STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DON AND PAMELA ASHLEY, SIERRA CLUB, INC., and PANHANDLE CITIZENS COALITION, INC.,	)	
Petitioners,	)	
vs.	)	Case Nos. 05-2361GM 05-2730GM
DEPARTMENT OF COMMUNITY AFFAIRS and FRANKLIN COUNTY,	)	
Respondents,	)	
and	)	
ST. JOE COMPANY and EASTPOINT WATER AND SEWER DISTRICT,	)	
Intervenors.	)	

RECOMMENDED ORDER

A final administrative hearing was held in this case on December 5 through 9, 2005, in Apalachicola and on February 27 through March 1, 2006, in Tallahassee, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether the amendments to the Franklin County (County) Comprehensive Plan (Plan) adopted by Ordinance No. 2005-20 (Amendments) on April 5, 2005, are "in compliance" as defined in Section 163.3184(1)(b), Florida Statutes.[1]

PRELIMINARY STATEMENT

On April 5, 2005, the County adopted Ordinance No. 2005-20, which contains several evaluation and appraisal report

(EAR)-based amendments to update, revise, and amend Franklin's Plan, including amendments to the Future Land Use Element (FLUE) and Map (FLUM) to add four new land use categories on areas of St. James Island (SJI). On May 26, 2005, the Department of Community Affairs (DCA) published a Notice of Intent to find these Amendments "in compliance."

Petitioners Don and Pamela Ashley (Ashleys) filed a Petition for Administrative Hearing (Petition), and Petitioners Sierra Club, Inc., and Panhandle Citizens Coalition, Inc. (Sierra and PCC) filed an Amended Petition for Administrative Hearing (Amended Petition). In July 2005, DCA referred the matters to the Division of Administrative Hearings (DOAH) where they were given DOAH Case Nos. 05-2361GM and 05-2730GM, respectively. The St. Joe Company (St. Joe) was granted leave to intervene in both cases, which were consolidated and set for a final hearing in Apalachicola on November 18 through 30, 2005. On August 23, 2005, Eastpoint Water and Sewer District (EWSD) was granted leave to intervene.

On September 13, 2005, the Ashleys moved for a continuance, which was granted, and the final hearing was rescheduled for December 5 through 9, 2005.

On November 10, 2005, the Ashleys moved to amend their Petition, which was partially opposed by DCA, the County, and

St. Joe on the ground that irrelevant allegations were included. On November 18, 2005, Attorney Burnaman appeared on behalf of Mrs. Ashley; Mr. Ashley continued to represent himself. On November 21, 2005, the Ashleys were granted leave to file their Amended Petition, and ruling on the partial opposition was reserved. In addition, the Ashleys' Request for Official Recognition of Florida Administrative Code Rule Chapter 9J-5[2] was granted.

On November 29, 2005, the parties filed a Pre-Hearing Stipulation. On December 1, 2005, Sierra and PCC filed a Notice of Voluntary Dismissal, and as result EWSD did not participate further in the case.

The final hearing was held on December 5 through 9, 2005, in Apalachicola and, when it could not be completed as scheduled, by agreement in Tallahassee on February 27 through March 1, 2006.

At the outset of the final hearing, additional requests by the Ashleys for official recognition were granted: the DOAH file in Case No. 04-3626GM and 9J-11 to the extent relevant; County Ordinance 2004-45, adopting a Tourist Development Plan and setting a referendum on a Tourist Development Tax; and the results of the referendum, which passed. In addition, Joint Exhibits 1-7 were admitted into evidence.

In their cases-in-chief, the Ashleys testified and called the following witnesses: Dr. Jeff Chanton, expert in hydrogeology and the evaluation of waste and nutrient systems in the karst geology of Florida; Dr. Robert J. Livingston, expert in aquatic ecology and pollution biology, with special expertise in the waters of Apalachicola Bay and Franklin County; Charles R. Gauthier, expert in comprehensive planning, Chapter 163, Florida Statutes, and 9J-5 (who was subpoenaed to testify); Franklin County Director of Administrative Services and Planner, Alan Pierce, an adverse party witness; Harrison T. Higgins; Manley Fuller; Dan Tonsmeire; and Joyce Estes. They also called Harley Means in rebuttal. Petitioners' Exhibits 11-12, 15, 20-21, 23-24, 27, 32-33, 36, 40-44, 50-51, 53, 56, 61, 64, 68-74, 80, 84, 86-87, 90-92, 98, 106, 109, 112-A, 114-116, 118-121, 124-125, 127-128, 133-134, 135-A, 138, and 143-155 were admitted into evidence.[3]

St. Joe called the following witnesses: Dr. John Garlanger, expert in the hydrogeology of Florida, including aquifers and aquifer recharge, the effects of development on groundwater quality and quantity, and the rate and transport of pollutants to groundwater; Dr. Harvey Harper, expert in the design and function of stormwater systems, stormwater treatment, the effects of stormwater pollutants on groundwater, the effects of stormwater pollutants on surface

waters and wetlands, and hydrology; Dr. Eldon C. Blancher, expert in water quality assessment in freshwater and estuarine systems, including pollutant loading, eutrophication modeling and mixing zone analysis, environmental impact assessment, including effects of development within watersheds on surface waters, biological assessments, including benthic and fish communities, wetlands delineation, and biology, stormwater impacts on surface waters, and environment toxicology; Raymond Greer, expert in urban and regional planning; Dr. Henry Fishkind, expert in economic analysis, forecasting, and needs analysis for comprehensive plans; Dr. John Wooding, expert in wildlife biology, ecology, and Florida black bears; James A. Sellen, expert in land use planning and community design; Robert R. Collins, expert in hurricane evacuation and emergency management planning; Dr. J. Thomas Beck, expert in comprehensive planning; and William A. Buzzett, St. Joe's Vice-President of Strategic Planning. Franklin County called Alan Pierce, expert in Franklin County planning and administration; and DCA called Valerie J. Hubbard, expert in comprehensive planning under Chapter 163, Part II, Florida Statutes, and its implementing Rules. Respondents' Exhibits 1-13, 17, 19, 21, 23-24, 27-28, 30–35, and 38–42 were admitted into evidence.

The Transcript was filed (in 13 volumes) on March 17, 2006. Proposed Recommended Orders (PROs) were filed April 6, 2006,[4] and have been considered and used in preparation of this Recommended Order.

FINDINGS OF FACT

A. Background

1. Franklin County (Franklin) is a coastal county located along the Gulf Coast of Florida's Panhandle. To the west is the Apalachicola River; it empties into a bay defined by barrier islands (St. Vincent, St. George, Dog), creating North America's second largest and most productive estuary. The eastern part of the County is St. James Island (SJI), separated from the mainland by the Crooked and Ochlockonee Rivers. Franklin's primary economic base is historically resource-based, including silviculture/timber, and since the 1930s primarily the fishing (seafood) industry. Tourism/retirement is an emerging industry especially on St. George Island, a noted resort destination. Retirees and vacationers come to enjoy the beautiful, pristine, relatively undeveloped, but still accessible waterfront stretches. Franklin's cities are Carrabelle, a 2.66 square mile fishing community about 50 percent developed and Apalachicola, a historic 4.81 square mile fishing community where about 90 percent of the land is still open for development. About 62-

70 percent of the County is federal or State land including the 1200-inmate State prison, Bald Point and St. George Island State Parks, Tate's Hell State Forest, and Apalachicola National Forest. FSU's Marine Lab is at Turkey Point. St. Joe owns over 55,000 acres in Franklin, mostly on SJI. Franklin has one of Florida's worst poverty rates.

2. SJI'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 Carrabelle on the east. SJI is mostly undeveloped except for: the Alligator Point area, including areas along County Road (CR) 370, areas along U.S. Highway (US) 98 including the unincorporated areas of St. Teresa and Lanark Village and adjacent to Carrabelle; and a few homes on Rio Vista Drive, just south of the Ochlockonee River. The natural systems on SJI are very diverse, and habitats range from xeric, well-drained uplands of pine and oak, to riverine swamps of cypress and hydric hardwoods, freshwater marshes, rivers and ponds, marine inter-tidal wetlands, bays, beaches, mudflats, seagrass meadows and open waters of the Gulf of Mexico. SJI is an ecologically significant and environmentally sensitive area that consistently scored in the 5 to 9 range (out of a high of 10) on the Florida Wildlife Commission's (FWC's) Integrated

Wildlife Habitat Ranking System (IWHRS). SJI supports up to 388 species of birds, mammals, amphibians and reptiles, including a number of State-listed species. Of particular note is the presence of the black bear on SJI, which is a State-listed threatened species with substantial strategic habitats identified by FWC on SJI, particularly in the McIntyre, Brandy Creek, Cow Creek and Bear Creek corridors. The Gulf Sturgeon, a federally-listed threatened species, occurs in the Ochlockonee and Crooked Rivers and is subject to an ongoing U.S. Fish and Wildlife Service Study to determine the importance of the habitat to spawning and distribution of this prehistoric fish.

