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DIVISION OF  
ADMINISTRATIVE  
HEARINGS

STATE OF FLORIDA  
LAND AND WATER ADJUDICATORY COMMISSION

BONITA BAY PROPERTIES, INC., and  
SWF PROPERTIES OF SOUTHWEST  
FLORIDA, LTD.,

Petitioners,

FLWAC CASE NO. APP-07-013  
DOAH CASE NO. 07-4843DRI

vs.

CITY OF BONITA SPRINGS,

Respondent.

**FINAL ORDER**

This cause came before the Governor and Cabinet, sitting as the Florida Land and Water Adjudicatory Commission ("Commission") on July 29, 2008, upon the Recommended Order entered pursuant to Sections 380.07 and 120.57(1), Florida Statutes (2007), in the Division of Administrative Hearings ("DOAH") Case No. 07-4843DRI. The Commission is charged with adjudicating appeals in regard to any development of regional impact. See § 380.07(2), Fla. Stat. (2007). For the reasons stated below, and upon review of the record, the Commission adopts the findings of fact and conclusions of law set forth in the Recommended Order, which is incorporated and attached as Exhibit "A," except for paragraphs 30 through 32, as modified herein.

**BACKGROUND**

On July 21, 2006, Petitioners submitted to the City of Bonita Springs a notice of proposed change to the Bonita Bay Development of Regional Impact ("DRI"). The proposed

change seeks to amend the DRI development order to allow residential development within an area that had been set aside for preservation in the existing DRI. On June 27, 2007, the City denied the proposed change through Resolution No. 07-02. On August 3, 2007, Petitioners filed a Petition for Formal Administrative Proceeding with the Commission pursuant to Section 380.07, Florida Statutes, and on October 22, 2007, the Commission referred this matter to DOAH. A final hearing was held by an Administrative Law Judge ("ALJ") on February 12 and 13, 2008, in Bonita Springs, Florida.

### **STANDARD OF REVIEW OF RECOMMENDED ORDER AND EXCEPTIONS**

The Administrative Procedure Act provides that the Commission will adopt the ALJ's Recommended Order except under certain limited circumstances. The Commission has only limited authority to reject or modify the ALJ's findings of fact:

The agency may not reject or modify the findings of fact 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 upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

§120.57(1)(I), Fla. Stat. (2007)

When fact-finding functions have been delegated to an ALJ, as is the case here, the Commission must rely upon the record developed before the ALJ. See Fox v. Treasure Coast Reg'l Planning Council, 442 So. 2d 221, 227 (Fla. 1st DCA 1983). As the ALJ in an administrative proceeding is the trier of fact, he or she is privileged to weigh and reject conflicting evidence. See Cenac v. Fla. State Bd. of Accountancy, 399 So. 2d 1013, 1016 (Fla. 1st DCA 1981). Therefore, "[i]t is the hearing officer's function in an agency proceeding to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." Bejarano v. State, 901 So. 2d 891, 892 (Fla. 4th DCA 2005)(quoting Heifetz v. Dep't of Bus. Regulation, 475 So.

2d 1277, 1281 (Fla. 1st DCA 1985) (citing State Beverage Dep't v. Ernal, Inc., 115 So. 2d 566 (Fla. 3rd DCA 1959)). The Commission cannot re-weigh evidence considered by the ALJ and cannot reject findings of fact made by the ALJ if those findings of fact are supported by competent substantial evidence in the record. Heifetz, 475 So. 2d 1277 (Fla. 1st DCA 1985). Competent substantial evidence means "such evidence as will establish a substantial basis of fact from which a fact at issue can be reasonably inferred", and evidence which "should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

The Commission may modify or reject conclusions of law in the Recommended Order over which it has substantive jurisdiction. See Section 120.57(1)(l), Fla. Stat. (2007). When rejecting or modifying a conclusion of law, the Commission must state with particularity its reasons for rejecting or modifying such conclusion of law. Id. Any substituted conclusion of law must be as or more reasonable than the conclusion of law provided by the ALJ in the recommended order. Id.

