DCA Order No. DCA09-GM-300

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

APA EMERSON @ INDRIO, L.L.C.,

Petitioner,

v. DOAH Case No. 07-5061GM

ST. LUCIE COUNTY and DEPARTMENT OF COMMUNITY AFFAIRS,

Respondents.

_____/

FINAL ORDER

This matter was considered by the Director of the Division of Community Planning of the Department of Community Affairs following receipt of a Recommended Order issued by an Administrative Law Judge of the Division of Administrative Hearings.[1] A copy of the Recommended Order is appended to this Final Order as Exhibit A.

Background and Summary of Proceedings

On May 16, 2006, St. Lucie County adopted an amendment to its comprehensive plan by Ordinance 06-019 (TVC Amendment). The TVC Amendment created a new "Town, Villages and Countryside" designation for approximately twenty-eight (28) square miles in north St. Lucie County. On July 17, 2006, the Department issued

[1] The Secretary of the Department recused himself from consideration of this matter and delegated his final order authority to the Director.

its Notice and Statement of Intent to find portions of the TVC Amendment not "in compliance." The Statement was referred to the Division of Administrative Hearings (DOAH) for further proceedings.[2]

The County and Department subsequently reached a settlement agreement, pursuant to which the County was required to adopt Remedial Amendments. The County adopted the Remedial Amendments, which were found by the Department to be "in compliance."

On August 6, 2007, APA Emerson @ Indiro, LLC (APA Emerson) filed a Petition for Administrative Hearing challenging both the TVC Amendment and the Remedial Amendments. The County filed a Motion to Dismiss this Petition to the extent it was attempting to "reach back" and challenge the TVC Amendment. The Department granted the Motion and dismissed the Petition with leave to amend.

APA Emerson filed an Amended Petition, which was referred to DOAH for further proceedings. The County again filed a Motion to Strike or, Alternatively, Motion in Limine again contending that portions of the Amended Petition should be stricken for

---

[2] A group of landowners also filed a Petition for Formal Administrative Hearing and contended that the TVC Amendment was not "in compliance." The Department subsequently entered into a settlement agreement with these landowners and the County. The remedial comprehensive plan amendments adopted pursuant to that settlement agreement were not challenged and the proceeding involving those landowners has been closed.

improperly attempting to "reach back" to the TVC Amendment. On February 1, 2008, the Administrative Law Judge entered a Corrected Order on Pending Motions which, in part, granted the Motion and struck all allegations in the Amended Petition that were directed at the TVC Amendment and not the Remedial Amendments.

The final hearing was scheduled for and held on February 19 & 20, 2008. Upon consideration of the evidence and post-hearing filings, the Administrative Law Judge entered a Recommended Order rejecting all of the allegations raised in the Amended Petition. The Order recommends that the Department find the Remedial Amendments "in compliance." Petitioners filed fifty (50) exceptions,[3] to which the County and Department filed a Joint Response.

Standard of Review of Recommended Order

The Administrative Procedure Act contemplates that the Department will adopt an Administrative Law Judge's Recommended

---

[3] APA Emerson timely filed its Exceptions within fifteen (15) days of the Recommended Order, but filed them with DOAH and not with the Department. Because the Exceptions were not received by the Department until seventeen (17) days after the Recommended Order, which is two (2) days late, the Department issued an Order to Show Cause as to why the Exceptions should not be stricken. See **Fla. Admin. Code r.** 28-106.217(1). APA Emerson has demonstrated cause and the Exceptions are addressed on their merits in this Final Order. See Hamilton County Bd. of County Commissioners v. Department of Environmental Regulation, 587 So. 2d 1378 (Fla. 1st DCA 1991).

Order as the agency's Final Order in most proceedings. To this end, the Department has been granted only limited authority to reject or modify findings of fact in a Recommended Order.

> Rejection or modification of conclusions of law may not form the basis for rejection or modification of 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.

Fla. Stat. § 120.57(1)(l).

Absent a demonstration that the underlying administrative proceeding departed from essential requirements of law, "[a]n ALJ's findings cannot be rejected unless there is no competent, substantial evidence from which the findings could reasonably be inferred." Prysi v. Department of Health, 823 So. 2d 823, 825 (Fla. 1st DCA 2002)(citations omitted). In determining whether challenged findings are supported by the record in accord with this standard, the Department may not reweigh the evidence or judge the credibility of witnesses, both tasks being within the sole province of the Administrative Law Judge as the finder of fact. See Heifetz v. Department of Bus. Reg., 475 So. 2d 1277, 1281-83 (Fla. 1st DCA 1985).

The Administrative Procedure Act also specifies the manner

in which the Department is to address conclusions of law in a Recommended Order.

> The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

Fla. Stat. § 120.57(1)(l); DeWitt v. School Board of Sarasota County, 799 So. 2d 322 (Fla. 2nd DCA 2001).

The label assigned a statement is not dispositive as to whether it is a finding of fact or conclusion of law. See Kinney v. Department of State, 501 So. 2d 1277 (Fla. 5th DCA 1987). Conclusions of law labeled as findings of fact, and findings labeled as conclusions, will be considered as a conclusion or finding based upon the statement itself and not the label assigned.

RULING ON EXCEPTIONS

1. Preliminary Matter

At the beginning of its Exceptions, Petitioner APA Emerson posits the following:

> As a preliminary matter, APA Emerson objects to the multitude of findings of fact and conclusions of law in relation to the TVC Amendments, insofar as APA Emerson was prohibited by the Corrected Order on Pending Motions (the "Corrected Order"), entered by the Administrative Law Judge ("ALJ") on February 1, 2008, from presenting evidence as to the nature and effect of the TVC Amendments.