3. SJI is surrounded by relatively clean (pristine) surface waters that have been designated as Outstanding Florida Waters (OFWs), including portions of Alligator Harbor and portions of the Ochlockonee Bay and River. A large part of Alligator Harbor is an Aquatic Preserve. Much of the Alligator Harbor and Ochlockonee Bay are designated as Class 2 Shellfish harvesting waters. SJI is home to Bald Point State Park, which provides a variety of wildlife habitat and recreational opportunities for nature observation and fishing. The eastern boundary of Tates Hell State Forest extends to Highway 319 on SJI and is separated from Bald Point State Park

by approximately 7 miles of agricultural land (silviculture) through the center of SJI.

4. Northeast Franklin, including SJI, is part of the Woodville Karst Plain, generally a sensitive karst area where some confining beds (especially in Wakulla County) are usually thin to absent, or breached. In unconfined karst hydrogeology, groundwater moves rapidly, but soil borings on SJI (Turkey Point) corroborate North Florida Water Management District maps which show a confining layer in eastern Franklin County varying in thickness from 15 to 20 feet. With such a confining layer, groundwater moves vertically at approximately 2 to 3 feet per year and laterally at approximately 100 feet per year in eastern Franklin County, including on SJI.

5. Petitioners attempted to contradict evidence presented by St. Joe and prove that SJI has karst hydrogeology primarily on evidence of core samples taken in eastern Franklin County. These core samples were not explained by any expert testimony and did not prove the absence of any clay confining layer in eastern Franklin County. While unlikely, there may be places in eastern Franklin County where the confining layer thins or is absent or breached.

6. In 1991 Franklin adopted a Plan for a long-term planning horizon of the year 2000. The Plan was found “in compliance,” at a time when approximately 27 percent of

Franklin was in public ownership and Franklin was designated an Area of Critical State Concern (ASCS) largely due to the importance of the Apalachicola Bay Area and its natural resources. See §§ 380.05 and 380.0555, Fla. Stat. The 1991 Plan designated a critical shoreline district and impervious surface area limitations within 150 feet of shorelines and wetlands, which not only were determined by Franklin and the Governor and Cabinet to effectively protect County wetlands but also won an award from DCA for Outstanding Environmental Protection. The Administration Commission removed Franklin's ACSC designation in 1992, but the Plan was not changed prior to 1995. After 1995, and within the year 2000 planning horizon, there was one policy addition--FLUE Policy 2.2(k)--and one policy amendment--to FLUE Policy 2.2(d).

7. In approximately 1997, Franklin prepared an EAR on the 1991 Plan. It did not state a need for, or anticipate any, changes to the FLUE or FLUM or much else in the Plan. However, Franklin did not timely adopt EAR-based amendments to the 1991 Plan, and the planning horizon of Franklin's Plan remained the year 2000.

8. Notwithstanding the 2000 planning horizon, there also were some amendments/additions/deletions to goals, objectives, and policies (GOPs) after 2000. Ordinance 2001-20 amended wetlands policies to reflect a change in State jurisdiction,

amended FLUEP 1.2(d) and 3.1, deleted FLUEP 3.2 and 3.3, amended Coastal/Conservation Element (C/CE) Policy 1.5, and added FLUEP 1.6-1.9. Ordinance 2003-1 amended C/CEOs 1, 2, 3, and 7 and added Capital Improvements Element (CIE) Policies 4.4-4.6.

9. Franklin also adopted two large-scale Plan amendments for mixed-use residential developments on SJI after 2000 without updating its Plan and planning horizon. In 2000 Franklin approved a FLUM amendment (FLUMA) from "Public Facilities" to "Mixed Use Residential" on 377.4 acres along US 98 at the intersection with Crooked River Road for a development of regional impact known as "St. James Bay." In 2002, Franklin transmitted a proposed FLUMA for 784 acres on Alligator Harbor from "Agriculture" to "Mixed-Use Residential," together with proposed FLUEP 11.11, for a St. Joe development called SummerCamp. During DCA's compliance review of the Summercamp amendments, the issue was raised whether the amendments should be found "in compliance" when Franklin's Plan was out-of-date and still planning for the year 2000. To resolve the situation, in 2003 Franklin adopted FLUEPs 11.12 and 11.13 along with the SummerCamp FLUMA. These amendments were found to be "in compliance."

10. FLUEP 11.12 required Franklin to conduct a county-wide assessment of eight key substantive areas, prepare an

overlay map and plan policies for SJI, and update its Plan not later than April 1, 2004, on the basis of the county-wide assessments, and to include requirements that all FLUMA on SJI be "consistent with the overlay map and policies."

11. The eight key substantive areas were:

> 1. Protection of natural resources including wetlands, floodplains, habitat for listed species, shorelines, sea grass beds, and economically valuable fishery resources, groundwater quality and estuarine water quality;
>
> 2. Protection of cultural heritage;
>
> 3. Promote economic development;
>
> 4. Promotion of emergency management including the delineation of the coastal high hazard area, maintaining or reducing hurricane evacuation clearance times, creating shelter space, directing population concentrations away from known or predicted coastal high hazard areas, and implementing appropriate parts of the Local Mitigation Strategy;
>
> 5. Adequate provision of public facilities and services including transportation, water supply, wastewater treatment, and facilities for access to water bodies;
>
> 6. Provision of affordable housing, where appropriate;
>
> 7. Inclusion of intensity standards; and
>
> 8. A list of allowable uses.

12. FLUEP 11.13 applied to any large-scale FLUMAs transmitted to DCA prior to the "effective date" of the Plan update pursuant to FLUEP 11.12, and required the FLUMA to "include an area-wide assessment covering the geographic area of the county where the FLUMA is located that addresses the same eight key substantive areas in FLUEP 11.12.

B. Transmittal and Adoption Process

13. The Plan Amendments at issue are the result of Franklin's endeavors to adopt EAR-based amendments and FLUMAs in accordance with FLUEPs 11.12 and 11.13.

14. Franklin initially contracted the Department of Urban and Regional Planning of the Florida State University (FSU) for: a review and evaluation of the current Plan and EAR to recommend plan changes; to have a consensus building process with at least six community workshops; to evaluate population and employment; to perform technical data assembly and analysis; to recommend updated GOPs; and to facilitate consensus on a planning overlay for SJI.

15. FSU produced updated data and analysis (D&A) in Geographic Information System (GIS) format and GOP revisions. FSU found no need for more residential land through 2020. FSU prepared a GIS-based "suitability analysis and county-wide map." Based upon St. Joe's concerns, FSU was told to delete it, and Franklin did not transmit the suitability

analysis/map. In lieu of the FSU's suitability analysis/map, a short narrative was submitted.

16. On June 16, 2004, Franklin filed a "transmittal package" with DCA: a "complete revised plan" with D&A and GOPs; a "supplementary notebook"; and 13 large FLUMs. Franklin proposed 8 FLUMAs: Eastpoint Sprayfield (45 acres); Breakaway Lodge/Marina (17.3 acres); Ft. Gadsden Creek (78.6 acres); Otter Slide Road (46.4 acres); McIntyre Rural Village (RV) (1,740 acres); Conservation Residential (ConRes) (6,532 acres); Carrabelle East Village (CEV) (201 acres); and Marina Village Center (MVC) (1,000 acres).

17. DCA found Franklin's transmittal insufficient per 9J-11.009(1). On July 13, 2004, Franklin transmitted St. Joe's "site suitability for Proposed St. James Island FLUM amendments"; "traffic study"; "historical data on City of McIntyre"; "St. James Island Forestry Type Map"; and "Archaeological Reconnaissance of the St. James Island/Ochlockonee River Tract."

18. On October 15, 2004, DCA issued an ORC per 9J-11.010. The ORC made numerous (49) objections, including, but not limited to: the SJI overlay/policies, FLUMAs, wetlands, population projections/need, potable water, Coastal High Hazard Area (CHHA), land use categories/density and intensity standards, affordable housing, water supply planning, water

dependent uses, no capital improvements schedule (CIS), and internal inconsistency.

19. DCA coordinated with Franklin and St. Joe on the ORC response (ORCR), which was transmitted to DCA along with Ordinance 2005-20, adopted April 5, 2005, consisting of amended GOPs and FLUM series. The Ordinance replaced the 1991 Plan, as previously amended, and repealed all prior ordinances to the extent of conflict. The Ordinance adopted seven elements--FLUE; traffic circulation (TCE); housing (HE); infrastructure (IE); C/CE; recreation and open space (ROSE); and intergovernmental coordination (ICE)--and a FLUM series. FLUEPs 11.12 and 11.13 were deleted. There was no Capital Improvements Elements (CIE).

20. In its new Plan, Franklin adopted five FLUMAs -- the Eastpoint Sprayfield and St. Joe's RV, ConRes, CEV, and MVC. The Eastpoint Sprayfield was dropped during DCA's compliance review, leaving the four St. Joe FLUMAs.