### ***SUA SPONTE REJECTION OF PARAGRAPHS 30 THROUGH 32***

In paragraphs 30 through 32, the ALJ made certain legal conclusions as to whether the proposed change is a "down-zoning" or "up-zoning" of the subject land. Those conclusions are based on the fact that the land currently has a local zoning that allows "all types of residential uses," whereas the proposed change would limit development to single-family detached residences. See Finding of Fact 28. However, the land is subject to a DRI development order restriction that prohibits any development. These restrictions preempt any contrary local zoning. The City would be in violation of Chapter 380, Florida Statutes, if it were to issue a permit under

the local residential zoning despite the DRI development order restrictions. Thus, as a pure matter of law, the proposed change is not a zoning issue but simply an increase in the amount of development under the DRI.

### **RULINGS ON EXCEPTIONS**

1. Respondent requests in its first exception that the Commission reject the portions of Findings of Fact 19, 53, 62 and 98, the fact that the United States Fish and Wildlife Service's ("USFWS") biological opinion "approved" the 330-foot buffer zone around the nest, identified as Nest LE-005 ("the nest"). The Commission has reviewed both Respondent's exception to the findings of fact and Petitioner's response to that exception, as well as relevant parts of the record. The Commission finds that the Administrative Law Judge's findings of fact were supported by competent substantial evidence. Therefore, the Respondent's "Exception to Findings of Fact 19, 53, 62 and 98" is DENIED.

2. Respondent requests in its second exception that the Commission reject Finding of Fact 29, regarding the finding that the proposed change meets the requirements of the City's land development code and that there are no compatibility or zoning issues. The Commission has reviewed both Respondent's exception to the finding of fact and Petitioner's response to that exception, as well as relevant parts of the record. The Commission finds that the Administrative Law Judge's finding of fact was supported by competent substantial evidence. Therefore, the Respondent's "Exception to Finding of Fact 29" is DENIED.

3. Respondent requests in its third exception that the Commission reject Finding of Fact 56, which finds that the proposed residences will be visible from the nest but that extensive

landscaping will minimize the visual impacts of the residences upon the eagles. The Commission has reviewed both Respondent's exception to the finding of fact and Petitioner's response to that exception, as well as relevant parts of the record. The Commission finds that the Administrative Law Judge's finding of fact was supported by competent substantial evidence. Therefore, the Respondent's "Exception to Finding of Fact 56" is DENIED.

4. Respondent requests in its fourth exception that the Commission reject Finding of Fact 58, regarding the lack of credible evidence that the proposed development will cause the abandonment of the nest. The Respondent has not identified any legal basis for its exception and this order need not rule on such exception. See § 120.57(1)(k), Fla. Stat. (2007). It also appears to ask the Commission to re-weigh the evidence. Therefore, the Respondent's "Exception to Finding of Fact 58" is DENIED.

5. Respondent requests in its fifth exception that the Commission reject Finding of Fact 59, regarding the City's concern that the proposed 330-foot buffer is not sufficient to protect the eagles using the nest. The Respondent has not identified any legal basis for its exception and this order need not rule on such exception. See § 120.57(1)(k), Fla. Stat. (2007). It also appears to ask the Commission to re-weigh the evidence. Therefore, the Respondent's "Exception to Finding of Fact 59" is DENIED.

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6. Respondent requests in its sixth exception that the Commission reject Finding of Fact 60, regarding the preponderance of the evidence showing that there is no difference in the nesting success of eagles in rural and suburban areas and that an analysis of the active eagle's nests in Lee County showed no correlation between the distance of a nest from development and the success of the nest. The Commission has reviewed both Respondent's exception to the finding

of fact and Petitioner's response to that exception, as well as relevant parts of the record. The Commission finds that the Administrative Law Judge's finding of fact was supported by competent substantial evidence. Therefore, the Respondent's "Exception to Finding of Fact 60" is DENIED.

