

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

APA EMERSON @ INDRIO, LLC,)
)
 Petitioner,)
)
vs.) Case No. 07-5061GM
)
ST. LUCIE COUNTY and DEPARTMENT)
OF COMMUNITY AFFAIRS,)
)
 Respondents.)

)

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings (DOAH), by its duly-designated Administrative Law Judge, J. Lawrence Johnston, on February 19 and 20, 2008, in Fort Pierce, Florida.

APPEARANCES

For Petitioner APA Emerson @ Indrio, LLC:

Glenn N. Smith, Esquire
Robyn Lynn Libow, Esquire
Ruden, McClosky, Smith,
 Schuster & Russell, P.A.
Post Office Box 1900
Fort Lauderdale, Florida 33302-1900

For Respondent St. Lucie County:

Daniel S. McIntyre, Esquire
St. Lucie County Attorney
Third Floor Administrative Annex
2300 Virginia Avenue
Fort Pierce, Florida 34952-5632

H. Michael Madsen, Esquire
Vickers, Madsen & Goldman, LLP
1705 Metropolitan Boulevard, Suite 101
Tallahassee, Florida 32308-3765

Andrew J. Baumann, Esquire
Lewis, Longman and Walker, P.A.
1700 Palm Beach Lakes Boulevard
Suite 1000
West Palm Beach, Florida 33401-2006

For Respondent, Department of Community Affairs:

Richard E. Shine, Esquire
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

STATEMENT OF THE ISSUE

This issue is whether Remedial Amendments, adopted as Ordinance 07-037, to the previously-adopted Towns, Villages, and Countryside (TVC) Amendments to St. Lucie County's Comprehensive Plan (Ordinance 06-019) are "in compliance" within the meaning of Section 163.3184(1)(b), Florida Statutes.

PRELIMINARY STATEMENT

On May 16, 2006, St. Lucie County (County) adopted Ordinance 06-019, which amended its Comprehensive Plan (Plan) to create a new "Towns, Villages and Countryside" (TVC) Future Land Use Element (FLUE) designation for nearly 28 square miles of rural land in northern St. Lucie County.

On July 17, 2006, the Department of Community Affairs (Department) issued its Statement of Intent to find portions of the TVC Amendment "not in compliance" with Part II, Chapter 163,

Florida Statutes. The Statement of Intent was referred to DOAH and assigned Case No. 06-2834GM. A group of landowners (the Brown Petitioners) also filed a Petition for Formal Administrative Hearing within 21 days of the Department's publication of its Statement of Intent. That Petition was referred to DOAH and assigned Case No. 06-2845GM.

The Department and the County subsequently reached a settlement. On June 5, 2007, the County, by Ordinance No. 07-037, adopted Remedial Amendments directed to the deficiencies alleged in the Statement of Intent.

On July 19, 2007, the Department published a Cumulative Notice of Intent to find the TVC Amendments and the Remedial Amendments "in compliance" with Part II, Chapter 163, Florida Statutes. The parties were realigned on August 13, 2007, and a final hearing was scheduled to commence on February 12, 2008.

On August 6, 2007, APA Emerson @ Indrio, LLC (APA Emerson), filed a Petition for Administrative Hearing challenging both the Remedial Amendments and the TVC Amendments. The County moved to dismiss APA Emerson's Petition on the grounds that it was untimely as to the TVC Amendments and attempted to "reach back" and challenge the TVC Amendments rather than the Remedial Amendments. The Department granted the County's motion with leave to amend.

APA Emerson filed an Amended Petition on October 5, 2007. The Amended Petition was referred to DOAH, assigned Case No. 07-5061GM, and consolidated with Case Nos. 06-2834GM and 06-2845GM. The County renewed its objection to APA Emerson's Amended Petition by filing a motion to strike or alternatively a motion in limine.

