SOUTH FLORIDA WATER MANAGEMENT DISTRICT
3301 Gun Club Road, West Palm Beach, Florida 33406 • (561) 686-8800 • FL WATS 1-800-432-2045 • TDD (561) 697-2574
Mailing Address: P.O. Box 24680, West Palm Beach, FL 33416-4680 • www.sfwmd.gov

December 18, 2006

Hon. J. Lawrence Johnston
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

SUBJECT: Order of Remand - Captiva Civic Association, Inc. vs. South Florida Water Management District, DOAH Case No. 06-0805

Dear Judge Johnston:

A hearing was conducted before the Governing Board of the South Florida Water Management District on December 14, 2006, for consideration of the Recommended Order, the exceptions and associated responses filed thereto. As a result, the Governing Board issued an Order of Remand, which is attached hereto.

Thank you for your attention to this matter.

Respectfully,

Susan R. Martin

Susan Roeder Martin
Senior Specialist Attorney

c: Richard Grosso, Esquire
Lisa Interlandi, Esquire
Robert Hartsell, Esquire
Matthew D. Uhle, Esquire
Gary A. Davis
Ken Oertel, Esquire

BEFORE THE GOVERNING BOARD OF THE
SOUTH FLORIDA WATER MANAGEMENT DISTRICT

CAPTIVA CIVIC ASSOCIATION INC., and SANIBEL CAPTIVA CONSERVATION FOUNDATION,
Petitioners,

And

THE CONSERVANCY OF SOUTHWEST FLORIDA,

Intervenor

vs.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT AND PLANTATION DEVELOPMENT, LTD.,

Respondents.

Order No. 2006-182 FOF-ERP

ORDER OF REMAND

This matter was presented before the Governing Board of the South Florida Water Management District on December 14, 2006, for the consideration of the Recommended Order issued on November 8, 2006, (incorporated herein, with modifications set forth below, and attached hereto as Exhibit "A"), by the duly-appointed Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") J. Lawrence Johnston. On November 27, 2006, pursuant to DOAH Uniform Rule 28-106.217(1), Petitioners Captiva Civic Association, Inc. and Sanibel Captiva Conservation Foundation and Intervenor, The Conservancy of Southwest Florida jointly filed Exceptions to the Recommended Order ("Petitioners' Exceptions"); Respondent South Florida Water Management District filed Exceptions to

Recommended Order ("SFWMD Exceptions"); and Respondent Plantation Development, Ltd. Filed Exceptions to Recommended Order ("PDL's Exceptions"). Pursuant to DOAH Uniform Rule 28-106-217, Fla. Admin. Code, Petitioners Captiva Civic Association, Inc. and Sanibel Captiva Conservation Foundation and Intervenor, The Conservancy of Southwest Florida jointly and timely filed a Response to Plantation Development, Inc.'s Exceptions to Recommended Order ("Petitioners' Response to PDL") and a Response to South Florida Water Management District's Exceptions to Recommended Order ("Petitioners' Response to SFWMD"); Respondent Plantation Development, Ltd. timely filed a Response to Petitioners' Exceptions ("PDL's Response"); and Respondent SFWMD timely filed a response to Petitioner's Exceptions.

Summary of Recommended Order

On February 8, 2006, the SFWMD, a public corporation existing by virtue of the Laws of Florida and operating as a multi-purpose water management district based in West Palm Beach, Florida, gave notice of its intent to approve Application No. 050408-15 for Modification of Environmental Resource Permit (ERP) No. 36-00583-S-02 for construction and operation of a surface water management system serving a 78.11 acre condominium development known as Harbour Pointe at South Seas resort, with discharge into wetlands adjacent to Pine Island Sound. On March 7, 2006, the SFWMD transmitted to DOAH the request for an administrative hearing filed by Petitioners, Captiva Civic Association and Sanibel Captiva Conservation Foundation. On May 10, 2006, Intervenor The Conservancy of Southwest Florida was granted leave to intervene.

The final administrative hearing was held before ALJ J. Lawrence Johnston on July 24-28, 2006. Based upon the oral and documentary evidence introduced at the final hearing and the entire record of the proceeding, Proposed Recommended Orders were filed by all parties. On

November 8, 2006, the ALJ entered his Recommended Order. All parties timely filed Exceptions to the Recommended Order, which are ruled on below.