Exceptions at 1. To the extent that this assertion is meant to be presented as an exception, it is legally deficient and need not be ruled upon. **Fla. Stat.** § 120.57(1)(l)("an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record").

On the merits of this issue, the Department concurs with the Administrative Law Judge's ruling that "a challenge to remedial amendments to plan provisions not previously challenged should not be permitted to 'reach back' to plan provisions affected by the remedial amendments," and his action in granting the Motion to Strike Portions of APA's Amended Petition. See Corrected Order on Pending Motions at 3-4.

2. Exception to Finding of Fact 16, Second Sentence

The second sentence of Finding 16 reads, in full, as follows: "Rather, the most efficient means of increasing road

capacity usually is to construct alternate parallel roads." Recommended Order at 13. Petitioner asserts that there is no competent, substantial evidence to support this Finding.

The project manager for the TVC Amendment testified that "[w]hile increasing lanes increases capacity, building alternate parallel roads is the most efficient way of doing that." Tr. at 157. A transportation engineer who reviewed the TVC Amendment testified that widening a road from two to four lanes could, in some scenarios, double the capacity of the roadway. Tr. at 210. However, this same witness testified that such a conclusion "depends on a case-by-case, roadway-by-roadway basis," and that, in at least one instance, parallel reliever roads cut in half the traffic volume on an existing, 2-lane roadway. Tr. at 210 & 213.

The second sentence of Finding 16 is a fair inference from this testimony.

This Exception is DENIED.

3. Exception to Finding of Fact 20, Third Sentence

The third sentence of Finding 20 reads, in full, as follows: "All of these objectives and policies were promoted by incentives and potential density transfers (Objective 3.1.7 and associated policies)." Recommended Order at 15. Petitioner asserts that "[t]o the extent that FOF 20 includes a finding that development in accordance with the TVC Amendments is incentive based for all

owners of property in the TVC Area, it is not supported by competent substantial evidence." Exceptions at 2.

Petitioner's exception is based upon a mischaracterization of this Finding. The cited sentence simply and correctly observes that the cited objectives and policies are promoted by the incentives and potential density transfers set forth in Objective 3.1.7 and associated Policies.

This Exception is DENIED.

4. Exception to Finding of Fact 21

This Exception reads in full as follows: "*See* Exception to FOF 20, ¶3, *supra*." Exceptions at 2. This Exception relies upon a mischaracterization of the cited Finding. Finding 21 simply and correctly lists the "[i]ncentives for property owners to develop in accordance with the TVC policies . . . ." Recommended Order at 16.

This Exception is DENIED.

5. Exception to Finding of Fact 24, First Sentence

This Exception reads in full as follows: "*See* Exception to FOF 20, ¶3, *supra*." Exceptions at 2. This Exception does not discuss the specifics of the cited Finding, but relies on a mischaracterization of it. Finding 24, first sentence, simply and correctly observes that "[t]he TVC Amendments are intended to be largely incentive-based." Recommended Order at 17.

This Exception is DENIED.

6. Exception to Finding of Fact 25, Second Sentence

The second sentence of Finding 25 reads, in full, as follows: "the TDV Map is designed to set pre-existing land uses for determining the amount of TDRs that can be reallocated into the new 'town' and 'village' developments." Recommended Order at 18. Petitioner contends that this sentence is not supported by competent substantial evidence.

Policy 3.1.2.5 provides that "[t]he TDV Map establishes the potential uses, densities and intensities for properties in the TVC area, as established in the pre-existing Future Land Use Element . . . ." Joint Ex. 3 at 3-6. Policy 3.1.7.8 provides that the first step in calculating the amount of transferable development rights is to "multiply[] the acreage of the sending site by the Transferable Development Value (as indicated on the TDV Map) . . . ." Id. at 3-31. These comprehensive plan provisions are competent substantial evidence in support of the cited portion on Finding 25.

This Exception is DENIED.

7. Exception to Finding of Fact 26

Finding 26 provides, in pertinent part, that Policy 3.1.1.2 and Table 3-1 specify the maximum allowable development for the entire TVC area. Recommended Order at 18. Petitioner contends

that there is no evidence to support this finding that there is a "cap" on development. Exceptions at 3.

The St. Lucie County Comprehensive Plan provides for the establishment of "Special Area Plans" for undeveloped areas in the County. See Joint Ex. 3 at 3-1 (Policy 3.1.1.1). Policy 3.1.1.1 lists the requirements for such Plans. Id. This Policy specifically provides that "Special Area Plans shall . . . [p]rovide a maximum allowable development program." Id. The "North St. Lucie County Special Area Plan," which covers the same area designated as TVC,[4] has an adopted maximum allowable development program of 37,500 dwelling units, 5,000,000 square feet of commercial/retail uses, and 464 acres of industrial uses. Id. Policy 3.1.1.2 and Figure 3-1 are themselves competent substantial evidence that there is a maximum allowable development in the TVC Element.

Petitioner's main contention is that the Policy cannot be interpreted to place the adopted cap on commercial development because the existing future land use map (FLUM) designations in the TVC area currently allow far in excess of 5,000,000 square feet of commercial development and the TVC Amendment specifically provides that landowners have the right to build according to the

---

[4] "The TVC Element applies only to the Special Area Plan for North St. Lucie County." Joint Ex. 3 at 3-ii.

existing FLUM. If landowners all build to the maximums currently allowed by the FLUM, continues Petitioner, the result will be commercial/retail development far in excess of 5,000,000 square feet.