In early January 2008, the County, the Department and the Brown Petitioners reached a settlement in Case Nos. 06-2834GM and 06-2845GM. On February 1, 2008, a Corrected Order on Pending Motions was entered. As a result, Case Nos. 06-2834GM and 06-2845GM were severed from Case No. 07-5061GM (and were later resolved by adoption of Remedial Amendments that were not challenged). In addition, portions of APA Emerson's Amended Petition that sought to "reach back" and challenge the TVC Amendments, and which did not otherwise pertain to the Remedial Amendments, were stricken.

The final hearing was held February 19 and 20, 2008, in Fort Pierce, Florida. At the final hearing, APA Emerson called: Marcela Cambolor, an expert in land planning; Jose Martinez; Michael Houston; and David Mulholland, P.E., an expert in traffic engineering. The County called Marcela Cambolor. The Department did not call a witness. The parties jointly moved the County's Exhibits 1-14 and 18 into evidence, and they were received as Joint Exhibits 1-14 and 18. County Exhibits 23, 24,

and 27 also were received in evidence. APA Emerson's Exhibits 5, 54, and 164 were offered and received. The Department offered no exhibits.

The Transcript of the hearing (two volumes) was filed with DOAH on March 6, 2008. Proposed recommended orders (PROs) were filed by the parties on April 4, 2008, and have been considered in the preparation of this Recommended Order.

Several other matters also were raised at or after the time for filing PROs.

On April 4, 2008, APA Emerson filed a Motion for Official Recognition of several Objections, Comments, and Recommendations (ORC) reports issued by the Department in other cases; official recognition of those documents was opposed by the Respondents and was denied.

On April 9, 2008, the Respondents moved to strike portions of APA Emerson's PRO raising internal inconsistency on the ground that APA Emerson waived those issues during the final hearing. APA Emerson opposed the motion to strike, and the motion is denied.

Finally, on April 18, 2008, APA Emerson filed a motion to strike portions of the PRO filed by the Respondents. The Respondents filed a Response on May 9, 2008, which was the deadline under Florida Administrative Code Rule 28-106.204(1). The motion to strike mostly re-argues issues addressed in APA

Emerson's PRO (except for adding a reference to Emerson Road in its attack on paragraph 57 of Respondents' PRO, which was not raised in either the cross-examination of Mr. Mulholland or in APA Emerson's PRO). For those reasons, the issues are appropriately addressed in this Recommended Order, and APA Emerson's motion to strike is denied.

FINDINGS OF FACT

1. APA Emerson owns approximately 26 acres of land located at the northwest corner of Indrio Road and Emerson Avenue, within the area to be designated TVC future land use. The property presented has a future land use designation of "Commercial" and a "CG" (Commercial General) zoning designation, and is located just inside the western edge of the Urban Service Boundary (USB).

Development of the TVC Amendments

(i) The North St. Lucie County Study Area

2. The TVC Amendments emerged from a study of a 60-square-mile area of northern St. Lucie County known as the North St. Lucie County Study Area. The area principally extends from the C-25 Canal at the southern boundary to the Indian River County line at the northern boundary, and from the Intracoastal Waterway on the east to the general area of the Florida Turnpike and somewhat west of Interstate 95 (I-95) on the west. The TVC Amendments themselves cover a 28-square-mile portion of the

Study Area, extending from the C-25 Canal north to the County Line and roughly from Kings Highway (SR 713) west to the Florida Turnpike.

3. The area covered by the TVC Amendments is rural in character. Most of the area is outside of the USB and is in active agricultural production. Most residents in the area moved there because of its rural character, and many had moved away from sprawling development patterns in other southeast Florida counties. Under the present comprehensive plan, however, most of the TVC Area outside the USB, and a portion inside the USB, can be developed for residential use at one unit per acre, which would perpetuate the sprawling development pattern that prevails elsewhere in St. Lucie County and South Florida.