Standard of Review

Section 120.57(1)(l), Florida Statutes, provides that an agency reviewing a DOAH recommended order may not reject or modify the findings of fact of an ALJ, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." Friends of Children v. Department of Health and Rehabilitative Services, 504 So. 2d 1345, 1347-48 (Fla. 1st DCA 1987). Florida law defines "competent substantial evidence" as "such evidence as is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1975); Gulf Coast Elec. Co-op v. Johnson, 727 So. 2d 259, 262 (Fla. 1999). Furthermore, an agency may not create or add to findings of fact because an agency is not the trier of fact. Friends of Children v. Dep't of Health and Rehabilitative Services, 504 So. 2d 1345 (Fla. 1st DCA 1987).

The decision to accept one expert's testimony over that of another is left to the discretion of the administrative law judge and cannot be altered absent a complete lack of competent, substantial evidence from which the finding could reasonably be inferred. Florida Chapter of Sierra Club v. Orlando Utility Commission, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). "Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact." Section 120.57(1)(l), Florida Statutes. With the exceptions of Findings of Fact 71, 74, and 76 which are modified as provided in this order, the Governing Board has determined that the rest of the findings of fact made by the ALJ in this case are based

on competent, substantial evidence that is sufficiently relevant and material such that a reasonable mind would accept it as adequate to support the conclusion reached.

With respect to the standard of review regarding an ALJ's conclusions of law, Section 120.57(1)(l), Florida Statutes, provides that an agency may reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction" whenever the agency's interpretation is "as or more reasonable" than the interpretation made by the ALJ. See Deep Lagoon Boat Club Ltd. v. Sheridan, 784 So. 2d 1140 (Fla. 2d DCA 2001). Florida Courts have consistently applied this section's "substantive jurisdiction limitation" to prohibit an agency from reviewing conclusions of law that are based upon the ALJ's application of legal concepts such as collateral estoppel, *res judicata*, hearsay, but not from reviewing conclusions of law that are based upon the ALJ's application of an agency's administrative rules or procedures.

For example, in Deep Lagoon Boat Club Ltd. v. Sheridan, the Second District Court of Appeal held that the scope of the Secretary of the Department of Environmental Protection's review of an ALJ's conclusions of law did not extend to the legal concepts of collateral estoppel and *res judicata*. 784 So. 2d at 1141-42. The court explained that the Legislature intended to limit the scope of an agency's review to those matters within the agency's "administrative authority" or "substantive expertise." Id. at 1142 n.2. Similarly, in Barfield v. Department of Health, the First District Court of Appeal held that determining whether certain documents were inadmissible hearsay in a dentistry licensing case was not within the Board of Dentistry's substantive expertise. 805 So. 2d at 1011.

Based on Florida Statutes Chapter 373 and Title 40E of the Florida Administrative Code, the Governing Board has the administrative authority and substantive expertise to exercise

regulatory jurisdiction over the administration and enforcement of ERP Criteria. Therefore, the Governing Board has substantive jurisdiction over the ALJ's conclusions of law and interpretations of administrative rules, and is authorized to reject or modify the ALJ's conclusions or interpretations if it determines that its conclusions or interpretations are "as or more reasonable" than the conclusions or interpretations made by the ALJ. With exception to Conclusions of Law 111, 112, and 116, which are rejected as set forth in this order, the Governing Board adopts the remaining conclusions of law in toto.

RULING ON EXCEPTIONS

The Governing Board, having carefully considered each of the parties' Exceptions and the Responses thereto, makes the following rulings:

Petitioners' Exception No. 1

Petitioners take exception to Finding of Fact 46 wherein the ALJ found that there were reasonable assurances that the proposed stormwater management and treatment system will not result in violation of any State water quality standards or significantly degrade the water quality of Bryant Bayou or Pine Island Sound. The basis for the exception is that PDL's water quality consultant, Dr. Harvey Harper, projected the water quality impacts based on a single family residential design. (Tr. 07/25/06 p. 298-300; Tr. 07/26/06 p. 11-12) However, Petitioners contend that the impacts should be estimated and evaluated for a multi-family development since the proposed project is for 6 condominium buildings of 4 units each.

Dr. Harper acknowledged that the project is a condominium project, but justified the use of the single family residential basis because he felt it more accurately reflected the character of the development. (Tr. 07/25/06 p. 298-300; Tr. 07/26/06 p. 72) According to Dr. Harper, since the difference between the single and multi family factors is based on the higher level of traffic

and large parking areas associated with multi family development, it was more appropriate to use the single family factors for the evaluation of the water quality impacts. Id.

