**FINAL ORDER NO. AC-06-008**

**STATE OF FLORIDA**
**ADMINISTRATION COMMISSION**

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DIVISION OF ADMINISTRATIVE HEARINGS

DON and PAMELA ASHLEY, SIERRA CLUB, INC., and PANHANDLE CITIZENS COALITION, INC.

Petitioners,

vs.

DEPARTMENT OF COMMUNITY AFFAIRS and FRANKLIN COUNTY,

Respondents,

and

ST. JOE COMPANY and EASTPOINT WATER AND SEWER DISTRICT,

Intervenors.

AC Case No. ACC-06-022
DOAH Case Nos. 05-2361GM
05-2730GM
DCA Docket No. 05-1ER-NOI-1901-(A)-(I)

**FINAL ORDER**

This cause came before the Governor and Cabinet, sitting as the Administration Commission ("Commission), on December 5, 2006, on the Recommended Order and Supplement to Recommended Order entered pursuant to section 163.3184, Florida Statutes (2005), in the Division of Administrative Hearings ("DOAH"), Case Nos. 05-2361GM and 05-2730GM. It involves a challenge pursuant to section 163.3184(9), Florida Statutes, to comprehensive plan amendments adopted by Franklin County ("County"), which the Department of Community Affairs ("Department") determined to be "in compliance," as defined in section

163.3184 (1)(b), Florida Statutes. The Administrative Law Judge (ALJ) entered a recommended order (RO), recommending that the Department enter a final order determining that the County's 2020 plan update, with St. James Island Future Land Use Map Amendments (FLUMAs), is not "in compliance."

## BACKGROUND

On April 5, 2005, Franklin County adopted Ordinance No. 2005-20. The Ordinance contained several evaluation and appraisal (EAR) based amendments to update, revise, and amend the County's plan, including amendments to the Future Land Use Element (FLUE) and Future Land Use Map (FLUM) to add four new land use categories on the area of St. James Island (SJI).

On May 26, 2005, the Department published its Notice of Intent (NOI) to find the amendments "in compliance." A formal administrative hearing was initiated by petitions filed by Don and Pamela Ashley, Sierra Club, Inc., and Panhandle Citizens Coalition, Inc. The St. Joe Company and Eastpoint Water and Sewer District were granted leave to intervene. Subsequently, Sierra Club and Panhandle Citizens Coalition filed a Notice of Voluntary Dismissal and did not participate further in the proceedings.

A final hearing was held on December 5 through 9, 2005, in Apalachicola, and February 27 through March 1, 2006, in Tallahassee. The ALJ issued a RO, concluding that: 1) without a capital improvements element (CIE), the 2020 Plan update was not "in compliance;" 2) the 2020 Plan's housing element objective (HEO) 2 and 3 and coastal high hazard area (CHHA) are inaccurate and inconsistent with compliance criteria; and 3) to be "in compliance," deleting

FLUEPs 11.12 and 11.13 should await a finding that the rest of the 2020 Plan is "in compliance."

The parties filed exceptions to the RO. In their exceptions, Petitioners requested that the Department remand to the ALJ for additional findings of fact and conclusions of law. On July 17, 2006, the Department issued an Order of Remand to the ALJ to address the potable water level of service standard and the demonstration of need for residential and non-residential land uses. The ALJ issued a Supplement to Recommended Order (SRO), which made supplemental findings and determined that no supplemental conclusion of law was required.

The Department, after reviewing the RO and SRO, as well as the exceptions thereto, determined that the amendments are not "in compliance," and forwarded the matter to the Administration Commission ("Commission") for final agency action.

## COMPLIANCE DETERMINATION

The Commission is authorized to take final agency action and determine whether the amendments to the County's Plan are "in compliance." *See* § 163.3184(9), Fla. Stat.

## RULINGS ON EXCEPTIONS

### JOINT EXCEPTIONS OF DEPARTMENT OF COMMUNITY AFFAIRS, FRANKLIN COUNTY AND INTERVENOR THE ST. JOE COMPANY (RESPONDENTS)

**Exception 1**

The Respondents take exception to Finding of Fact 2, page 8 of the RO, arguing that the last sentence incorrectly states that the St. James Island's boundaries are the Crooked River and the Ochlockonee River and Bay on the North, Bald Point State Park on the east, Alligator Harbor Aquatic Preserve and the Gulf of Mexico on the South and the City of Carabelle, on the *east.* The St. James Island is actually bounded on the west by the City of Carabelle. Petitioners have

no objection to the correction. Accordingly, Exception 1 is GRANTED, and the RO is modified accordingly.