21. During DCA's compliance review, many ORC objections were considered unresolved. Some issues were resolved on further review, but others remained, as reflected in a May 6, 2005, staff memo opining that the Plan Amendments were not "in compliance." This memo was written by DCA planners Susan Poplin and Jeff Bielling, who had extensively reviewed the County's transmittal and adoption packages. It was approved

by their immediate supervisor, Charles Gauthier, a certified planner with extensive experience with Franklin, who left DCA not long after approving the memo. The memo was then presented to Valerie Hubbard, DCA's Director of the Division of Community Planning (and Gauthier's immediate supervisor), who considered the issues presented in the memo, along with additional information presented by the County, ultimately disagreed with the planners, and issued an "in compliance" Notice of Intent.

C. No CIE

22. A CIE is a mandatory element. See § 163.3177(3)(a); 9J-5.005(1)(c)2, 9J-5.0055(1)(b) and (2); 9J-5.016. The 1991 Plan had a CIE that was amended by ORD 2003-1 (CIEPs 4.4-4.6 were added). Franklin transmitted a proposed CIE to: change the "initial planning period" in CIEO 3.4 to 2004-2009; delete CIEPs 3.3 and 3.4; make a minor change to CIEP 2.1; and change CIEP 5.4 (LOS for potable water, principal arterial roads, and recreational facilities). DCA objected to the lack of a five-year CIS, which also is mandatory. In the ORCR, Franklin explained the absence of the CIS by maintaining that there were no capital improvements needed for the next five years. The adopted 2020 Plan has no CIS, which DCA found "in compliance" based on Franklin's explanation. However, it also has no CIE, which was not obvious or apparent to DCA in its

compliance review because the CIE was not submitted in strike-through/underline format, as required by 9J-11. In addition, several adopted elements cross-reference to the CIE.

23. Franklin contends that it did not adopt a CIE because there were no capital improvements to be shown on a five-year CIS and because of its understanding that many items, including building or paving roads, are not capital improvements. However, it appears Franklin may have inadvertently neglected to adopt the CIE as transmitted. The deletion was not discussed at the adoption hearing.

24. When the deletion of the CIE came to the attention of DCA after the May 6, 2005, staff memo, DCA chose to accept Franklin's explanations as to why the CIE was deleted and why the 2020 Plan was "in compliance" without a CIE. But the evidence does not support these explanations.

25. Notwithstanding Franklin's explanations, Franklin Ordinance 04-45 authorized a referendum on a local tourist development tax, which was approved by the voters on November 2, 2004, to provide for development of a beach park and for other recreational facility infrastructure. Franklin estimated $718,896 in tax receipts for FY 2005-06.

26. The other parties contend that the expenditure of these capital improvement funds need not be addressed in the CIS or CIE in part because they are for the benefit of

tourists, not residents. But it is clear from the evidence that both will benefit, and there does not appear to be any exception for capital improvements designed to benefit both. The other parties also point out, correctly, that only capital improvements needed to meet concurrency requirements need to be on the CIS.

27. Besides the possible use of tourist development funds, Franklin's 2005-06 $34,036,313 annual budget includes a number of other items that appear to be capital improvement items: "capital outlay - land $100,000; capital outlay - imp. other than buildings $300,000; walk path Tillie Miller Park $10,000; Carrabelle Rec Park/FRDAP grant $200,000; Rec. Fac. Improvements other than buildings $25,000; Bald Pt. land $50,000; Bald Pt. improvements other than buildings $495,697; road paving-improvements $1,200,000; paving project-CR 30 $1,951,379; boating-improvements other than buildings $94,877; Lanark Village Drainage Improvement $92,059; Airport Fund capital outlay- improvements other than buildings $1,407,069." In addition, Franklin's CR 370 along Alligator Point has repeatedly washed out from storms, and current estimated repair costs are $2.1 million, with $1 million budgeted and FEMA matching funds anticipated.

28. The other parties presented the direct testimony of several witnesses that none of the expenditures Franklin is

planning to make in the next few years, even if capital expenditures, need to be on a CIS. Petitioners presented no direct testimony to the contrary. Based on the evidence, it was not proven that beyond fair debate that any of these expenditures were required to be included in a CIS.

29. CIE requirements include GOPs. 9J-5.016(3). Franklin Planner Pierce and St. Joe witness Beck testified that CIE requirements can be found in other elements of the 2020 Plan. However, the 2020 Plan does not contain an explanation of any such combination of elements as required by 9J-5.005(1)(b). In addition, based upon the evidence, while some CIE requirements can be found in other elements, it is beyond fair debate that the other elements of the 2020 Plan do not contain all of the required CIE GOPs.

30. One CIE requirement is to have a policy setting public facilities level of service standards (LOSS), including one for recreational facilities. See § 163.3177(3)(a)3; 9J-5.016(3)(c)4. See also 9J-5.0055(1)(b) and (2). The 2020 Plan lacks LOSS for recreational facilities. ROSEP 1.2 purports to adopt LOSS "as provided in Exhibit 7-2 of this element," but Franklin did not adopt Exhibit 7-2. See 9J-5.005(2)(g). Franklin's transmittal D&A proposed updated recreational LOSS using population forecasts for "projected need for 2010." Exhibit 7-2 in Franklin's June 14, 2004,

transmittal was based on those 2010 forecasts. There was no projection of need for either five years or to 2020. Franklin's transmittal D&A showed a deficit for bike trails, fresh/saltwater fishing, football/soccer, tennis, and swimming pools through 2010. Franklin Planner Pierce testified Exhibit 7-2 was not adopted because it was inaccurate. He testified that it was based on total population, including incorporated areas, and failed to count some swimming pools and tennis courts. But he did not supply the corrected information, and accurate D&A was not submitted for review. Pierce admitted that no data in evidence showed that Franklin can meet recreational needs through 2020, or that current recreational LOSS are being met.

31. Franklin operates Class 1 and Class 3 landfills located on the east side of CR 65, north of US 98. D&A indicated that there are two-three more years of Class 1 landfill capacity at 2004 collection levels, with household trash being trucked to Bay County under a contract valid until 2007. The Class 3 landfill takes construction debris for a fee. Franklin did not assess Class 1 disposal requirements after the 2007 contract expiration, or Class 3 disposal requirements, and the 2020 Plan is not supported by an assessment of future solid waste disposal requirements through either a five-year or 2020 time frame based upon the projected

population. Franklin may need to expand either, or both, of its landfills during the 2010 and 2020 time frames, but there is no discussion of such improvements.

32. DCA, Franklin, and St. Joe concede that Franklin's 2020 Plan without a CIE is deficient, but they characterize the deficiency as merely "technical" and "inconsequential" because: "there are no deficiencies for which to plan, and many Plan provisions ensure capital improvements implementation, monitoring and evaluation, and concurrency management"; and Franklin "has demonstrated that it can adopt a CIS and CIE in the future, if needed." But it is beyond fair debate that Franklin's 2020 Plan, as it stands now without a CIE, is not in compliance because it is inconsistent with Section 163.3177(3)(a), 9J-5.0055(1)(b) and (2), and 9J-5.016(3)(c)4.

D. Combination Coastal and Conservation Elements

33. Petitioners also contend that the 2020 Plan combines the coastal and conservation elements but does not contain an explanation of such combination, as required by 9J-5.005(1)(b). In a small jurisdiction like Franklin County, with the vast majority of its land in public ownership, combination of these two elements is appropriate because most of the County’s developable acreage is coastal, and conservation measures must necessarily focus on coastal areas.

This combination was previously found in compliance in 1991. No expert witness for Petitioners testified that the combination of these elements is inconsistent with 9J-5.005(1)(b), or that the 2020 Plan is not "in compliance" as a result. To the contrary, several experts for the other parties testified that the 2020 Plan is "in compliance."

E. Two Planning Periods/Timeframes

34. Petitioners contend that it is beyond fair debate that the 2020 Plan does not include a planning period covering at least the first five-year period after adoption, as required by Section 163.3177(5)(a). But the Plan contains a number of objectives and policies in the HE, IE, and C/CE that establish a five-year planning period for achieving certain objectives. See HEO 4; IEO 2.16; C/CEOs 5.9, 8.3, 9, 14.9, 15, 15.9, 18, and 21.

35. Petitioners seem to contend that the 2020 Plan fails to include the two required time frames--one at least five years and one at least ten years--because Franklin's analyses included disparate time frames and lacked a uniform 2020 analysis. But there does not appear to be a prohibition against analyzing more time frames than just the long-term planning horizon. It was not proven beyond fair debate that the 2020 Plan does not cover at least two planning periods,

one for at least the first five years and another for at least ten years after adoption.

F. Affordable Housing

36. Petitioners contend: "To the extent that FLUE Policies 11.12 and 11.13 required an assessment of affordable housing on SJI, there is no data or analysis to support a finding that an affordable housing assessment was prepared." Pam Ashley PRO, ¶ 42. But FLUEPs 11.12 and 11.13 were deleted by the Plan amendments at issue. Besides, the county-wide assessment would include the area of SJI.