Petitioners' first exception is requesting the Governing Board to reweigh the evidence, which is beyond the scope of the Board's authority. Since Petitioners have failed to show there is no competent substantial evidence to support Finding of Fact 46, Petitioners' first exception is rejected.

Petitioners' Exception No. 2

Petitioners' second exception is that there is no competent, substantial evidence to support Findings of Fact 51 and 52, that restoration of the sand/shell road would result in improved hydrologic connection to Pine Island Sound and enhance the value of functions in the preserved wetlands. The basis for Petitioners' exception is that PDL failed to rebut evidence that any benefits would be short term and would be nonetheless be negated by wave action.

The SFWMD Response cites expert testimony in the record which supports the ALJ's Findings of Fact 51 and 52. Erwin, 07/26/06 p. 133-137, 07/28/06 p. 197-199; Frankenberger, 07/26/06 p. 283-293; Missimer, 07/26/06 p. 87-88. The Governing Board may only reject the findings of fact if there is **no** competent substantial evidence supporting the finding. Petitioners' second exception is requesting the Governing Board to reweigh the evidence, which is beyond the scope of the Board's authority. Since Petitioners have failed to show there is no competent substantial evidence to support Findings of Fact 51 and 52, Petitioners' second exception is rejected.

Petitioners' Exception No. 3

Petitioners' third exception is that there is no competent substantial evidence to support Finding of Fact 60, that elimination of the swimming pool and moving one or more buildings to

the pool's location would not be a practicable means of reducing the footprint of the project. However, PDL presented testimony that a residential building of the proposed size could not be located as close to the water's edge and would block the view of Meristar's residential properties in that location. Pavelka, 07/25/06 190-191. Petitioners' third exception is requesting the Governing Board to reweigh the evidence, which is beyond the scope of the Board's authority. Since Petitioners have failed to show there is no competent substantial evidence to support Finding of Fact 60, Petitioners' third exception is rejected.

Petitioners' Exception No. 4

Petitioners' fourth exception is that there is no competent, substantial evidence to support Finding of Fact 74, that the proposed project will probably have a negative effect on fish and wildlife which nonetheless would not be considered adverse if the applicant satisfies the elimination and reduction requirements of BOR 4.2.1.1. Petitioner is correct that this is not a finding of fact, but an incorrect conclusion of law. Section 4.2.1 of the Basis of Review states that "[a]ny adverse impacts remaining after practicable design modifications have been implemented may be offset by mitigation as described in subsections 4.3-4.3.9." Mitigation is to offset adverse impacts identified through the application of the Public Interest Test, and may only be approved after the applicant has met the requirements of Section 4.2.1 for elimination and reduction of impacts. See BOR 4.2.3; 4.3.

Therefore, a mitigation proposal may be accepted to offset impacts, but does not alter the determination that there is an adverse impact based on the criteria outlined in the Public Interest Test. For these reasons, the incorrect and misplaced conclusion of law is removed so that Finding of Fact 74 is modified to read as follows:

> The proposed ERP would impact (fill and destroy) 2.98 acres of very important, high quality mangrove wetlands. Even with the restoration or creation of 0.7

acres of probable former wetlands and improvements in the hydrologic connection of the 36.5-acre preserved wetland (Parcel A) to Pine Island Sound, the proposed ERP probably will have a negative effect on the conservation of fish and wildlife, including listed species. If impacts to the conservation of fish and wildlife are reduced and eliminated, and further offset by mitigation, there should be no significant adverse effect on the conservation of fish and wildlife.

Petitioners' Exception No. 5

Petitioners' fifth exception is that Finding of Fact 76 contains an incorrect conclusion of law, that the determination of whether the proposed project "will adversely affect fishing or recreational values is informed by both the UMAM functional assessment and the reduction and elimination analysis." Petitioners are correct that Rule 62-345.100(3)(h) of the Florida Administrative Code specifically states that UMAM is not applicable to fishing or recreational values, pursuant to Section 373.414(1)(a)(4). However, Petitioners further assert in their fifth exception that the permit should be denied as contrary to the public interest based on the adverse impact on fishing and recreational values. This portion of the exception is rejected because it asks the Governing Board to reweigh the facts, which is beyond the scope of the authority of the Board. Furthermore, a finding of adverse impact to fishing and recreational values is not automatic grounds for denial of the permit. Finding of Fact 76 is modified as follows, to comport with Florida Administrative Code Rule 62-345.100(3)(h).