**Exception 2**

The Respondents argue that Finding of Fact 72, page 47 of the RO, implies that less than 3,552 dwelling units were considered by the County at the adoption of the SJI FLUMAs. The ALJ, in Finding of Fact 72, was discussing the allegation that inconsistent data was used in violation of 9J-5. As an example, the ALJ noted that:

> The other [example] was that a traffic study in the 6/2004 transmittal package used a projection of 2,965 residential units in the SJI FLUMA while Franklin Planner testified to a different number 3,400.

Although the Department agrees that the figure of 2,965 units was taken from the traffic study included within the June 2004 transmittal package, it maintains that the figure was subsequently revised to 3,552 units in response to the Department's objections, recommendations, and comments (ORC) report. The Department requests a modification of Finding of Fact 72 because of the implication that less than 3,552 dwelling units were considered by the County at the adoption of the SJI FLUMA.

The specific issue addressed in Finding of Fact 72 with regard to the dwelling units is whether the lack of testimony of 2,965 units in the FLUMA and the 3,400 units testified to by the County planner constituted the use of inconsistent data in violation of 9J-5. The ALJ did not make a finding as to a specific number of units. Accordingly, Exception 2 is REJECTED.

**Exception 3**

The Respondents take exception to Findings of Fact 24 (last sentence), 29, 30-32, and conclusion of law 103, pertaining to the capital improvements element (CIE). The parties

acknowledged that the County did not adopt a separate capital improvements element as part of the updated plan, as required by section 163.3177(3), Florida Statutes. A CIE is a mandatory element. Accordingly, Exception 3 is REJECTED, and the Commission imposes remedial action as set forth below.

**Exception 4**

Respondents take exception to Finding of Fact 37 and conclusion of law 103. The parties do not dispute that the 473 units for low and moderate families and the 244 units for mobile homes reflect units *in addition to* those stated in the prior Plan. Accordingly, Exception 4 is REJECTED, and the Commission imposes remedial action as set forth below.

**Exception 5**

Respondents take exception to Findings of Fact 41 and 42 and conclusion of law 103, concerning the coastal high hazard area (CHHA). They argue that the County's depiction of the CHHA should be found in compliance because there is no significant difference in the Hurricane Evacuation Study Category 1 Evacuation Zone and Franklin County's Coastal High Hazard Area.

In 2006 the Florida Legislature defined the CHHA. Pursuant to section 163.3178(2)(h), Fla. Stat. (2006), the CHHA means "the area below the elevation of the category 1 storm surge line as established by Sea, Lake and Overland Surges from Hurricanes (SLOSH) computerized storm surge model." It also requires local governments to amend their future land use map and coastal management elements to appropriately depict the new CHHA no later than July 1, 2008. Section 163.3178 and Rule 9J-5.003(17) govern CHHA designations, as delineated by the applicable regional planning council. Because the County's CHHA designation in the CHHA map does not correspond to the evacuation zone for a category 1 hurricane as established in the

regional hurricane study, Exception 5 is REJECTED, and the Commission imposes remedial action as set forth below.

**JOINT EXCEPTIONS OF PAMELA AND DON ASHLEY (PETITIONERS)**

**Exception 1**

Petitioners take exception to the second sentence of Finding of Fact 4, arguing that the RO does not identify which North Florida Water Management District map shows a "confining layer in eastern Franklin County." Petitioners admit that there are two possible map sources and proceed to attack the expert testimony presented at the hearing.

The ALJ found that "[i]n unconfined karst hydrogeology, groundwater moves rapidly, but soil borings on SJI (Turkey Point) corroborate North Florida Water Management District maps which show a confining lawyer in eastern Franklin County varying in thickness from 15 to 20 feet." The ALJ noted that Petitioner had attempted to contradict the evidence presented by St. Joe and prove that SJI has karst hydrogeology primarily on evidence of core samples taken in eastern Franklin County. The ALJ concluded that the core samples did not overcome the finding of a confining layer in eastern Franklin County.

Petitioners do not dispute that at least two North Florida Water Management District maps were introduced. Likewise, Petitioners do not dispute that Dr. Garlanger presented expert testimony as to the existence of a confining layer of approximately 15 to 20 feet.

Dr. Garlanger testified, without objection, as an expert in hydrogeology of Florida, including aquifers and aquifer recharge and the effects of development on groundwater quality and quantity and the fate and transport of pollutants to groundwater. He established a confining layer in eastern Franklin County. (T. Pp. 772-776). Therefore, Finding of Fact 4 is supported by

competent, substantial evidence, and Exception 1 is REJECTED.

**Exception 2**

Petitioners take exception to the first sentence of Finding of Fact 5, arguing that it misstates their argument and evidence. This exception is further argument by the Petitioners to overcome the ALJ's finding of a confining layer in eastern Franklin County.

