

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF COMMUNITY)
AFFAIRS,)
)
 Petitioner,)
)
and)
)
JOANNE E. KOWAL, C. TOMOKA)
BRADY, PATRICK M. WRIGHT, and)
C. PERRY BROWN,)
)
 Intervenors,)
)
vs.) Case No. 07-3267GM
)
CITY OF TALLAHASSEE and LEON)
COUNTY,)
)
 Respondents,)
)
and)
)
ARBOR PROPERTIES DEVELOPMENT,)
INC.,)
)
 Intervenor.)
_____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on November 28-30 and December 12, 2007, in Tallahassee, Florida, before J. Lawrence Johnston, an Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether Leon County's Comprehensive Plan Amendments 2007-1-T-015 ("the Plan Amendments"), which exempt "closed basins" from Lake Jackson Special Development Zone (SDZ) development restrictions, are in compliance as defined by Section 163.3184(1)(b), Florida Statutes.¹

PRELIMINARY STATEMENT

On February 1, 2007, Leon County ("the County") transmitted to the Department of Community Affairs ("DCA" or the "Department") a package of proposed comprehensive plan amendments, including the Plan Amendments at issue in this case. DCA issued an Objections, Recommendations and Comments Report ("ORC") on April 13, 2007, objecting to the Plan Amendments and urging the County not to adopt them. The County adopted the Plan Amendments at a public hearing conducted on May 8, 2007, and transmitted them to DCA on May 24, 2007. The transmittal package included a response to DCA's ORC and provided additional data and analysis in support of the Plan Amendments. On July 10, 2007, DCA issued a Notice of Intent to find the Plan Amendments not "in compliance."²

At the final hearing, Joint Exhibits 1-3 were admitted into evidence. The Department presented the testimony of Joe Knetsch, Larry Nall, Wayne Tedder, Eric Livingston,

Harley Means, and Charles Gauthier. DCA's Exhibits 12 and 14-24 were admitted into evidence. Ruling was reserved on objections to DCA Exhibits 1-11 and 13. DCA Exhibits 1-10 (old newspaper accounts of Lake Jackson) are received subject to the valid objections to the hearsay reported in the accounts.

(Similarly, DCA Exhibits 11, a 1989 Executive Order of the Governor, and 18-19, which are admissible under Section 163.3184(7)(a), Florida Statutes, are received subject to the valid objections to the hearsay which they contain.) The relevance objections to DCA Exhibits 13, 25, and 26 are overruled, and those exhibits also are received in evidence.³

Intervenors, JoAnne Kowal, Tomoka Brady, Patrick Wright, and Perry Brown ("the Kowal Intervenors" or "Petitioner-Intervenors") presented the testimony of Thomas Kwader, George Baragona, Matthew Aresco, and Tyler Macmillan in their case-in-chief. They also re-called witnesses Baragona, Macmillan, and Kwader and called an additional witness, Mark Endries, in rebuttal. The Kowal Intervenors' Exhibits 1-25 were admitted in evidence.

The County presented the testimony of Wayne Tedder and John Kraynak, and County Exhibits 1 and 3-10 were admitted in evidence.

Intervenor Arbor Properties Development, Inc. ("Arbor"), presented the testimony of Devo Seereeram, Andrew Barth, and Thomas Missimer. Arbor Exhibits 1-4 were admitted in evidence.

Counsel for the City of Tallahassee ("the City") attended the final hearing, but the City did not present any evidence or cross-examine any witnesses.

An eight-volume Transcript of the proceeding was filed on January 4, 2008. The parties requested and were given 20 days from the filing of the transcript to submit proposed recommended orders. The Proposed Recommended Orders (PROs) filed on January 24, 2008, were considered in preparing this Recommended Order.

FINDINGS OF FACT

Background

1. The County and City have a joint comprehensive plan in that most provisions are adopted by both local governments, but some provisions are only adopted by one or the other local government. The Plan Amendments at issue in this case were adopted by the County but not the City; they relate to Lake Jackson.

2. Lake Jackson is a 4,000-plus acre water body in the northern portion of the County, north of Interstate 10. When U.S. Highway 27 was built, it crossed the western edge of Lake Jackson, dividing the main body of the lake from the part that

became known as Little Lake Jackson. However, Little Lake Jackson remains connected to the main body of Lake Jackson through culverts under Highway 27.

3. Lake Jackson is located within the larger Lake Jackson Drainage Basin, which includes all land from which water drains to Lake Jackson. The boundary of the City intersects the southern and eastern reaches of the Lake Jackson Drainage Basin.

4. Lake Jackson is an important state resource. It has been designated as a Florida Aquatic Preserve, an Outstanding Florida Water, is on the Northwest Florida Water Management District's Surface Water Improvement and Management Program priority list, and is listed as resource of regional significance under the Northwest Florida Strategic Regional Policy Plan. Significant resources, including roughly 9 million dollars since 1999, have been spent by state, regional, and local entities to manage and restore the lake.

5. Repeatedly throughout and before its recorded history, Lake Jackson has flooded or almost entirely disappeared. The water level of Lake Jackson is mainly controlled by rainfall conditions. The most extreme flood event recorded occurred on June 18, 1966, when the water level of Lake Jackson reached 96.16 NAVD.⁴ Rainfall conditions are cyclical, and the lake's disappearance is due to sinkholes on the lake bottom that periodically "unplug" and allow the lake water to drain to the

Floridan Aquifer, especially during dry cycles. The local area is now experiencing an extended generally dry cycle. In 1999 Porter Sink unplugged and much of the lake drained. Porter Sink and some of the lake filled somewhat during times of more normal rainfall since 1999, but the lake again drained during the prevailing drier times and was still low at the time of the final hearing.

Plan Provisions Relating to Lake Jackson

6. In 1990 the County and the City adopted their joint comprehensive plan. Among other things, it included a future land use element and a conservation element.

7. Goal 2 [C] (designating the Conservation Element) of the Plan was to: "Protect and enhance natural surface water bodies to provide for fishable and swimmable uses." Objective 2.1 [C] addressed Stormwater Management. Objective 2.2 [C] addressed Water Bodies Protection and required the County to "have in place programs and procedures to improve water quality in degraded water bodies" and, "[i]n other natural water bodies, . . . to maintain water quality in order to meet local standards or state standards if no local standards are designated."

