STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SC. READ, INC., A FLORIDA CORPORATION AND JENNIFER FINCH, AS PARENT, LEGAL GUARDIAN AND NEXT FRIEND OF CHRISTOPHER BRADY, A MINOR,	)	
Petitioners,	)	
and	)	
TUSCAWILLA HOME OWNERS' ASSOCIATION, INC.,	)	
Intervenor,	)	
vs.	)	Case No. 04-4304RP
SEMINOLE COUNTY SCHOOL BOARD,	)	
Respondent.	)	

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings by its duly-designated Administrative Law Judge, Jeff B. Clark, held a final hearing in this case on February 9, 10, 11, 12, and 13, 2005. On January 12 and 13, 2005, a hearing was held to determine whether Petitioners had standing to bring this rule challenge.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue presented for determination is whether the proposed high school attendance zone plan, Z2, is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On November 29, 2004, Petitioners, SC. Read, Inc., a Florida corporation, and Jennifer Finch, as parent, legal guardian and next friend of Christopher Brady, a minor, filed a petition with Respondent, Seminole County School Board (School

Board or Respondent), requesting a determination that the high school attendance plan proposed to be adopted by Respondent constituted an invalid exercise of delegated authority. On the same day, the petition was forwarded electronically to the Division of Administrative Hearings.

On December 1, 2004, the Chief Administrative Law Judge assigned the case to the undersigned Administrative Law Judge. On December 2, 2004, a Notice of Hearing was forwarded to the parties, scheduling a final hearing in the case for December 21 and 22, 2004. A case management conference was held by telephone on December 6, 2004. During that case management conference, the final hearing scheduled for December 21 and 22, 2004, was rescheduled as a hearing on Respondent's motion to dismiss based on Petitioners' alleged lack of standing, and the final hearing was rescheduled for January 12 through 14, 2005.

On December 13, 2004, Petitioners filed a Second Amended Petition/Request for Determination of Invalidity of Proposed Rule. In that petition, Petitioners alleged that the proposed rule was invalid for the following reasons:

a. The proposed rule is to be promulgated in violation of Florida Statutes.

b. The Florida Statutes require the School Board to utilize the average of October and February

attendance/enrollment numbers for rezoning data; the School Board used only October attendance/enrollment numbers.

c. The School Board utilized inflated attendance numbers by utilizing "geographic" attendance numbers rather than actual attendance/enrollment numbers alleged to be over-crowded or "undercrowded" (sic), and which were subject to the redistricting.

d. The School Board failed to coordinate rezoning and planning with comprehensive land development as required by applicable Florida Statutes.

e. The proposed rule is invalidly adopted, as the School Board failed to follow its promulgated rules for adopting policies and procedures, as those procedures relate to rezoning and redistricting of high school attendance zones.

f. Section J, Section III - Process Revision, of the School Board's policies on rezoning, requires that the School Board:

> a. Have "core" community committees develop and recommend rezoning plans for consideration by the SCHOOL BOARD;
> b. Have the core committee review and confirm governing parameters in the Board policy;
> c. Have the committee revise its alternative plans based on public input;
> d. Have the committee schedule a public work session with the School Board to review final plan recommendations and additional input; and

e. Have the Board select a core committee plan alternative for consideration.

g. The proposed plan, Z2, was created by the School Board's superintendent without being presented to the Core Committee for its consideration and review.

h. The proposed rezoning plan was presented to the School Board by the superintendent without public input.

i. The School Board failed to follow its promulgated rules in adopting or proposing to adopt Plan Z2 and in refusing to adopt one of the three plan alternatives which resulted from the process required by the promulgated policies and procedures of the School Board.

j. The School Board failed to obtain, provide to the Core Committee, or consider in proposed adoption of Plan Z2 any enrollment or relevant data related to affected feeder middle schools.

k. The School Board's rezoning initiative is a result of alleged overcrowding in Seminole County high schools.

l. The School Board's policies and procedures require that the School Board audit "School Board" (sic) attendance in affected schools where rezoning is a result of perceived "over-crowding."

m. The School Board failed to conduct an audit of attendance at all affected schools prior to adoption of the proposed rule.

n. The School Board failed to review or consider safety or traffic data relevant to busing of students created by Plan Z2 or any other suggested plan. The School Board failed to investigate or determine safety risks of transported children by failing to conduct transportation tests and studies of current traffic situations along proposed transportation routes and failed to consider future safety and transportation circumstances from planned road development and construction along the affected transportation path.

o. The School Board failed to conduct a financial impact statement to ascertain the cost of Plan Z2 busing on county transportation costs or the cost to affected parents resulting from the additional distance and costs of personal transportation to extracurricular activities.

p. The School Board failed to conduct an adequate economic impact statement considering the costs of the proposed rezoning rule and failed to present such impact statement to the affected public.

q. The proposed rule is arbitrary and/or capricious in its development and implementation.

r. The School Board failed to conduct an attendance audit to adequately verify attendance records within the affected schools and, therefore, does not have either a competent or substantial basis in fact supporting the necessity of the School Board to rezone Lake Brantley High School as a result of "over-crowding."