37. Adopted HEO 2 provides: "There will be sites available for 473 units of housing for low and moderate families by the year 2020 ~~2000~~." (Underlining/strikethrough in original.) As stated, the number in the objective clearly is incorrect. Actually, D&A showed a need for 473 units in addition to the 1803 units identified in the 1991 Plan. Adopted HEO 3 makes the same kind of error for mobile homes: "There will be adequate sites for 244 mobile homes in the County by the year 2020 ~~2000~~." (Underlining/strikethrough in original.) It is beyond fair debate that these objectives, as stated, are not supported by D&A. The plan should be corrected to comport with D&A.

G. CHHA Designation

38. Section 163.3178(2)(h) defines the CHHA to mean the Category (Cat) 1 hurricane evacuation zone. See also Rule 9J-5.003(17) (defining the CHHA to mean the evacuation zone for a Cat 1 hurricane as established in the applicable regional hurricane study).

39. The Apalachee Regional Transportation Analysis Final Report is the most recent applicable regional hurricane evacuation study (HES) per 9J-5.003(17). According to the HES, Franklin's Cat 1 evacuation zone boundary "would roughly coincide with US 98 throughout the County. The HES map of Franklin's evacuation zone, which is in GIS format, depicts one minor exception south of US 98, east of CR 30A (which is west of Apalachicola), and another southeast of US 98 (and southwest of CR 370) in the middle of SJI. Both exceptions are inland--i.e., they do not extend seaward to the coast (St. Vincent Sound in the case of the first exception, and Alligator Harbor in the case of the second exception).

40. The adopted FLUM series includes a CHHA map that notes:

"The Coastal High Hazard Area shall be designated . . . as all areas seaward of Highway 98 or County Road 30A with the exception of areas depicted as 1 and 2 on this map. The Coastal High Hazard Area for unincorporated Franklin County is

based on the Apalachee Regional Transportation Analysis Final Report." The Areas 1 and 2 exceptions on Franklin's CHHA map purport to be the same two exceptions in the HES map. But unlike the HES map, the two exceptions depicted on Franklin's CHHA map extend all the way to the coast. In addition, they are larger than the exceptions depicted on the HES map, with Franklin's Area 2 exception on SJI clearly much larger.

41. DCA, Franklin, and St. Joe concede that Franklin's CHHA map does not correspond to the HES Cat 1 evacuation zone for Franklin. However, they characterize the differences as "slight" and attributable to the "representational nature" of the HES map. To the contrary, the HES map, which is in GIS format, fixes precise boundaries that clearly are not matched by Franklin's map in the cases of Areas 1 and 2. Besides, 9J-5 does not permit Franklin's CHHA to take liberties with the applicable regional study's evacuation zone based on alleged generalized depictions or representations in the regional map.

42. A witness for St. Joe testified that evacuation zones are related to clearly identifiable landmarks and physical features, like US 98, for easier and clearer communication to the public. But that clearly is not always the case, as can be seen from the various HES maps. In any event, there was no evidence that such considerations could justify Franklin's departure from the HES Cat 1 evacuation

zone boundaries in this case, and such an argument is not made in the Joint PRO filed by DCA, Franklin, and St. Joe. It is beyond fair debate that the 2020 Plan's CHHA designation in the CHHA map does not correspond to the evacuation zone for a Cat 1 hurricane as established in the applicable regional hurricane study, as required by Section 163.3178(2)(h) and 9J-5.003(17).

43. Petitioners also point out that HES was based, in part, upon the National Hurricane Center's Sea, Lake, and Overland Surges from Hurricanes (SLOSH) model in the 1994 Florida Hurricane Surge Atlas-Franklin County, and that HES included areas of Wakulla County north of SJI in the SLOSH Cat 1 area in Wakulla's Cat 1 evacuation zones, but excluded such areas south of the Ochlockonee Bay and River from Franklin's Cat 1 evacuation zone. They seem to contend that the HES Cat 1 evacuation zone for Franklin is not as large as it should be. But the evidence implied that the difference in treatment of these areas by HES was the result of lobbying by Wakulla's director of emergency management for their inclusion. In any event, as stated, Section 163.3178(2)(h) and 9J-5.003(17) accept the Cat 1 evacuation zone delineated by the applicable regional study, regardless of possible error.

H. Inventory/Analysis/GOP for Natural Disaster Planning

44. Petitioners question the adequacy of Franklin's inventory/analysis and GOPs for natural disaster planning under 9J-5.012. Besides citing some D&A, Petitioners make several major arguments: first, the CHHA may not plan to mitigate flooding damage; second, Franklin did not plan for projected populations; third, the 2020 Plan makes no provision for capital improvements to build shelters despite adding C/CEPs 14.8 and 14.12 regarding shelters inside and outside of county; fourth, parts of the evacuation routes out of Franklin are subject to storm surge and flooding; fifth, Franklin's planning ends at the county line; and, sixth, special needs persons were not considered.

45. 9J-5.012(2)(e)1. provides:

> (e) The following natural disaster planning concerns shall be inventoried or analyzed:
>
> 1. Hurricane evacuation planning based on the hurricane evacuation plan contained in the local peacetime emergency plan shall be analyzed and shall consider the hurricane vulnerability zone, the number of persons requiring evacuation, the number of persons requiring public hurricane shelter, the number of hurricane shelter spaces available, evacuation routes, transportation and hazard constraints on the evacuation routes, and evacuation times. The projected impact of the anticipated population density proposed in the future land use element and any special needs of the elderly, handicapped, hospitalized, or other special needs of the

> existing and anticipated populations on the above items shall be estimated. The analysis shall also consider measures that the local government could adopt to maintain or reduce hurricane evacuation times.

These inventories and/or analyses are found in the C/CE, the regional hurricane evacuation study, the Comprehensive Emergency Management Plan (CEMP), and the Local Mitigation Strategy (LMS). The Plan incorporates the hazard mitigation appendix of the CEMP through C/CEP 15.7. Additionally, in C/CEPs 14.1, 14.6, the 2020 Plan recognizes appropriate parts of the LMS, such as the need to maintain and improve evacuation routes throughout the County.

46. 9J-5.012(3) sets out requirements for coastal management GOPs, including the requirement in (a) for "one or more goal statements which establish the long term end toward which regulatory and management efforts are directed" to "restrict development activities that would damage or destroy coastal resources, and protect human life and limit public expenditures in areas subject to destruction by natural disasters"; and the requirement in (b) for "one or more specific objectives for each goal statement which . . . 7. [m]aintain or reduce hurricane evacuation times . . . ."

47. To support their contention that the CHHA may not plan to mitigate flooding damage, Petitioners cite a statement

in the CEMP that flooding is the greatest potential hurricane damage. The also cite D&A in Franklin's 6/2004 transmittal package that evaluated areas subject to coastal flooding and observed:

> Areas subject to coastal flooding resulting from storm surges are shown in Map 6.4. The map portrays substantial risk from flooding outside the Category 1 storm zone . . . . By limiting the CHHA to the Category 1 storm surge zone the county may not be planning to mitigate the substantial flooding risks posed by storm surges and Category 2 and 3 storms . . . .

However, there was no evidence that Franklin, DCA, or anyone else ever came to the conclusion that the CHHA was inadequate for that reason. In any event, as stated in the discussion on the CHHA, state law defines the CHHA to coincide with the Cat 1 evacuation zone as drawn by the applicable regional hurricane evacuation study. See Finding 38, supra.

48. Petitioners base their contention that Franklin did not plan for projected populations on a reference in the LMS to Franklin's future land uses as of 2000, instead of its future land uses in 2020. But is clear that Franklin also considered the four SJI FLUMAs with their future land uses for 2020.

49. As to shelters, Petitioners essentially argue that the CIS is inadequate. But C/CEPs 14.8 and 14.12 require assessments of shelter availability inside and outside

Franklin, pursuit of agreements with neighboring counties to provide out-of-county shelters, and exploration of the possibility of locating some shelters in Franklin (even though the entire county will be evacuated in the event of a Cat 2-5 storm). There was no D&A as to a need for capital funding within the next five years for inclusion in a CIS.

50. Regarding the impact of storm surge and flooding on evacuation routes out of Franklin, there was evidence that US 319 is subject to flooding at the Ochlocknee River during a storm, that US 98 is subject to storm surge and flooding at the Ochlocknee Bay, and that the four SJI FLUMAs are expected to move the critical link in Franklin's evacuation plan from US 98 near Lanark Village to US 98 at the Ochlocknee Bay. But there was no evidence that Franklin failed to consider the impact of storm surge and flooding on evacuation routes out of Franklin. To the contrary, the evidence was clear that Franklin is planning for the complete evacuation of the county to take place before those routes are impacted by storm surge or flooding.

51. The USACE guidance for HES states in part:

> Each jurisdiction's existing hurricane evacuation routes are evaluated. In choosing roadways for the hurricane evacuation network care should be taken to designate only those roads that are not expected to flood from rainfall or storm surge while evacuation is in process.

There was no evidence that HES did not follow this guidance.