8. The comprehensive plan adopted in 1990 also included a separate Objective 2.3 [C] on Lake Jackson, which was to "adopt policies and ordinances [by 1991] that will prevent any further degradation of Lake Jackson and by the year 2000, return water

quality in the lake to its condition at the time of Outstanding Florida Waters (OFW) designation." Policy 2.3.1 [C], also adopted in 1990, was to "designate special development zones for Lake Jackson that restrict activities that impact the quality of stormwater."

9. The comprehensive plan adopted in 1990 also included Policy 2.2.18 [L] (designating the Land Use Element) of the Plan, which created "a protection category that is specific to the well documented scientific concerns regarding the degradation and continuing pollution of Lake Jackson." It limited density and intensity of development in the Lake Protection future land use category. As part of the Lake Protection development limitations, this policy also prohibited clustered residential development in the Lake Jackson SDZs. However, it also included a Mixed Use Lake Protection category for "closed basins." "Closed basin" was defined in the Glossary of the Plan as "[a] naturally depressed portion of the earth's surface for which there is no natural outlet for runoff other than percolation, evaporation, or transpiration."

10. The Department found the comprehensive plan adopted by the City and County in 1990 not to be "in compliance" and recommended remedial action, including elimination of the Lake Protection Mixed Use category and action to protect Lake Jackson, to "include buffer zones, restrictions on development

activity, reduced densities and intensities, and environmental design criteria." [DCA Exhibit 25] During the course of the resulting administrative proceeding, a Stipulated Settlement Agreement was reached in 1991 that required the City and County to adopt remedial action.

11. The remedial action adopted by the City and County included elimination of the Lake Protection Mixed Use category, and the following language was added to Policy 2.2.18 [L]: "Future development will not be subject to the limitations of the Lake Protection land use category if [it] can be demonstrated by competent scientific evidence that the development is located in a closed basin that does not naturally or artificially discharge to the larger Lake Jackson Basin. Closed basins must be certified by a registered engineer to the effect that there are no artificial or natural discharges from it." (Emphasis added.) The policy also provided that future development in the Lake Jackson SDZs had to be Planned Unit Developments (PUDs).

12. In addition, Policy 2.2.12 [C] was adopted in accordance with the 1991 Stipulated Settlement Agreement and established SDZs that limit the amount of disturbance that can occur on properties under certain elevations for several lakes in Leon County, including Bradford Brook Chain of Lakes, Fred

George Basin, Lake Iamonia, and Lake Jackson. Specific to Lake Jackson, the Plan established SDZs as follow:

Policy 2.2.12: [C] Special development zones with accompanying criteria shall be established and implemented through the LDRs for the following lakes:

Lake Jackson - Zone A = below elevation 100 feet NGVD (criteria) 5% or 4,000 sq. ft. may be disturbed

Zone B = between 100 feet NGVD and 110 feet NGVD (criteria) 50% of the site must be left natural

Preserve shoreline vegetation in its natural state for minimum of 50 linear feet landward of the ordinary high water line. Allow essential access. Government initiated stormwater facilities for retrofit purposes may utilize a greater portion of the SDZ if applicable criteria (Policy 2.1.9[C]) are met.

[Joint Exhibit 3 at IV-20]

13. As a result of the Stipulated Settlement Agreement and adopted remedial action, and DCA found the resulting comprehensive plan (the Plan) to be "in compliance."

14. In 2005, the County eliminated the "closed basin" exception from Policy 2.2.18 [L]. However, the 2005 revision provided that PUDs approved prior to January 1, 2005, were vested for all approved uses, intensities, and densities.

15. Arbor's Summerfield development, which is located just southwest of Lake Jackson across U.S. Highway 27, and just southeast of and contiguous to Little Lake Jackson, received a

PUD approval under the "closed basin" exception from Policy 2.2.18 [L] prior to January 1, 2005.

16. Arbor's PUD approval was challenged in circuit court by some of the Kowal Intervenors, and others, and in May 2006 it was held in that case that, while the Summerfield PUD was grandfathered under Policy 2.2.18 [L], the Lake Jackson SDZ criteria in Policy 2.2.12 [C] applied. The Plan Amendments at issue in this case ensued.

Plan Amendments

17. The Plan Amendments at issue moved the Lake Jackson part of Policy 2.2.12 [C] to Objective 2.3 [C], which addresses Lake Jackson Protection. The rest of Policy 2.2.12 [C] was left intact and now applies only to the Bradford Brook Chain of Lakes, the Fred George Basin, and Lake Iamonia. The Lake Jackson policy was renumbered 2.3.1 [C], replacing existing Policy 2.3.1 [C]. Besides the re-numbering and replacement of existing Policy 2.3.1 [C], the amendment added: "These SDZ criteria shall not apply within closed basins." This language also was added to Policy 2.1.10 [L], which had prohibited cluster residential development in the Lake Jackson SDZs.⁵

Challenge to the Plan Amendments

18. The Department and the Kowal Intervenors have alleged numerous statutory and rule provisions to support their compliance challenge. Generally, they contend that the Plan, as

amended, fails to adequately protect Lake Jackson and natural resources associated with the lake and is therefore inconsistent with Section 163.3177(6)(d), Florida Statutes, which sets forth the requirements of the conservation element.⁶

19. They also allege that the Plan Amendments are inconsistent with the following provisions of Florida Administrative Code Rule Chapter 9J-5⁷: 9J-5.003(123) (defining "stormwater"); 9J-5.006(3)(b)4. (requiring protection of natural resources); 9J-5.013(2)(b)3. (requiring protection of minerals, soils and native vegetative communities, including forests); 9J-5.013(2)(b)4. (requiring protection of fisheries, wildlife and wildlife habitat); 9J-5.013(2)(c)6. and 9J-5.013(3) (requiring protection of the natural functions of wetlands, floodplains, fisheries, wildlife habitats and lakes); and 9J-5.013(2)(c)9. (requiring protection of environmentally sensitive lands).

20. DCA and the Kowal Intervenors also challenge the Plan Amendments as not supported by adequate data and analysis and therefore inconsistent with Sections 163.3177(8) and (10), Florida Statutes. See also Rule 9J-5.005(2) (data and analysis requirements) and Rule 9J-5.006(2) (land use analysis requirements).