The question whether the proposed ERP will adversely affect fishing or recreational values is informed by the reduction and elimination analysis and BOR Section 4.2.3.4. If impacts to wetlands and surface waters are reduced and eliminated, and offset by mitigation, there should be no significant adverse effects on fishing and recreational values.

Petitioners' Exception No. 6

Petitioners' sixth exception is that there is no competent, substantial evidence to support Finding of Fact 79, and that the ALJ's finding is incorrect as a matter of law. Petitioner asserts that since fishing and recreational values are not considered in the UMAM analysis, the ALJ's

finding that "mitigation according to the UMAM assessment can offset unavoidable impacts to the functions performed by the areas affected by the proposed activity" is not supported by evidence and is incorrect as a matter of law.

On the contrary, Florida Statutes Section 373.414(1)(b) specifically allows the permitting authority to consider mitigation to offset impacts if the applicant is "otherwise unable to meet the criteria" of the public interest test, including the evaluation of impacts on fishing and recreational values. Therefore, Petitioners' sixth exception is rejected.

Petitioners' Exception No. 7

Petitioners' seventh exception is that there is no competent, substantial evidence to support Conclusion of Law 98, and that it is incorrect as a matter of law. Petitioners take exception to the finding that the "applicant has committed to compensate for any functional loss determined by UMAM by purchasing additional mitigation bank credits from the LPIWMB, which is specifically allowed by Section 373.414(1)(a)(7), Florida Statutes, and Rule 62-345.100(2)." Petitioners contend that the applicant failed to provide competent, substantial evidence that purchase of mitigation bank credits from LPIWMB is "appropriate, desirable and a permittable mitigation option."

> Use of a Mitigation Bank is appropriate, desirable, and a permittable mitigation option when the Mitigation Bank will offset the adverse impacts of the project; and (a) on-site mitigation opportunities are not expected to have comparable long term viability...; or (b) use of the Mitigation Bank would provide greater improvement in ecological value than on-site mitigation. BOR Section 4.4.2.1.

PDL presented testimony that the project is within the mitigation service area of the LPIWMD and that PDL has committed to purchasing the number of credits necessary to offset adverse impacts. Pavelka, 07/24/06 p. 132-135, 139-140; Bain, 07/27/06 p. 33.

In addition, the purchase of mitigation credits is a supplement to the other proposed mitigation in the form of on-site restoration and preservation. See Finding of Fact 19.

Petitioners' seventh exception is requesting the Governing Board to reweigh the evidence, which is beyond the scope of the Board's authority. Furthermore, as correctly stated by the ALJ, the purchase of mitigation credits is allowed to offset adverse impacts pursuant to Florida Statutes 373.414(1)(a)(7) and Rule 62-345.100(2). Since Petitioners have failed to show there is no competent, substantial evidence to support Conclusion of Law 98, Petitioners' seventh exception is rejected.

Petitioners' Exception No. 8

Petitioners' eighth exception is to Conclusion of Law 99, that "PDL's proposal to remove existing shell/sand road, restore wetlands there, place a conservation easement on 72.8 acres, including the conservation of the Calusa Indian mound on parcel C, and the purchase of mitigation bank credits meet those mitigation requirements," is not supported by competent, substantial evidence, and is otherwise incorrect as a matter of law. Petitioners reassert the same arguments set forth in Petitioners' Exceptions Nos. 2 and 7, that there is no evidence removal of the sand/shell road is adequate mitigation and that the purchase of mitigation credits is not appropriate in this case. These portions of the exception are therefore rejected for the same reasons as Petitioners' Exceptions Nos. 2 and 7.

Furthermore, Petitioners are asking the Governing Board to reweigh the facts evaluated by the ALJ in concluding that PDL's proposed mitigation package met the requirements of BOR Section 4.3 through 4.4.13.5. Petitioners' eighth exception is requesting the Governing Board to reweigh the evidence, which is beyond the scope of the Board's authority. Since Petitioners have

failed to show there is no competent, substantial evidence to support Conclusion of Law 99, Petitioners' eighth exception is rejected.

