chase will undertake appropriate remedial action.

#### Diversion of Groundwater

18. The wetlands which will remain after development are primarily hydrated by on-site groundwater, which is part of the area-wide surficial aquifer groundwater system. The soil types

on the property indicate that it is not an aquifer recharge area, so no adverse impacts to aquifer recharge are anticipated. Additionally, due to the characteristics of the proposed residential development, water will be able to percolate into the soil, and thence into the groundwater. For these reasons, there will not be a significant adverse impact to the groundwater source for the wetlands.

19. Walden Chase is undertaking additional measures to ensure the System will not adversely draw down groundwater. Two of the storm water facilities near wetlands were lined with clay materials to ensure they would not lower the groundwater elevations below the wetlands. Groundwater will not be lowered more than an average of three feet across the site nor more than five feet at any one location.

20. Of particular concern to Petitioner were possible effects to the hydrology of Wetland 8, a large wetland system that extends onto her property. However, the source of seepage to Wetland 8 is primarily a groundwater source, not surface water. Rainwater percolates through the ground and then travels laterally through the soil to the seepage slope. The Project will not significantly reduce the groundwater source because the percolation area is to be maintained.

#### Water Quantity

21. In permitting wet detention-type systems, the maximum flow of water discharged (the "peak rate of discharge") from the

system is analyzed to ensure that the natural drainage conveying water off-site is not overtaxed. Under pre-development conditions, the peak rate of discharge from the Project site is 52 cubic feet per second. After development, the peak rate of discharge will be 49 cubic feet per second. The post-development peak rate of discharge will not exceed the pre-development peak rate of discharge.

22. The Project roads have been designed to be flood-free, pursuant to the requirements of the applicable St. Johns County regulations. The first floor elevations of buildings will be located above the 100-year flood elevation, as is required by St. Johns County.

23. The Project is not located on a water course. The upstream drainage area for the Project is significantly less than five square miles.

#### Water Quality

24. Before discharge, storm water from the Project is treated by the wet detention system and the vegetative natural buffers. The wet detention system slows water to allow time for pollutants to settle out. Also, treatment processes are provided through "nutrient uptake" by resident algae that live in the ponds, and by adsorption and oxidation of pollutants on the pond slopes and bottom. The proposed vegetative natural buffers treat the run-off from the back yards prior to discharge into wetlands.

25. The District has determined that the storm water treatment system for Quail Ridge is not currently in compliance with the District's design criteria, but no evidence was presented that the quality of discharge from Quail Ridge is out of compliance with water quality standards. To ensure that the water diverted from Quail Ridge into Wetland 8 complies with state water quality standards, Walden Chase will undertake a three-step analysis. First, if the Quail Ridge storm water system is brought into compliance with its design, then the water quality being discharged from the system will presumptively meet water quality standards and the diversion can take place. Second, if the Quail Ridge system is not brought into compliance with the design criteria, then Walden Chase will sample the water quality of water discharging from Quail Ridge: if that water meets water quality standards, then the diversion can take place. Third, if the Quail Ridge system is not in compliance and the water quality discharging from that system does not meet water quality standards, then the diversion will not take place. In that instance, the currently existing discharge will be maintained until water quality standards are met, and Wetland 8 will be monitored to ensure that the surface water diversions caused by the Project will not adversely affect that wetland.

#### Environmental Considerations

26. The Project site includes pine flatwoods, scrubby flatwoods, sandhills, pine plantations, cypress swamp, wet pine

flatwoods, two borrow pits, and several drainage ditches. The wetlands on site total 34.57 acres. There are also 1.27 acres of upland-cut drainage ditches, a 3.9 acre borrow pit, and a 0.18-acre borrow pit adjacent to Wetland 5.

27. The following wetlands and drainage ditches will be preserved or otherwise not be disturbed by the Project: 1, 3, 4, 8, 9, 13, 15, 16, and 17. A total of 29.29 acres of wetlands will be preserved through imposition of a conservation easement, and 1.94 acres of wetlands will remain undisturbed.