On December 13, 2004, Petitioners filed a motion to continue the final hearing, which was granted during a telephone hearing on December 15, 2004. A hearing on Petitioners' standing was scheduled for January 12 and 13, 2005, and the final hearing was rescheduled for February 9 through 11, 2005, if necessary. On January 12 and 13, 2005, a standing hearing was held. An Order was entered on February 2, 2005, determining that both Petitioners had standing.

On January 12, 2005, a Petition for Leave to Intervene was filed by Tuscawilla Home Owners' Association, Inc., a Florida corporation. On January 18, 2005, a telephone hearing was held on the Petition for Leave to Intervene and Respondent's Response to Petition for Leave to Intervene. By Order dated January 26, 2005, the Petition for Leave to Intervene was granted, subject to Intervenor demonstrating standing at the onset of the final hearing.

The final hearing took place as rescheduled on February 9, 10, and 11. The final hearing continued on Saturday, February 12, and was concluded on Sunday, February 13, 2005.

Initially, the standing of Intervenor was considered. Intervenor presented four witnesses: Moti Khemlani, Desiree Dannecker, William Rynerson, and Daniel Torres. Intervenor offered four exhibits that were relevant to the standing issue. These were admitted and marked Intervenor's Exhibits 1 through 4. Respondent presented Superintendent Bill Vogel as its witness and offered one exhibit, which was admitted as Respondent's Exhibit 31. An ore tenus Order was entered at the conclusion of the testimony and argument that Intervenor had standing to challenge the validity of the rule, but that Intervenor was limited to the issues raised by Petitioners.

Petitioners presented 16 witnesses: Pamela Levin, Jeffrey Ashton, Dianne Kramer, Sandy Robinson, Kate Landis, Co-Co Wu, Jeanne Morris, Larry Furlong, Lynne Smith, Gary Kreisler, Raymond Gaines, Darvin Booth, John Pavelchak, Superintendent Bill Vogel, Robert Moore, and Jennifer Finch. Petitioners offered 21 exhibits that were admitted into evidence and marked Petitioners' Exhibits 10 through 30. Respondent presented four witnesses: Dede Schaffner, Diane Bauer, Superintendent Bill Vogel, and Paul Hagerty. Respondent offered 13 exhibits that were received into evidence and marked Respondent's Exhibits 32

through 44. During the course of the testimony of witnesses called by Petitioners and Respondent, Intervenor attempted to introduce two additional exhibits; one was admitted into evidence and marked Intervenor's Exhibit 5, and the other was not admitted, but was proffered and marked accordingly.

The Transcript of the final hearing was filed with the Clerk of the Division of Administrative Hearings, on February 28, 2005. Petitioners and Intervenor filed Petitioners' and Intervenor's Joint Proposed Final Order; Respondent filed Respondent's Proposed Final Order. Both proposed orders were filed on March 7, 2005, as required. The undersigned Administrative Law Judge thoughtfully considered both proposed orders.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, the following findings of fact are made:

1. This rule challenge to a proposed rule is a result of proposed changes to school attendance zones in Seminole County, Florida, which would result in students attending different schools than they presently attend.

2. Hagerty High School (Hagerty) is a newly constructed Seminole County school. The opening of this new high school in August 2005 was the catalyst for the county-wide rezoning. Incidental to rezoning to accomplish populating the new high

school, adjustments in student populations were made in an attempt to create appropriately balanced racial and ethnic student populations and to alleviate school over-crowding.

3. Since 1970, schools in Seminole County have been subject to the jurisdiction of the Federal government regarding desegregation of the public schools. This continuing jurisdiction is the subject of "Consent Decrees" between the United States of America and Respondent in Case No. 70-152, ORL CIV (M.D. Fla. August 19, 1975). In particular, adjustments in school attendance zones have been the subject of the scrutiny of the Federal government. Several members of the current School Board were on the School Board when a rezoning plan was rejected by the Federal government.

4. Since early in the 1990's, the School Board and school administration have aggressively pursued the goal of a "unitary" school system, i.e., a system that has accomplished a myriad of goals which equate to a system wherein any student, regardless of race and ethnicity, has an equal opportunity for a quality education. Once the status of a "unitary school district" is accomplished, direct Federal supervision will cease. In 2002, preparing for the day when "unitary" status would be achieved, the School Board developed an extensive post-unitary status policy.