Petitioner is correct that the maximum allowable commercial/retail development on the existing FLUM exceeds 5,000,000 square feet. See Joint Ex. 6 at 1 ("Existing commercial, retail and professional office equals a total of 41,397,820 [square feet]"). Petitioner is also correct that the TVC Amendment specifically provides that "[t]he TVC Element shall not limit the underlying potential densities or intensities, as established by the pre-existing Future Land Use Element." Joint Ex. 3 at 3-6 (Policy 3.1.2.5). Petitioner's ultimate contention, however, is not correct and these two findings do not conflict.

The "Maximum Allowable Development Program" set forth in Table 3-1 reflects the amount of development that will occur in the TVC area if all landowners participate in the TVC program. The facility analysis that accompanied the instant Amendment is based upon this total maximum, consistent with the requirements of Chapter 163, Part II, Florida Statutes. See Department of Community Affairs v. Lee County, Final Order AC-06-006 (Admin. Comm. Nov. 15, 2006), DOAH Case No. 06-0049GM.

The maximums referenced by Petitioners are those allowed by

the existing St. Lucie County FLUM. The right to develop under this FLUM was not amended by the Amendment subject to review in this proceeding. The Department previously determined the underlying land uses on the FLUM to be in compliance and they are merely being allowed to continue. Accordingly, there was no need for St. Lucie County to conduct a facilities analysis and no basis for the Department to conduct a compliance review on a FLUM that was not being amended.

This Exception is DENIED.

8. Exception to Finding of Fact 27

This Exception reads in full as follows: "*See* Exception to FOF 26, ¶7, *supra*." Exceptions at 5. This Exception is apparently directed to the portion of this Finding regarding "the overall cap of five million square feet . . . ." Recommended Order at 19. The arguments regarding the "cap" were addressed immediately above.

This Exception is DENIED.

9. Exception to Finding of Fact 28

Petitioner next contends that Finding of Fact 28 must be stricken because it incorrectly finds that Table 3-8 provides for a "range of sizes" for retail and is inconsistent with Findings of Fact 29 and 32. Petitioner argues that Table 3-8 actually only provides minimums for the retail uses.

Table 3-8 on its face provides a range of sizes for retail uses: for example, a "local store" must be between 500 and 2,000 square feet. Joint Ex. 3 at 3-35. Any range will necessarily have a minimum. See id. (Policy 3.1.8.2.1.a). Petitioner's argument that a "range" and a "minimum" are inconsistent is not logically supportable.[5]

This Exception is DENIED.

10. Exception to Finding of Fact 29, Second Sentence

In this Exception, Petitioner repeats the argument that a "range" and a "minimum" are inconsistent. This argument was addressed immediately above.

This Exception is DENIED.

11. Exception to Finding of Fact 30, Second Sentence

The second sentence of Finding of Fact 30 reads as follows: "As noted in Policy 3.1.8.2.1.b, Figure 3-13 depicts the desired (not required) general locations for new retail establishments and the preferred retail planning unit or type (i.e., Local Store, Convenience Center, etc.)." Recommended Order at 20. Petitioner avers that this sentence is not supported by competent, substantial evidence.

---

[5] Petitioner also asserted that this Finding "is contrary to the testimony of the County's land use expert that these so-called 'ranges' are, in fact, simply minimums." Exceptions at 5. This witness actually testified that there are "minimums" and there is a "range." Tr. at 52, ln. 1.

Policy 3.1.8.2.1.b provides in pertinent part as follows: "The General Retain Development Plan (**Figure 3-13**) depicts the desired general locations identified for new retail establishments and the corresponding retail type . . . ." Joint Ex. 3 at 3-35 (emphasis in original). The narrative accompanying Figure 3-13 notes that "these locations are not precisely site specific." Id. at 3-37. This is competent, substantial evidence in support of the disputed Finding.

Petitioner then argues that "[i]f future retail development need not be located as depicted on Figure 3-13, then the Traffic Study is not coordinated to the future development of the TVC Area." Exceptions at 6. This portion of this Exception does not present a legal ground upon which it may be granted and need not be ruled upon by the Department. See **Fla. Stat.** § 120.57(1)(k). Moreover, the narrative to Figure 3-13 specifically provides that if retail uses are not in the identified areas it "will require a review of the overall transportation network and concurrency strategy for the TVC area." Joint Ex. 3 at 3-37.

This Exception is DENIED.

12. Exception to Finding of Fact 33, Last Sentence

The last sentence of Finding of Fact 33 reads in full as follows: "That [transportation] modeling study contained both an evaluation of existing traffic and existing roadway needs and a

projection of future traffic based upon planned development under the TVC Amendments and the anticipated roadway needs to support the TVC area at full build-out." Recommended Order at 21. Petitioner asserts that this Finding is not supported by competent, substantial evidence because the transportation study did not analyze full build-out of the underlying FLUM.

This Finding does not state that the study addresses build-out of the underlying FLUM: thus, there is no basis to grant the Exception.

The true questions posed by this and numerous other Exceptions are (1) what transportation data and analysis are required to support the TVC Amendments, and (2) what transportation network must be planned to support that level of development. Petitioner asserts that the analysis and resulting improvements should be based on the build-out of the underlying FLUM. The County and Department argue that only the amount of development set forth in Table 3-1 needs to be analyzed. See Joint Ex. 3 at 3-2.