52. Under C/CEO 14 of the 1991 Plan, reasonable hurricane evacuation standards of 16 hours for Cat 1 and 24 hours for Cat 2-5 storm events were adopted. The 2020 Plan amends C/CEO 14 to read:

> Hurricane Evacuation - The County shall conduct its hurricane evacuation procedures to ensure that Countywide evacuation clearance times do not exceed 16 ~~24~~ hours for Category 1 ~~&~~ ~~2~~ storms and 24 ~~30~~ hours for Category 2, 3, 4 and 5 storms. 9J5-012(3)(b)(7).

(Underlining/strikethrough in original.)

53. Actual hurricane evacuation times are based on models that estimate the amount of time it would actually take to evacuate the County. These models include consideration of behavioral tendencies and tourist occupancies. Without the SJI FLUMAs, actual hurricane evacuation clearance times for the entire County are 4 ½ hours for a Cat 1 evacuation and 8 ¼ hours for Cat 2–5 evacuations, with high tourist occupancy and a slow public response. With the additional populations from the SJI FLUMAs (none of which fall within the CHHA), actual clearance times would increase slightly to five hours for Cat 1 and 10 ½ hours for Cat 2 – 5 evacuations. However, today’s actual evacuation times of 4 ½ hours and 8 ¼ hours can be maintained or reduced with the use of reasonable mitigation

measures found in C/CEP 14.1--namely, encouraging the use of SR 65 and SR 67 as alternatives to US 98 and SR 319.

54. Petitioners contend that Franklin's hurricane evacuation standards actually have been lowered as a result of the amendment to C/CEO 14 by the addition of the word "clearance." But there was no evidence that the 1991 Plan's C/CEO 14 actually planned for something other than clearance from Franklin.

55. Regardless whether evacuation plans changed by addition of the word "clearance," Petitioners question whether it is wise to plan only to clear Franklin before the arrival of tropical storm conditions when evacuees still must pass through Cat 1 evacuation zones in other counties, e.g., Wakulla, before reaching a place of safety. As they point out, the HES envisions the need for a regional evacuation in the event of a major hurricane with the majority of evacuees in the region evacuating to Leon County, and states: "For the near term, it may be most appropriate for the coastal counties, especially Franklin and Wakulla, to use the clearance times for Leon County rather than using their own specific figures." Moreover, HES stated:

> Until the roadway improvements are completed on the Crawfordville Highway and Capital Circle, the evacuation clearance times calculated for Franklin, Wakulla and Leon Counties can exceed one full day of heavy

> evacuation traffic movement for a worst-case storm if all those who wish to leave the area are to be accommodated. This timeframe easily extends beyond the maximum amount of warning and preparation time provided by the National Hurricane Center under a Hurricane Warning.

This D&A in and of itself does not prohibit Franklin from using times to clear the county in its evacuation planning. But use of clearance times would require regional evacuation needs to be coordinated among the various counties and incorporated in the CEMP and LMS. There was no evidence in this case that such coordination has not occurred or that the various counties are not planning for evacuees to pass through all evacuation zones and reach places of safety soon enough to get out of harm's way.

56. Petitioners also argue that special needs persons have not been considered. This argument is based on the supposed testimony of St. Joe's witness, Collins, that there is no provision in the 2020 Plan for the evacuation of persons with special needs. Actually, Collins' testimony was that there is a Plan provision that "definitely affects the evacuation" of persons with special needs, and not just indirectly, in that adult living facilities within the CHHA are prohibited. He also testified that the CEMP deals with those issues.

57. Mr. Gauthier, the former DCA chief of comprehensive planning was subpoenaed by Petitioners and explained why, in his opinion, the 2020 Plan is not "in compliance" because of inconsistency with 9J-5.012. He based his opinion on the incorrect CHHA designation, failure to direct population concentrations away from the CHHA, and C/CEO 14's establishment of a clearance time standard greater than actual clearance times. While the CHHA may not be designated accurately, assuming a correct definition, there was at least fair debate as to whether the 2020 plan directs population concentrations away from the CHHA. As indicated, none of the FLUMAs are in the CHHA, either as designated or as it should have been designated. Elsewhere, both the 1991 and the 2020 Plans limited residential density in the CHHA to a maximum of one DU/acre, which arguably does not constitute a population "concentration." For the reasons described in the preceding findings, the evidence in this record did not prove beyond fair debate that Franklin's 2020 Plan is inconsistent with 9J-5.012 and not "in compliance."

I. SJI FLUMAs and FLUEPs

58. RV consists of 1,704 acres on the 2020 FLUM and FLUEP 2.2(l). It is presently designated agriculture (with residential development allowed at 1 DU/40 acres), and parts are in silviculture. FLUEP 2.2(l) is designed as a rural

village that focuses on the historical heritage and natural surroundings of the Crooked River, with the objective being to create a rural village center in proximity to the river and a supporting rural community of river cottages and single-family (SF) lots. FLUEP 2.2(l) lists seven allowable uses, including residential, some commercial, and recreational uses. Non-residential maximum intensity is expressed in terms of FAR and set at .20; maximum overall gross residential density is 1 DU/5 gross acres. FLUEP 2.25 does not apply. RV can be all residential. Franklin Planner Pierce testified that, at most, 340 acres can be used for non-residential uses. He calculated this by multiplying the total acreage by the FAR. He also testified that, if 340 acres are non-residential, a maximum of 272 residential DUs could be developed on the remaining 1,363 acres. If all 1704 acres of RV are residential, the maximum residential use would be 340 DUs. Clustering is allowed but not required. At least 25 percent (426 acres) must be in "common open space" (including roads and other infrastructure); 50 percent "common open space" is required for cluster developments. Central water and wastewater is mandatory, and SMSs must meet OFW standards.

59. As transmitted, the ConRes FLUMA was 6,531 acres to the east of RV and along the Ochlocknee River and Bay. As adopted, it is 2,500 acres. The parts of the transmitted

version adjacent to RV and along the river and Bear Creek were eliminated in the adopted version. The land is presently "Agriculture" (with residential development allowed at 1 DU/40 acres); the land is used for silviculture. As described in FLUEP 2.2(m), ConRes is generally intended for large, private tracts of land that are appropriate for low density residential development and the protection of natural and cultural resources. A stated important objective is to allow for low density residential development that accentuates and celebrates the natural environment and is designed to fit into the natural setting instead of altering the natural setting to fit the design of the development. It allows detached SF residential use, passive and active recreational uses, related infrastructure, silviculture, and accessory use for residents and guests, and other similar or compatible uses. Free-standing nonresidential or commercial uses intended to serve non-residents are not permitted. Neither "active" nor "passive" recreational uses are defined in FLUEP 2.2(m). "Timeshare" or "vacation rentals" may be allowed. Maximum gross density is 1 DU/5 gross acres, and maximum overall impervious surface coverage cannot exceed 15 percent of the land area. No FAR is included or, arguably, required because ConRes is primarily a residential concept. Septic tanks are allowed but may not be located within 500 feet of the

Ochlocknee River, Ochlocknee Bay, or Bear Creek. "Aerobic systems" to provide a higher level of treatment apparently are not required, as they are on St. George Island and Alligator Point. IEP 1.2 states: "The County shall adopt a policy that mandates aerobic septic systems on a county-wide basis." Apparently, this has not yet occurred. SMSs must meet OFW standards.

60. MVC is 1,000 acres presently "Agriculture" on the FLUM (with residential development allowed at 1 DU/40 acres); the land is used for silviculture. The land is to the immediate east of ConRes along the Ochlocknee Bay and west of the US 98 bridge over the bay. MVC is described in FLUEP 2.2(n). The intent is to create a southern coastal fishing village focused on a marina, which is a required use. In addition to the marina, the village may contain a mix of related activities including retail, office, hotel, restaurant, entertainment, and residential uses. "Public and private utilities" are allowed but are not defined; they probably contemplate those needed for MVC itself. Clustering is not required. Residential use may not be required, but it certainly is expected of a "southern coastal fishing village." Residential use may be any combination of SF, multi-family (MF), condominiums, private residence clubs, time shares, and other forms of fractional ownership. The maximum FAR for non-

residential use is .30. The maximum residential density is "2 DU/gross acres", maximum ISR (impervious surface ratio) is .80, minimum "common open space" is .25, and other applicable Franklin zoning code provisions. FLUEP 2.25 applies, and at least three land uses are required, "none of which may be less than 10 percent of the total land area." Central water and wastewater is required. SMSs must meet OFW standards.