7. Respondent requests in its seventh exception that the Commission reject Finding of Fact 61, regarding the conclusion that the more persuasive evidence establishes that eagles are able to adapt and acclimate to human activities in order to take advantage of suitable habitat. The Commission has reviewed both Respondent's exception to the finding of fact and Petitioner's response to that exception, as well as relevant parts of the record. The Respondent appears to be asking the Commission to re-weigh the conflicting expert testimony, which it is not permitted to do. The Commission finds that the Administrative Law Judge's finding of fact was supported by competent substantial evidence. Therefore, the Respondent's "Exception to Finding of Fact 61" is DENIED.

8. Respondent again requests in its eighth exception, as it did in its first exception, that the Commission reject Finding of Fact 62, regarding whether the USFWS "approved" the biological plan reducing the buffer size to 330 feet around the nest. Again, the Commission finds that the Administrative Law Judge's finding of fact was supported by competent substantial evidence.

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Therefore, the Respondent's "Exception to Finding of Fact 62" is DENIED.

9. Respondent requests in its ninth exception that the Commission reject Finding of Fact 63, regarding the finding that the proposed roadway serving the residences does not adversely impact the eagles using the nest. The Commission has reviewed both Respondent's exception to the finding of fact and Petitioner's response to that exception, as well as relevant parts of the

record. The Commission finds that the Administrative Law Judge's finding of fact was supported by competent substantial evidence. Therefore, the Respondent's "Exception to Finding of Fact 63" is DENIED.

10. Respondent requests in its tenth exception that the Commission reject Finding of Fact 70, regarding the gopher tortoise relocation plan's consistency with the City's regulations. The Commission has reviewed both Respondent's exception to the finding of fact and Petitioner's response to that exception, as well as relevant parts of the record. The Commission finds that the Administrative Law Judge's finding of fact was supported by competent substantial evidence. Therefore, the Respondent's "Exception to Finding of Fact 70" is DENIED.

11. Respondent requests in its eleventh exception that the Commission reject Finding of Fact 78, regarding the lack of persuasive evidence as to the existence of any "high quality plant communities" apart from the existence of the nest. The Commission has reviewed both Respondent's exception to the finding of fact and Petitioner's response to that exception, as well as relevant parts of the record. The Commission finds that the Administrative Law Judge's finding of fact was supported by competent substantial evidence. Therefore, the Respondent's "Exception to Finding of Fact 78" is DENIED.

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12. Respondent requests in its twelfth exception that the Commission reject Finding of Fact 83, regarding the proposed change's protection of the "high-quality natural plant communit[y]" in the nest-tree area. The Commission has reviewed both Respondent's exception to the finding of fact and Petitioner's response to that exception, as well as relevant parts of the record. The Commission finds that the Administrative Law Judge's finding of fact was supported by

competent substantial evidence. Therefore, the Respondent's "Exception to Finding of Fact 83" is DENIED.

13. Respondent requests in its thirteenth exception that the Commission reject Findings of Fact 85 to 92, regarding the consistency of the proposed change with Objective 7.3 of the City's Comprehensive Plan to maintain and enhance the fish and wildlife diversity and distribution within the City. The Commission has reviewed both Respondent's exception to the finding of fact and Petitioner's response to that exception, as well as relevant parts of the record. The Commission finds that the Administrative Law Judge's findings of fact were supported by competent substantial evidence. Therefore, the Respondent's "Exception to Finding of Fact 85 to 92" is DENIED.

14. Respondent requests in its fourteenth exception that the Commission reject Findings of Fact 96 and 97, regarding the City's contention that the proposed change is inconsistent with Policy 7.6.1 of the City's Comprehensive Plan. The Commission has reviewed both Respondent's exception to the findings of fact and Petitioner's response to that exception, as well as relevant parts of the record. The Commission finds that the Administrative Law Judge's findings of fact were supported by competent substantial evidence. Therefore, the Respondent's "Exception to Findings of Fact 96 and 97" is DENIED.