The TVC Amendments seek to change the development form for the subject area by offering incentives for landowners to develop in accordance with the new goals, objectives and policies. The amounts of development that would result from the program are capped pursuant to Table 3-1. The traffic study that was

prepared on behalf of the County examined that total maximum development. This analysis of the new, proposed form of development is appropriate.

The TVC Amendments provide that the land uses and intensities and densities of the underlying FLUM still apply and may be utilized by landowners who do not choose to develop under the TVC Amendments. These statements make abundantly clear that the TVC Amendments do not amend the underlying FLUM but, instead, offer an alternative. Because the underlying FLUM is not being amended and has been previously found by the Department to be in compliance, there is no need for the County to provide data and analysis regarding the development allowed by the FLUM.

This Exception is DENIED.

13. Exception to Finding of Fact 39

This Exception repeats the same arguments forwarded in Exception Seven.

This Exception is DENIED.

14. Exception to Finding of Fact 40

This Exception asserts that virtually every portion of Finding of Fact 40 is unsupported by competent, substantial evidence. Each contested sentence is addressed individually below.

> These maximum land uses were distributed throughout the TVC area into Traffic Analysis

> Zones ("TAZs"), geographic areas assigned a specific amount of expected land use (i.e., number of residential units and square footage of non-residential use).

Petitioner asserts that this sentence is not supported by competent, substantial evidence because the assignment of land uses was based on the amount of development allowed by Table 3-1 instead of being based on the underlying FLUM designations. This argument is the same as was raised in Exception Seven, and has been addressed supra.

> Vehicle trips were then assigned based upon accepted trip conversion tables that attribute a certain number of trips to each residential unit and each square foot of commercial or industrial use.

Petitioner argues that this sentence is not supported by competent, substantial evidence because (1) Respondents did not include record citations in their Proposed Recommended order and (2) "there were different trips per square feet assigned to each TAZ." Exceptions at 7. The first allegation does not forward a legal basis upon which this Exception may be granted and need not be ruled upon.[6] See **Fla. Stat.** § 120.57(1)(k). As support for the second contention, Petitioner cites to Exhibits 6 and 23, neither of which contains any information about trip assignments

[6] Petitioner also refers the Department to paragraph 53 of its Proposed Recommended Order in support of this Exception. That paragraph contains no record citations.

to individual TAZs.[7] In the absence of appropriate and specific citations to the record, the agency need not rule on this portion of the Exception. Id.

> The Neighborhood Center commercial node shown at the intersection of Indrio Road and Emerson Avenue was located in TAZs 157 and 163.

Petitioner asserts that this Finding is in error because the evidence demonstrates that this Neighborhood Center commercial node is not located "solely" in TAZs 157 and 163, but is also in TAZ 162. Exceptions at 7. Respondents admit that "a very small portion of the node is depicted in TAZ 162 . . . ." Response to Exceptions at 10. The question, then, is whether this discrepancy requires that this portion of the Finding be rejected.

The answer to the question is "no." The map that depicts the small portion of this Neighborhood Center commercial node being in TAZ 162 is accompanied by a note that "these locations are not precisely site specific," and that "the proposed uses should be provided within a 1/4 mile radius of the area indicated on the map." Joint Ex. 3 at 3-37. Accordingly, these uses may be moved, to some extent, among the three TAZs. Importantly, the

---

[7] Exhibit 6 compares the amount of development allowed by the underlying FLUM to that provided for in Table 3-1. Exhibit 23 shows the TAZs and the uses assigned to them, but does not contain information about trip assignment.

maximum commercial development allowed in each of the three TAZs under the TVC Amendments was properly analyzed by the County.

> The total of the ultimate commercial build-out at this location, as modeled by Mr. Mulholland, was therefore at least one million square feet.

Petitioner asserts that this portion of the Finding is not supported by competent, substantial evidence. To the contrary, this Finding is supported by Exhibit 23, which allocates 700,000 square feet of commercial to TAZ 163, 300,000 square feet to TAZ 157, and 550,000 square feet to TAZ 162.

This Exception is DENIED.

15. Exception to Finding of Fact 43

Finding of Fact 43 provides in full as follows:

> Acceptable levels of service on Indrio and other roads are preserved by planning for a series of alternative parallel roads to handle future traffic demands as part of the planned fine grid of interconnected two- and four-lane roads proposed for the area.

Recommended Order at 25. Petitioner asserts that this Finding is not based upon competent, substantial evidence because it does not assume the maximum development potential of the underlying FLUM but, instead, is based on the caps in Table 3-1. This argument was addressed above with respect to Exception Seven.

This Exception is DENIED.

16. Exception to Finding of Fact 44, first sentence

The first sentence of Finding of Fact 44 provides in full as follows:

> Mr. Mulholland then ran the model utilizing a second scenario - full build-out of the TVC area along with the proposed future transportation system - in order to demonstrate that the future transportation system could accommodate the maximum allowable development as capped by Policy 3.1.1.2 and Table 3-1.

Petitioner asserts that this Finding is not based upon competent, substantial evidence because it does not assume the maximum development potential of the underlying FLUM but, instead, is based on the caps in Table 3-1. This argument was addressed above with respect to Exception Seven.

This Exception is DENIED.

17. Exception to Finding of Fact 45, second sentence

The second sentence of Finding of Fact 45 provides in full as follows:

> The long-term transportation analysis and Mr. Mulholland's testimony demonstrated that this roadway system will preserve the required levels of service at full build-out of the TVC Area.