Petitioners' Exception No. 9

Petitioners' ninth exception is that there is no competent, substantial evidence to support Conclusion of Law 103, and this conclusion is otherwise incorrect as a matter of law. The ALJ found that "use of the mandatory UMAM established that PDL's proposed mitigation, plus approximately .9 of LPIWMB credit, would offset impacts, including secondary impacts, and satisfy the requirements of Rule 40E-4.301(1)(f)." Petitioners simply restate the arguments set forth in Petitioners' Exceptions 2, 7, and 8. Therefore, Petitioners' ninth exception is rejected for the same reasons. Since Petitioners have failed to show there is no competent, substantial evidence to support Conclusion of Law 103 and that it is not otherwise incorrect as a matter of law, Petitioners' ninth exception is rejected.

Petitioners' Exception No. 10

Petitioners' Exception No. 10 is that there is no evidentiary support for the portion of Conclusion of Law 114 that states "evidence proved that elimination of the swimming pool at Harbour Pointe would not be a practicable design modification." However, PDL presented testimony that the elimination of the swimming pool would not be a practicable means of reducing the footprint of the project. See Finding of Fact 60; Pavelka, 07/25/06 190-191. Petitioners' tenth exception is requesting the Governing Board to reweigh the evidence, which is beyond the scope of the Board's authority. Since Petitioners have failed to show there is no competent, substantial evidence to support Conclusion of Law 114, Petitioners' tenth exception is rejected.

Petitioners' Exception No. 11

Petitioners eleventh exception is that the "ALJ erred by not finding that the secondary and cumulative impacts of the roadway (leading to the drawbridge) must be analyzed prior to the issuance of the permit modification." This exception is not particular to any Finding of Fact or Conclusion of Law, but rather, to the absence of a finding. There does not appear to be any evidence or testimony in the record regarding secondary and cumulative impacts of the roadway leading to the drawbridge. The Governing Board cannot consider matters raised for the first time in the exceptions. Bass Farms Inc. v. The Heidrich Corp., 1998 WL 866282 (Fla. Div. Admin. Hrgs.); Oakes v. the Heidrich Corp., 1997 WL 1053299 (Fla. Div. Admin. Hrgs.). Therefore, Petitioners eleventh exception is rejected.

PDL's Exceptions

PDL filed exceptions to Finding of Fact 64 and Conclusion of Law 115 on the grounds that the ALJ did not give proper deference to the District's interpretation of the rules. In Finding of Fact 64, the ALJ simply recited testimony presented by the SFWMD that the District did not review financial information on the proposed project in the context of the elimination and reduction of impacts analysis. Bain, 07/27/06, p. 14. Since PDL has failed to show there is no competent, substantial evidence to support Finding of Fact 64, PDL's exception to Finding of Fact 64 is rejected.

PDL also filed an exception to Conclusion of Law 115, which found that the SFWMD did not make a sufficient inquiry into the reduction and elimination of adverse impacts based on the failure to review financial or market information to evaluate the economic viability of reducing the number of units. BOR Section 4.2.1.1 specifically includes economic viability in the evaluation of whether a modification is practicable to eliminate or reduce adverse impacts.

In addition, the District's testimony was that financial statements were not reviewed as part of the application. Bain, 07/27/06, p. 14. Since PDL has failed to show there is no competent, substantial evidence to support Conclusion of Law 115, PDL's exception to Conclusion of Law 115 is rejected.

Respondents' Exceptions

Respondents' PDL and SFWMD both filed exceptions arguing the ALJ applied the incorrect standard in Conclusions of Law 111, 112, and 116. In Conclusions of Law 111, 112, and 116, the ALJ applied a standard for reduction and elimination of impacts which required the applicant to reduce and eliminate impacts "to the extent practicable." BOR Section 4.2.1 provides that "[a]ny adverse impacts remaining after practicable design modifications have been implemented may be offset by mitigation." Further, Section 4.2.1.1 requires the District to

> consider whether the applicant has implemented **practicable design modifications** to reduce or eliminate such adverse impacts. The term 'modification' shall not be construed as including the alternative of not implementing the system in some form, nor shall it be construed as requiring a project that is significantly different in type or function. A proposed modification which is not technically capable of being done, is not economically viable, or which adversely affects public safety through the endangerment of lives or property is not considered '**practicable**.' A proposed modification need not remove all economic value of the property in order to be considered not 'practicable.' Conversely, a modification need not provide the highest and best use of the property to be '**practicable**.' In determining whether a proposed modification is **practicable**, consideration shall also be given to the cost of the modification compared to the environmental benefit it achieves.