61. CEV in the 2020 Plan FLUM and FLUEP 2.2(o) addresses 200 acres presently designated Agriculture (allowing 1 DU/40 acres residential use); the land is in silviculture. The CEV FLUMA represents the first phase of development. CEV is generally intended to create a self-sustaining community with a mixture of functionally integrated land uses anchored by a village center. It is to complement the existing community of Carrabelle and create places to live, work and shop in the context of promoting moderately priced housing and economic development opportunities. Allowable uses are limited to SF and MF residential, retail commercial, service-oriented commercial, office, business and industrial park, passive and active recreation, schools and other civic facilities, public and private utilities, and houses of worship. There is no definition limiting the type of industrial use allowed, but Franklin Planner Pierce interpreted FLUEP 2.2(o) to mean industry like a truss factory or a cement batching plant, not

heavier industry. Performance standards are 1-3 DU per gross acre gross residential density, maximum non-residential intensity of .25 FAR, commercial and business park intensity of .25 FAR, minimum common open space of .25, minimum civic space of .10, and other applicable Franklin zoning code provisions. FLUEP 2.25 applies, and at least three land uses are required, "none of which may be less than 10 percent of the total land area."

J. Density, Intensity, and Mixed-Use Standards

62. Petitioners contend that the 2020 Plan provisions, including the SJI FLUMAs, are not "in compliance" for failure to identify densities and intensities of uses and for creating mixed-use categories without percentage distribution or other objective measures of the mix of land uses in each category, as mandated by 9J-5.006(4)(c) and (3)(c)7 and Section 163.3177(6)(a)("distribution, location and extent"). See also 9J-5.013(3)(b)("type, intensity or density, extent, distribution and location of allowable land uses"). However, it is clear that residential densities are provided for each category, and Petitioners concede in their PROs that the mixed-use residential category in FLUEP 2.2(e) has policies/standards for the percentage distribution among the mix of uses, or other objective measurement (of distribution), and the density or intensity of each use.

63. In the ORC, DCA objected to Franklin's proposed plan for failure to identify non-residential intensities and for creating mixed-use categories without percentage distribution or other objective measures of the mix of land uses in each category. In response, Franklin added FAR standards and FLUEP 2.25. DCA's 5/06/2005 staff memo acknowledged the FARs and accepted them. The staff memo also acknowledged FLUEP 2.25 and accepted it as providing a percentage distribution mix of uses for mixed-use residential, mixed-use commercial, MVC, and CEV. However, the staff memo criticized the mixed-use categories for not requiring some residential use.

64. Petitioners contend that, since FLUEP 2.25 does not apply to RV and ConRes, those categories fail to provide a percentage distribution or other objective measures of the mix of land uses. But it is at least fairly debatable that RV and ConRes are not true mixed-use categories, such that 9J-5.006(4)(c) does not apply.

65. Petitioners also contend that, since ConRes does not have FAR standards, intensity of non-residential uses is not provided for that category. In that regard, Petitioners argue that FLUEP 2.2(m) allows "free-standing non-residential or commercial uses" in ConRes and that Franklin Planner Pierce was unable to state how much of those uses are allowed in ConRes. Actually, FLUEP 2.2(m) disallows such uses if

"intended to serve non-residents." It is not clear from the policy that such uses are allowed at all in ConRes since other allowable uses are described as "similar or compatible uses." If such uses are allowable by negative implication, they would have to serve only residents. Arguably, non-residential intensity standards are not required in ConRes.

66. Petitioners put on no expert testimony to explain why the FLUMAs and related policies in the 2020 Plan do not meet the requirements of 9J-5.006(4)(c) and (3)(c)7 and Section 163.3177(6)(a), and they put on no expert testimony that the 2020 Plan is not "in compliance" for those reasons. Meanwhile, experts for the other parties testified that the 2020 Plan is "in compliance." On the evidence presented, it was not proven beyond fair debate that the FLUMAs and related policies in the 2020 Plan create 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.

K. Predictable Standards for MVC and CEV

67. Petitioners attempted to prove that wildly varied development scenarios could result from application of FLUEP 2.25 to MVC and CEV. The evidence did not disclose any reason to believe that uses will be combined so as to maximize certain types of uses and result in lopsided development

scenarios. Assuming that were to occur, the evidence was not clear what the maximum possible density and intensity of particular uses could be under various scenarios. This is partly because Franklin's Planner Pierce seemed to interpret MVC and CEV as establishing a maximum gross residential density on the entire acreage (1000 acres for MVC and 200 acres for CEV), regardless how much land actually was devoted to residential uses. Using that interpretation (which runs counter to Mr. Pierce's interpretation of the RV FLUEP), taken to an extreme 2000 DU of residential could be developed in MVC even if 900 acres were used for non-residential uses (e.g., marina and other commercial or office) and only 100 acres were used for residential, and 600 DU of residential could be developed in CEV even if 180 acres were used for non-residential uses and only 20 acres were used for residential. Given those results, such an interpretation does not seem logical. In addition, the applicable Franklin zoning code provisions were not clear. Also, factors such as FAR and ISR limitations and the necessity for "common open space" were not applied in a clear or consistent manner in the testimony. It can, however, be found that, in the unlikely event that lopsided development were to occur, large amounts of either residential or non-residential uses theoretically could develop in MVC and CEV depending on the development scenario.

68. In calculating some alleged development scenarios for MVC and CEV, Petitioners (and Mr. Pierce) also may have been applying the minimum common open space requirements and FAR intensity standards incorrectly. In some instances, they seemed to treat the minimum common open space requirements as if it were a separate allowable land use within the FLUMA and subtract the common open space minimum from total gross acreage to calculate acreage remaining for allowable land uses in the FLUMA. But it is not clear why minimum common open space requirements could (and should) not be incorporated within acreage devoted to the various allowable uses. In some instances, Petitioners (and Mr. Pierce) seemed to apply minimum FAR to gross acreage in the FLUMA to calculate maximum acreage that can be devoted to non-residential land uses. (This also was done for RV. See Finding 58, supra.) But it is not clear why FAR intensity standards should not be applied instead to the discrete acreage devoted to allowable non-residential uses to determine the maximum allowable floor area coverage within the acreage devoted to allowable non-residential uses.

69. Petitioners put on no expert testimony to explain why the unlikely possibility of lopsided development in MVC or CEV makes those FLUMAs and related policies, or the 2020 Plan, not "in compliance." Meanwhile, experts for the other parties

testified that the 2020 Plan is "in compliance." On the evidence presented, it was not proven beyond fair debate that the 2020 Plan is not "in compliance" because of the possibility of lopsided development in MVC or CEV.

L. Failure to Consider/React to Best Available Data

70. FLUEPs 11.12 and 11.13 required consideration of eight key areas. These areas included protection of natural resources and cultural heritage, promotion of economic development and emergency management, provision of adequate public facilities and services and affordable housing, and inclusion of intensity standards and allowable uses. Based on all of the documents in the record, the updated 2020 Plan was supported by consideration of each of the eight key areas listed by FLUEP 11.12 and, for the four SJI FLUMAs, by FLUEP 11.13.

71. Petitioners contend that Franklin's 2020 Plan is not based on the best available data existing as of the date of adoption, April 5, 2005, as required by: Section 163.3177(8)("elements of the comprehensive plan, whether mandatory or optional, shall be based upon data appropriate to the element involved") and (10)(e)("Legislature intends that goals and policies be clearly based on appropriate data"); 9J-5.005(2)(a)("shall be based upon relevant and appropriate data and the analyses applicable to each element" and "[t]o be

based on data means to react to it in an appropriate way and to the extent necessary indicated by the data available on that particular subject at the time of adoption of the plan or plan amendment at issue"); and 9J-5.006(1)(FLUE data requirements). In support of that contention, they cite to a few of the voluminous data in the record submitted by St. Joe and used by Franklin that are not the best available or have errors or a weakness (an unknown source). But their argument concedes that the best available data are in the record, and no expert witness testified that the 2020 Plan is not based on the best available data. To the contrary, Petitioners' expert questioned the quality of the analysis of the data in the adoption package. Meanwhile, expert witnesses for the other parties testified that the 2020 Plan is based on the best available evidence.

72. Petitioners also contend that inconsistent data was used in violation of 9J-5.005(5)(a)("[w]here data are relevant to several elements, the same data shall be used, including population estimates and projections"). While their PRO does not cite any specifics, during the hearing Petitioners directed Mr. Gauthier to two examples. One was that Florida Land Use Cover Classification System data was used to identify wetlands in the FLUE, while National Wetlands Inventory data (supplemented with hydric soils analysis) was used to identify

wetlands for the SJI FLUMAs. But those data were used in the same element, not in different elements. The other 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. But the higher number represented a theoretical maximum, which is not necessarily the data on which traffic analyses should be based. No expert testified that this constituted the use of inconsistent data in violation of 9J-5.005(5)(a). To the contrary, witnesses for the other parties testified that the 2020 Plan is based on the best available data and professionally acceptable analyses, that the County appropriately responded to the D&A in preparing the Plan update, and that the 2020 Plan is "in compliance."