Recommended Order at 26.

Petitioner asserts that this Finding is not based upon competent, substantial evidence because it does not assume the maximum development potential of the underlying FLUM but, instead, is based on the caps in Table 3-1. This argument was

addressed above with respect to Exception Seven.

This Exception is DENIED.

18. Exception to Finding of Fact 49

Finding of Fact 49 observes that the Remedial Amendments contain sections entitled "Proposed Transportation Amendments to the TVC Element" and "Proposed Transportation Amendments to the Capital Improvements Element," both of which are reproductions of roadway improvements that were found in the original TVC Amendments. This Finding is supported by competent, substantial evidence. See Joint Ex. 3, p. 3-20; Joint Ex. 13, Attachment 1, pp. 18-19.

Petitioner takes issue with this Finding to the extent that it concludes that these provisions "cannot therefore be challenged by APA Emerson . . . ." Exceptions at 9. This Finding does not contain such a statement; that issue is addressed in the Recommended Order in separate Conclusions of Law and will be addressed in this Final Order in the exceptions to those Conclusions.

This Exception is DENIED.

19. Exception to Finding of Fact 52

Petitioner alleges that the portion of this Finding regarding Policy 3.1.1.2 and Table 3-1 and development caps is not supported by competent, substantial evidence. This argument

was addressed above with respect to Exception Seven.

This Exception is DENIED.

20. Exception to Finding of Fact 56

Petitioner alleges that this Finding is not based upon competent, substantial evidence because the amount of development analyzed by the subject study is the amount allowed under the TVC Amendments and not full build-out of the underlying FLUM. This argument was addressed above with respect to Exception Seven.

This Exception is DENIED.

21. Exception to Finding of Fact 57

Petitioner alleges that there is no competent, substantial evidence to support the finding that the design of the transportation network itself "was already completed in connection with the previously-adopted TVC Amendments." Recommended Order at 31. Petitioner asserts that this finding conflicts with the Department's issuance of a Statement of Intent to find the TVC Amendments not in compliance based, in part, upon transportation concerns.

The Department's Statement of Intent did not question the design of the transportation network: rather, the Statement raised a compliance issue with the financial feasibility of the transportation plans. Finding of Fact 51, which was not the subject of any exception, specifically notes that "[a] major

focus of the Remedial Amendments with respect to transportation was demonstrating five-year financial feasibility to conform to the 2005 Growth Management Act amendments contained in Chapter 2005-290, Laws of Florida (2005)(Senate Bill 360), which was passed during the process leading to the TVC Amendments." Recommended Order at 29.

The remainder of this Exception repeats arguments in other Exceptions that have been addressed supra.

This Exception is DENIED.

22. Exception to Finding of Fact 58

This Exception repeats arguments in other Exceptions that have been addressed supra.

This Exception is DENIED.

23. Exception to Finding of Fact 59

Petitioner next asserts that Finding of Fact 59 errs in stating that Petitioner "limited its challenges" to the TVC Amendments in a certain manner. This Finding contains no such statement. The Finding is supported by the record and, in fact, is a summary of the argument forwarded by Petitioner in its Proposed Recommended Order. See Petitioner's Proposed Recommended Order at ¶¶ 19-24.

This Exception is DENIED.

24. Exception to Finding of Fact 60

This Exception repeats argument in other Exceptions that have been addressed supra.

This Exception is DENIED.

25. Exception to Finding of Fact 61

This Exception repeats the arguments forwarded in Exception Seven, which has been addressed supra.

This Exception is DENIED.

26. Exception to Finding of Fact 62

Petitioner asserts that Finding of Fact 62 is not supported by competent, substantial evidence to the extent it finds that the theoretical maximums of 17 and 41 million square feet of commercial uses are based "on the unrealistic and inappropriate assumption that such areas would be developed entirely for commercial use with no residential use." Petitioner posits that the County's expert land use witness verified these numbers.

While the witness indeed testified that those two maximums were mathematically possible under the plan, he also testified that such a maximum was not realistic.

> It also had to do a lot with the fact that while the future land use map contemplated that 41 million square feet, you know, a number of tests had been done just to demonstrate that simply would not fit. That was the equivalent of 20 residential [sic] malls in that area . . . .

Tr. at 61. This testimony is competent, substantial evidence to

support the Finding that the maximum theoretical intensities are not realistic or appropriate.

This Exception is DENIED.

27. Exception to Finding of Fact 63

Petition next avers that "[t]he evidence demonstrates that the County neither collected data nor performed an analysis of what level of commercial development was feasible in the TVC Area." Exceptions at 15. The County's land use expert testified that the County determined retail needs for the TVC Area, examined existing retail, and relied upon a jobs-to-housing ratio from the Department of Transportation. Tr. at 61.

The remainder of this Exception repeats arguments raised in other Exceptions and addressed supra.

This Exception is DENIED.

28. Exception to Finding of Fact 64

This Exception repeats the arguments raised in Exception Seven, which was addressed supra.

This Exception is DENIED.

29. Exception to Finding of Fact 65

Petitioner states that it "demonstrated that the County was required to perform a property-by-property analysis of what development was permitted by the FLUM . . . ." Petitioner provides no record citation or legal authority in support of this

statement, which is a sufficient basis to not rule upon this Exception. See **Fla. Stat.** § 120.57(1)(k).