However, in Conclusions of Law 111, 112, and 116, the ALJ evaluated whether the applicant provided reasonable assurances that wetland impacts were "reduced and eliminated to the extent practicable." Respondents' exception is based on the ALJ's application of an apparently stricter standard than that found in BOR Section 4.2.1.1. Respondents argue that the application of a standard which requires elimination and reduction of impacts to the extent

practicable is a stricter standard than BOR Section 4.2.1.1, which requires the applicant to make "practicable design modifications to reduce or eliminate such impacts."

The District has previously rejected an interpretation that BOR Section 4.2.1 "generally requires than an applicant provide reasonable assurances that wetland impacts be eliminated or reduced to the greatest extent practicable." Belanger v. Conquest Developments USA, L.C. and SFWMD, DOAH Case No. 02-0116, Recommended Order ¶ 7. In its rejection of this proposition, the District cited the exact language of Section 4.2.1 which requires the District to "consider whether the applicant has implemented practicable design modifications to reduce or eliminate such adverse impacts." Belanger v. Conquest Developments USA, L.C. and SFWMD, DOAH Case No. 02-0116, Final Order ¶ 7.

Petitioners cite Paragraphs 42 and 77 of Brown v. SFWMD, DOAH Case No. 04-0476 (2004) for the proposition that "to the extent practicable" is the appropriate standard for evaluation of the applicant's elimination and reduction of impacts. In Brown, the ALJ recited the steps for the evaluation of an ERP application, including the inquiry of whether the applicant has reduced and minimized impacts "to the extent practicable." Brown at ¶ 44. However, in the determination of whether the elimination and reduction requirement had been satisfied, the ALJ found that the applicant "has incorporated into the proposed dock design all **practicable modifications** that could eliminate or reduce these adverse impacts." Brown at ¶ 44. The ALJ in Brown applied the correct standard found in BOR Section 4.2.1.1, that the District "shall consider whether the applicant has implemented **practicable design modifications** to reduce or eliminate such adverse impacts." Therefore, the standard applied in Brown is in accordance with Section 4.2.1.1, and is the same standard Respondents argue should have been applied in this case.

Consistent with both Belanger and Brown, the correct standard for determining whether the applicant has met the requirement of elimination and reduction of adverse impacts should have been applied in this case, as enunciated in BOR Section 4.2.1.1. The SFWMD shall

> consider whether the applicant has implemented **practicable design modifications** to reduce or eliminate such adverse impacts. The term 'modification' shall not be construed as including the alternative of not implementing the system in some form, nor shall it be construed as requiring a project that is significantly different in type or function. A proposed modification which is not technically capable of being done, is not economically viable, or which adversely affects public safety through the endangerment of lives or property is not considered '**practicable**.' A proposed modification need not remove all economic value of the property in order to be considered not 'practicable.' Conversely, a modification need not provide the highest and best use of the property to be '**practicable**.' In determining whether a proposed modification is **practicable**, consideration shall also be given to the cost of the modification compared to the environmental benefit it achieves. BOR 4.2.1.1.

Respondent PDL also filed an exception to Finding of Fact 71 on the same grounds as the exception to Conclusions of Law 111, 112, and 116. Finding of Fact 71 found that PDL's failure to present evidence on the profitability of reducing the number of units and eliminating a building "constituted a failure to give reasonable assurance that wetland and surface water impacts would be reduced and eliminated by design modifications to the extent practicable." Finding of Fact 71 is actually a combined statement of fact and conclusion of law. The portion of Finding of Fact 71 which constitutes the Conclusion of Law is rejected, but the Finding of Fact portion will be undisturbed because "rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact." Section 120.57(1)(l), Florida Statutes. Therefore, Finding of Fact 71 may be considered on remand and is modified as follows:

> PDL did not calculate or present evidence of whether it could make a profit building and selling 16 or 20 units, thereby eliminating a building or two (and

perhaps some road and stormwater facility requirements) from the project's footprint.