28. None of the wetlands on site are high quality. The following wetlands and other surface waters are of low or marginal quality or do not otherwise require mitigation of impacts: 10, 14, 18, 20, and 21. With the exception of three areas (the 3.9-acre borrow pit, the 0.18-acre borrow pit adjacent to Wetland 5, and a small borrow pit within Wetland 8), the wetlands on site are all "ephemeral," meaning that they dry-up periodically during the year.

#### Wetland Impacts

29. Certain of the wetlands are considered "isolated," which means that they are completely surrounded by uplands. In considering impacts to isolated wetlands, the District rules distinguish between isolated wetlands of less than 0.5 acres and those 0.5 acres or larger. Isolated wetlands of less than 0.5 acres are: Wetlands 2 (0.02 acres); 5 (0.37 acres); 10 (0.01 acres); 11 (0.3 acres); 12 (0.14 acres); and 14 (0.04 acres).

All of these isolated wetlands are proposed to be impacted by the Project (D Ex 10). Isolated wetlands of 0.5 acres or larger are: Wetlands 1 (1.52 acres); 3 (1.06 acres); 4 (7.51 acres); 6 (0.5 acres); 9 (5.52 acres); and 15 (1.12 acres). Of those wetlands, only isolated Wetland 6 (0.5 acres) is proposed to be impacted.

30. The other wetlands on-site are considered contiguous. These are: Wetlands 7 (1.04 acres); 8A (1.81 acres); 8 (13.7 acres on site); and 13 (0.01 acres). Of these, Wetlands 7 and 8A will be impacted for a total of 2.85 acres.

31. The following are not truly wetlands, but rather are upland cut drainage ditches: 16 (0.02 acres); 17 (0.12 acres); 18 (0.07 acres); 19 (0.25 acres); 20 (0.06 acres); and 21 (0.06 acres). Of these, the following will be impacted by the Project: 16, 18, 19, 20, and 21. Alterations in upland cut drainage ditches are not required to comply with the criteria related to fish, wildlife, or listed species and their habitats unless they provide significant habitat for threatened or endangered species.

#### Wetlands Functions

32. All of the wetlands and uplands have been impacted in part by land management activities on the site and adjacent sites. For example, the site has been extensively logged, borrow pits have been constructed, and the Quail Ridge subdivision severed Wetlands 5, 6, 7, and 8A from a formerly large wetland area that extended into the Quail Ridge site. The power line and its associated road and the construction of the Quail Ridge

subdivision altered the hydrology of Wetlands 5, 6, 7, and 8A. All of these alterations were completed prior to existing District rules requiring a permit prior to construction of a surface water management permit became effective on December 7, 1983.

33. For the isolated wetlands less than 0.5 acres in size which will be impacted (Wetlands 2, 5, 10, 11, 12, and 14), the following un rebutted testimony was provided: (i) the wetlands are not used by threatened or endangered species for more than an incidental use; (ii) the wetlands are not located in an area of critical state concern; and (iii) the wetlands are not connected by standing or flowing surface waters at seasonal high water levels to one or more wetlands. These isolated wetlands less than 0.5 acres in size are of minimal value to fish and wildlife, when considered individually and cumulatively. The impact to these isolated wetlands are considered de minimus, based upon the disturbed condition of these wetlands and their use by limited members of animal species. Petitioner's expert MacDonald opined that Wetlands 2, 5, 11, and 12 were of more than minimal value, although she admitted Wetlands 2 and 11 were not as important as other wetlands on the site. However, the mitigation plan compensates for whatever functional value these wetlands may provide.