4. The roads within the TVC area are rural, two-lane roads, many of which are unpaved. Much of the area is not served by public roads. Indrio Road is presently the principal east-west roadway through the TVC area and has the only interchange with I-95. Indrio Road is a two-lane rural highway east of I-95. East of Emerson Avenue, a number of single-family residences front along Indrio as does a historic schoolhouse. East of Kings Highway, Indrio is lined with a historic tree canopy. As Indrio proceeds eastward toward U.S. Highway 1, much of the area to its south is undeveloped land that lies to the

north of the St. Lucie County Airport, but none of the airport-related uses connects with or relies upon Indrio Road. Indrio does not currently connect to the barrier island, and no connection is planned. The lack of such a connection reduces the pressure on Indrio Road as an east-west travel route.

5. Kings Highway, Koblegard Road, and Johnston Road presently are the principal north-south roads through the area. Kings Highway proceeds northeast from the TVC area and is used to access U.S. Highway 1 and more urbanized areas along the coast. Because it takes such an easterly jog, it is not actually the principal connector between Indian River and St. Lucie Counties. Rather, Johnston and Koblegard presently fulfill that role. However, neither of those roads extends completely through the TVC area in a paved condition, necessitating the use of Indrio Road to switch between these north-south connections. Much of the present traffic on Indrio Road is actually north-south traffic that uses Indrio as a connector to move from one north-south route to another, due to the presently undeveloped nature of the area and its roadway network. Presently, Kings Highway is heavily used by truck traffic to move from the industrial and agricultural areas in the north to the I-95 and Turnpike interchanges at Okeechobee Road (SR-70).

ii. Impetus for the TVC Citizens' Master Plan

6. The TVC planning effort grew out of a series of controversial development approvals in northern St. Lucie County. Prior to 2004, two large, gated residential subdivisions were approved in the area. One project, called Portifino Shores, had commenced construction, but certificates of occupancy could not be issued for the newly-constructed homes because no water utilities were available to service the development.

7. These developments caused citizens of the area to become involved in public meetings of the Planning and Zoning Board and the Board of County Commissioners. Citizens began to complain about similar, single-use residential developments being proposed, and began to express a growing concern about urban sprawl in an area that had, until then, retained a relatively rural character featuring large areas of open space and agricultural operations.

8. In February 2004, a seven-day planning charrette was held to gather public input regarding how the area should develop over the long-term. The charrette was organized by an appointed Charrette Steering Committee composed of area residents, property owners' representatives, landowners, and business owners from the area, supported by the Treasure Coast Regional Planning Council ("TCRPC"), working under a contract

with the County. More than 350 members of the public participated. While the public was not opposed to development occurring in the area, the principal thrust of public sentiment was to avoid single-use, automobile-dependent, urban forms of development and to preserve open space. Transportation impacts of sprawling development were an important topic of discussion, with the City of Port St. Lucie often mentioned as an example of the type of development the citizens wished to avoid. To the extent possible, the citizens wished to avoid large, multi-lane, high-speed roadways in the area and instead maintain a rural, pedestrian-friendly character to the roadways.

9. The TCRPC and the citizens were supported in this planning effort by expert consultants in surface water management, citrus farming, ecology, residential market analysis, retail market analysis, employment projections, urban design and code drafting, architecture, financial feasibility, and transportation engineering. The work of these experts ultimately constituted much of the data and analysis submitted to the Department in support of the TVC Amendments and the Remedial Amendments.

iii. The Citizens' Master Plan

10. A Citizens' Master Plan was the product of the planning charrette. Several planning concepts form the basis

for this Master Plan and ultimately were implemented in the TVC Amendments.

11. The overall theme of the Master Plan was "striking a balance," or, in other words, accommodating the potential of the area for urban development, but at the same time retaining rural character within the area and avoiding the negative impacts of sprawling development. Several planning strategies were used to achieve this balance.

12. The fundamental concept of the Master Plan is to promote a more compact form of urban development with a range of housing types from large-lot single-family to apartments, at an overall residential density that is higher than typical in single-use, single-family sprawl. At the same time, large areas of open space are retained in a coordinated, interconnected system that incorporates a central, "backbone" storm water management system as well as agricultural areas and public recreation areas, golf courses, and greenways. Development under these concepts could potentially preserve over 50 percent of the land as open space, while the coordinated flow-way system would improve water quality in receiving water bodies and provide an amenity for adjacent urbanized areas.