21. DCA and the Kowal Intervenors also contend that the Plan Amendments render the Plan internally inconsistent and therefore violate Section 163.3177(2), Florida Statutes,

(requiring that "the several elements of the comprehensive plan shall be consistent"). See also Rule 9J-5.005(5) (requiring internal consistency). DCA and the Kowal Intervenors have identified numerous plan provisions to support this claim, most of which deal with protection of area lakes and natural resources.

22. Numerous provisions of the state comprehensive plan have been raised in opposition to the Plan Amendments, as follows: Section 187.201(7)(b)8. (preservation of hydrologically significant wetlands and other natural floodplain features); Section 187.201(7)(b)10. (protection of surface and groundwater quality and quantity); Section 187.201(7)(b)12. (elimination of inadequately treated wastewater and stormwater discharge into the waters of the State); Section 187.201(9)(a) (protection of unique natural habitats and ecological systems); Section 187.201(9)(b)1. (conservation of forests, wetlands, fish, marine life, and wildlife); Section 187.201(9)(b)7. (protection of wetlands systems); Section 187.201(9)(b)10. (acquisition and maintenance of ecologically intact systems) Section 187.201(15)(a) (requiring development to be directed to areas with resources to accommodate growth in an environmentally acceptable manner; Section 187.201(15)(b)6. (requiring consideration in land use planning of the impact on water

quality and quantity, natural resources, and the potential for flooding).

23. The Plan Amendments also are alleged to be inconsistent with the Strategic Regional Policy Plan, and specifically Policy NR 1.2.10, which provides for restoration of water quality in Lake Jackson to standards established by Florida Department of Environmental Protection (DEP) and Rule Chapter 62-302.

More Than Mere Clarification

24. In response to the challenge, the County and Arbor first take the position that the Plan Amendments merely clarify that the Lake Jackson SDZs never applied to closed basins. However, the County and Arbor are estopped from taking that position in this case because of the circuit court ruling against the County and Arbor on that precise point. As a matter of law, that the County may not have applied the Lake Jackson SDZ criteria in certain "closed basins" means only that the County did not follow its Plan on those occasions. As a matter of law, the Plan Amendments actually do have the effect of exempting closed basins from the Lake Jackson SDZ criteria.

Glossary Definition

25. At one point in their PRO, the County and Arbor argue that the Plan Glossary's definition of "closed basin" ensures that the Plan Amendments will not affect Lake Jackson because it

does not allow any surface water discharge from a "closed basin." (A similar argument was made to the circuit court, that "common sense and logic support the conclusion that these [SDZ] restrictions do not apply to a development within a closed basin because stormwater from a closed basin by definition never reaches the lake." [DCA Exhibit 13, p.4]) But the Glossary definition allows percolation into the groundwater, which could subsequently enter the lake or emerge from the ground and become surface flow outside the closed basin. In addition, as indicated, supra, the Glossary definition does not mention artificial outlets for runoff from a "closed basin." Policy 2.2.18 [L], as it existed prior to 2005, included that concept in its definition for purposes of the Lake Protection future land use category exception, but that language has been eliminated from the Plan.

26. Even setting aside the possibility for groundwater to reach the lake, and assuming that the Glossary definition included, or should be interpreted to include, the concept of no artificial outlet for runoff, the County and Arbor also argue, inconsistently, that surface water in "closed basins" can overtop and flow into the Lake Jackson Drainage Basin in certain rainfall conditions. Indeed, the County found the Summerfield development to include all or part of two exempt closed basins for purposes of both Policy 2.1.18 [L] and Policy 2.2.12 [C]

because the basins would not discharge surface water in a 100-year, 24-hour storm, not because it would never discharge surface water to the Lake Jackson Drainage Basin.

Other Proposed Closed Basin Definitions

27. As indicated, one possible definition of closed basin refers to the capacity to retain surface water resulting from a 100-year, 24-hour storm, which was the definition used for the Summerfield site.

28. For Lake Jackson, 10.9 inches of rain in 24 hours amounts to a 100-year, 24-hour storm event. However, in evaluating the Summerfield site, the County followed the Department of Transportation's conservative practice of assuming 12 inches of rain in a 100-year, 24-hour storm event. However, it was not clear from the evidence whether the Summerfield evaluation assumed build-out of the PUD. This is significant because development reduces the capacity of a basin to retain stormwater runoff. This is because impervious surface would be increased, and cleared lands would be subject to soil compaction which prevents rainfall from soaking into the ground, resulting in increased stormwater volume.

29. Regardless of how it evaluated the Summerfield site, the County has not consistently used any one, standard "normal" rainfall event for determining closed basins. In addition to a 100-year, 24-hour storm event, the County also has used a 50-

year, 24-hour storm, and a three-year, 24-hour storm.⁸ The evidence suggests that the storm event chosen to be used may have depended on the County's purpose in determining the existence of a closed basin--e.g., if the County was determining, on the one hand, whether a Lake Protection future land use category (or SDZ) exemption applied or, on the other hand, whether flooding was a concern under Policies 1.3.2.d [C] and 2.2.5 [C].

30. When the County deleted the closed basin exception from the Lake Protection land use category in 2005, County staff recommended approval of the amendment at least in part because of the burden placed on developers and County staff to determine whether a development included a closed basin, and the confusion that existed as to how to make that determination. (Another reason given by County staff was that elimination of the exception would promote land use densities and intensities more consistent with the protection of Lake Jackson.)

31. When the County transmitted proposed plan amendments before adopting the Plan Amendments at issue, it proposed to define closed basins for purposes of the Lake Jackson SDZ exemption by reference to a 100-year, 24-hour storm. But when DCA in its ORC report cited the inconsistency with the definition in the Plan's Glossary, the County deleted the definition from the adopted Plan Amendments. It would seem

that, without a clear definition of closed basin, the Plan Amendments would result in the same kind of burdens and confusion the County sought to eliminate by removing the Lake Protection land use category exception in 2005.

32. The County now says that it anticipates adopting the 100-year, 24-hour storm definition through its LDRs. But any such definition, if actually adopted in the LDRs, would be subject to change outside the statutory plan amendment process.