34. The major wetland impacts are to Wetlands 6, 7, and 8A. Wetland 6 is a lower quality wetland which provides some forage



habitat for wading birds and mammals that may stray through, and some breeding habitat for amphibians. Wetland 6 may provide some minimal value or less-than-minimal value to wood storks that may incidentally use the wetland, and no value for the Florida Black Bear. Wetland 7 is a lower quality wetland due to the adjacent ditch, roadway, trail road, and power line easement. Wetland 7 may provide breeding habitat for some frogs, but not for gopher frogs. It may provide for foraging, cover, breeding, nesting and perching for other animal species. Wetland 8A may provide breeding habitat for gopher frogs and foraging, cover, breeding, nesting, and perching areas for other animals. It is not a habitat typically suited for forage habitat for wood storks.

35. Upland cut drainage ditches to be impacted are 16, 18, 19, 20, and 21. These are considered to be low quality. The 3.9-acre borrow pit and the 0.18-acre borrow pit provide minimal functional value. Gopher frogs (a Species of Special Concern) may breed in the 0.18-acre borrow pit. The larger borrow pit supports a fish population but does not have sufficient shallow water areas for forage or draw down ability to concentrate fish. The smaller borrow pit does not have a fish population and does not appear to have suitable forage areas.

36. Petitioner testified that on one occasion she saw wood storks (an endangered species) on the Walden Chase property in the power line easement near Wetlands 7 and 8A. She also saw Little Blue Herons (a Species of Special Concern) use the 3.9

acre borrow pit more than once. She also saw a Sherman's Fox Squirrel (a Species of Special Concern), Snowy Egret (a Species of Special Concern), and Bald Eagle (a Threatened Species), but she did not specify where or when she saw those animals or how frequently. Petitioner's daughter saw a Florida Black Bear (a Threatened Species) one time near the power line on the Walden Chase property about four years ago. However, there was no evidence that these animals use the wetlands for nesting or denning or that the wetlands on the Walden Chase property provide critical habitat for these animals. Petitioner's expert MacDonald testified that the site is not used for nesting or denning of these and other species. Any use of the wetlands on-site by threatened or endangered species would be incidental because the habitat on-site is not the type typically used by such species. Any impacts to these species would be offset by the mitigation plan.

37. All parties agreed that gopher frogs may be present on-site and may use some of the wetlands on-site for breeding habitat. However, impacts to gopher frogs will be mitigated through Walden Chase's plan to relocate all gopher frogs to an approved site. The relocation plan has been approved by the Florida Fish and Wildlife Conservation Commission. Any gopher frogs which escape this relocation effort will still be able to use the wetlands remaining on the site for breeding purposes.

## Wetland Mitigation

38. To mitigate for anticipated impacts to wetland functions, Walden Chase will create 3.8 acres of new wetlands, preserve 29.39 acres of wetlands, and preserve 5.64 acres of uplands. Wetlands will be created adjacent to Wetlands 8 and 4. The creation areas are currently typical pine plantation, an abundant land form in the area. The wetland and upland preservation areas will be encumbered by a conservation easement subject to the provisions of Section 704.06, Florida Statutes. The mitigation ratios offered are consistent with the District's past practice and within the District's rule guidelines. The mitigation is to be conducted on-site. The mitigation is viable and sustainable.

39. Allegations that the mitigation offered is "poor" because it does not preserve adjacent uplands is in error because the preserved wetlands remaining are surrounded by upland buffers, except for a road-crossing in Wetland 8A. The road-crossing is considered a secondary impact, off-set by additional mitigation.

40. The proposed mitigation will off-set the adverse impacts to wetland functions caused by the Project. The functional values lost by the Project will be replaced. The conservation easement will preserve portions of the property, keeping those portions in their existing condition in perpetuity. Permit conditions have been imposed to ensure success of the

creation areas. A monitoring and maintenance program will be undertaken to assure success.

#### Mitigation Costs

41. The mitigation, including monitoring and maintenance, is expected to cost between \$81,287 and \$112,800. Walden Chase will ensure that the funds to complete the mitigation are available by funding an escrow account for that purpose. The escrow account will be established at 110 percent of the contracted amount for such work.