The Parties

5. Petitioner, Jennifer Finch, is the mother of Christopher Brady; she and Christopher reside in Seminole County, in the residential community known as Sable Point. Christopher is currently in the sixth grade. The Finch residence is in Cell 27A; a "cell" is a geographic area created by the Core Committee when it divided the county into numerically identified “cells” for purposes of considering rezoning alternatives. The Finch residence is currently zoned for Lake Brantley High School. As a result of the proposed rezoning, children (with the exception of "grandfathered in" children) residing in Cell 27A will be zoned to attend Lyman High School. Lake Brantley High School is "over-crowded." The facility is designed to accommodate 3,000 students; it has a current student population of approximately 3,650. Because of Lake Brantley High School's over-crowding, its principal regularly audits the student population, using unique and creative methods, in an effort to assure that each of the students attending Lake Brantley High School is zoned to attend Lake Brantley High School.

6. Petitioner, SC. Read, Inc., is a Florida corporation. Members of SC. Read, Inc., live in Cell 27A, and several of its members have children who are currently enrolled in the public schools of Seminole County.

7. Intervenor, Tuscawilla Home Owners' Association, Inc., is a Florida corporation. Part of Cell 10, and all of Cell 11, are within the area of subdivisions represented by Intervenor. Intervenor has 2,109 member households; 734 member households are in Cells 10 and 11. The homes in Cells 10 and 11 are single-family residences with many children who attend Seminole County public schools. The proposed rezoning contemplates students living in Cells 10 and 11, who are not specifically "grandfathered in," attending Oviedo High School instead of Winter Springs High School where they are currently zoned. One of the specific functions of Intervenor is to engage in efforts to secure educational opportunities and a stable educational environment for its members. It has historically worked with the schools to provide increased educational and extracurricular activities for its constituent members.

8. The School Board is the governmental entity responsible for the operation, supervision, and control of public schools in Seminole County, Florida, including establishing attendance zones, determining the educational capacity of schools and assigning students to schools.

The Rezoning Process

9. Rezoning is a thankless responsibility; whenever the lives of children are disrupted, parents are unhappy. Moving a

student from one school to another, places unanticipated demands on both parents and students.

10. In January 2000, the School Board adopted a policy entitled “Revision of School Attendance Zones” (hereinafter referred to as “Policy J”).

11. Section III of Policy J, entitled Process for Revision, at Step One provides, in relevant part:

> The Board establishes a Core Committee including, but not limited to district representatives . . . , affected school administrators, a representative from the affected School Advisory Councils, and a PTA representative from the affected schools to solicit public input, develop and evaluate alternative plans, and keep the local community informed of the progress . . . .

12. The role of the Core Committee in the rezoning process is advisory. Its responsibilities, as enumerated in Policy J, are to serve as a conduit for public communication, receive demographic data, create "cells" to be considered in attendance zone shifts, consider public input, and create rezoning plans to be considered by the School Board.

13. Policy J provides definitions of certain "words of art" used in the rezoning process, for example, "Over-enrolled/under-enrolled": an over-enrolled school has an enrollment that exceeds its permanent design capacity, and an under-enrolled school has an enrollment less than its design capacity -- both are identified on an annual basis, and "Design

capacity": the permanent capacity of a school as calculated by the Department of Education. Portables are not included in the design capacity of a school. The calculation variables include class size, classroom program types, and scheduling. Based on appropriate definitions and criteria, Lake Brantley High School is "over-enrolled" and Lyman High School is "under-enrolled."

14. In addition, Policy J specifies specific parameters that "current and proposed attendance zone plans will be measured against." The parameter having the highest priority according to this policy is: "[T]he plan is consistent with the district Consent Decrees as long as the decrees remain in effect."

15. In April 2004, in anticipation of the August 2005 opening of Hagerty, the rezoning process was initiated. Because rezoning was county-wide and affected numerous schools, the Core Committee consisted of 54 people. The following schedule was established:

Organizational Meeting	June 15	Core Committee will identify "cells"
Core Committee (CC)	August 19	CC will use cell data to develop plan options
Core Committee	Sept. 2	CC will choose plans for public input
Public Input	Sept. 20	Lyman High 7:00 PM
Public Input	Sept. 23	Winter Springs High 7:00 PM
Core Committee	Sept. 30	CC uses public input to develop final drafts
School Board Public Input	Oct. 26	Educational Support Center 6:00 PM
Final Adoption	Nov. 9	