33. While adoption of a Plan amendment to define closed basins for purposes of a Lake Jackson SDZ exception by reference to a 100-year, 24-hour storm event would be a clearer and more conservative definition, it would not necessarily be the most appropriate definition because it would not take into account antecedent and subsequent rainfall conditions, or the cumulative effect of smaller events. The evidence was clear that areas meeting a 100-year, 24-hour storm definition of "closed basin" would discharge to the Lake Jackson Drainage Basin and ultimately to Lake Jackson due to the cumulative effect of various combinations of lesser rainfall events. Arbor's own expert witness, Dr. Seereeram, described the importance of determining the antecedent conditions on the ground, as well as antecedent rainfall conditions, and explained that the highest recorded level for Lake Jackson in 1966 was attributable to a 100-year, three-year rainfall event. For this reason,

Dr. Seereeram has been preaching to regulators not to use the 100-year, 24-hour storm event for modeling big land-locked lakes like Lake Jackson, but rather what they "need to do is run continuous simulation models."

34. Due to the concerns expressed by Dr. Seereeram and the other experts, if closed basins for purposes of the Lake Jackson SDZ exemption are defined by reference to a 100-year, 24-hour storm event, instead of a continuous simulation model, the definition also should include an appropriate recovery time requirement. For example, there was evidence that the County's LDRs have included a requirement that stormwater retention facilities must be designed so as to recover their volume capacity within 14 days. This would help to account better for antecedent and subsequent rainfall conditions, and the cumulative effect of smaller events.

Insufficient Analysis

35. The County and Arbor take the position that the Plan Amendments are supported by data and analysis indicating that only a relatively small area with the Lake Jackson Drainage Basin that would be affected by a closed basin exception. However, the County's analysis was based on a 100-year, 24-hour storm definition. As indicated, the Plan as amended does not include this definition. Also, as indicated, it is not clear whether the analysis assumed build-out of the PUD. Without a

clear and appropriate definition of closed basins for purposes of the Lake Jackson SDZ exception, the County's analysis fails to support the Plan Amendments at issue.

36. Even assuming a clear and appropriate closed basin definition in the Plan, the County's analysis would not be complete for two reasons. First, it failed to identify some basins that should have been analyzed. Second, it assumed that groundwater and other data and analysis pertaining to the Summerfield site was a valid proxy for all identified (and unidentified) closed basins in the Lake Jackson SDZs.

(i) Closed Basins in Lake Jackson SDZs

37. Ultimately, through the evidence presented at the final hearing, the County attempted to demonstrate the limited number of closed basins in the Lake Jackson SDZs through analysis of Light Detection and Ranging (LIDAR) data, which was used to produce a Digital Elevation Model (DEM). The model results were further analyzed by identifying resulting basins at least two feet deep. The County took the position that, using this analysis, there were 16 "closed basins" within the Lake Jackson Drainage Basin, of which seven were within the Lake Jackson SDZs. Of those seven, the County determined that only three--named Kane, Old Bainbridge Road, and Perkins Road--retain development potential and would not discharge in a 100-year, 24-hour storm. Kane lies entirely within the Summerfield site,

while roughly the southwestern half of the Old Bainbridge Road basin (the half southwest of Old Bainbridge Road) is within the Summerfield site.

38. Using this analysis, the County further determined that those three "closed basins" comprised 40.7 of the 2,221 acres of land in the Lake Jackson Zone A SDZ (1.8 percent) and 37.2 of the 1,204 acres of land in the Lake Jackson Zone B SDZ (3.1 percent). Since the Lake Jackson Zone B SDZ allows up to 50 percent disturbance, the County's analysis was that only 18.6 acres of the 1,204 acres of land in Lake Jackson Zone B (1.5 percent) would be affected by the Plan Amendments.

39. Mr. Endries, an expert witness for the Kowal Intervenors, was able to further analyze the LIDAR data using an ArcView program also available to the County and identify numerous closed depressions two or more feet deep not identified or analyzed by the County. One was approximately 272 feet across. Mr. Macmillan, another expert witness for the Kowal Intervenors, identified more closed depressions not analyzed by the County using the U.S. Geological Survey document titled, "Hydrologic Significance of 1966 Flood Levels at Lake Jackson Near Tallahassee, Florida." At least two of those closed depressions identified by Mr. Macmillan are located within the Lake Jackson SDZs and outside of the floodplain. Mr. Macmillan also testified that existing development is minimal-to-none in

most of the closed depressions identified by Mr. Endries north of the lake, which means that development possibly could occur in such areas in the future.

40. For these reasons, to the extent that the closed basin definition used in the County's analysis is not appropriate, more surface water discharges to Lake Jackson than assumed in the County's analysis. In addition, the County's analysis of possible harm to the water quality of Lake Jackson by groundwater flow to Lake Jackson was deficient.

(ii) Lake Jackson SDZs Not Just For Stormwater

41. The County and Arbor also take the position that, because Policy 2.3.1 [C] designates Lake Jackson SDZs "that restrict activities that impact the quality of stormwater," the Lake Jackson SDZs do not address groundwater or any other comprehensive plan concerns. For several reasons, this position is rejected.

42. First, the location of the Lake Jackson SDZs in Policy 2.2.12 [C] of the 1991 Plan requires that they be read in context with the goal and the objective of the companion policies, which are not limited to stormwater.

43. Second, Rule 9J-5.003(123) defines "stormwater" as "the flow of water which results from a rainfall event." It is clear that some of the runoff from a rainfall event leaves a natural closed basin via percolation into the ground. For this

reason, the flow of groundwater beneath a closed basin can be considered part of "the flow of water which results from a rainfall event."

44. Third, contrary to the arguments of Arbor and the County that the sole purpose of the Lake Jackson SDZs is to establish "filter strips" of vegetation around the edges of the lake, restricting development and impervious surface in other parts of the Lake Jackson SDZs not only preserves more of the capacity of the SDZs to hold surface water runoff from rainfall events but also preserves vegetation that helps remove nutrients such as nitrogen and phosphorus--contaminants particularly detrimental to water bodies like Lake Jackson--before they reach the groundwater. The County and Arbor base their argument on Policy 2.3.4 [C], which provides for a vegetated buffer zone around the lake edge. But that policy does not reference either closed basins or SDZs, is not under the same objective as Policy 2.2.12 [C] on SDZs, and does not mean that the SDZs only apply to those areas that are contiguous to Lake Jackson.