Application of the standard as provided in BOR Section 4.2.1.1 may alter the ALJ's findings or the outcome of this case. However, the Governing Board does not have the authority to reweigh the evidence. Heifetz v. Dep't of Business Reg., 475 So. 2d 1277 (Fla. 1st DCA 1985). "When an agency's construction of a statute or rule necessitates additional fact finding, the proper procedure is for the agency to remand the case to the hearing officer for that purpose." Grier v. Agency for Health Care Administration, 704 So. 2d 1072, 1075 (Fla. 1st DCA 1998). Since application of the language of the rule is "as or more reasonable" than the ALJ's interpretation of the standard for elimination and reduction of impacts, Conclusions of Law 111, 112, and 116 are rejected. Remand is required for the ALJ, as the trier of fact, to apply the standard specified in BOR Section 4.2.1.1, and conduct additional fact finding or evidentiary proceedings necessary to apply the correct standard.

ORDER

Based upon the foregoing, the Governing Board, having considered the ALJ's Recommended Order, the Exceptions and associated Responses thereto, and being otherwise fully advised in the premises, hereby ORDERS that this matter is REMANDED to the Division of Administrative Hearings to:

1. Reconsider the findings of fact and conclusions of law in light of the correct standard, as enunciated in BOR Section 4.2.1.1;
2. Allow further evidentiary proceedings on additional mitigation, the proposed additional conditions referenced in the ALJ's Recommendation on page 54 of the Recommended Order, or other proceedings consistent with the provisions of this order as may be necessary and appropriate.

DONE AND SO ORDERED, this 14th day of December, 2006, in West Palm Beach, Florida.

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT
BY ITS GOVERNING BOARD

Sheryl Wood

SHERYL WOOD, General Counsel

ATTEST:

BY: Jacki McGarty

DATE: 12/14/2006

LEGAL FORM APPROVED:

TEW CARDENAS LLP
Board Counsel to the Governing Board

BY: [signature]
Santiago D. Echemendia, Esq.

DATE: December 14, 2006

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been furnished this 15th day of December, 2006, by U.S. Mail to the following parties and counsel:

Richard Grosso, Esq.
Env. & Land Use Law Ctr.
3305 College Ave.
Ft. Lauderdale, FL 33314

Lisa Interlandi, Esq.
Robert Hartsell, Esq.
Everglades Law Center
330 U. S. Highway 1, Suite 3
Lake Park, FL 33403

Kenneth G. Oertel, Esq.
Gavin Burgess, Esq.
Oertel, Fernandez, Cole & Bryant, P.A.
P. O. Box 1110
Tallahassee, FL 32302

Gary A. Davis
The Conservancy of Southwest Florida
1450 Merrihue Ave.
Naples, FL 34102

Matthew D. Uhle, Esq.
Knott, Consoer, Ebelini & Swett, P. A.
1625 Hendry St., Third Floor
Ft. Myers, FL 33901

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT
3301 Gun Club Road, MSC 1410
West Palm Beach, FL 33401
(561) 682-6251

Sheryl Wood

SHERYL WOOD, General Counsel

NOTICE OF RIGHTS

As required by Sections 120.569(1), and 120.60(3), Fla. Stat., following is notice of the opportunities which may be available for administrative hearing and/or judicial review when the substantial interests of a party are determined by an agency. Please note that this Notice of Rights is not intended to provide legal advice. Not all the legal proceedings detailed below may be an applicable or appropriate remedy. You may wish to consult an attorney regarding your legal rights.

Right to Request Administrative Hearing
A person whose substantial interests are or may be affected by the South Florida Water Management District's (SFWMD or District) action has the right to request an administrative hearing on that action pursuant to Sections 120.569, 120.57, and 120.60(3), Fla. Stat. Persons seeking a hearing on a District decision which does or may determine their substantial interests shall file a petition for hearing with the District Clerk within 21 days of receipt of written notice of the decision in accordance with Rule 28-106.111, Fla. Admin. Code. Any person who receives written notice of a District decision and fails to file a written request for hearing within 21 days waives the right to request a hearing on that decision as provided by Subsection 28-106.111(4), Fla. Admin. Code.

The Petition must be filed at the Office of the District Clerk of the SFWMD, 3301 Gun Club Road, P.O. Box 24680, West Palm Beach, Florida, 33416, and must comply with the requirements of Rule 28-106.104, Fla. Admin. Code. Filings with the District Clerk may be made by mail, hand-delivery or facsimile. **Filings by e-mail will not be accepted.** A petition for administrative hearing is deemed filed upon receipt during normal business hours by the District Clerk at SFWMD headquarters in West Palm Beach, Florida. Pursuant to Rule 28-106.104, Fla. Admin. Code, any document received by the office of the District Clerk after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day.