16. This schedule outlined in paragraph 17, supra, was essentially followed. However, one meeting was cancelled and one shortened because of hurricanes. The Core Committee meetings, while they took place in public facilities, did not lend themselves to ongoing public input due to the nature of the work that was to be accomplished by the committee members. As would be expected, the committee members relied heavily on school administrators, Deputy Superintendent of Operations Dianne L. Kramer, in particular, who was the facilitator and contact between the committee and school administration, for information necessary for their consideration of student demographics, school populations, and other pertinent data for high schools and middle schools. Geographic enrollment numbers (all potential students living in a geographic area) were used, which is appropriate for rezoning planning. In addition to the information provided directly and electronically to the Core Committee members, which was more than adequate and conforming to Policy J requirements, the School Board made this information available to the interested public directly and electronically. Nothing in this record indicates that any Core Committee member was denied any needed information.

17. Policy J charges the Core Committee with the responsibility "to solicit public input, develop and evaluate alternative plans, and keep the local community informed of the

progress." This was accomplished. Because the Core Committee is composed of members of the Parent-Teacher Associations and School Advisory Councils from each affected school, parents were involved and made aware of the Core Committee activities. The Core Committee and the School Board meetings were advertised as required. There was a great deal of public awareness of the rezoning process. For example, it was estimated that 1,600 people attended the two scheduled "public input" sessions, and the School Board meeting and workshop where the plans were presented took more than seven hours.

18. At the conclusion of the Core Committee's consideration of many alternatives, some of which were submitted by the public, three rezoning plans were advanced by the committee. These plans were identified as W, Z, and Z1. Plan Z1 was a plan modified by Deputy Superintendent Kramer at the direction of the committee. These plans were then published on the School Board web-site and made available to the School Board members.

19. Policy J and the Core Committee's stated involvement and participation in the "process for revision," was substantially complied with and any deviation from Policy J or the Core Committee's purpose was insignificant and did not negatively affect the rezoning process.

20. On October 19, 2005, the School Board members took an informational bus trip during which they traveled proposed bus routes for the rezoning plan alternatives. The School Board members are generally familiar with routes to and from the various schools in Seminole County.

21. Seminole County, like most of Central Florida, has experienced dynamic growth in the past decades. This growth has burdened the infrastructure of all communities. As a result, not only are new schools needed, but roads must be constructed and improved. Traffic congestion, whether occasioned by too many vehicles, new construction or for whatever reason, is a daily challenge to central Floridians. Regardless of the particular school a student attends, buses transporting students will be a part of the traffic with which all motorists, including the bus drivers, must contend. Student transportation is a consideration in rezoning, but is not significant or controlling.

22. The School Board has a safety advisory committee whose membership includes police officials and traffic safety personnel from the various governmental entities in Seminole County. As safety or traffic issues arise, this committee provides recommendations regarding those issues. As the need arises, bus routes can be adjusted to accommodate optimum travel time and safety.

23. Subsequent to the publication of the Core Committee Plans W, Z, and Z1, several of the School Board members approached Superintendent Bill Vogel and indicated that they did not feel that any of the Core Committee plans would be acceptable to the Federal government. The School Board members are regularly informed of student demographics, school populations, over/under-crowding, and myriad other statistics which help them make informed judgments in their roles as School Board members. On each school day, every Seminole County school electronically provides the School Board administration with data, including attendance information, to assist in school governance. During the rezoning process, each School Board member was provided timely updates on the Core Committee's activities and had numerous contacts with the general public regarding concerns associated with rezoning.

24. Perhaps, the School Board members who had previously seen a rezoning plan rejected by the Federal government were overly concerned; perhaps, in order to achieve "unitary" status, they wanted to see racial and ethnic ratios adjusted to meet county averages; or perhaps, they were concerned about under/over-crowding. For whatever reason, the School Board members directed Superintendent Vogel to create additional rezoning plans which would address over-crowding at Lake Brantley High School and student enrollment at Lyman High School

that included disproportionately high percentages of students qualifying for free or reduced-price lunches.

25. As a result, Superintendent Vogel directed Deputy Superintendent Kramer to prepare modified plans addressing the deficiencies in Plans W, Z, and Z1: that enrollment at Lake Brantley High School had not been reduced in the plans presented by the Core Committee to the extent that it needed to be and that the percentage of students receiving free and reduced-price lunches at Lyman High School was too high in each of the plans presented by the Core Committee. In addition, Superintendent Vogel believed a greater number of the district's high schools could be closer in enrollment percentages to the county-wide averages for black students, Hispanic students, and students receiving free and reduced-price lunches. This planning direction is one of the fundamental considerations of Policy J.