On its merits, Petitioner's assertion that the County was required to go out and gather new data is contrary to Section 163.3177(10)(e), Florida Statutes, which provides that "Chapter 9J-5, Florida Administrative Code, shall not be construed to require original data collection by local governments . . . ."

The remainder of this Exception repeats arguments that were raised in other Exceptions and addressed supra.

This Exception is DENIED.

30. Exception to Finding of Fact 66, last sentence

The last sentence of Finding of Fact 66 reads as follows: "But those theoretical maximums and 'rule-of-thumb' calculations do not prove beyond fair debate that the transportation system planned to accommodate what actually will occur on APA Emerson's property was not appropriately based on data and analysis." Recommended Order at 36. Petitioner asserts that this Finding is not supported by competent, substantial evidence.

At its core, this Exception relies upon the same logic and arguments presented in Exception Seven; that is, the County failed to plan for a transportation system based upon the maximum theoretical development potential. The discussion of Exception Seven is incorporated by this reference.

This Exception is DENIED.

31. Exception to Finding of Fact 67

Petitioner next asserts that it presented "uncontroverted evidence" that it would develop its property to the maximum allowed by the pre-TVC County comprehensive plan. As found by the Administrative Law Judge, this testimony was presented at the final hearing and not to the County during the adoption process for the TVC and Remedial Amendments. Because it was presented for the first time at the final hearing, this data was not available to the County and may not be the basis for a determination that the amendments are not in compliance. See **Fla. Admin. Code r.** 9J-5.005(2)(a).

Moreover, as also found by the Administrative Law Judge,

> [t]his testimony was insufficient to prove beyond fair debate that the absorption rates, the existing traffic conditions, or the other assumptions used by Mr. Mulholland in his 2011 Transportation Study were incorrect or inappropriate. If the 80,000 square foot absorption figure used in Mr. Mulholland's 2011 study underestimated actual demand, this would be dealt with under the policies in the Remedial Amendments, which appropriately address short-term concurrency issue[s] . . . .

Recommended Order at 36-37 (Finding of Fact 67).

This Exception is DENIED.

32. Exception to Finding of Fact 68

In this Exception, Petitioner raises the same arguments

regarding the transportation system and maximum theoretical build-out, but does so for particular intersections instead of for the TVC area as a whole. This argument has been addressed above in numerous other Exceptions.

This Exception is DENIED.

33. Exception to Finding of Fact 69

In this Exception, Petitioner raises the same arguments regarding the transportation system and maximum theoretical build-out, but does so for a particular development (Wal-Mart) instead of for the TVC area as a whole. This argument has been addressed above in numerous other Exceptions.

This Exception is DENIED.

34. Exception to Finding of Fact 71

This Exception incorporates by reference Exception Eighteen. The discussion of Exception Eighteen above is incorporated by this reference.

This Exception is DENIED.

35. Exception to Finding of Fact 73

Petitioner next argues that the transportation planning analysis is flawed because Mr. Mulholland testified on cross-examination that a roadway-by-roadway analysis would be necessary to determine whether the capacity of a specific roadway would be doubled by widening or whether a parallel roadway would be

required. As noted by the Administrative Law Judge, "there was no evidence as to the relevance or necessity of such determinations." The evidence demonstrates that the County modeled the entire roadway network in the TVC area in support of the TVC and Remedial Amendments. See Joint Ex. 7, Appendices D & E. This analysis demonstrates that the roadway network is adequate, which is sufficient support for the Amendments.

This Exception is DENIED.

36. Exception to Finding of Fact 74

This Exception reads in full as follows: "*See* APA Emerson's PRO, ¶ 73." This paragraph of the Proposed Recommended Order argues that the Remedial Amendment is flawed because the County allegedly did not submit an analysis of the roadway volumes and capacities. There is no dispute that such an analysis was performed and that the modeling derived from this technical analysis was submitted as data and analysis. See Joint Ex. 7, Appendices D & E. Local governments need not submit all data and analysis along with a plan or plan amendment and may instead submit summaries thereof. See **Fla. Stat.** §§ 163.3177(8) & (1)(e); **Fla. Admin. Code rr.** 9J-5.005(2)(a) & (d).

This Exception is DENIED.

37. Exception to Finding of Fact 75, second sentence

The second sentence of Finding of Fact 75 reads as follows:

"APA Emerson presented no evidence of alleged internal inconsistencies other than the Comprehensive Plan provisions themselves." Petitioner argues that this Finding is not supported by competent, substantial evidence and, in support of this assertion, refers the agency to numerous paragraphs of its Proposed Recommended Order. These paragraphs of the Proposed Recommended Order contain arguments as to alleged internal inconsistencies but do not contain any citations to the record. An agency need not rule on an exception that does not include appropriate and specific citations to the record. **Fla. Stat.** § 120.57(1)(k).

This Exception is DENIED.

38. Exception to Finding of Fact 76

Petitioner alleges that Finding of Fact 76 is erroneous because it finds that certain paragraphs of its Proposed Recommended Order "rely solely on the assertion that the long-term transportation plan is insufficient to meet the needs of its future land use . . . [emphasis added]." This assertion mischaracterizes this Finding, which actually finds that "much, if not all" of the allegations rest on the alleged insufficiency of the transportation system.

On the merits, Petitioner argues that this Finding is not supported by competent, substantial evidence and, in support of

this assertion, refers the agency to numerous paragraphs of its Proposed Recommended Order. These paragraphs of the Proposed Recommended Order contain arguments as to alleged internal inconsistencies but do not contain any citations to the record. An agency need not rule on an exception that does not include appropriate and specific citations to the record. **Fla. Stat.** § 120.57(1)(k).