- Filings made by mail must include the original and one copy and must be addressed to the Office of the District Clerk, P.O. Box 24680, West Palm Beach, Florida 33416.

- Filings by hand-delivery must also include the original and one copy of the petition. **Delivery of a petition to the District's security desk does <u>not</u> constitute filing. To ensure proper filing, it will be necessary to request the District's security officer to contact the Clerk's office.** An employee of the District's Clerk's office will file the petition and return the extra copy reflecting the date and time of filing.

- Filings by facsimile must be transmitted to the District Clerk's Office at (561) 682-6010. Pursuant to Subsections 28-106.104(7), (8) and (9), Fla. Admin. Code, a party who files a document by facsimile represents that the original physically signed document will be retained by that party for the duration of that proceeding and of any subsequent appeal or subsequent proceeding in that cause. Any party who elects to file any document by facsimile shall be responsible for any delay, disruption, or interruption of the electronic signals and accepts the full risk that the document may not be properly filed with the clerk as a result. The filing date for a document filed by facsimile shall be the date the District Clerk receives the complete document.

The following provisions may be applicable to SFWMD actions in combination with the applicable Uniform Rules of Procedure (Subsections 40E-0.109(1)(a) and 40E-1.511(1)(a), Fla. Admin. Code):

(1)(a) "Receipt of written notice of agency decision" as set forth in Rule 28-106.111, Fla. Admin. Code, means receipt of either written notice through mail or posting that the District has or intends to take final agency action, or publication of notice that the District has or intends to take final agency action.

(b) If notice is published pursuant to Chapter 40E-1, F.A.C., publication shall constitute constructive notice to all persons. Until notice is published, the point of entry to request a formal or informal administrative proceeding shall remain open unless actual notice is received.

(2) If the District's Governing Board takes action which substantially differs from the notice of intended agency decision, the persons who may be substantially affected shall have an additional point of entry pursuant to Rule 28-106.111, Fla. Admin. Code, unless otherwise provided by law. The District Governing Board's action is considered to substantially differ from the notice of intended agency decision when the potential impact on water resources has changed.

(3) Notwithstanding the timeline in Rule 28-106.111, Fla. Admin. Code, intended agency decisions or agency decisions regarding consolidated applications for Environmental Resource Permits and Use of Sovereign Submerged Lands pursuant to Section 373.427, Fla. Stat., shall provide a 14 day point of entry to file petitions for administrative hearing.

Hearings Involving Disputed Issues of Material Fact

The procedure for hearings involving disputed issues of material fact is set forth in Subsection 120.57(1), Fla. Stat., and Rules 28-106.201-.217, Fla. Admin. Code. Petitions involving disputed issues of material fact shall be filed in accordance with Rule 28-106.104, Fla. Admin. Code, and must comply with the requirements set forth in Rule 28-106.201, Fla. Admin. Code.

Hearings Not Involving Disputed Issues of Material Fact

The procedure for hearings not involving disputed issues of material fact is set forth in Subsection 120.57(2), Fla. Stat, and Rules 28-106.301-.307, Fla. Admin. Code. Petitions not involving disputed issues of material fact shall be filed in accordance with Rule 28-106.104, Fla. Admin. Code, and must comply with the requirements set forth in Rule 28-106.301, Fla. Admin. Code.

Mediation

As an alternative remedy under Sections 120.569 and 120.57, Fla. Stat., any person whose substantial interests are or may be affected by the SFWMD's action may choose to pursue mediation. The procedures for pursuing mediation are set forth in Section 120.573, Fla. Stat., and Rules 28-106.111 and 28-106.401-.405, Fla. Admin. Code. Choosing mediation will not adversely affect the rights to a hearing if mediation does not result in a settlement.

DISTRICT COURT OF APPEAL

Pursuant to Sections 120.60(3) and 120.68, Fla. Stat., a party who is adversely affected by final SFWMD action may seek judicial review of the SFWMD's final decision by filing a notice of appeal pursuant to Florida Rule of Appellate Procedure 9.110 in the Fourth District Court of Appeal or in the appellate district where a party resides and filing a second copy of the notice with the SFWMD Clerk within 30 days of rendering of the final SFWMD action.