26. Using essentially the same data and cells identified by the Core Committee, Deputy Superintendent Kramer developed Plans Z2 and Z3 in response to the Superintendent's directive. Plan Z2 incorporates the essential components of the plans advanced by the Core Committee with modification of the attendance zones for specific cells. The primary modification in Plan Z2 is moving Cell 27A from the Lake Brantley High School attendance zone to the Lyman High School attendance zone.

Cells 10 and 11, which are included in the Intervenor's area of interest, were recommended for transfer from Winter Springs High School in Plan Z as well as Plans Z1 and Z2. Plans Z1 and Z2 were forwarded to the School Board and the Core Committee members electronically upon development.

27. On October 26, 2004, after being appropriately advertised, all five rezoning plan alternatives were presented at an eight-hour public meeting of the School Board held at the School Board's administration building, at which time the public addressed the School Board on the subject rezoning plans. At the close of the public input, Superintendent Vogel recommended Plan Z2 to the School Board.

28. During the presentation in which Plan Z2 was recommended, Superintendent Vogel presented an assessment of each of the five rezoning plan alternatives and how each impacted each Seminole County high school, including the new high school, Hagerty. This assessment included the current student enrollment, with black students, Hispanic students, and students receiving free or reduced-price lunches noted by percentage, current numeric enrollment, and target numeric enrollment. The assessment specifically addressed the effect of each rezoning plan alternative on these critical areas and demonstrated how each plan alternative measured against each critical area. Superintendent Vogel's recommendation reflects

consideration of the criteria and process outlined in Policy J, as well as considerations fundamental to the basic objectives articulated by the School Board's commitment to becoming a "unified" school district.

29. Members of the School Board were not bound by Superintendent Vogel's assessment; each had a worksheet by which each individual School Board member could render his or her own assessment. In addition, several of the School Board members had over 14 years of Board experience being first elected in 1990. These experienced members had participated in previous rezonings and had a wealth of experience and knowledge of critical information needed to make informed decisions with or without Superintendent Vogel's assessment of the various plans. The totality of the evidence presented revealed that each of the School Board members was well-informed on all significant data needed to make an informed decision.

30. At the close of the October 26, 2004, meeting, the School Board unanimously voted to accept Superintendent Vogel's recommendation of Plan Z2 with certain modifications.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearing has jurisdiction over the parties to and the subject matter of this case, pursuant to Section 120.56, Florida Statutes (2004).

32. This administrative proceeding is a challenge to a proposed rule.

33. Subsections 120.56(1) and (2), Florida Statutes (2004), read in pertinent part: Challenges to rules.--

> (1) GENERAL PROCEDURES FOR CHALLENGING THE VALIDITY OF A RULE OR A PROPOSED RULE.--
>
> (a) Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.
>
> (b) The petition seeking an administrative determination must state with particularity the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity.
>
> * * *
>
> (2)(a) The petition shall state with particularity the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority. The petitioner has the burden of going forward. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised.

34. Petitioners and Intervenor have alleged that the "proposed rule," rezoning alternative Plan Z2," is an invalid exercise of delegated legislative authority.

35. Subsection 120.52(8), Florida Statutes (2004), reads:

> (8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement

> statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

36. Subsection 120.52(15), Florida Statutes (2004), reads:

> "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule.

37. The adoption of district-wide high school student attendance zones or district-wide revision of high school student attendance zones is rule-making. Polk v. School Board of Polk County, 373 So. 2d 960, 961 (Fla. 2d DCA 1979).

38. Respondent is the constitutional entity charged with the operation, control, and supervision of public schools in Seminole County, Florida. Art. IX, § 4, Fla. Const.

39. A school board is classified as an "Educational Unit." § 120.52(6), Fla. Stat. (2004).

40. A school board may adopt or revise student attendance zones under its general rule making authority as set forth in Section 1001.41, Florida Statutes (2004), and RHC and Associates, Inc. v. Hillsborough County School Board, Case

No. 02-3138RP, 25 FALR 157, 178 (Fla. Div. Adm. Hrgs. 2002) (stating that Florida Statutes Sections 230.03 (now Section 1001.32) and 230.22 (now Section 1001.41) delegated "broad statutory authority to the school boards to operate the local systems . . .").

41. Under Florida law, "district school boards may adopt rules to implement their general powers under s. 1001.41." § 120.81(1)(a), Fla. Stat. (2004).

42. A school board's "rule-making function involves the exercise of discretion, and absent a flagrant abuse of that discretion a court may not substitute its judgment for that of the agency." Polk v. School Board of Polk County, 373 So. 2d at 962.