13. Future development envisioned by the Master Plan would occur in a coordinated system of "villages" and "towns" defined by "transects" that establish a core, center, general

neighborhood, an edge of each settlement, bounded by open areas termed "countryside." Residential and non-residential uses are integrated in each town and village. Required minimum densities for residential areas, together with transect-based design principles, result in a suitably integrated mix of housing types with public, institutional, and commercial uses located appropriately throughout the area.

14. The Master Plan contemplates incentives for this more sustainable pattern of development through density bonuses, transferable development rights (TDRs), and provision of urban services outside the USB (which otherwise would be retained in its current location) for development in the TVC area that qualifies in accordance with the Master Plan's principles.

15. The integration of the transportation system into this more sustainable form of development was central to the planning effort. Roadway design principles envisioned a fully-interconnected, dense system of parallel streets, rather than continued reliance on a few major arterial roadways in a sparse, hierarchical network. The dense, interconnected network provides alternative routes for traffic, allows traffic to disperse, and creates friendlier small neighborhood and rural roads that are inviting for cars, bicyclists, and pedestrians. Design standards for roadways would facilitate these goals and include pedestrian and bicycle facilities on all roadways.

16. While the conventional approach to increasing road capacity is simply to add lanes to existing roads, planning and transportation data indicate that this is not usually the most efficient solution. Rather, the most efficient means of increasing capacity usually is to construct alternate parallel roads. Accordingly, a conventional roadway network relying upon a few large arterial roads to connect otherwise isolated pods of single-use development (i.e., a residential neighborhood or a shopping center) was expressly rejected by the participating citizens. The dense, interconnected roadway system is proposed not only within each town or village, but also is planned on a larger scale for the entire TVC area.

17. The combination of the dense, integrated roadway network and the development of commercial, institutional, and public uses in close proximity to residential uses in each town and village has a dramatic, positive impact on the transportation system. Pedestrian and bicycle travel become possible, and vehicle trips are both shorter and disbursed over a larger number of roads rather than concentrated on a few arterial roadways.

18. After the Citizens' Master Plan report was finalized and presented to the Planning and Zoning Board and the Board of County Commissioners, the TCRPC (acting under its contract with the County and with the support of its team of contract experts)

undertook the process of preparing comprehensive plan amendments to implement the Citizens' Master Plan.

The TVC Amendments (Joint Exhibit 3)

(i) Implementation of Citizens' Master Plan

19. The County adopted the TVC Amendments on May 16, 2006, as Ordinance No. 06-019. Sometimes referred to as a Sub-element of the FLUE, and sometimes referred to as a separate Element of the Plan, the TVC Amendments actually created a new FLUE Objective 3.1.1 and associated policies for the use of Special Area Plans for undeveloped areas, to "ensure that new development in existing agriculture areas is predictable and responds to the vision of the citizens of St. Lucie County." Such Special Area Plans, of which the North St. Lucie County Special Area Plan is the first, "shall be created with a high degree of citizen involvement and shall be submitted as part of the data and analysis required to amend the Future Land Use Map." Special Area Plans are required to have 14 specified features, including analysis of "existing transportation issues including the potential impact of new development," identification of "the appropriate location and amount of new retail . . . [and] new commercial uses," and "a maximum allowable development program" to "serve as a basis for setting and evaluating levels of service."