#### Reduction and Elimination

42. Walden Chase considered alternative designs which would reduce or eliminate the impacts to Wetlands 6, 7, and 8A. Wetland 6, as a 0.5 acre isolated wetland, will be impacted for the construction of Lake 5 (part of the storm water management system). Reconfiguration of Lake 5 to avoid impact to Wetland 6 would result in a loss of seven residential lots (at a cost of approximately \$280,000) and increased construction costs (of \$46,800), for a total increase of \$326,000. The alternative is not practicable because the benefits to be achieved by preservation of Wetland 6 do not warrant the cost of avoidance.

43. Wetland 7 is being impacted to construct ballfields which are part of the recreation park located in the center of the Project. Moving the ballfields to an alternative location would result in a loss of approximately 15 residential lots (at a cost of \$525,000) and would require construction of additional

supporting facilities (at a cost of \$150,00), for a total cost of \$675,000. Wetland 7 is a medium quality wetland that has been previously drained, and is not a pristine wetland. The alternative is not practicable because the environmental benefits would be very small compared to the costs of relocating the facilities.

44. Wetland 8A is being impacted by construction of a road-crossing and a storm water pond (Pond 3). The road-crossing is required to connect the various areas in the Project and the various land uses in the CR 210 PUD. The road-crossing is unavoidable, and crosses the wetland at the narrowest location. There is no practical alternative to relocating Pond 3 because that relocation would require use of pipes that would be too large to install in the ground. Two other alternatives were considered: (i) relocating the pond and discharge through Wetland 8 (at a cost of \$1,600,000); and (ii) moving the pond immediately south of Pond 3 and losing 13 lots (at a cost of \$450,000). Wetland 8A is a medium quality wetland. The alternative is not practicable because the environmental benefits to be achieved compared to the cost were not reasonable.

45. The District provided unrebutted testimony that a reduction and elimination analysis would not be required for the isolated wetlands less than 0.5 acre in size.

46. Further reduction of Wetland impacts will be achieved by lining storm water Ponds 3 and 4, which are adjacent to wetlands.

#### Wildlife Utilization

47. The potential exists for secondary impacts to wildlife utilization in wetlands crossings located adjacent to Wetland 1 and into Wetland 8A. However, except for those areas, upland buffers of a minimum width of 15 feet and an average width of 25 feet are provided abutting the Wetlands that will remain on-site. The wetland mitigation plan offsets any wetland functions and values lost through those impacts.

48. With regard to whether the Project will adversely impact adjacent uplands which are used by aquatic and wetland-dependent animal species that are listed in Table 12.2.7-1 of the Applicant's Handbook, the uplands are not used for nesting or denning by any of the species listed.

#### Historical and Archaeological Resources

49. There will be no adverse impact to significant historical or archaeological resources. There are no such resources on the site. Additionally, the Permit conditions require that if any such resources are discovered during construction that work be halted, and the District be notified.

#### Future Phases

50. Potential secondary impacts of the Project are wetland impacts which could potentially result from future phases of the

Project. Walden Chase and the District presented an un rebutted analysis of a future phase of the CR 210 PUD that could potentially impact a portion of Wetland 8, which is located off the Walden Chase property. The potential wetland impact would be a 0.6-acre road-crossing required by the local government in order to connect portions of the CR 210 PUD. Conceptually, the 0.6-acre impact could be mitigated by preservation of wetlands and uplands on the tract of land served by the road-crossing. However, the additional phase could be constructed in a way consistent with the District rules that would not result in secondary impacts to wetlands or water quality.

#### ERP Criteria

51. In order for an applicant to obtain an ERP from the District, an applicant must provide reasonable assurances that construction and operation of the proposed surface water management system comply with the criteria enunciated in Rules 40C-4.301 and 40C-4.302, Florida Administrative Code. The Applicant's Handbook adopted in Rule 40C-4.091, Florida Administrative Code, provides clarification of these rules.