This Exception is DENIED.

39. Exception to Conclusion of Law 78

Petitioner asserts that Conclusion of Law 78 is in error because it states that the "fairly debatable" standard applies in this proceeding, and avers that the "preponderance of the evidence" standard should apply. The original compliance issues with the TVC Amendments were cured by a settlement agreement, pursuant to which the County adopted the Remedial Amendments and the Department issued a cumulative notice of intent to find them "in compliance." Pursuant to Section 163.3184(16)(f), Florida Statutes, the "fairly debatable" standard governs this challenge to the cumulative notice of intent. The conclusion argued by APA Emerson is not as or more reasonable than the one reached by the Administrative Law Judge.

This Exception is DENIED.

40. Exception to Conclusion of Law 79

This Exception merely repeats Exception Thirty-Nine, discussed immediately above. The conclusion argued by APA Emerson is not as or more reasonable than the one reached by the Administrative Law Judge.

This Exception is DENIED.

41. Exception to Conclusion of Law 81

This Exception relies upon Exceptions Seven and Eighteen, both of which are discussed above. The conclusion argued by APA Emerson is not as or more reasonable than the one reached by the Administrative Law Judge.

This Exception is DENIED.

42. Exception to Conclusion of Law 82, last sentence

The last sentence of Conclusion of Law 82 reads as follows: "These [Remedial Amendment] efforts were different from the long-term regional traffic analysis that was performed to support the TVC Amendments." Petitioner asserts that the County had "statutory and rule obligation[s]" with respect to the Remedial Amendments that are "separate and apart" from its obligations with respect to the TVC Amendments.

This Exception simply does not identify a legal basis upon which it could be granted and, accordingly, the agency need not rule upon it. See **Fla. Stat.** § 120.57(1)(k). In fact, it appears that Petitioner agrees with the disputed Conclusion of

Law. To the extent Petitioner is urging a contrary conclusion, such is not as or more reasonable than the one reached by the Administrative Law Judge.

This Exception is DENIED.

43. Exception to Conclusion of Law 83, last sentence

The last sentence of Conclusion of Law 83 posits that APA Emerson put on no evidence to show that the study supporting the financial feasibility of the five-year plan was flawed, inadequate or inappropriate. APA Emerson admits that it did not challenge the financially feasibility of the five-year plan. Again, it appears that Petitioner actually agrees with the disputed Conclusion.

APA Emerson then asserts that its true challenge to the Remedial Amendment is that the planned transportation network is inadequate. This assertion has been addressed repeatedly above. The conclusion argued by APA Emerson is not as or more reasonable than the one reached by the Administrative Law Judge.

This Exception is DENIED.

44. Exception to Conclusion of Law 84, second sentence

Petitioner contends that Conclusion of Law 84 incorrectly concludes that its challenge to the adequacy of the planned roadway network is untimely. As held by the Administrative Law Judge, the planned roadway network was established and adopted in

the TVC Amendment, which Petitioner did not challenge. Petitioner challenged the Remedial Amendment, which sets forth a financially feasible capital improvements schedule to pay for the planned roadway network. Because the Remedial Amendments did not alter the roadway network as set forth in the TVC Amendment, the Department concurs with the Administrative Law Judge's ruling that "a challenge to remedial amendments to plan provisions not previously challenged should not be permitted to 'reach back' to plan provisions affected by the remedial amendments," and his action in granting the Motion to Strike Portions of APA's Amended Petition. See Corrected Order on Pending Motions at 3-4. The conclusion argued by APA Emerson is not as or more reasonable than the one reached by the Administrative Law Judge.

This Exception is DENIED.

45. Exception to Conclusion of Law 85, last sentence

This Exception relies upon Exceptions Seven, Twenty-One, Twenty-Six, Forty-Two and Forty Four, all of which were discussed above. The conclusion argued by APA Emerson is not as or more reasonable than the one reached by the Administrative Law Judge.

This Exception is DENIED.

46. Exception to Conclusion of Law 86

This Exception relies upon Exceptions Seven, Twenty-One, Twenty-Six, Forty-Two and Forty Four, all of which were discussed

above. The conclusion argued by APA Emerson is not as or more reasonable than the one reached by the Administrative Law Judge.

This Exception is DENIED.

47. Exception to Conclusion of Law 87

This Exception is directed at Conclusion of Law 87, the crux of which is contained in the second sentence: "It is inappropriate to plan for public facilities based on growth projections well in excess of maximum allowable and what is realistic to expect in the future." Relying solely on allegations in its Proposed Recommended Order, APA Emerson argues that the Remedial Amendments are not in compliance because they did not analyze the infrastructure required to support the maximum theoretical development allowed by the underlying (non-TVC) land uses. This argument fails for several reasons.

First and foremost, the Remedial Amendments address only the financially feasible capital improvements necessary for development under the alternative offered in the TVC Amendments. Development under the TVC Amendments is capped pursuant to Policy 3.1.1.2 to an amount which was analyzed by the Remedial Amendments. Thus, the amount of development and the infrastructure analysis are consistent.

As noted above, the underlying future land use designations and the assigned densities and intensities were not altered or

affected by the Remedial Amendments. Petitioner has no legal ground to challenge those designations and the associated capital planning.