43. Subsections 1001.41 (1), (2) and (6), Florida Statutes (2004), read as follows:

> The district school board, after considering recommendations submitted by the district school superintendent, shall exercise the following general powers:
>
> (1) Determine policies and programs consistent with state law and rule deemed necessary by it for the efficient operation and general improvement of the district school system.
>
> (2) Adopt rules pursuant to 120.536(1) and 120.54 to implement the provisions of law conferring duties upon it to supplement those prescribed by the State Board of Education and the Commissioner of Education.

* * *

(6) Assign students to school.

44. Subsections 1001.42(4)(a) and (22), Florida Statutes (2004), read as follows:

> The district school board, acting as a board, shall exercise all powers and perform all duties listed below:
>
> * * *
>
> (4) ESTABLISHMENT, ORGANIZATION, AND OPERATION OF SCHOOLS – Adopt and provide for the execution of plans for the establishment, organization, and operation of the schools of the district, including, but not limited to, the following:
>
> (a) Schools and enrollment plans. – Establish schools and adopt enrollment plans that may include school attendance areas and open enrollment provisions.
>
> * * *
>
> (22) ADOPT RULES. Adopt rule pursuant to ss. 120.536(1) and 120.54 to implement this section.

45. Respondent explicitly is authorized to establish school attendance as it has done in the instant case; therefore, it did not enlarge, modify, or contravene the specific provisions of those statutes when it developed attendance zones in order to assign students to the public schools in Seminole County.

46. A Superintendent of Public Schools is a constitutional officer, charged with the exclusive authority, duty, and

responsibility for making recommendations regarding policies to be adopted by the School Board. Art. IX, § 5, Fla. Const.; §§ 1001.49(3) and 1001.51, Fla. Stat. (2004).

47. The superintendent is charged with the authority, duty, and responsibility for making recommendations to the school board for the establishment, organization, and operation of schools, classes, and services, which include recommending revisions to high school attendance zones. §§ 1001.49(4) and 1001.51(6), Fla. Stat. (2004).

48. Rezoning Plan Z2 was submitted to the School Board for its consideration by Superintendent Vogel pursuant to his authority as set forth in Subsections 1001.49(3), 1001.49(4), and 1001.51(6), Florida Statutes (2004).

49. Respondent, like all school boards in Florida, may only act to accept or reject recommendations submitted by the superintendent. § 1001.41, Fla. Stat. (2004). In the instant case, Respondent unanimously accepted Superintendent Vogel's recommendation with modifications, in accordance with Florida law.

50. Subsection 120.56(2)(a), Florida Statutes (2004), charges Petitioners with providing the specific grounds for their objections to the proposed rule and the reasons they allege that the proposed rule is an invalid exercise of delegated legislative authority.

51. Petitioners' Second Amended Petition/Request for Determination of Invalidity of Proposed Rule alleges 18 specific grounds.

52. Petitioners alleged that the proposed rule is to be promulgated in violation of Florida Statutes. Although no specific statute is identified, the preponderance of the evidence is that Respondent followed applicable statutes in the promulgation of the proposed rule. Meetings of the School Board and the Core Committee were advertised, and the proposed plans were advertised and published.

53. Petitioners alleged that the Florida Statutes require the School Board to utilize the average of October and February attendance/enrollment numbers for rezoning data; the School Board used only October attendance/enrollment numbers. The evidence is that the use of the October and February attendance average is for specific activities other than rezoning. Respondent used geographic enrollment numbers (all potential students living in a geographic area) which are appropriate for rezoning planning. There is no statutory requirement directing the use of particular student enrollment figures for rezoning.

54. Petitioners alleged that the School Board utilized inflated attendance numbers by utilizing "geographic" attendance numbers rather than actual attendance/enrollment numbers alleged to be over-crowded or "undercrowded" (sic), and which were

subject to the redistricting. Although geographic attendance figures were used, this allegation is not supported by the evidence; as stated immediately above, the geographic enrollment numbers used were appropriate, as they represent all potential students in a particular geographic area.

55. Petitioners alleged that the School Board failed to coordinate rezoning and planning with comprehensive land development as required by applicable Florida Statutes. The evidence failed to show any such statutory requirement.

56. Petitioners alleged that the proposed rule is invalidly adopted as the School Board failed to follow its promulgated rules for adopting policies and procedures, as those procedures relate to rezoning and redistricting of high school attendance zones. This allegation is not supported by the evidence; as previously stated, Policy J was essentially followed and any deviation was harmless.

57. Petitioners alleged that Section J, Section III - Process Revision, of the School Board's policies on rezoning, requires that the School Board:

> a. Have "core" community committees develop and recommend rezoning plans for consideration by the SCHOOL BOARD;
> b. Have the core committee review and confirm governing parameters in the Board policy;
> c. Have the committee revise its alternative plans based on public input;

d. Have the committee schedule a public work session with the School Board to review final plan recommendations and additional input; and

e. Have the Board select a core committee plan alternative for consideration.