52. Section 10.2.1 of the Applicant's Handbook establishes a presumption that construction and operation of a surface water management system will meet certain rule criteria if certain conditions are met. These conditions are met because: (i) the post-development peak rate of discharge (49 cubic feet per second) does not exceed the pre-development rate of discharge (52

cubic feet per second); (ii) no calculations are required regarding volume of discharge because the system does not discharge to a land-locked lake, nor are any special basin criteria adopted for the area; and (iii) flows of adjacent streams, impoundments or other water courses will not be decreased so as to cause adverse impacts. Having satisfied these four conditions, the following rule criteria are presumably met:

- (1) Construction and operation of the System will not cause adverse water quantity impacts to receiving waters and adjacent lands. § 40C-4.301(1)(a), Florida Administrative Code;
- (2) Construction and operation of the System will not cause adverse flooding to on-site or off-site property. § 40C-4.301(1)(b), Florida Administrative Code; and
- (3) Construction and operation of the System will not cause adverse impacts to existing surface water storage and conveyance capabilities. § 40C-4.301(1)(c), Florida Administrative Code.

53. Rule 40C-4.301(1)(d), Florida Administrative Code, requires that construction and operation of the System will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters. A four-part test for satisfying any secondary impacts for the System affecting this criterion is described in Section 12.2.1 of the Applicant's Handbook. A potential adverse secondary impact exists for the disturbance of the wetlands by use of adjacent uplands (e.g., horses, dogs, cats, etc.). However, pursuant to



Section 12.2.7 of the Applicant's Handbook, these impacts are not considered adverse if upland buffers of a minimum of 15 feet, an average of 25 feet, are provided. No aquatic and wetland-dependent species use the uplands on the site for nesting and denning and therefore it is presumed that no adverse secondary impact to those species will occur. There will be no adverse impact to significant archeological and historical resources and therefore it is presumed that no adverse secondary impact to those species will occur. The future phase of the CR 210 PUD is not part of the Project nor is it being developed by Walden Chase. However, for purposes of permitting, wetland impacts on that phase could be considered potential secondary impacts of the Project. Walden Chase and the District presented un rebutted testimony that the future phase of the CR 210 PUD could be constructed so as not to adversely impact wetlands or water quality, and therefore it is presumed that no adverse secondary impacts will occur as a result of that phase. The potential secondary impact for the road-crossing in Wetland 8A would not result in adverse impacts to wetlands or water quality. The potential secondary impact for the road-crossing in Wetland 8A was considered as part of the other impacts to that wetland, and as part of the wetlands impact onsite are offset by the mitigation plan. Additionally, the values and functions of the wetland impacts are off-set by the mitigation plan.

Consequently, the criterion contained in Rule 40C-4.301(1)(d) has been satisfied.

54. Rule 40C-4.301(1)(e), Florida Administrative Code, requires that construction and operation of the System will not adversely affect the quality of receiving waters so as to violate state water quality standards. This criterion is presumed met if the System is designed and constructed in accordance with Chapter 40C-42, Florida Administrative Code; and Section 10.7.2, Applicant's Handbook. The parties have stipulated that this condition has been met for all portions of the System except: (i) the diversion from Quail Ridge into Wetland 8; and (ii) the discharge of storm water from back yards through vegetative natural buffers. With regard to the diversion from Quail Ridge, Walden Chase has agreed to refrain from diverting that discharge until water quality standards are met, assuring that the diversion will not violate these standards. With regard to the vegetative natural buffers, those buffers have been calculated to be large enough to provide the required level of storm water treatment. Consequently, the criterion contained in Rule 40C-4.301(1)(e) has been satisfied.

55. Rule 40C-4.301(1)(f), Florida Administrative Code, requires that construction and operation of the System will not cause adverse secondary impacts to the water resources. Water quality discharging from the System will presumptively meet water quality standards because the System is designed in accordance

with the provisions of Chapter 40C-42, Florida Administrative Code. No diversion of water from Quail Ridge to Wetland 8 will be allowed if water quality standards are not met. The vegetative natural buffers provide water quality treatment for water discharging into the wetlands. Therefore, there will be no adverse secondary impacts to the water quality of the water resource. Additionally, Walden Chase has provided reasonable assurance that there will be no adverse impact to groundwater resources by lining those storm water ponds necessary to prevent draw-down of wetlands, and by ensuring that water will continue to percolate into groundwater sources. There will be no adverse impact to aquifer recharge. Consequently, the criterion contained in Rule 40C-4.301(i)(f), Florida Administrative Code, is satisfied.