45. Finally, there are other ancillary benefits beyond stormwater quality derived from the Lake Jackson SDZs, including the furtherance of policies in the Plan protecting wildlife and groundwater.

(iii) Summerfield Groundwater Analysis

46. Besides the possibility of a surface water connection during certain rainfall conditions (depending on the closed basin definition used), groundwater also can flow to Lake Jackson from closed basins. As indicated, this could occur either from a direct groundwater discharge to the lake, or when groundwater from a closed basin surfaces outside the closed basin and becomes surface water that can flow to the lake. Under any definition of closed basin, water retained in a closed basin can percolate into the soil and become groundwater. In the vicinity of Lake Jackson, groundwater typically would percolate into the Miccosukee formation, a layer of silty sands and clayey sands overlying the Torreya formation. The Torreya formation consists of very dense clay that acts like a sheet of plastic. It is nearly impermeable when it is intact. Due to the clays in the Miccosukee formation and especially the Torreya formation, horizontal flow of groundwater in the surficial aquifer is faster than vertical flow by approximately an order of magnitude (approximately ten feet per day versus one foot per day). Hydraulic head is an important consideration in determining the direction and rate of groundwater flow. Generally, groundwater flows from higher to lower water levels and moves faster the greater the difference in water levels. Groundwater can flow laterally under a road such as U.S.

Highway 27. For these reasons, although a closed basin may not "pop-off," it can be connected via the sand layer to Lake Jackson, either directly or indirectly.

47. Arbor's analysis of groundwater flow to Lake Jackson focused on the Summerfield site. There was some evidence suggesting that groundwater levels in the surficial aquifer on the Summerfield site are lower than the water level of Lake Jackson, which would indicate groundwater flow from Summerfield away from the lake. However, the data available for making such a determination was limited and less-than-ideal--seven core borings on the Summerfield site that were not well-correlated to the water level of Lake Jackson at the time, and a LIDAR map of data from a single day in 2003 or 2004 when the level of the surficial aquifer at the site was below the bottoms of the closed depressions on the site and undetectable.

48. In any event, Arbor's analysis then assumed groundwater flow from the Summerfield site towards Lake Jackson at the conservative rate of 10-12 feet per day. At that rate, groundwater from the two closed depressions on the site, which are approximately 180 feet and 600 feet from the lake, would reach the lake in approximately 18 and 60 days, respectively. The analysis then demonstrated the unlikelihood of contamination of Lake Jackson from any of the likely pollutants from a residential development at Summerfield (mainly hydrocarbon in

oil and grease from automobiles, nutrients from fertilizer, pesticides, and some heavy metals) due to the attenuation of the contaminants, which would travel more slowly through the soils than groundwater, before reaching the lake.

49. Arbor's analysis was that it was even less likely that contaminants from the other closed basins identified by the County in its analysis as being in the Lake Jackson SDZs and still potentially developable would reach the lake via direct groundwater flow, since they were farther from the lake. However, this analysis did not expressly address the possibility of groundwater flow from those closed basins emerging from the ground and mingling with surface water.

50. As indicated, the evidence presented by the County and Arbor did not analyze land already developed within the Lake Jackson SDZs. However, since the Lake Jackson SDZ restrictions apply to redevelopment, eliminating them for closed basins would allow redevelopment in closed basins in the Lake Jackson SDZs without regard to the SDZ restrictions.

51. In addition, Arbor's analysis did not address any other potential closed basins around Lake Jackson. The evidence indicated that some ponds around Lake Jackson are higher in elevation than the lake, and groundwater from those closed depressions normally would drain towards the lake. As indicated, the rate of groundwater flow would depend on the

hydraulic gradient. During times of increased rainfall, the water level in the ponds surrounding Lake Jackson will be even higher, and the Miccosukee formation will become saturated, leading to a greater hydraulic head and faster migration of groundwater to the lake. The possibility of contamination from groundwater from these other potential closed basins was not analyzed.

52. These questions only can be answered through a complete and thorough analysis of all closed basins and potential closed basins--similar to the way the County analyzed all parcels to be affected by the establishment of SDZs in the Lake Lafayette watershed in 2002.

(iv) Habitat for Flora and Fauna

53. Other policies under Objective 2.2 [C] cover floodplains, inter-basin transfer of water, wetland and lake function, and other conservation issues. Some of these issues are broad enough to include habitat for flora and fauna--e.g., in connection with protection and conservation of wetland and lake function.

54. The Plan Amendments are to provisions that do not specifically address wildlife and fish and their habitat. However, the Plan Amendments nonetheless could have an impact on fish and wildlife, which in turn can impact water quality in the lake. This was not raised as an issue by DCA, but was addressed

in the evidence presented by the Kowal Intervenors, who did raise the issue.

55. Reptiles, amphibians, birds, and mammals, including some listed and endangered species, use Lake Jackson and the wetlands and uplands surrounding it. These include seven species of freshwater turtles, four species of snakes, alligators, and amphibians, including multiple species of frogs.

56. There is much movement of these wildlife species back and forth between and among Lake Jackson and the wetlands and uplands surrounding the lake for a distance of up to two kilometers from the lake. Many of the wetlands and uplands used by Lake Jackson's wildlife species, and the connections between them, are located within the SDZs. The SDZs also include some "fishless" areas where amphibians can breed.

57. For example, turtles are semi-aquatic and leave the water to lay their eggs in the uplands around the lake. Frogs also migrate between these uplands and wetlands and the lake. Leopard frogs, for example, forage in the uplands around the lake and then return to the lake. Parts of the Summerfield site are used for breeding by the barking tree frog and the spadefoot toad. Thousands of tree frogs have migrated off the Summerfield site toward the Lake in a single documented event.

58. The terrestrial connections between the areas used by some of these animals are critical to them because they must use

these different habitats either seasonally or at other times for their life-cycle requirements and have to move over land in order to utilize them and for dispersal. If the terrestrial connections are eliminated, and these animals are restricted to just one area of their life-cycle, they cannot survive.