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15. Respondent requests in its fifteenth exception that the Commission reject Finding of Fact 98, regarding the "approval" of the Bald Eagle Management Plan ("BEMP") by the USFWS and the Florida Fish and Wildlife Conservation Commission. The Commission has reviewed both Respondent's exception to the finding of fact and Petitioner's response to that exception, as well



as relevant parts of the record. The Commission finds that the Administrative Law Judge's finding of fact was supported by competent substantial evidence. Therefore, the Respondent's "Exception to Finding of Fact 98" is DENIED.

16. Respondent requests in its sixteenth exception that the Commission reject Findings of Fact 102 and 103, regarding the Administrative Law Judge's ultimate findings that the more persuasive evidence establishes that the proposed change will not adversely affect the nest, contains adequate protections for the nest and eagles using the nest, and is consistent with the City's Comprehensive Plan. The Respondent states its explanation as "for the above referenced reasons" and thereby references its previous exemptions. All previous exemptions have been denied. Therefore, the Respondent's "Exception to Findings of Fact 96 and 97" is DENIED.

17. Respondent requests in its seventeenth exception that the Commission reject Conclusions of Law 123 and 124 regarding whether the City's decision to deny the proposed change is entitled to deference in the de novo hearing before the Administrative Law Judge and whether the proposed change is consistent with the City's Comprehensive Plan. The Commission reviewed the record on whether a de novo hearing should have been held and agreed with the Administrative Law Judge's determination that a *de novo* hearing was proper under Section 380.07(6), Florida Statutes (2007). See Young v. Dept. of Community Affairs, 625 So. 2d 831 (Fla. 1993); see also Transgulf Pipeline Co. v. Gadsden County, 438 So. 2d 876 (Fla. 1st DCA 1979). While a City's interpretation of its comprehensive plan is entitled to deference, a City's decision is not entitled to "presumption of validity" at a *de novo* hearing, as was the case here. See Manatee County v. Estech Gen. Chemicals Corp., 402 So.2d 1251, 1256 (Fla. 2nd DCA 1981). Respondent's assertions are not as or more reasonable than the Administrative Law

Judge's determinations as to conclusions of law. Therefore, the Respondent's "Exception to Conclusions of Law 123 and 124" is DENIED.

### REVIEW OF NON-SUBSTANTIAL DEVIATION

Ordinarily, "[a]ny proposed change to a previously approved development which creates a reasonable likelihood of additional regional impact, or any type of regional impact created by the change not previously reviewed by the regional planning agency, shall constitute a substantial deviation and shall cause the proposed change to be subject to further development of regional impact review." See §380.06(19)(a), Fla. Stat. Similarly, Section 380.06(19)(b)14., Florida Statutes, states that any proposed change "which would result in development of any area which was specifically set aside in the application for development approval or in the development order for preservation or special protection of endangered or threatened plants or animals . . ." is subject to further DRI review. However, Section 380.06(19)(e)2.j. provides that the refinement of the boundaries and configurations of such areas are not subject to further DRI review. Specifically:

Changes that modify boundaries and configuration of areas described in subparagraph (b)14. due to science-based refinement of such areas by survey, by habitat evaluation, by other recognized assessment methodology, or by an environmental assessment. In order for changes to qualify under this sub-subparagraph, the survey, habitat evaluation, or assessment must occur prior to the time a conservation easement protecting such lands is recorded and must not result in any net decrease in the total acreage of the lands specifically set aside for permanent preservation in the final development order.