20. The TVC Amendments created a TVC Sub-Element to the Land-Use Element and provided a strategy of incentive-based options designed to encourage the sustainable pattern of future development envisioned by the Citizens' Master Plan. In keeping with the objectives identified in the Citizens' Master Plan, policies in the TVC Amendments implemented the denser, traditional neighborhood pattern with integrated non-residential uses (Objectives 3.1.4 and 3.1.8 and associated policies); the dense, integrated roadway network (Objective 3.1.9 and associated policies; Policy 3.1.4.2.7); the "backbone" storm water flow-way system (Objective 3.1.6 and associated policies); and the permanent, coordinated open space areas (Objective 3.1.5 and associated policies). All of these objectives and policies were promoted by incentives and potential density transfers (Objective 3.1.7 and associated policies). In addition, Policy 3.1.5.7(1) specifically addressed maintaining the rural character of Indrio Road between Johnston Road and Emerson Avenue by requiring new developments "to position a substantial amount of the Countryside component along the property line adjoining the Indrio Road right of way." The 28-square-mile TVC area was given the new "TVC" future land-use classification, and the policies of the TVC Amendments were applied to "those portions of the County where the TVC land use designation has been adopted."

21. Incentives for property owners to develop in accordance with the TVC policies included transferable development rights (Policy 3.1.2.5; Objective 3.1.7 and associated policies); density bonuses that encourage use of TDRs, encourage denser development within the USB, and encourage provision of public facility sites and workforce housing (Policy 3.1.7.7); provision of urban services to developments outside the USB that conform to TVC policies, without expanding the USB (Policy 3.1.2.3); and expedited review for projects that conform to TVC policies (Policy 2.1.2.4).

22. Outside the USB, parcels greater than 500 acres in size, if developed, were required to develop in accordance with TVC policies. Parcels of less than 500 acres may develop to the pre-existing residential density or may transfer development rights to other parcels, but in all cases new development is required to coordinate roadway systems and open space with adjacent development. (Policies 3.1.2.6, 3.1.2.7). Existing ownership patterns within the TVC area include large assemblages of land. The County reasonably expects development in the TVC area to occur both on a large scale, as "villages" and "towns," and on a smaller scale, as also allowed under TVC Plan policies.

23. The TVC transportation system follows the principles developed in the Citizens' Master Plan. For the entire area, and on a smaller scale within towns and villages, the system

will include an interconnected network of two-lane roadways wherever possible (Policy 3.1.4.1.(7), Objective 3.1.9 and related policies, Figure 3-15). The long-term transportation plan for the area includes extending both Johnston Road and Emerson Avenue as paved roads to the south of Indrio; transforming Johnston into a four-lane roadway with gentle curves to the south of Indrio where it presently has sharp corners; and crossing Johnston and Emerson well to the south of Indrio. Johnston Road will thus relieve Kings Highway as the major north-south route for truck traffic, and Indrio Road will be relieved from a portion of the east-west traffic that presently uses Indrio to move from one north-south route to another. This will also create additional intersections as logical locations for commercial nodes and for relieving traffic pressure at existing intersections such as Kings-Indrio.

(ii) Maximum Development Under the TVC Amendments

24. The TVC Amendments are intended to be largely incentive-based. Accordingly, Policy 3.1.3.1(4) provides:

The TVC Element shall not limit the underlying potential densities or intensities, as established by the pre-existing Future Land Use Element as of [date of adoption of TVC Amendment]. New non-residential uses allowed pursuant to the pre-existing Future Land Use Element are encouraged to follow the retail and workplace strategies outlined in this element and shall follow the TVC Land Development Regulations. The potential

densities and intensities on the TDV Map may be increased by the application of the policies in the TVC Element.

25. Similarly, Policy 3.1.2.5 creates a Transferable Development Value ("TDV") Map to establish the potential uses, densities, and intensities for properties within the TVC area under the pre-existing FLUE. The TDV Map is designed to set pre-existing land uses for determining the amount of TDRs that can be reallocated into new "town" and "village" developments. While the policy speaks of pre-existing "densities and intensities" in this regard, the policies governing TDRs (Objective 3.1.7 and subsidiary policies) provide only for transfer of residential density; industrial or commercial intensities previously allowed under the pre-existing land-use map are not transferable from one site to another.