Petitioners offer neither an explanation as to how the sentence is a misstatement nor a legal basis justifying modification of the ALJ's finding. *See* § 120.57(1), Fla. Stat. They attempt to fashion an argument that the core sample data were merely "discussed," but proceed to attack the confining layer finding. As previously stated in Exception 1, competent, substantial evidence exists in the record to support the ALJ's finding. Accordingly, Exception 2 is REJECTED.

**Exception 3**

Petitioners take exception to Finding of Fact 19, and argue that the reference to capital improvements "elements" should be singular. Respondents agree, citing section 163.3177(3), Florida Statutes. Accordingly, Exception 3 is GRANTED, and the RO is modified accordingly.

**Exception 4**

Petitioners take exception to the last sentence of Finding of Fact 20, arguing that there is no competent substantial evidence that the Eastpoint Sprayfield FLUM was dropped. The record shows that the Eastpoint Sprayfield FLUMA was adopted. It was the Petitioners' challenge to the sprayfield that was not pursued at the final hearing or "dropped." Respondents have no objection to this clarification of the RO. Accordingly, Exception 4 is GRANTED, and Finding of Fact 20 is modified to indicate that the Eastpoint Sprayfield FLUM was adopted, and the challenge to that amendment was not pursued at the final hearing.

**Exception 5**

Petitioners argue that the last sentence of Finding of Fact 26 is a mislabeled conclusion of law and is inaccurate. Although Petitioners quote section 163.3177(3)(a), Florida Statutes, and Rule 9J-5.016(4), they fail to state a legal basis or point to any provision justifying the modification of the ALJ's finding. *See* § 120.57(k), Fla. Stat. Accordingly, Exception 5 is REJECTED.

**Exception 6**

Petitioners take exception to the second and last sentences of Finding of Fact 33. With regard to the second sentence, Petitioners argue that there is no competent substantial evidence that "most of the County's developable acreage is coastal" and that the phrase is vague. Petitioner then proceeded to challenge the development suitability analysis. However, Finding of Fact 33 does not concern development suitability. Rather, the ALJ was addressing the reason for combining the coastal and conservation elements, stating "in a small jurisdiction like Franklin County, with the vast majority of its land in public ownership, combination of [coastal and conservation] elements is appropriate because most of the County's developable acreage is coastal, and conservation measures must necessarily focus on coastal areas." This description of the County's lands is neither a mislabeled conclusion of law nor is it "vague."

Competent, substantial evidence exists in the record to support the ALJ's finding. (T. 1812 and EX 23). Dr. Beck testified as to the amount of public ownership in Franklin County and the consequence that most of the developable land occurred around the coast.

With regard to the last sentence, Petitioners admit that Respondents' experts testified that the 2020 Plan is "in compliance." Petitioners, however, argue that it is inconsistent to rely upon

a land use planner's opinion on a legal issue, while rejecting that opinion of the ultimate issue in the case. As recognized by the Petitioners, the ALJ rejected the "in compliance" testimony, as evidence by Conclusion of Law 103, finding the Plan not in compliance. Petitioners fail to cite any legal authority or basis for the Commission to modify Finding of Fact 33. Accordingly, Exception 6 is REJECTED.

**Exceptions 7 and 8**

Petitioners take exception to Findings of Fact 34 and 35, arguing that the ALJ erroneously concluded, as a matter of law, that the Plan meets the requirements in section 163.3177(5)(a), Florida Statutes, for a planning period covering at least the first five-year period after adoption. Section 163.7177(5)(a) provides that "[e]ach local government comprehensive plan must include at least two planning periods, one covering at least the first 5-year period occurring after the plan's adoption and one covering at least a 10-year period."

The comprehensive plan is made up of several elements and a future land use map all supported by, and consistent with, a five-year schedule of capital improvements necessary to maintain the adopted level of service standards for public facilities and demonstrating the coordination of land use decisions and availability of projected fiscal resources. The County's Plan does not include a five-year capital improvements schedule. Accordingly, Exceptions 7 and 8 are GRANTED, and the Commission imposes remedial action as set forth below.

**Exception 9**

Petitioners take exception to Finding of Fact 41, arguing that the last sentence is a conclusion of law and the citation to 9J-5 should cite to section 163.3178(2)(h), Florida Statutes, and Rule 9J-5.003(17), F.A.C. The ALJ's interpretation of 9J-5 constitutes a conclusion of law.

The Respondents do not object to the corrected citations. Accordingly, Exception 9 is GRANTED, and the RO is modified accordingly.