The evidence supports Respondent's contention that Policy J was followed as a practical matter; Policy J does not supercede the Florida Constitution and Florida Statutes and must be reconciled with those controlling directives. For example, the suggestion that the School Board must "select a core committee plan for consideration," must be tempered by the requirement that the superintendent must recommend a plan and that the School Board must consider the recommendation of the superintendent. In this case, the School Board members independently considered all three plans forwarded by the Core Committee, were not satisfied with the plans, and directed Superintendent Vogel to bring forward additional plans which addressed deficiencies noted by the School Board members in the Core Committee plans. As a practical matter, Policy J was followed because all the Core Committee plans were considered (and rejected), and Plan Z2, while not a plan of the Core Committee, utilizes the same attendance zones and is a "hybrid" of the Core Committee's efforts.

58. Petitioners alleged that the proposed plan, Z2, was created by the School Board's superintendent without being

presented to the Core Committee for its consideration and review. The evidence is that, after plan alternative Z2 was created, each member of the Core Committee was e-mailed the plan, that the plan was advertised, and that any Core Committee member could have participated in the October 26, 2004, public meeting. In addition, any Core Committee member could have contacted any or all of the School Board members regarding plan alternatives Z2 and Z3.

59. Petitioners alleged that the proposed rezoning plan was presented to the School Board by the superintendent without public input. The evidence is that plan alternative Z2 was advertised and was the subject of public consideration at the October 26, 2004, meeting which involved approximately seven hours of public input.

60. Petitioners alleged that the School Board failed to follow its promulgated rules in adopting or proposing to adopt Plan Z2 and in refusing to adopt one of the three plan alternatives which resulted from the process required by the promulgated policies and procedures of the School Board. As previously suggested, Policy J is not controlling; Florida law gives the superintendent and the School Board the implicit authority to consider other plans. Policy J was followed to the extent that all Core Committee plans were considered to such an extent by the School Board that the School Board members found

deficiencies in the Core Committee plans and directed modifications of the Core Committee plans, which resulted in Plan Z2.

61. Petitioners alleged that the School Board failed to obtain, provide to the Core Committee, or consider in proposed adoption of Plan Z2 any enrollment or relevant data related to affected feeder middle schools. This allegation is not supported by the evidence. The Core Committee members received relevant information on feeder middle schools.

62. Petitioners alleged that the School Board's rezoning initiative is a result of alleged overcrowding in Seminole County high schools. This allegation is not supported by the evidence. Clearly, this rezoning was occasioned by the necessity of populating a new high school, Hagerty.

63. Petitioners alleged that the School Board's policies and procedures require that the School Board audit "School Board" (sic) attendance in affected schools where rezoning is a result of perceived "over-crowding." The evidence shows that there is a constant flow of information regarding attendance. In addition, individual high school principals or their designees, constantly monitor student populations in an effort to assure that students attend the schools to which they are zoned. Rezoning in this case was not the result of "over-crowding," although the evidence clearly demonstrates that some

Seminole County high schools are "over-crowded." The evidence did not support the requirement for an audit because the rezoning was not occasioned by "over-crowding," but by the need to populate a new school.

64. Petitioners alleged that the School Board failed to conduct an audit of attendance at all affected schools prior to adoption of the proposed rule. The evidence does not disclose any requirement to "audit" enrollments during a rezoning which is a result of the opening of a new school. Notwithstanding the lack of a required audit, the evidence clearly shows that "auditing" is an on-going process within the Seminole County school system.

65. Petitioners alleged that the School Board failed to review or consider safety or traffic data relevant to busing of students created by Plan Z2 or any other suggested plan. The School Board failed to investigate or determine safety risks of transported children by failing to conduct transportation tests and studies of current traffic situations along proposed transportation routes and failed to consider future safety and transportation circumstances from planned road development and construction along the affected transportation path. There is no evidence that the School Board is required to do any of the activities suggested by this allegation. The evidence does show that the School Board considered various bus routes. No

evidence was presented regarding "safety risks." The School Board does have a standing committee (unrelated to rezoning) made up of transportation and safety professionals from Seminole County governmental entities providing on-going counsel to the School Board on transportation and safety matters.

66. Petitioners alleged that the School Board failed to conduct a financial impact statement to ascertain the cost of Plan Z2 busing on county transportation costs or the cost to affected parents resulting from the additional distance and costs of personal transportation to extracurricular activities. There is no evidence that there is a legal requirement for the School Board to undertake a financial impact statement as suggested by this allegation. In addition, there is no evidence that there is any reasonable way to estimate such variables as the "cost of personal transportation to extracurricular activities," or transportation costs when considering five different rezoning plans.