59. All of these animals are important to the function of the Lake Jackson ecosystem because they are part of the overall food web of the lake. A food web is all of the connections between species that feed on each other. All of these animals moving back and forth among the uplands and wetlands around the lake contribute to the biomass of the lake, which is a measure of the food web and productivity of the lake. For example, turtles in the U.S. Highway 27 area of Lake Jackson alone accounted for approximately 12 tons of biomass over a time period of six years. This is an indication that Lake Jackson is a very productive system.

60. If the SDZ disturbance criteria are removed, it could impact the forage, reproduction, and survival of some of the wildlife of Lake Jackson. The loss of wildlife can affect the functioning of the Lake Jackson ecosystem. For example, one species of turtle, the Florida cooter, eats filamentous algae and as a group eat tons of algae, which is a benefit to the Lake. These turtles need the connection between the lake and the uplands to survive, including areas that are SDZs subject to

the Plan Amendments. A loss of species diversity would simplify the complex food web of the lake, which could adversely affect the function of wetlands and the Lake.

61. Arbor presented evidence that Summerfield's wildlife habitat is relatively degraded and unimportant due to its history of being used for cattle grazing. However, as indicated, it still is used by Lake Jackson's wildlife.

62. Since the evidence presented by Arbor and the County focused on Summerfield, there was no analysis of other potential closed basins.

Plan's Other Lake Jackson Protections
And Internal Consistency

63. The County and Arbor take the position that other provisions of the Plan adequately protect Lake Jackson even if the SDZ criteria are not applied in closed basins in the Lake Jackson SDZs. DCA and the Kowal Intervenors take the position that, to the contrary, the Plan Amendments are inconsistent with many of the same Plan provisions.

64. The Plan contains a number of goals, objectives, and policies that function in conjunction with the Lake Jackson SDZs to protect and restore Lake Jackson, in accordance with statutory and rule requirements.

65. The goal of the Conservation Element is to "[p]reserve, protect and conserve the ecological value and diversity of natural resources in Tallahassee and Leon County."

66. Policy 1.1.1 [C] requires that a natural resources inventory be conducted on a site before any development or rezoning occurs.

67. Policy 1.3.2 [C] protects conservation areas such as floodplains, closed basins, significant grades, and active karst features. Policy 1.3.2.d [C] (County Only) allows development in closed basins to the extent that there is sufficient stormwater capacity within the basin. It also states that "[d]evelopment will be permitted reflective of the density allowed by the existing land use category."

68. Policy 1.3.6 [C] protects preservation areas such as wetlands, water bodies, severe grades, and native forests. Wetlands, floodways, and flood plains are also protected by Policy 1.1.1 [SM] (designating the Stormwater Sub-element of the Utilities Element of the Plan), which requires that those features be maintained in their natural state.

69. Objective 2.1 [C] requires the County and City to "coordinate the various elements of their overall stormwater program through a unified plan to ensure the efficient and effective provisions of stormwater regulations, enforcement, planning, maintenance, operations, and capital improvements."

70. Policy 2.2.1 [C] is to: "Protect and conserve the natural function of wetlands by limiting wetland destruction and adverse impacts."

71. Policy 2.2.4 [C] is to: "Require additional restrictions in drainage basins that have been identified through scientific studies as having significant surface water degradation as defined by declining surface water systems, loss of aquatic plant and animal species, and an increase in the level of the parameters that define polluted water."

72. Policy 2.2.5 [C] provides that "development in closed basins will be permitted only to the extent there is sufficient stormwater capacity within the basin." It also addresses the conditions under which inter-basin transfer of water will be permitted.

73. Policy 2.3.4 [C] requires "a natural vegetation zone around the lake edge that severely limits clearing and is sufficient in size to help buffer the lake against runoff and provide aquatic vegetation for habitat."

74. Objective 3.1 [C] is to "[p]rotect and enhance populations of endangered, threatened and species of special concern listed by Leon County and the Florida Game and Fresh Water Fish Commission, and their habitat so there is no loss of wildlife species"

75. Policy 4.2.3 [C] restricts incompatible land uses near active karst features, which not defined in the Plan, and prohibits untreated stormwater from entering those features. It states: "Incompatible land uses are uses that use, produce, or generate as a waste any listed Resource Conservation and Recovery Act material or Environmental Protection Agency priority pollutant."

76. It is found that the foregoing Plan provisions, taken together, do not make the Lake Jackson SDZ criteria redundant or superfluous in closed basins. To the contrary, the Plan provided more protection for Lake Jackson before the Plan Amendments.

77. At the same time, DCA and the Kowal Intervenors did not prove beyond fair debate that the Plan Amendments are inconsistent with any of the foregoing Plan provisions, either individually or taken together. See § 163.3177(2), Fla. Stat.; Fla. Admin. Code R. 9J-5.005(5).

Other Statutory and Rule Compliance Criteria

78. Section 163.3177(8), Florida Statutes, states: "All elements of the comprehensive plan . . . shall be based upon data appropriate to the element." The implementing rule states:

All goals, objectives, policies, standards, findings and conclusions within the comprehensive plan and its support documents, and within plan amendments and their support documents, shall be based upon

relevant and appropriate data and the analysis applicable to each element. To 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.

Fla. Admin. Code R. 9J-5.005(2)(a).

79. It is found that, due to the great importance of Lake Jackson as a natural resource, the data and analysis were insufficient to support the Plan Amendments, which do not react appropriately to the data and analysis. More analysis is required before it is can be determined that the benefits of the Lake Jackson SDZs should be eliminated in closed basins. First, as indicated, the definition of closed basin in the Plan's Glossary would include basins with an artificial outlet for runoff into the greater Lake Jackson Drainage Basin. Any other definition of closed basin not in the Plan, including the 100-year, 24-hour storm event definition the County indicates it intends to adopt through its LDRs, would be subject to change outside the statutory plan amendment process. Even assuming that such a definition were in the Plan, the data and analysis suggest that such a definition would not be the most appropriate definition to use in the interest of Lake Jackson's water quality. Rather, the definition should specify that it would be applied post-development and that it should be based on a continuous simulation model, or at least include an appropriate

recovery time requirement, to account for antecedent and subsequent rainfall and the cumulative effect of smaller rain events. Until such an appropriate definition is adopted as part of the Plan, and the closed basins identified and evaluated, it cannot be determined that eliminating the SDZs in closed basins will not harm Lake Jackson, including possible harm from effects on groundwater beneath the closed basins and from effects on wildlife using the closed basins. For these reasons, the Plan Amendments do not react appropriately to the data and analysis.