**Exceptions 10 and 12**

Petitioners take exception to Finding of Fact 44, arguing that the first sentence mischaracterizes the allegations in the Amended Petition. Petitioners fail to articulate any mischaracterization.

Petitioners also argue that the RO makes no findings of fact as to whether the Plan is based on an appropriate inventory and analysis of natural disaster planning concerns as required by Rule 9J-5.012. First, the ALJ applied rule 9J-5.012, making extensive findings, which are supported by substantial, competent evidence. The Commission may not reweigh the evidence or make supplemental findings of fact.

Petitioners also take exception to Finding of Fact 49, arguing that nothing in the record provides a basis for determining the number of persons requiring shelter. There is competent, substantial evidence in the record that the entirety of Franklin county evacuates for every storm event above a category 1 storm, and that there are Plan provisions committing the County to both coordinating with neighboring counties to ensure the availability of out-of-county sheltering and reassessing its out-of-county sheltering needs at least every five years. These provisions ensure that the needs of anticipated populations will be assessed throughout the planning horizon.

For these reasons, Exceptions 10 and 12 are REJECTED.

**Exceptions 11 and 13**

Petitioners take exception to Finding of Facts 48 and 54 because they mischaracterize Petitioner's argument. Petitioners offer no explanation or legal basis for this contention.

Petitioners further argue that there is no competent substantial evidence that the four SJI FLUMA considered the anticipated populations for 2010 and 2020. The record belies this contention. The County's population is forecast to increase from 9,829 persons to approximately 12,9612 persons in 2010 and 15,690 persons in 2020. Expert testimony demonstrates that with reasonable mitigation measures, current clearance times for category 1-5 hurricane evacuations could be maintained even with additional populations attributed to the four SJI FLUMAs.

Mr. Collins converted the additional units to the number of people evacuating. Because the bulk of the increase in residential development will occur as a result of the four SJI FLUMAs, the "countywide" analysis is subsumed by the analysis of the SJI FLUMA. Accordingly, Exceptions 11 and 13 are REJECTED.

**Exception 14**

Petitioners argue that the first sentence of Finding of Fact 56 mischaracterizes their argument, but offer no explanation or basis for the exception.

Petitioners further argue that there is nothing in the record that provides a basis for determining the number of persons with special needs in the hurricane vulnerability zone in 2010 or 2020. He further contends that Collins' testimony may not form the basis to determine the contents of the Comprehensive Emergency Management Plan (CEMP), but cites no legal authority for this argument. Because there is competent, substantial evidence in the record to support the ALJ's finding, Exception 14 is REJECTED.

**Exception 15**

Petitioners take exception to Finding of Fact 57, arguing that the last sentence is a conclusion of law and that Findings of Fact 44-56 do not support the conclusion that the 2020

Plan is consistent with Rule 9J-5.012(2)(e), F.A.C. Petitioners fail to articulate why the last sentence is a conclusion of law. Petitioners also fail to articulate why Findings of Fact 44-56 do not support the ALJ's determination regarding consistency with 9J-5.012(2)(e). Petitioners, however, do not contend that Findings of Fact 44-56 are not supported by competent, substantial evidence, or if treated as a conclusion of law, Petitioners fail to articulate why a finding of inconsistency with 9J-5.012 is as or more reasonable than that which was pronounced by the ALJ. Accordingly, Exception 15 is REJECTED.

**Exception 16**

Petitioners take exception to Finding of Fact 59, arguing that the Conservation Residential land use category does not contain an intensity standard because it does not contain a Floor-Area Ratio (FAR). Assuming as Petitioners contend that whether or not an intensity standard is required is a question of law, the ALJ's finding is legally correct.

With regard to Conservation Residential, the intensity standard is an impervious surface coverage limitation of no greater than 15% (including residential uses, accessory uses, and infrastructure). Impervious surface ratios are a type of intensity standard, like floor area ratios. Accordingly, Exception 16 is REJECTED.

**Exception 17**

Petitioners take exception to the last sentence of Finding of Fact 62. They base their exception on the ALJ's finding of fact that, even if the argument advanced by the Petitioners in their Proposed Recommended Order were correct, i.e., that the Conservation Residential and Rural Village categories are mixed-use categories, these categories are the kinds of "residential mixed use" categories under FLUE Policy 2.2 (e) to which the provisions of FLUE Policy 2.25

explicitly apply and therefore the requirements for a minimum mix of uses and percentage distribution of those have been met. However, the ALJ also recognized that there is competent, substantial evidence in the record supporting the Respondents position that Conservation Residential and Rural Village are not true mixed-use categories, so that Rule 9J-5.006(4)(c) does not apply. Accordingly, Exception 17 is REJECTED.