M. Suitability of SJI FLUMAs and FLUEPs

73. Petitioners contend that none of the SJI FLUMAs are "inherently suitable for development at the permitted density and intensity." In their PRO, they based their contention in large part on FSU's analysis of various criteria, including proximity of three of the FLUMAs to the relatively pristine Ochlocknee River and Bay and their natural resources, presence of wetlands, soil types, floodplains, vegetative cover, habitat for Florida black bear and other wildlife, and alleged karst hydrogeology. They also cite DCA's 5/6/2005 staff memo,

the concerns of Drs. Chanton and Livingston about density and intensity increases, and Mr. Gauthier's testimony that he is "concerned and believe[s] that there are compliance problems . . . based on suitability." The evidence might support the proposition that there are more suitable places in Franklin for development, including in the middle of SJI, where St. Joe also is contemplating possible development in the future, and nearer to Apalachicola and Carrabelle. But the middle of SJI would not be suitable for a marina village, and there may be other aspects of St. Joe's planned developments that could not be accommodated on other land available for development. In addition, Franklin wants to protect the land within the Apalachicola River and Bay basin. In any event, the question presented in this case is not whether there are more suitable lands for development. Rather, the question is whether, based on all the evidence presented, it is beyond fair debate that the locations of the FLUMAs are unsuitable. "Development suitability" is defined as "the degree to which the existing characteristics and limitations of the land and water are compatible with a proposed use or development."

74. FLUEP 1.2 requires review of FLUMAs "to insure [sic] that the proposed uses, in the various categories, do not conflict with the prevailing natural conditions including":

(a) soil conditions; (b) topography; (c) drainage; (d) wetlands; and (e) floodplains.

75. In their PRO, Petitioners criticize the soil suitability analysis submitted in support of the FLUMAs as being "based upon a subset of on-site soils termed 'predominate' with no percentage quantification and no analysis of the other on-site soils" and as misrepresenting and selectively quoting from the soil survey. See Pamela Ashley PRO, ¶73. But the soils in the SJI FLUMAs were re-analyzed at length during the final hearing. The evidence was that there are upland soils in each SJI FLUMA. In the ConRes FLUMA, the only SJI FLUMA allowing septic tanks, suitable soils and a 500-foot setback from principal surface waters should provide adequate attenuation to accommodate on-site sewage systems. There are soils in each SJI FLUMA that are not the best for the proposed development. These soils are potentially limiting but arguably can accommodate the proposed development, given appropriate site planning and engineering, together with the 2020 Plan's provisions that operate to protect natural resources and environmentally sensitive areas. It was fairly debatable that the soils in the FLUMAs are suitable for the proposed development.

76. Petitioners in their PRO also criticize the topography of the SJI FLUMAs in that parts are subject to

inundation during a Cat 1 storm. But the evidence was that low-density development is not necessarily unsuitable in the CHHA, and it was fairly debatable that the topography of the FLUMAs is suitable for the proposed development.

77. As for drainage, each SJI FLUMA requires an SMS employing OFW design criteria. OFWs have special resource value and need heightened protection. A 1991 Plan provision required County SMSs to collect and treat runoff from the first 1.5 inches of rainfall regardless of the area drained. This provision exceeds OFW criteria and applies to each SJI FLUMA.

78. The SMS design criteria, buffers, setbacks, and the nature of development anticipated in each SJI FLUEMA are intended to work in concert to minimize surface water impacts. Employing these elements is anticipated to allow the development of the FLUMAs without impacting surface waters. If there is no measurable pollutant loading to nearby waters, aquatic flora and fauna should experience no impact. Fewer significant seagrass beds are located in waters north of where MVC is located, and it should be possible to site a marina facility there in deeper water without significant seagrasses.

79. The strict SMS design criteria assure the collection and treatment of stormwater for water quality purposes. The SMSs also will provide important sources of groundwater

recharge and help protect water quantity. Runoff collected in SMSs is retained on-site and returned to the groundwater component of the hydrologic cycle (minus losses to evaporation and evapotranspiration). The retention of stormwater on-site offsets the potential loss of runoff resulting from increased impervious surfaces, facilitating aquifer recharge. With proper engineering, runoff from each of the SJI FLUMAs could be collected within the required SMSs resulting in minimal or no adverse effect on aquifer recharge on SJI.

80. Recharge rates on SJI vary from high (15 to 20 inches per year) to moderate (10 to 15 inches per year) to low (less than 5 inches per year), depending on location. As indicated, the confining layer between the surficial aquifer and the underlying Floridan aquifer in eastern Franklin thins from west to east but is not believed to degenerate into karst features. See Findings 4-5, supra. Rather, the confining layer in eastern Franklin County appears to vary in thickness from 15 to 20 feet. Assuming no karst features or other anomalies creating a direct conduit to the Floridan, groundwater moves vertically throughout SJI at approximately 2 to 3 feet per year. This rate would provide sufficient time for the natural breakdown (attenuation) of residual pollutants from on-site sewage and stormwater treatment systems as well as any additional pollutants that may be generated such that

development within the SJI FLUMAs should not threaten the Floridan aquifer.

81. Lateral flow of groundwater from beneath the SJI FLUMAs also should not pose a risk to surface waters. In contrast to unconfined karst, where the movement of groundwater to and through the Floridan aquifer may be rapid, groundwater appears to move laterally at approximately 100 feet per year in eastern Franklin, providing adequate time for the attenuation of any added pollutants prior to any such groundwater seepage reaching surface waters.

82. Petitioners in their PRO also criticize the amount of wetlands in the FLUMAs. RV has 1,324 wetland acres (78 percent) with 380 acres (22 percent) of "interspersed" uplands; ConRes has 525 wetland acres (21 percent) with 1,975 acres of uplands (79 percent); MVC has 276 wetland acres (28 percent) and 724 upland acres (72 percent); and CEV has 66 wetland acres (33 percent) and 134 upland acres (67 percent).

83. In response to ORC criticism, Franklin's wetlands policies were amended to address "high quality" and "low quality" wetlands and give a higher level of protection to the former. Petitioners criticize the 2020 Plan for not identifying and mapping the high and low quality wetlands. They also rely on Gauthier's opinion that "the wetland policies are flawed, in that they're vague and not specific

and there are significant gaps" as a result of exceptions and waivers. They also contend that the 2020 Plan fails to direct development away from wetlands, which will result in degradation of water quality in the Ochlockonee River/Bay and Apalachicola Bay system primarily from increased urban runoff and nutrification. But it is at least fairly debatable that the amended wetlands policy will increase wetlands protections and that wetlands in the FLUMAs can be protected in the course of development as proposed under the amended wetland policies.

84. Each SJI FLUMA allows “clustering,” which concentrates DUs in a portion of the overall site without increasing the overall number of units. Clustering is mandatory in ConRes and CEV. Clustering is advantageous to the extent that it encourages open space, reduces impervious surface, reduces pollutants generated from more widespread development, and enhances aquifer recharge. However, the advantages could be illusory to the extent that clustering simply allows the wholesale transfer of density from a portion of the site where development is unsuitable and should not be anticipated (e.g., high-quality wetlands) to other portions of the site. Such a result would be of particular concern in RV, which is 78 percent wetlands, if all 340 DUs were to be concentrated on 375 acres of uplands, effectively at a density of almost one DU/acre, interspersed among 1,330 acres of high-

quality wetlands. (The concern would be even greater if non-residential uses in RV were surprisingly high, and if the interpretation of "gross density" suggested by Franklin's planner for MVC and CEV were applied to RV, thereby further increasing the effective residential density interspersed among high-quality wetlands.)

85. C/CEP 10.1 requires that the County's site plan review process be amended to take into consideration natural constraints, including wetlands, and restricted depending upon the severity of those constraints. Because no site plan has been proposed for any of the SJI FLUMAs, it is unknown to what extent, if any, the privately-owned wetlands may actually be disturbed. It is at least fairly debatable that, given the relatively low overall densities, the extent of available uplands (at least in ConRes and MVC), the arguably-enhanced wetland protections, and properly-implemented clustering, wetlands in the SJI FLUMAs can be protected in the course of development as proposed and that the FLUMAs are suitable for the proposed development notwithstanding the wetlands in the SJI FLUMAs.

86. Petitioners in their PRO also criticize the suitability analysis submitted in support of the FLUMAs for failure to quantify floodplains (although admittedly depicting them on maps and citing FIRM maps), for "inaccurate and

generalized narrative," and for stating "that development is allowed 'but flood considerations must be evaluated'." Pamela Ashely PRO, ¶ 76, citing the ORCR. As to "areas subject to coastal flooding" (the hurricane vulnerability zone), all of the SJI FLUMAs are subject to Cat 3 evacuation and the vast majority are within the Cat 3 SLOSH surge area. But some effort was made to focus development outside of the floodplains. Besides, development within floodplains is not prohibited by state or federal law. Rather, development within a floodplain must be constructed above certain elevations and provide compensating flood storage for any displaced flood plain area. The evidence was that low density development is not necessarily unsuitable in the these areas, and it was at least debatable that the FLUMAs are suitable for the proposed development notwithstanding the presence of floodplains in the FLUMAs.

87. Petitioners in their PRO also criticize the suitability analysis submitted in support of the FLUMAs as to "vegetative cover" and "wildlife habitats" for only addressing bald eagle nests and bear sightings and road kill locations, and for generally stating that St. Joe's silvicultural use has "vastly altered" or otherwise displaced the natural vegetation and wildlife habitat. IWHRS data and best available bear data

was not addressed in the suitability analysis. However, all of this D&A was presented and analyzed during the hearing.