80. State law requires local governments to include a conservation element in their comprehensive plans "for conservation, use, and protection of natural resources in the area, including air, water, water recharge areas, wetlands, waterwells, estuarine marshes, soils, beaches, shores, flood plains, rivers, bays, lakes, harbors, forests, fisheries and wildlife, marine habitat, minerals, and other natural and environmental resources." § 163.3177(6)(d), Fla. Stat. The conservation element must have policies for: "Protection and conservation of the natural functions of existing soils, fisheries, wildlife habitats, rivers, bays, lakes, floodplains, harbors, wetlands including estuarine marshes, freshwater beaches and shores, and marine habitats" Fla. Admin. Code R. 9J-5.013(2)(c)6. Rule Chapter 9J-5 reinforces this requirement by requiring: future land use objectives to "[e]nsure the

protection of natural resources" (Fla. Admin. Code R. 9J-5.006(3)(b)4.); future land use policies for "[p]rotection . . . of environmentally sensitive lands" (Fla. Admin. Code R. 9J-5.006(3)(b)6.; and conservation element objectives to conserve native vegetative communities, fisheries, and wildlife habitat (Fla. Admin. Code R. 9J-5.013(2)(b)3.- 4.).

81. By a preponderance of the evidence, it is found that the Plan, as amended, would be inconsistent with the foregoing statutes and rules in that the data and analysis were insufficient to determine that the Plan, as amended, would adequately protect Lake Jackson. Given the data and analysis, the Plan Amendments do not react appropriately.

82. Local governments are also required to include in their comprehensive plans a "general sanitary sewer, solid waste, drainage, potable water, and natural groundwater aquifer recharge element correlated to principles and guidelines for future land use, indicating ways to provide for future potable water, drainage, sanitary sewer, solid waste, and aquifer recharge protection requirements for the area."

§ 163.3177(6)(c), Fla. Stat. The future land use element must have policies for: "Provision for drainage and stormwater management" Fla. Admin. Code R. 9J-5.006(3)(c)4. Furthermore, comprehensive plans must have an element for sanitary sewer, solid waste, stormwater management, potable

water and natural groundwater aquifer recharge with objectives that "address protecting the functions of natural groundwater recharge areas and natural drainage features" and policies "[r]egulating land use and development to protect the functions of natural drainage features" Fla. Admin. Code R. 9J-5.011(2)(b)5 & (2)(c)4. It was not proven by a preponderance of the evidence that the Plan Amendments would be inconsistent with any of those provisions.

83. The evidence was that the Plan Amendments were inconsistent with the State Comprehensive Plan to the extent that it was inconsistent with other statutory and rule compliance criteria.

84. No evidence was presented to prove inconsistency with the Strategic Regional Policy Plan.

CONCLUSIONS OF LAW

85. All parties are affected persons with standing to participate in this proceeding pursuant to Section 163.3184(1)(a), Florida Statutes.

Consistency with the 1991 Compliance Agreement

86. In their petitions, both DCA and the Kowal Intervenors asserted that the Plan Amendments were not consistent with the 1991 Stipulated Settlement Agreement entered into by the County and DCA. But DCA conceded at hearing, and the Kowal Intervenors also agreed in their PRO, that consistency with an earlier

settlement or compliance agreement is not one of the compliance criteria identified in Section 163.3184(1)(b), Florida Statutes. See Melzer, et al. v. Martin County, et al., DOAH Case Nos. 02-1014GM and 02-1015GM, 2003 Fla. ENV LEXIS 147 (DCA Oct. 24, 2003); 2003 Fla. ENV LEXIS 149, at *96-97 (DOAH July 1, 2003).

87. With certain exceptions not applicable to this proceeding, DCA reviews local government comprehensive plan amendments to determine whether they are "in compliance." That term is defined in Section 163.3184(1)(b), Florida Statutes, as follows:

"In compliance" means consistent with the requirements of ss. 163.3177, 163.3176, 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.

Burden of Proof

88. A determination by DCA that a local government's plan amendment is not "in compliance" results in administrative proceedings conducted pursuant to Section 163.3184(10), Florida Statutes. The standard of review in such proceedings has been established by statute and differs somewhat from the de novo

review that is the norm in most administrative hearings. In a Section 163.3184(10) proceeding,

the local government's determination that the comprehensive plan or plan amendment is in compliance is presumed to be correct. The local government's determination shall be sustained unless it is shown by a preponderance of the evidence that the comprehensive plan or plan amendment is not in compliance. The local government's determination that elements of its plans are related to and consistent with each other shall be sustained if the determination is fairly debatable.

"The fairly debatable standard of review is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety." Martin v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997). If the internal consistency of an amendment with other provisions within a comprehensive plan is open to dispute on logical grounds, the County's determination that the amendment does not create an internal inconsistency within the comprehensive plan must prevail.

See Hussey, et al. v. Collier County, et al., DOAH Case Nos. 02-3795GM and 02-3796GM, Recommended Order, 2003 Fla. Div. Adm. Hear. LEXIS 304, at *56 (DCA Jul. 22, 2003; DOAH Apr. 29, 2003), quoting Yusem at 1295. See also Martin County v. Section 28 Partnership Ltd., 772 So. 2d 616, 621 (Fla. 4th DCA 2000) (if there is "evidence in support of both sides of a comprehensive plan amendment, it is difficult to determine that the County's

decision was anything but 'fairly debatable"). Also, the creation of an exemption or waiver of a general rule within a comprehensive plan generally does not create an internal inconsistency. Melzer, supra, 2003 Fla. EV LEXIS 149, at *94. A plan amendment creates an internal inconsistency only when it conflicts with other provisions in the comprehensive plan.

Internal Consistency

89. As found, other provisions in the Plan that are designed to protect natural resources both in the Lake Jackson basin and more generally throughout the County remain in effect and can be implemented without conflicting with other provisions as a result of the Plan Amendments at issue here. For that reason, it was not proven beyond fair debate that the Plan Amendments create internal inconsistencies.