56. Compliance with Rules 40C-4.301(1)(g), (h), and (k), Florida Administrative Code, has been stipulated to by the parties.

57. Rule 40C-4.301(1)(i), Florida Administrative Code, requires that construction and operation of the System will be capable of being performed and of functioning properly. The System is a very simple, low-maintenance system that is expected to perform well. Consequently, the criterion contained in Rule 40C-4.301(1)(i) has been satisfied.

58. Rule 40C-4.301(1)(j), Florida Administrative Code, requires that construction and operation of the System will be

performed by an entity with the financial, legal, and administrative capability of ensuring that the activity will be undertaken in accordance with the terms of the permit. Walden Chase has designated the HOA as the operation and maintenance entity. In conformance with Section 7.1.2 of the Applicant's Handbook, Walden Chase has submitted Articles of Incorporation, draft revisions to those Articles of Incorporation, and Covenants and Restrictions which provide sufficient powers to the HOA to operate the System, establish rules and regulations, assess members for associated costs, contract for services, and exist in perpetuity. Walden Chase will also establish an escrow account in the amount of 110 percent of the cost of mitigation for the purpose of establishing the financial responsibility for the mitigation, monitoring, and corrective action for wetland mitigation work. Consequently, the criterion contained in Rule 40C-4.301(1)(j), Florida Administrative Code, is satisfied.

59. Rule 40C-4.301(2), Florida Administrative Code, and Section 12.2.4.5 of the Applicant's Handbook set forth special requirements that are to be applied if an applicant is unable to meet water quality standards because the ambient conditions in the receiving body of water are below water quality standards. As set forth above, Walden Chase has provided reasonable assurances that water quality standards will not be violated. Consequently, the criterion contained in Rule 40C-4.301(2), Florida Administrative Code, is satisfied.

60. Rule 40C-4.302(1)(a), Florida Administrative Code, requires that the District balance seven factors to determine whether construction and operation of the System will be contrary to the public interest. The public health, safety, and welfare factor is considered neutral because: (i) the System will not impact off-site properties; (ii) flood levels are controlled; and (iii) water flows are maintained. The factor related to conservation of fish and wildlife, including endangered or threatened species or their habitats is considered neutral because adverse impacts to those functions are offset by the mitigation plan. The factor related to erosion, navigation, the flow of water, and shoaling is considered neutral because an effective erosion control plan is in place, and no harmful effects are anticipated to navigation or the flow of water or as a result of shoaling. The factor related to fishing or recreational values and marine productivity in the vicinity of the activity is considered neutral because the mitigation would off-set any adverse impact. The factor related to significant historical and archaeological resources is considered neutral because none are anticipated to be on-site. The factor related to the current condition and relative functions being performed by areas affected by the proposed activity is considered neutral because the current condition and relative values of wetlands will be maintained. The System will be permanent, a condition which is considered neutral in balancing the public interest

because any adverse impacts are off-set by the mitigation plan. On balance, the Project is not contrary to the public interest. Consequently, the criterion contained in Rule 40C-4.302(1)(a), Florida Administrative Code is satisfied.

61. Rule 40C-4.302(1)(b), Florida Administrative Code, requires that construction and operation of the System will not cause unacceptable cumulative impacts. Such an analysis asks the question whether the proposed system, considered in conjunction with past, present and future activities in the drainage basin, would be the "straw that breaks the camel's back" with regard to water quality, wetland, and other surface water functions. The mitigation for wetlands impacts is being conducted on-site and adequately off-sets any adverse impacts. If all projects in the same drainage basin undertook similar mitigation for the same type of wetland impacts, there would be no adverse cumulative effect. As attested by Petitioner's expert, there will be no cumulative loss occurring on site. Consequently, the criterion contained in Rule 40C-4.302(1)(b), Florida Administrative Code, is satisfied.