§380.06(19)(e)2.j., Fla. Stat. (2007)

The Commission notes the uniqueness of this case regarding the fact that the Petitioner and Respondent stipulated that the proposed DRI change met the conditions of subsection 380.19(e)2.j. When the issue was appealed to the Commission on August 3, 2007, the parties did not agree about whether the proposed change constituted a substantial deviation. On February 6, 2008, the parties filed a "Pre-Hearing Stipulation" stipulating that the Petitioner meets the conditions of Section 380.06(19)(e)2.j., Florida Statutes. See Paragraph 21, Pre-Hearing Stipulation. Essentially the parties stipulated that the two factors in Section 380.06(19)(e)2.j. were true. By such stipulation, the parties implicitly stipulated to the existence of the two underlying actual conditions in the (e)2.j. exception: 1) a conservation easement had not been recorded protecting such lands and, 2) there would be no net decrease in the total acreage of the lands specifically set aside for permanent preservation in the final development order. The ALJ accepted and relied upon this stipulation, and as a result made a conclusion that in this case, the proposed change constituted a non-substantial deviation. Based on the record before it, the Commission has no basis to reject the ALJ's conclusion, as the Commission is constrained by the stipulation of the parties with regards to these findings of fact.

### **CONDITIONS AND RESTRICTIONS**

On October 16, 2006, the USFWS issued a letter, attached as Exhibit "B," amending its earlier Biological Opinion concerning the eagle's nest at issue. In that letter, admitted into evidence at the DOAH hearing, it states that the ten conservation measures suggested by the Petitioner would prevent a "taking" of the eagle under the Endangered Species Act. On August 13, 2007, the Florida Fish and Wildlife Conservation Commission issued a letter, attached as Exhibit "C," stating that it agreed with the USFWS amended opinion and that the required

conservation measures are adequate to protect the eagles and their nest. The 10 conservation measures are:

1. Future development will be restricted to that area that extends beyond a 330-foot buffer around the nest tree. The new 330-foot buffer will be secured in the form of a restrictive covenant consistent with the Florida Statutes. The restricted covenant shall prohibit the development or alteration of land and vegetation for any purpose within this area without express approval of the Service and the FWC.
2. A provision will be incorporated into the restrictive covenants to preserve the existing vegetated canopy as an additional buffer between residences and the tree nest.
3. The two-lane access road width will be limited to 24 feet, with 2-foot wide gutters, within a 50-foot right-of way (ROW). An 11-foot area on each side of the access road and within the ROW will be landscaped with native vegetation to enhance the existing native vegetation buffer within the road and the nest tree. The road ROW will be outside the 330-foot buffer.
4. Minimum landscaping requirement will be established for the front yards of all lots and the side yard of lot 12 to enhance the vegetative buffers between these lots and the nest tree.
5. A height restriction of no more than two stories will be incorporated within the restrictive covenants.
6. All project infrastructures (grading, paving, guttering, installation of underground utilities and street lighting) will be installed during the non-nesting season (May 16- September 30) for LE-005.
7. All home construction activities may occur throughout the year. However, should any such construction occur during the active nesting season (October 1 – May 15) for LE 005, monitoring in accordance with provisions of the Bald Eagle Monitoring Guidelines (Service 2005) shall be implemented to document and evaluate bald eagle behavior and response to construction activities.
8. Exterior lighting shall be installed directionally and subdued to minimize the effect of artificial lighting toward the nest tree.
9. Fencing will be constructed along the perimeter of the 330-foot buffer adjacent to the two-lane access road and lot 12 to restrict access to the preserve. Signage will be posted around the perimeter of the 330-foot buffer identifying the eagle preserve.

10. The applicant proposes to provide a voluntary donation in amount of \$35,000 to the Wildlife Foundation of Florida (Trust Fund) to provide financial support for monitoring bald eagles within Lee County.

An additional condition was adopted by the Commission pursuant to Section 380.07(7), Florida Statutes:

11. Notwithstanding Condition #7 above, the applicant agrees to double the monitoring required by the Bald Eagle Monitoring Guidelines (Service 2005). The applicant also agrees to provide monitoring reports for review to a third party agree upon by the applicant and the City of Bonita Springs.