67. Petitioners alleged that the School Board failed to conduct an adequate economic impact statement considering the costs of the proposed rezoning rule and failed to present such impact statement to the affected public. There is no evidence that there is a legal requirement for the School Board to conduct and publish an economic impact statement as suggested by this allegation.

68. Petitioners alleged that the proposed rule is arbitrary and/or capricious in its development and implementation. To the contrary, the evidence shows that Plan Z2 was the deliberative result of the specific direction of the School Board members, who, based on extensive knowledge and understanding, determined that the Core Committee plans had specific shortcomings, in particular, the "over-crowding" at Lake Brantley High School, and a high percentage of free or reduced-price lunches at Lyman High School. Responsive to the direction of the School Board members, Superintendent Vogel, through his staff which utilized the "work-product" of the Core Committee, developed two additional plans. Superintendent Vogel's recommendation of a plan which specifically addresses noted deficiencies in the Core Committee plans and the School Board's unanimous acceptance of that plan are circumspect and prudent. Competent, substantial evidence supported the adoption of Plan Z2.

69. Petitioners alleged that the School Board failed to conduct an attendance audit to adequately verify attendance records within the affected schools and, therefore, does not have either a competent or substantial basis in fact supporting the necessity of the School Board to rezone Lake Brantley High School as a result of "over-crowding." The evidence clearly shows that Lake Brantley High School is "over-crowded." Plan Z2

best addresses the over-crowding at Lake Brantley High School. As previously mentioned, there is no requirement for an "audit." However, school officials audit on a continuous basis in an attempt to make certain that students attend the school to which they are assigned.

70. While Petitioners enumerated the foregoing specific grounds for their objections, these grounds are not supported by law or the evidence. As a result, Petitioners and Intervenor have failed to meet the initial burden of establishing a factual basis for their objections to Plan Z2. St. Johns River Management Dist. V. Consolidated Tomoka Land Co., 717 So. 2d 72, 76 (Fla. 5th DCA 1998).

71. Assuming, arguendo, Petitioners and Intervenor had met this initial burden and alleged a factual basis for invalidity, as previously stated, Respondent has demonstrated by a preponderance of the evidence that the proposed rule, Plan Z2 as modified, is a valid exercise of legislative authority delegated to it.

72. In paragraph 63 of the Second Amended Petition/Request for Determination of Invalidity of Proposed Rule, Petitioners specifically identify the subparagraphs of Subsection 120.52(8), Florida Statutes (2004), upon which the allegation that Respondent exceeded its delegated legislative authority is predicated: (1) that the School Board exceeded its grant of

rule making authority; (2) the rule contravenes, modifies, and/or enlarges the law implemented; and (3) is arbitrary and capricious and is not supported by competent or substantial evidence as to, including but not limited to, parameters such as student enrollment, safety, and economic cost and impact. The requirement that the rule "is not supported by competent substantial evidence" is no longer a statutory requirement. § 120.52(8), Fla. Stat. (2004).

73. The evidence demonstrates that the School Board had the authority to rezone schools and that the exercise of that authority did not contravene, modify or enlarge that authority.

74. Petitioners and Intervenor focused on their contention that Policy J was not followed explicitly, and, therefore, apparently, the result must be arbitrary and capricious. The evidence, however, demonstrates that the policy and the parameters of the policy were followed to the extent that adherence was possible and appropriate. Further, Policy J must be considered in conjunction with the Florida Constitution, controlling Florida law, and other policy of the School Board. The School Board's decision in adopting Plan Z2, as modified, appears to have harmonized these various considerations. To the extent reasonably possible, critical information was available and used. The numerous considerations of an undertaking of this magnitude were given appropriate attention. The testimony of

the School Board members shows that the School Board members found what they considered to be compelling reasons for rejecting Plans W, Z, and Z1, and there is substantial, competent evidence supporting the adoption of Plan Z2, which satisfied the School Board's concern with "over-crowding" and racial and ethnic imbalance. The entire process evidences a logical analysis of appropriate information and thoughtful consideration of solutions, resulting in the adoption of Plan Z2.

ORDER

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

ORDERED that Petitioners' Second Amended Petition/Request for Determination of Invalidity of Proposed Rule is dismissed, there being no evidence that the proposed rule is an invalid exercise of delegated legislative authority. Similarly, Intervenor's Petition for Leave to Intervene is dismissed.

DONE AND ORDERED this 17th day of March, 2005, in Tallahassee, Leon County, Florida.

JEFF B. CLARK
Administrative Law Judge
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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.