62. Rule 40C-4.302(1)(c), Florida Administrative Code, establishes additional criteria for Projects located in adjacent or in close proximity to certain classified waters. The parties have stipulated that the Project is not so located. Consequently, this criterion has been satisfied.

63. Rule 40C-4.302(1)(d), Florida Administrative Code, requires certain conditions for projects which constitute vertical sea walls. The parties have stipulated that the Project does not contain vertical sea walls. Consequently, this criterion has been satisfied.

#### CONCLUSIONS OF LAW

64. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties hereto pursuant to Section 120.57, Florida Statutes (1998).

65. This is a de novo proceeding intended to formulate final agency action. Dept of Transp. v. J.W.C., Inc., 396 So. 2d 778, 786-87 (Fla. 1st DCA 1981). The burden of proof in a permitting hearing initially falls upon the applicant to prove entitlement by a preponderance of the evidence. J.W.C., 396 So. 2d at 788 (citing Balino v. Dept of Health & Rehabilitative Servs., 348 So. 2d 349 (Fla. 1st DCA 1977)). To carry the initial burden, the applicant must provide reasonable assurances through presentation of credited and credible evidence of entitlement to the permit. Id. at 789. The applicant's burden is one of reasonable assurances, not absolute guarantees. City of Sunrise v. Indian Trace Community Dev. Dist., 14 F.A.L.R. 866, 869 (South Florida Water Management Dist., January 16, 1992). The applicant's evidence will be accepted by the trier of fact when it is accepted by the agency and properly identified and authenticated by the agency as being accurate and reliable.

J.W.C., 396 So. 2d at 789. Likewise, even for contested issues, an applicant's un rebutted testimony will not be rejected unless it is shown to be inaccurate or unreliable. Id.; Merrill Stevens Dry Dock Co. v. G. & J. Inv., 506 So. 2d 30 (Fla. 3d DCA 1987).

66. Once the applicant has carried this burden through a preliminary showing of entitlement, the burden of presenting contrary evidence shifts to the Petitioner. J.W.C., 396 So. 2d at 789; Hoffert v. St. Joe Paper Co., 12 F.A.L.R. 4972, 4987 (Dept of Env'tl. Regulation, December 6, 1990). The Petitioner is required to present evidence of equivalent quality and prove the truth of the facts alleged in the petition. J.W.C., 396 So. 2d at 789, Hoffert, 12 F.A.L.R. at 4987. For applicants who have provided prima facie evidence of entitlement to the permit, the permit cannot be denied unless the Petitioner presents contrary evidence of equivalent value. J.W.C., 396 So. 2d at 789; Ward v. Okaloosa County, 11 F.A.L.R. 4217, 4236 (Dept of Env'tl. Regulation, June 29, 1989). The Petitioner's burden cannot be met by way of presentation of mere speculation of what "might" occur. Chipola Basin Protective Group, Inc. v. Florida Chapter Sierra Club, 11 F.A.L.R. 467, 480-81 (Dept of Env'tl. Regulation, December 29, 1988).

67. Walden Chase provided credible and credited evidence demonstrating entitlement to the environmental resource permit. The burden then shifted to Lee to present evidence of equivalent quality to that evidence. Lee has not carried this burden.



68. By a preponderance of the credible and accepted evidence, Walden Chase has given reasonable assurances that the criteria set forth in Rules 40C-4.301 and 40C-4.302, Florida Administrative Code, as well as relevant provisions of the Applicant's Handbook, have been complied with, and the permit should accordingly be issued.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is:

RECOMMENDED that a final order be entered granting the requested permit in accordance with the agency's proposed agency action.

DONE AND ENTERED this 1st day of September, 1999, in Tallahassee, Leon County, Florida.

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DON W. DAVIS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 1st day of September, 1999.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.