Data and Analysis

90. On the other hand, as found, DCA and the Kowal Intervenors were able to prove by a preponderance of the evidence that the Plan Amendments are not supported by "relevant and appropriate data." This is not because data was not submitted to DCA or considered at the time of adoption, neither of which is required, so long as the data was available to the County at the time of adoption. See Runyan, et al. v. Dept. of Community Affairs, et al., DOAH Case No. 07-2239GM, Recommended Order, 2007 Fla. Div. Adm. Hear. LEXIS 547, at *24-25 (DOAH

Oct. 5, 2007), citing Zemel v. Lee County, et al., DOAH Case No. 90-7793GM, 1992 Fla. Div. Adm. Hear. LEXIS 5927, at *71-76 (DCA June 22, 1993), aff'd, 642 So. 2d 1367 (Fla. 1st DCA 1994). It also is not because the County did not collect enough data. Both Section 163.3177(10)(e) and Rule 9J-5.005(2)(b) expressly state that Chapter 9J-5 cannot "be construed to require original data collection by local governments" In addition, Rule 9J-5.005(2)(c) provides that, unless a local government elects to collect new data, the data relied upon in support of a plan amendment must be "the best available existing data" Rather, it is because the Plan Amendments do not react appropriately to the best data available at the time of adoption and to the analyses of the data presented through the time of the final hearing. See Fla. Admin. Code R. 9J-5.005(2)(a). See also Zemel, supra.

Other Compliance Criteria

91. DCA and the Kowal Intervenors also alleged that the amendment was not in compliance with Section 163.3177(6)(d), Florida Statutes, and a number of provisions in Rule Chapter 9J-5. As found, DCA and Kowal proved, by a preponderance of the evidence, that the Plan Amendments are not consistent with the statute and several of these provisions because the data and analysis were insufficient to determine that the Plan, as amended, would adequately protect Lake Jackson, notwithstanding

other provisions in the Conservation Element of the County's Plan that provide protection for Lake Jackson, because the Plan Amendments may eliminate necessary protections for the lake. (Contrary to the contention of the Kowal Intervenors, the Plan Amendments are not inconsistent with the definition of "stormwater" set forth in Rule 9J-5.003(123)).

92. DCA and the Kowal Intervenors also asserted that the Plan Amendments are inconsistent with both the State Comprehensive Plan and the applicable regional policy plan. For purposes of determining consistency between a comprehensive plan and both the state and regional plans, Section 163.3177(10)(a) provides the following guidance:

[F]or the purpose of determining whether local comprehensive plans are consistent with the state comprehensive plan and the appropriate regional policy plan, a local plan shall be consistent with such plans if the local plan is "compatible with" and "furthers" such plans. The term "compatible with" means that the local plan is not in conflict with the state comprehensive plan or appropriate regional policy plan. The term "furthers" means to take action in the direction of realizing goals or policies of the state or regional plan. For the purposes of determining consistency of the local plan with the state comprehensive plan or the appropriate regional policy plan, the state or regional plan shall be construed as a whole and no specific goal and policy shall be construed or applied in isolation from the other goals and policies.

93. Both the State Comprehensive Plan and regional policy plans establish general goals and policy rather than the type of minimum criteria that are set forth in Chapter 9J-5. As a consequence, before a comprehensive plan amendment could be found inconsistent with either the State or a regional plan, careful consideration would have to be given to the entirety of those more general plans, as well as to the entirety of the local comprehensive plan. See Recommended Order, DCA v. City of Groveland, et al., DOAH Case No. 04-3651GM (DOAH Nov. 25, 2005)(DCA petition dismissed after Recommended Order), at 39.

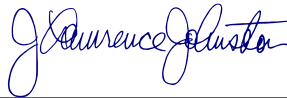
In addition, many of the provisions of the State Comprehensive Plan and its agencies apply to the State of Florida and its agencies in planning on the state level, as opposed to local governments. Rarely, if ever, will a local plan violate the State Comprehensive Plan if it does not also violate the applicable Rule Chapter 9J-5 "minimum criteria."

Id. As found and concluded, the Plan Amendments are inconsistent with Section 163.3177(6)(d), Florida Statutes, and some Rule Chapter 9J-5 provisions. Based on those findings and conclusions, it is concluded that the Plan Amendments also are inconsistent with Section 187.201(9)(a) and (b)1. and 7., Florida Statutes. The evidence did not prove inconsistency with the Strategic Regional Policy Plan.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Administration Commission find the Plan Amendments to be not "in compliance."

DONE AND RECOMMENDED this 13th day of March, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 13th day of March, 2008.

ENDNOTES

^{1/} Unless otherwise indicated, all statute citations are to the 2007 Florida Statutes.

^{2/} The Notice of Intent also gave notice of DCA's intent to find not in compliance a plan amendment jointly adopted by the County and the City of Tallahassee relating to the five-year schedule of capital improvements. By Order dated November 19, 2007, that portion of the case was severed, and the hearing proceeded solely on the sufficiency of Plan Amendment 2007-1-T-015.

^{3/} Although DCA Exhibits 25 and 26 are in evidence, consistency with the 1991 Stipulated Settlement Agreement is not a compliance criterion under Section 163.3184(1)(b), Florida Statutes.

^{4/} NAVD stands for the North American Vertical Datum of 1988. It standardized vertical data on the North American continent by accounting for differences in mean sea level in different locations, unlike vertical data using the former National Geodetic Vertical Datum of 1929 (NGVD). The adjustment for NGVD data at Lake Jackson is 0.37 feet--i.e., 0.37 feet are subtracted from NGVD data at Lake Jackson to convert to NAVD.

^{5/} This policy was revised in 1995, and the evidence is not clear precisely what the 1995 revision was.

^{6/} The Kowal Intervenors added the allegations regarding natural resources, which were not alleged by DCA.

^{7/} Rule citations are to the current version of the Florida Administrative Code, unless otherwise indicated.

^{8/} The County identified the Lakeside development, located directly north of the Summerfield site, as having a closed basin for purposes of the Lake Jackson SDZs. It is not clear how the County made this determination. In any event, the entirety of the Lakeside development actually was developed within the development limitations set out in the Lake Jackson SDZs.

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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.