26. While Policies 3.1.3.1 and 3.1.2.5 make it clear that the TVC Element is not intended to limit or reduce pre-existing density and intensity on any specific property within the TVC area, Policy 3.1.1.2 implements the requirement in Policy 3.1.1.1 for a "maximum allowable development program" by placing overall caps on the maximum allowable total development within the TVC area. Table 3-1, entitled "Maximum Allowable Development Program," specifies the maximum allowable development allowed for the entire TVC area: 37,500 residential units, 5,000,000 square feet of commercial/retail uses, and 464

acres of industrial uses. The concept of including such caps on overall development was suggested by the Department during the development of the TVC Amendments. The caps were included to avoid the need to plan roads and other infrastructure to serve levels of development that would not actually occur and, as noted in Policy 3.1.1.1, to "serve as a basis for setting and evaluating levels of service."

(iii) TVC General Retail Development Strategy

27. Within the overall cap of five million square feet, the TVC Amendments address the placement and scale of individual non-residential land uses in two sets of policies. Objective 3.1.8 and its associated policies create a General Retail Development Plan addressing commercial/retail uses. Objective 3.1.10 and its associated policies address a workplace employment strategy addressing commercial/office and industrial uses.

28. Retail components are broken down into planning units in a range of sizes described on Table 3-8: Local Store (averaging 500-2,000 square feet); Convenience Center (averaging 3,000-80,000 square feet); Neighborhood Center (80,000-150,000 square feet); Village Center (150,000-400,000 square feet); and Town Center (more than 200,000 square feet). This is the terminology used by the International Council of Shopping Centers.

29. As noted above, the TVC Element contemplates that new development in the form of "villages" and "towns" will integrate non-residential uses including retail. Policy 3.1.8.2.1.a provides that new developments in the TVC area must provide at least the minimum amount of retail outlined in Table 3-8 based on the number of homes proposed. In this manner, the TVC Amendment coordinates the residential and retail land uses to further the goal of compact, mixed-use communities.

30. Policy 3.1.8.2.1.b and Figure 3-13 represent the General Retail Development Plan for the TVC area. 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.).

31. The County's retail market expert and the transportation engineer collaborated, with the support of TCRPC planning experts, in developing the General Retail Development Plan and the Future Street Network, so that the two would function together.

32. The intersection of Emerson Avenue and Indrio Road is identified as a location for a Neighborhood Center, but Policy 3.1.8.2.1.b.iii encourages this intersection to develop alternatively as an office or mixed-use development. Taken together, the entire Policy provides a preferred development

strategy which identifies the minimum amount of retail use (and its preferred approximate location) to support the residential units authorized under the TVC Amendments.

(iv) Sufficiency of Planned Transportation Infrastructure

33. In support of the TVC Amendments, the County's consulting traffic engineers, GMB Consultants, Inc., and that firm's partner, David Mulholland, conducted a long-term, regional traffic analysis. The original analysis was replaced by a revised analysis, dated April 24, 2006, and transmitted with the County's response to the Department's ORC Report. That 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.

34. Evaluation of the existing transportation system was conducted to determine existing infrastructure needs in the TVC area, using both average daily traffic counts and peak-hour traffic counts. Improvements were identified as needed if peak seasonal traffic exceeded the allowable service volume for a given roadway. This analysis utilized the 2004 traffic count database maintained by the St. Lucie County Metropolitan Planning Organization ("MPO"). Service volumes, which roughly equate to the capacity for each type of road, were taken from

the Florida Department of Transportation 2002 Quality Level of Service Handbook.

35. The performance of a roadway, and ultimately the determination of whether any improvements are needed, is based upon a comparison of the existing or projected traffic volume against the road's capacity to handle traffic while maintaining the level of service ("LOS") adopted in the County's Plan. This volume-to-capacity analysis is expressed as a ratio of V/C. A V/C ratio greater than 1.0 indicates a roadway volume which exceeds the capacity of the road to operate at the adopted LOS. A V/C of less than 1.0 indicates that the road has the capacity to handle additional traffic.