Importantly, capital improvement planning under the Growth Management Act is accomplished in a five-year schedule that must be updated annually. See **Fla. Stat.** §§ 163.3177(2) & (3). Thus, while ultimate infrastructure planning should anticipate development of the maximum allowed by the land use category, and the future land use and transportation elements must be coordinated so that long range transportation improvements are identified which are commensurate withh and able to support the long range future land use plan, capital planning for that infrastructure need only account for what is going to occur in the next five years. Petitioner did not demonstrate that the absorption rates relied upon by the County were unrealistic or inappropriate for the five-year period.

For all of these reasons, the conclusion argued by APA Emerson is not as or more reasonable than the one reached by the Administrative Law Judge.

This Exception is DENIED.

48. Exception to Conclusion of Law 90

Petitioner first asserts that it demonstrated that "there was no adequate existing data demonstrating what level of

development was feasible in the TVC Area . . . ." However, in Exception Twenty-Nine, Petitioner asserts the direct opposite: "A finding that the data to perform this analysis [of the development allowed in the TVC Area] was not available to the County at the time of adoption of the Remedial Amendments is not supported by competent, substantial evidence." As noted by the Administrative Law Judge, "[i]t is not clear exactly what APA Emerson is arguing here."

Petitioner's argument regarding the relative capacity improvements achieved by parallel roadways versus roadway expansions was addressed above.

Petitioner finally argues that the County's land use expert testified that he was "sure" that there were more recent traffic counts available than the ones used for the Remedial Amendment. However, there is no testimony or other evidence that such counts were available to the County at the time the Remedial Amendments were adopted.

The conclusion argued by APA Emerson is not as or more reasonable than the one reached by the Administrative Law Judge.

This Exception is DENIED.

49. Exception to Conclusion of Law 91

This Exception relies upon Exceptions Forty-Eight, which was discussed above. The conclusion argued by APA Emerson is not as

or more reasonable than the one reached by the Administrative Law Judge.

This Exception is DENIED.

50. Exception to Conclusion of Law 92

This Exception relies upon Exception Forty-Eight, which was discussed above. The conclusion argued by APA Emerson is not as or more reasonable than the one reached by the Administrative Law Judge.

This Exception is DENIED.

ORDER

Based on the foregoing, it is hereby ordered as follows:

1. The Findings of Fact and Conclusions of Law in the Recommended Order are adopted.

3. The Administrative Law Judge's Recommendation is accepted.

4 The Remedial Amendment to the St. Lucie County Comprehensive Plan adopted by Ordinance 07-037, which remediated the TVC Amendments (Ordinance 06-019)to the County Comprehensive Plan, is hereby deemed to be "in compliance."

DONE AND ORDERED in Tallahassee, Florida.

Charles Gauthier, AICP, Director
Division of Community Planning
DEPARTMENT OF COMMUNITY AFFAIRS
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

NOTICE OF RIGHTS

EACH PARTY IS HEREBY ADVISED OF ITS RIGHT TO SEEK JUDICIAL REVIEW OF THIS FINAL ORDER PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND FLORIDA RULES OF APPELLATE PROCEDURE 9.030(b)(1)(C) AND 9.110.

TO INITIATE AN APPEAL OF THIS ORDER, A NOTICE OF APPEAL MUST BE FILED WITH THE DEPARTMENT'S AGENCY CLERK, 2555 SHUMARD OAK BOULEVARD, TALLAHASSEE, FLORIDA 32399-2100, WITHIN 30 DAYS OF THE DAY THIS ORDER IS FILED WITH THE AGENCY CLERK. THE NOTICE OF APPEAL MUST BE SUBSTANTIALLY IN THE FORM PRESCRIBED BY FLORIDA RULE OF APPELLATE PROCEDURE 9.900(a). A COPY OF THE NOTICE OF APPEAL MUST BE FILED WITH THE APPROPRIATE DISTRICT COURT OF APPEAL AND MUST BE ACCOMPANIED BY THE FILING FEE SPECIFIED IN SECTION 35.22(3), FLORIDA STATUTES.

YOU **WAIVE** YOUR RIGHT TO JUDICIAL REVIEW IF THE NOTICE OF APPEAL IS NOT TIMELY FILED WITH THE AGENCY CLERK AND THE APPROPRIATE DISTRICT COURT OF APPEAL.

MEDIATION UNDER SECTION 120.573, FLA. STAT., IS NOT AVAILABLE WITH RESPECT TO THE ISSUES RESOLVED BY THIS ORDER.

CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that the original of the foregoing has been filed with the undersigned designated Agency Clerk, and that true and correct copies have been furnished to the persons listed below by the method indicated on this 28th day of August, 2009.

for Paula Ford
Agency Clerk

First Class U.S. Mail

Daniel S. McIntyre, Esquire
St. Lucie County Attorney
3rd Floor, Admin. Annex
2300 Virginia Avenue
Jupiter, Florida 34982-5652

Andrew Baumann, Esquire
Lewis Longman & Walker, P.A.
1700 Palm Beach Lakes Boulevard
Suite 1000
West Palm Beach, FL 33401

H. Michael Madsen, Esquire
Vickers Madsen & Goldman, LLP
1705 Metropolitan Blvd., Suite 101
Tallahassee, FL 32308-3761

Glenn N. Smith, Esquire
Ruden, McClosky, Smith, Schuster & Russell, P.A.
200 East Broward Boulevard, 15th Floor
Post Office Box 1900
Fort Lauderdale, Florida 33302-1900

Hand Delivery

Richard Shine, Esquire
Assistant General Counsel
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399

Interagency Mail

The Honorable J. Lawrence Johnston
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060