88. The SJI FLUMAs comprise a fraction of the 1.2 million acres of habitat supporting the Apalachicola black bear population, of which SJI bears are also a fraction. In response to the ORC, Franklin and St. Joe made some accommodation to the black bear by significantly reducing the size of the ConRes FLUMA and removing the Bear Creek area from the FLUMA. The SJI FLUMAs also preserve the possibility of a bear corridor of appropriate dimensions connecting Bald Point State Park on the east end of SJI with the Crooked River Tract and the larger publicly-owned bear habitat to the west. Along with the availability of public lands, residential clustering will help facilitate bear movement through SJI notwithstanding the development of the SJI FLUMAs. Bears should still frequent the FLUMAs when food supplies are ample, even during construction.

89. Even with the accommodation and a corridor, the proposed development will impact the black bear. Road kills occur where bears and roadways mix. (Generally, the more people there are in and near bear habitat, the more problems will arise from bear encounters with people, and the more likely that the resolution of such problems will not benefit the bears.) But the SJI FLUMAs themselves are not considered

critical bear habitat, and their development alone should not result in a significant adverse impact on the bear population.

90. While the gulf sturgeon, a protected species, is known to pass through nearby waters, neither the Ochlocknee River nor Bay has been designated critical habitat for the fish. No surface water impacts that would affect the sturgeon were proven.

91. Based on the evidence, it is at least fairly debatable that the SJI FLUMAs are suitable for the proposed development notwithstanding the presence of the black bear, the Gulf sturgeon, and other wildlife now using SJI.

92. Based on the foregoing, it was not proven beyond fair debate that the SJI FLUMAs are unsuitable for the proposed development, notwithstanding the issues raised by Petitioners as to soils, topography, drainage, wetlands, floodplains, vegetative cover, and wildlife and their habitat.

N. Deletion of FLUEP 11.12 and 11.13

93. The County deleted FLUEPs 11.12 and 11.13 as part of the Plan update. This decision was appropriate because the substantive aspects of FLUEPs 11.12 and 11.13 were considered and would be incorporated within the various provisions of the updated Plan, once effective. Also, the assessments required under those policies must be made regardless of whether policies are included within the Plan because they are

required under 9J-5. All of the expert planners--including Mr. Gauthier--testified that the 2020 Plan is "in compliance" notwithstanding deletion of those policies. Once FLUEPs 11.12 and 11.13 are no longer necessary, it is the County's prerogative to include them in or remove them from the Plan.

94. FLUEP 11.12 required the preparation and adoption of an overlay plan for SJI, which would result in an overlay map and policies. Although an overlay plan was prepared, it was not adopted as part of the 2020 Plan but rather was included as an appendix to the Technical Data and Analysis Report submitted in support of the 2020 Plan update.

95. Potential adoption of the overlay as part of the Plan was a concern to many of the citizens attending the visioning meetings. There was confusion as to what adoption of an overlay into the Plan actually meant and whether it established development entitlements. The County has the discretion to adopt or remove Plan provisions that duplicate or exceed statutory and regulatory requirements. Utilization of the overlay as D&A is consistent with state planning requirements. It was not proven beyond fair debate that the 2020 Plan would not be "in compliance" without the SJI overlay.

CONCLUSIONS OF LAW

96. It was stipulated in this case that Petitioners:

submitted oral or written comments, recommendations, or objections; and reside and own property within the County. As such, each is an "affected person" under Section 163.3184(1)(a) and has standing to initiate a proceeding under Section 163.3184(9), as also stipulated by the other parties. No issue was raised as to St. Joe's standing to intervene.

97. Petitioners also sought findings that they are "adversely affected," presumably for purposes of establishing appellate standing under Section 120.68(1). See Melzer v. Dept. of Community Affairs, 881 So. 2d 623 (Fla. 4th DCA 2004); O'Connell v. Dept. of Community Affairs, 874 So. 2d 673 (Fla. 4th DCA 2004); Fla. Chapter of the Sierra Club v. Suwannee American Cement Co., 802 So. 2d 520 (Fla. 1st DCA 2001). DCA, the County, and St. Joe reserve the right to oppose such findings at the appropriate time. It is considered unnecessary and premature to determine whether any party would be entitled to judicial review of the final order entered in this case, or to make findings as to whether the parties would be "adversely affected." It is believed that such determinations, if they become necessary, can be made upon the evidence in the record.

O. Standard of Review/Standard of Proof

98. Except for certain "amendments directly related to proposed small scale development activities" and described in

Section 163.3187(1)(c), DCA reviews all local government comprehensive plans and plan amendments for "compliance"--i.e., for consistency "with the requirements of ss. 163.3177, 163.31776, when a local government adopts an educational facilities element, 163.3178, 163.3180, 163.3191, and 163.3245, with the state comprehensive plan, with the appropriate strategic regional policy plan, and with chapter 9J-5, Florida Administrative Code, where such rule is not inconsistent with this part and with the principles for guiding development in designated areas of critical state concern and with part III of chapter 369, where applicable." § 163.3184(1)(b), Fla. Stat.

99. When DCA determines that a local government's plan or plan amendment is "in compliance," administrative proceedings under Section 163.3184(9) may take place. Most administrative proceedings initiated after preliminary agency review and notice of the agency's intent to take final action are de novo proceedings under Sections 120.569 and 120.57(1) designed to "formulate final agency action, not to review action taken earlier and preliminarily." McDonald v Department of Banking and Finance, 346 So. 2d 569 (Fla. 1st DCA 1977). But the Legislature has chosen to treat administrative review of comprehensive plan and plan amendment cases differently. In proceedings under Section 163.3184(9),

a different standard of review is established: "In this proceeding, the local plan or plan amendment shall be determined to be in compliance if the local government's determination of compliance is fairly debatable." § 163.3184(9)(a), Fla. Stat.

100. The phrase "fairly debatable" is not defined in Chapter 163 or in Rule Chapter 9J-5. The Supreme Court of Florida has opined, however, that the fairly debatable standard under Chapter 163 is the same as the common law "fairly debatable" standard applicable to decisions of local governments acting in a legislative capacity. In Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997), the Court stated that the fairly debatable standard is deferential and requires "approval of a planning action if reasonable persons could differ as to its propriety." Quoting from City of Miami Beach v. Lachman, 71 So. 2d 148, 152 (Fla. 1953), the Court stated further:

> [A]n ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity.

Id.

101. Only issues plead or tried by consent may be considered. Cf. §§ 120.569, 120.57(1), Fla. Stat.; Fla. Admin. Code R. 28-106.201(2); Heartland Environmental Council,

Inc. v. Department of Community Affairs, et al., DOAH Case No. 94-2095GM, 1996 Fla. Div. Adm. Hear. LEXIS 3152, at *49 (DOAH October 15, 1996; DCA November 25, 1996). In this case, the allegations in the Amended Petition were further amended without objection in the Prehearing Stipulation, and those allegations are considered to have been heard by consent to the extent that evidence was presented on them. No other issues may be considered.

P. Substantive Compliance Criteria

102. The pertinent substantive compliance criteria have been cited in the Findings.

103. As found, most of the issues raised by Petitioners under the compliance criteria were at least fairly debatable. However, Petitioners proved beyond fair debate that, without a CIE, the 2020 Plan update is not "in compliance." In addition, it was proven beyond fair debate that the 2020 Plan's HEO 2 and 3 and CHHA are inaccurate and inconsistent with compliance criteria. Finally, 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."

Q. Disposition by ALJ, DCA, and Administration Commission

104. Under Section 163.3184(9)(b), if the ALJ recommends that a plan or plan amendment be found "in compliance," the recommended order (RO) is submitted to the DCA, which is

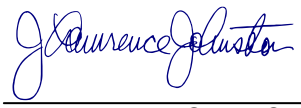
required to allow for the filing of exceptions and either: (1) enter a final order finding the plan or plan amendment to be "in compliance"; or (2) submit the RO to the Administration Commission for final agency action if DCA determines that the plan or plan amendment is not "in compliance."

RECOMMENDATION

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

RECOMMENDED that that DCA enter a final order determining that Franklin's 2020 Plan update, with SJI FLUMAs, is not "in compliance" at this time.

DONE AND ENTERED this 12th day of June, 2006, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of June, 2006.

ENDNOTES

[1]/ Unless otherwise indicated, all statutory references are to the 2005 codification of the Florida Statutes, and all

references to Sections are to Sections of the Florida Statutes.

[2]/ Unless otherwise indicated, all rule references are to the current version of the Florida Administrative Code, and all references to 9J-5 are to rules found in that rule chapter.

[3]/ To the extent that ruling was reserved on objections to exhibits offered by Petitioners, those objections are overruled.

[4]/ Each Petitioner filed a PRO that adopted the other Petitioner's PRO. The other parties filed a Joint PRO.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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