36. The results of the existing condition study were summarized on Table 1 of the April 24, 2006, Transportation Study, which demonstrated that all roads within the TVC, as of the date of the study, had existing capacity to accommodate existing traffic.

37. Having analyzed existing conditions, the County's consulting traffic engineer, David Mulholland, conducted a long-term traffic projection to verify that a roadway system could be developed in keeping with the planning objectives in the Citizens' Master Plan, while meeting the roadway infrastructure needs for the TVC area at full build-out.

38. Mr. Mulholland relied upon the direction of the County's land use planners and retail and residential economists to provide the applicable land use assumptions as to both density/intensity and location, and the projected build-out date, which was determined by the County's consultant to be 2050. The long-term study also analyzed traffic projections at 2030 as an interim, benchmark year.

39. For the purposes of the long-term transportation study, the maximum development potential was assumed to be 37,500 residential units, 5,000,000 square feet of commercial/retail use, and 464 acres of industrial use, which were the express caps on total development within the TVC area provided for in Policy 3.1.1.2 and Table 3-1 of the TVC Amendment.

40. These maximum land uses were distributed throughout the TVC area into Traffic Analysis Zones ("TAZs"), geographic areas assigned a specified amount of expected land use (i.e., number of residential units and square footage of non-residential use). 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. The Neighborhood Center commercial node shown at the intersection of Indrio Road and Emerson Avenue was located in TAZs 157 and 163. TAZ 157, which

includes APA Emerson's property on the north side of Indrio, was assigned 300,000 square feet of commercial development for this modeling study. TAZ 163, which contains the portion of the commercial node on the south side of the Emerson-Indrio intersection, was assigned 700,000 square feet of commercial development. The total of the ultimate commercial build-out at this location, as modeled by Mr. Mulholland, was therefore at least one million square feet.

41. Utilizing a professionally recognized, computerized regional traffic model supported by the MPO and the TCRPC, known as the Treasure Coast Regional Planning Model ("TCRPM"), Mr. Mulholland then modeled two different scenarios. First, he modeled the TVC future land uses and the existing roadway network. This scenario helped identify areas where roadways would likely fail adopted LOS standards without additional improvements.

42. Based on this analysis, Mr. Mulholland designed a future street network to accommodate the TVC land uses at full build-out while accommodating transportation strategy outlined in the Citizens' Master Plan. As noted in Mr. Mulholland's report: "Through the design Charrette process, the direction [was] to provide a well-balanced alternative transportation network that would service the transportation demands versus the traditional capacity improvements (i.e., widening to six lanes).

The emphasis of the plan was to provide an interconnected network of two- and four-lane roadways that will service the capacity needs created." Joint Exhibit 7, § 2.6). Whenever possible, two-lane roadways were retained, in keeping with citizens' desire to preserve the rural character of the area. In particular, Indrio Road would remain a two-lane road east of Emerson Avenue in order to preserve its existing rural character, preserve the historic tree canopy along the road, and avoid adversely impacting existing single-family residences and the historic schoolhouse on Indrio.

43. Acceptable levels of service on Indrio and other roads are preserved by planning for a series of alternate 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.

44. 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. Mr. Mulholland testified to his professional engineering opinion that, based upon his long-term analysis, the roadway network identified on Figure 3-15 will be adequate to support 37,500 residential units, 5,000,000 square feet of commercial/retail,

and 464 acres of industrial land uses and maintain adopted LOS standards. Mr. Mulholland further testified that, while some of the Tables contained in his April 24, 2006, Long-Term Transportation Study were summaries of traffic conditions on the more important roadways, his actual study included all the roadways within the network, and all the existing and proposed roadways for the TVC area are depicted on Figure 3-15.

45. The long-term transportation analysis resulted in the development of the Future Street Network Map shown on Figure 3-15 of the TVC Amendments. 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.