**Exception 18**

Petitioners take exception to the last sentence in Finding of Fact 64, arguing that it is a conclusion of law. Even if it is a conclusion of law, the ALJ correctly applied the fairly debatable standard to the underlying consistency determination. Moreover, Petitioners failed to provide an interpretation that is as or more reasonable than that of the ALJ. Accordingly, Exception 18 is REJECTED.

**Exception 19**

Petitioners take exception to Finding of Fact 65, arguing that an intensity standard is required. For the reasons stated in Exception 16, the Commission concludes that the ALJ's finding is supported by competent, substantial evidence.

There is competent, substantial evidence that Conservation Residential does include an intensity standard in the form of impervious surface coverage limitations. Thus, regardless of whether by negative implication free-standing on-residential uses intended to serve residents are allowed in Conservation Residential, there are standards guiding such uses if they are allowable and developed as "other similar or compatible uses." Conservation Residential and Rural Village are not true mixed-use developments, and the record is clear as to this point. Accordingly, it is fairly debatable that Conservation Residential includes intensity standards, and therefore

Exception 19 is REJECTED.

**Exception 20**

The same analysis applied to Exception 6 is applicable here. The ALJ concluded *on the evidence presented* that Petitioners failed to prove beyond a fair debate that the FLUMAs and related policies created mixed-use land use categories without the percentage distribution among the mix of uses, or other objective measurement, or without the density or intensity of each use. This conclusion was based on competent, substantial evidence, and accordingly Exception 20 is REJECTED.

**Exception 21**

Petitioners claim that the ALJ mischaracterized their Amended Petition and conclude that the ALJ should have considered the maximum density and intensity allowed by the Plan, instead of considering various "development scenarios." Petitioners fail to assert a legal basis for this exception and are inviting the Commission to reweigh the evidence, which it cannot do. Accordingly, Exception 21 is REJECTED.

**Exception 22**

Petitioners take exception to Finding of Fact 68, claiming that they did not apply the minimum common space requirements and FAR intensity standards incorrectly. Petitioners are improperly requesting that the Commission reweigh the evidence. Petitioners also argue that the 2020 Plan policies are required to set forth density and intensity standards. There is competent, substantial evidence in the record indicating that density and intensity standards are provided in the Plan. Therefore, Exception 22 is REJECTED.

**Exception 23**

Petitioners take exception to Finding of Fact 69, essentially for the same reasons they took exception to Finding of Fact 66 in Exception 20. For the same reason Exception 20 was rejected, Exception 23 is REJECTED.

**Exception 24**

Petitioners take exception to Finding of Fact 70 because the Plan deleted those provisions that required the adoption of a St. James Island overlay and associated policies. The County has discretion to adopt or remove Plan provisions that duplicate or exceed statutory and regulatory requirements. Most of the criteria in FLUE Policies 11.12 and 11.13 are Chapter 163 and Rule 9J-5 issues that were addressed. Adoption of an overlay for St. James Island is not a planning requirement in Chapter 163 or Rule 9J-5. Therefore, in this case, the Plan could be found "in compliance" without an adopted St. James Island overlay and associated policies. For these reasons, Exception 24 is REJECTED.

**Exception 25**

Petitioners take exception to Finding of Fact 71, arguing that the second sentence mischaracterizes their data-related claims and citation to the evidence bearing on the issue of the best available existing data as of the date of adoption. There is competent, substantial evidence, given the testimony of Dr. Beck and the record before the Commission that the Plan amendments were adopted by Franklin County using the best available data. Therefore, Exception 25 is REJECTED.

**Exception 26**

Petitioners take exception to Finding of Fact 72, raising multiple arguments. Petitioners argue that the first sentence mischaracterizes their data-related claims and citation to the evidence bearing on the issue of consistent data. As stated in the previous exception, there is competent, substantial evidence that the Plan update was based on the best available data and professionally acceptable analysis. Petitioners also argue that two wetlands data sets are referenced in the 2020 Plan materials transmitted to the Department, Future Land Use Cover and Classification System ("FLUCCS") and National Wetlands Inventory ("NWI"). At the hearing Petitioners argued that FLUCCS was the best available data and that the County's use of the NWI data for identification of wetlands within the SJI FLUMAs was an inconsistent use of data. The record reflects that the FLUCCS and NWI generally coincide with each other. The NWI was based on both soil survey and construction of aerial photography, as was the FLUCCS. However, the NWI includes several areas in freshwater areas of forests that are not necessarily in the FLUCCS, which is the major difference. (T. 1022-24) Therefore, there is competent, substantial evidence that the use of the NWI was not only appropriate, but actually is a more conservative indicator of the presence of wetlands (yielding more wetlands) than the FLUCCS.