### CONCLUSION

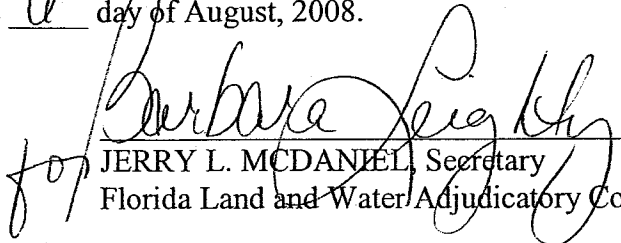
**WHEREFORE**, the Commission concludes that the Bonita Bay Development of Regional Impact should be changed to allow further residential development and the Recommended Order is adopted, as amended, and subject to the above-listed 11 Conditions and Restrictions;

**It is therefore ORDERED and ADJUDGED that:** Bonita Bay's application for DRI change is **APPROVED** subject to the above-listed 11 Conditions and Restrictions.

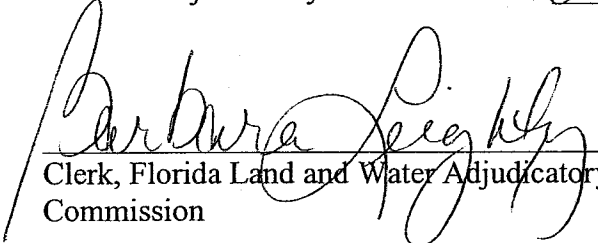
### NOTICE OF RIGHTS

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

DONE AND ORDERED this 6<sup>th</sup> day of August, 2008.

*for*   
JERRY L. MCDANIEL, Secretary  
Florida Land and Water Adjudicatory Commission

FILED with the Clerk of the Florida Land and Water Adjudicatory Commission this 6<sup>th</sup> day of August, 2008.

  
Clerk, Florida Land and Water Adjudicatory  
Commission

## CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was delivered to the following persons by United States mail or hand delivery this 10<sup>th</sup> day of August, 2008.

Honorable Charlie Crist  
Governor  
The Capitol  
Tallahassee, Florida 32399

Honorable Alex Sink  
Chief Financial Officer  
The Capitol  
Tallahassee, Florida 32399

Honorable Bill McCollum  
Attorney General  
The Capitol  
Tallahassee, Florida 32399

Honorable Charles H. Bronson  
Commissioner of Agriculture  
The Capitol  
Tallahassee, Florida 32399

Carly A. Hermanson, Esquire  
Governor's Legal Office  
Room 209, The Capitol  
Tallahassee, Florida 32399-0001

Audrey Vance, City Attorney  
City of Bonita Springs  
9101 Bonita Beach Road  
Bonita Springs, Florida 34135

Jacob D. Varn, Esquire  
Craig D. Varn, Esquire  
Fowler, White, Boggs & Banker, P.A.  
Post Office Box 11240  
Tallahassee, Florida 32302

Kenneth G. Oertel, Esquire  
Jeffrey Brown, Esquire  
Oertel, Fernandez, Cole & Bryant, P.A.  
Post Office Box 1110  
Tallahassee, Florida 32302-1110

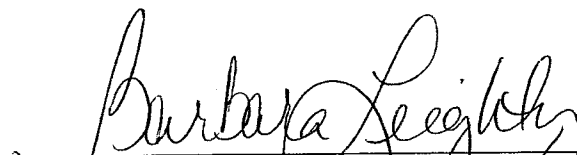
Thomas G. Pelham, Secretary  
Shaw Stiller, General Counsel  
Department of Community Affairs  
2555 Shumard Oak Boulevard  
Tallahassee, Florida 32399-2100

Southwest Florida Regional Planning  
Council  
1926 Victoria Avenue  
Fort Myers, Florida 33901

Honorable T. Kent Wetherell, II  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060

Florida Administrative Law Reports  
Post Office Box 385  
Gainesville, Florida 32602

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for JERRY L. MCDANIEL, Secretary  
Florida Land and Water Adjudicatory  
Commission