Finally, Petitioners take exception to the projections of residential units in the four SJI FLUMAs. They argue that because of the lack of legally sufficient standards and guidelines for density and percentage of mixes, the record supports neither of the projected numbers for dwelling units in the RO. The lack of standards and guidelines for density and percentages has already been addressed. Likewise, the numbers for dwellings units in the SJI FLUMA amendments have also been addressed in this order.

For the preceding reasons, Exception 26 is REJECTED.

**Exception 27**

Petitioners take exception to Finding of Fact 72, arguing a mischaracterization of their claims, without a legal basis. Petitioners further argue that no county-wide suitability study was conducted in support of the updated FLUE. Exception 27 is REJECTED, because there is competent, substantial evidence that: 1) the Plan was analyzed and updated, considering FLUE Policies 11.12 (county-wide) and 11.13 (SJI); and 2) the amendments to the Plan were based on the best available data.

**Exception 28**

Petitioners take exception to Finding of Fact 75, arguing that the first sentence mischaracterizes their claims and citations to evidence, but offer no argument for rejection of the finding. In this exception, Petitioner essentially requests a reweighing of the evidence presented at the final hearing regarding soil suitability, which the Commission may not do. There is substantial, competent evidence in the record that the 2020 Plan's provisions operate to protect natural resources and environmentally sensitive areas by assigning low densities and clustering development on more suitable areas such as uplands. Further, to the extent that limited aspects of future development may be placed on soils with development limitations, such facilities can be engineered to compensate for the limitations. Because the ALJ's finding regarding soil suitability is supported by competent, substantial evidence, Exception 28 is REJECTED.

**Exception 29**

Petitioners take exception to Finding of Fact 76, arguing that the first sentence mischaracterizes their claims and citations to evidence concerning topography, but offer no argument for rejection of the finding. In this exception, Petitioner essentially requests a reweighing of the evidence presented at the final hearing regarding topography, which the Commission may not do. Moreover, there is substantial, competent evidence in the record addressing topographical suitability as one of the criteria in FLUE Policies 11.12 and 11.13. Accordingly, Exception 29 is REJECTED.

**Exception 30**

Petitioners take exception to Finding of Fact 78 because it refers to "development anticipated in each SJI FLUEMA," although Finding of Fact 85 states that no site plan exists. Respondents have no objection to this Exception. Accordingly, Exception 30 is GRANTED, and the RO shall be modified accordingly.

**Exception 31**

Petitioners take exception to Finding of Fact 79, arguing that there was no evidence presented that "strict SMS design criteria assure the collection and treatment of stormwater." This contention is belied by the transcript of the final hearing, wherein there is competent, substantial evidence to support the ALJ's finding. (T. 782-86, 798, 957-58, 968-70, 975, 978-79). Accordingly, Exception 31 is REJECTED.

**Exception 32**

Petitioners take exception to Finding of Fact 80, arguing lack of competent, substantial evidence for the finding that there is a confining layer between the surficial aquifer and the

underlying aquifer in Franklin County. The Commission rejected this same argument in Petitioners Exceptions 1 and 2. For the reasons stated therein, Exception 32 is REJECTED.

**Exception 33**

Petitioners take exception to Finding of Fact 81, arguing that there is no competent, substantial evidence "for this," but fail to identify or argue with which statement of fact they take issue. With regard to the incorporation of Exceptions to Findings of Fact 4 and 5 by reference, those exceptions have already been addressed in this Order. Exception 33 is, therefore, REJECTED.

**Exception 34**

Petitioners argue that the first sentence of Finding of Fact 82 mischaracterizes their wetland-related claims and citations to the evidence, but offer no legal basis or argument for rejection of the finding. Therefore, Exception 34 is REJECTED.

**Exception 35**

Petitioners take exception to Finding of Fact 83, raising the same argument as in Exception 34. Additionally, Petitioners claim that the County did not submit data or analysis regarding "high quality" and "low quality" wetlands. There is ample record evidence regarding the values, functions, and conditions of Franklin County Wetlands, based on reviews of NWI and FLUCCS data. (T. 1022-1036). Accordingly, Exception 35 is REJECTED.

**Exception 36**

Petitioners take exception to Finding of Fact 85, arguing the last sentence is a conclusion of law and "full of speculation and conjecture." The ALJ's finding is supported by substantial, competent evidence, given the extensive testimony regarding wetlands that was presented at the

final hearing. See Exception 35. Even if Petitioners are correct that the finding is a conclusion of law, the ALJ properly applied the fairly debatable standard. Accordingly, Exception 36 is REJECTED.

**Exception 37**

Petitioners take exception to Finding of Fact 86, arguing that the first sentence oversimplifies their floodplain related claims and citations to the evidence, but fail to articulate a legal basis for rejection of this finding. Petitioners also reargue suitability. The Commission has already determined that the ALJ's determination of suitability was supported by competent, substantial evidence. The Commission may not reweigh the evidence. Thus, Exception 37 is REJECTED.

**Exception 38**

Petitioners take exception to Finding of Fact 86, arguing that the first sentence oversimplifies their floodplain-related claims and citations to evidence bearing on the issue of whether the Ordinance is supported by data and analysis to insure that habitat suitability criteria are met when considered with other factors. Petitioners fail to state a clear legal basis to reject this finding. Moreover, the finding relating to habitat suitability is supported by competent, substantial evidence in the record. (T. 1212-83). Accordingly, Exception 38 is REJECTED.

**Exception 39**

Petitioners take exception to Finding of Fact 91, arguing that it is a mislabeled conclusion of law. Petitioners offer no legal basis for rejecting this finding. Even assuming that this is a conclusion of law, Petitioners fail to argue that it should be rejected or offer an interpretation that is as or more reasonable than that of the ALJ. Accordingly, Exception 39 is REJECTED.

**Exception 40**

Petitioners take exception to Finding of Fact 93, arguing that the second sentence is a conclusion of law and raises arguments as to 11.12 and 11.3 that admittedly were previously addressed in Exceptions to Findings of Fact 9 through 12. Because these exceptions have already been addressed, Exception 40 is also REJECTED.

**Exception 41**

Petitioners take exception to Finding of Fact 94, arguing that the first sentence is an oversimplification of Policy 11.12 and there is no finding that the overlay is either data or analysis. The record contains competent, substantial evidence that the overlay was transmitted as part of Franklin County's Technical Data and Analysis Report. (T. 1775) Accordingly, Exception 41 is REJECTED.

**Exception 42**

Petitioners take exception to Finding of Fact 95, raising substantially the same argument as raised in the previous exception. For the same reasons stated therein, Exception 42 is REJECTED.

**Exception 43**

Petitioners take exception to Conclusion of Law 97, arguing that the ALJ should have made findings regarding their standing for appellate purposes. The ALJ concluded that it would be unnecessary and premature to determine whether petitioners would be entitled to review of the final order.

Standing for appellate purposes under section 120.68(1), Florida Statutes, is narrower than standing for administrative proceedings under section 163.3184, Florida Statutes. Under

120.68(1) a party has to demonstrate that it was *adversely affected* by final agency action. This order constitutes "final agency action." Thus, the ALJ correctly determined that findings as to final judicial review would be premature. *See Melzer v. Dep't of Comm. Affairs*, 881 So. 2d 623 (Fla. 4th DCA 2004). Accordingly, Exception 43 is REJECTED.

**Exception 44**

Petitioners take exception to Conclusion of Law 101, but set forth no legal basis or argument for its rejection. Therefore, Exception 44 is REJECTED.

**Exception 45**

Petitioners take exception to Conclusion of Law 102. This exception resulted in the Department's July 17, 2006 Order of Remand to the ALJ to address, in a supplemental recommended order, the issues in paragraphs 9 and 19 of the Pre-Hearing Stipulation. Although Petitioners attempt to raise a legal issue with regard to the "fairly debatable" standard applied by the ALJ, they fail to state a clear legal basis or argue an interpretation that is as reasonable or more reasonable than the ALJ's. Accordingly, Petitioners' Exception 45 is REJECTED.

**Exception 46**

Petitioners take exception to Conclusion of Law 103. In this exception, Petitioners repeat arguments previously made in other exceptions, all of which have been addressed throughout this Order. Exception 46 is, therefore, REJECTED.

## PETITIONERS' EXCEPTIONS TO SUPPLEMENT TO RECOMMENDED ORDER

**Exception 1**

Petitioners' exception essentially reargues the evidence presented at the hearing and amounts to an inappropriate request to reweigh the evidence, which the Commission may not do.

Accordingly, Exception 1 is REJECTED.

**Exception 2**

Petitioners take exception to Finding of Fact 6 regarding Franklin County's industrial land use need through 2020, essentially disagreeing with the ALJ's calculations and offering alternative calculations and analysis of the evidence. The ALJ's findings are supported by competent, substantial evidence in the record. Therefore, Exception 2 is REJECTED.

**Exception 3**

Petitioners take exception to the first sentence of Finding of Fact 7, arguing that it is based on speculation. The record contains competent, substantial evidence to support this finding. (T. 1853, 1134-37, 1146-47, 503, 1144). Petitioners also argue that they were not put on notice that the supplemental recommended order would contain speculation about an analysis that was not placed at issue or the subject of testimony or evidence. The record below shows that Dr. Fishkind testified regarding structural change and Petitioners cross-examined him on this issue. Accordingly, Exception 3 is REJECTED.

**Exception 4**

Petitioners take exception to Finding of Fact 8, specifically to the finding that there was data and analysis that Franklin County is designated a rural area of critical economic concern. The Petitioners also maintain that a statute and executive order are neither data nor analysis. This finding is supported by competent, substantial evidence and Petitioners offer no basis as to why these are not data or analysis. Accordingly, Exception 4 is REJECTED.

**Exception 5**

Petitioners take exception to Finding of Fact 9. However, their argument is essentially a request for the Commission to reweigh the evidence. Therefore, Exception 5 is REJECTED.

**Exception 6**

Petitioners take exception to Finding of Fact 10. Their arguments have been previously rejected in this Order. Accordingly, Exception 6 is REJECTED.

**Exception 7**

Petitioners take exception to Finding of Fact 11 and incorporate by reference their exceptions to Finding of Facts 61 and 67-69 of the RO. For the same reasons those exceptions were rejected, Exception 7 is REJECTED.

**Exception 8**

Petitioners take exception to Finding of Fact 12, arguing initially that the first four sentences contain comments on the testimony offered. There is no legal basis cited to reject the finding on this basis.

Petitioners also argue that because FLUE Policy 2.2(o), the Carrabelle East Village FLUMA, allows a mix of residential and non-residential uses, standards for the percentage distribution among the mix of uses or other objective measurement of the distribution, density, and intensity of each use is required. There is competent, substantial evidence in the record that Carrabelle East Village FLUMA, which is a mixed-use land use category under the County's Plan, identifies the percentage distribution of the mix of uses by operation of FLUE Policy 2.23, which requires development to include a minimum of three of the listed land uses, none of which may comprise less than 10 % of the total land area of the development.

Petitioners' final argument is a request for the Commission to reweigh the evidence. This is not the Commission's role. Accordingly, Exception 8 is REJECTED.

## CONCLUSION

The Commission hereby adopts the ALJ's findings of fact and conclusions of law in the Recommended Order and Supplement to Recommended Order except as modified herein. Upon review of the entire record, the RO, the SRO, the Department's determination of not "in compliance," and after considering the parties' exceptions thereto, the Commission further determines Franklin County's 2020 Plan update, with SJI FLUMAs, is not "in compliance." Accordingly, the Commission directs the County to adopt remedial measures as specifically stated herein.

## REMEDIAL ACTION

### Capital Improvements Element

The County shall adopt a capital improvements element, including the adoption of the recreational facilities level of service standard and County landfill needs for the appropriate planning period time frames required by Chapter 163.

### Affordable Housing

The County shall amend the appropriate objectives in the Plan to include the total number of units needed as reflected in the data and analysis.

### Coastal High Hazard Area (CHHA)

The County shall adopt a CHHA map that comports with section 163.3178(2), Florida Statutes (2006).

**Two Planning Periods**

The County shall adopt a schedule of capital improvements in the capital improvements element, pursuant to section 163.3177(5)(a), Florida Statutes. Should the data and analysis indicate that there are no improvements needed to achieve and maintain adopted level of service standards during the corresponding periods, this should be reflected in the schedule.

## NOTICE OF RIGHTS

Any party to this Order has the right to seek Judicial review of the Final Order pursuant to section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Commission, Office of Policy and Budget, Executive Office of the Governor, The Capitol, Room 1801, Tallahassee, Florida 32399-0001; and by filing a copy of the Notice of Appeal, accompanied by the applicable filing fees, with the appropriate District Court of Appeal. Notice of Appeal must be filed within 30 days of the day this Order is filed with the Clerk of the Commission.

DONE AND ENTERED this 8th day of December, 2006.

Teresa B. Tinker
for MICHAEL P. HANSEN, Secretary
Administration Commission

FILED with the Clerk of the Administration Commission this 8th day of December, 2006.

Barbara Leighty
Clerk, Administration Commission

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was delivered to the following persons by United States Mail or hand delivery this 8th day of December, 2006.

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Chief Financial Officer
The Capitol
Tallahassee, Florida 32399

Honorable Charlie Crist
Attorney General
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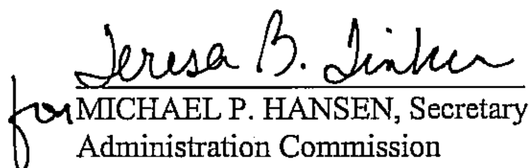

for MICHAEL P. HANSEN, Secretary
Administration Commission