Adoption of the TVC Remedial Amendments

46. On July 17, 2006, the Department issued its Statement of Intent to find portions of the TVC Amendments "not in compliance" with the pertinent provisions of Part II, Chapter 163, Florida Statutes. The Statement of Intent identified three areas of noncompliance with respect to the TVC Amendments. Two of these areas of noncompliance, with respect to potable water and sanitary sewer (Paragraph I.A.1) and with respect to workforce housing (Paragraph I.A.3) were dealt with by the County's Remedial Amendments and are not at issue in this proceeding.

47. With respect to transportation, Paragraph I.A.2. of the Statement alleged:

The Plan Amendments include future land use map amendments which would increase demand on transportation facilities and services. The Plan Amendments do not modify the Capital Improvements Element to provide for transportation facility enhancements to accommodate the increased demand on transportation facilities and services and maintain adopted level of service standards.

To cure this asserted deficiency, the Statement of Intent directed that the County should amend the Capital Improvements Element to include "the transportation facility improvements needed to support the amendment."

48. The Department and the County subsequently settled the issues in the Statement of Intent, and on June 5, 2007, the County adopted Ordinance No. 07-037, containing Remedial Amendments directed to the deficiencies alleged in the Statement of Intent. In support of the Remedial Amendments, the County submitted additional data and analysis, which the Department expressly accepted as adequate.

49. With respect to transportation issues, the Remedial Amendments contained sections entitled, "Proposed Transportation Amendments to TVC Element," and "Proposed Transportation Amendments to Capital Improvement Element." Under the latter heading, the Amendments created Table 11-13, which is a tabular listing of the future roadways that already were shown, with

projected construction dates, on Figure 3-15 of the TVC Amendments. Former Table 3-9, another listing of future roadway improvements, was re-designated Table 11-11, which relocated it from the FLUE to the Capital Improvements Element, but the proposed future numbers of lanes on the roadways, including Indrio Road, were not changed. Thus, the Capital Improvements Element was amended to include the same roadway projects already designed and included in the TVC Amendments at the time of their adoption. The design of the roadway network was not altered in the Remedial Amendments; in fact, Figure 3-15 was reproduced in the Remedial Amendments and changed only by assigning names to some of the previously unnamed future roadways. APA Emerson has not challenged the financial feasibility of Table 11-13 or Table 11-11.

50. The Remedial Amendments also addressed transportation concurrency by amending Policies 3.1.4.13 and 3.1.9.17. Concurrency, as to specific properties such as APA Emerson's property, is not an issue in this case or in any growth management case; rather, APA Emerson's allegations assert that the long-range planning for the future roadway network is inadequate. The Remedial Amendments also provided that the MPO transportation map had been amended to reflect Figure 3-15, the TVC Future Street Network Map (Policy 3.1.9.19); that internal capture rate and jobs-to-housing ratio would continue to be

monitored (Policies 3.1.9.20, 21, and 22); and that a master transportation plan to direct funding and prioritize building the roadways shown on the Future Street Network Map would be established within two years (Policy 3.1.9.23). None of these features of the Remedial Amendments are at issue in the present proceeding.

51. 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. Thus, the County committed in Policy 3.1.9.16 to create a special taxing district, municipal services taxing district, and/or a municipal services benefit unit to fund capital improvements within the North St. Lucie County Special Area Plan to the extent such improvements were not adequately funded by other sources. Policies 11.1.1.29 and 11.1.1.30 addressed financial feasibility, and Tables 11-12 and 11-12A listed the roadway projects that would be required within five years to maintain level of service standards within the TVC Area, and funding sources for such projects.

52. Policy 3.1.1.2 and Table 3-1, capping the maximum residential dwelling units (37,500), commercial and retail uses (5,000,000 square feet) and industrial uses (464 acres), were

unaltered by the Remedial Amendments. Policies 3.1.2.5 (Transferable Development Value Map) and 3.1.3.1.4 (Potential Densities and Intensities), both of which reiterate the intent of the TVC Amendments not to limit the underlying densities and intensities established by the pre-existing FLUE, were also unchanged by the Remedial Amendments. Policies 3.1.8.1 through 3.1.8.3 and Figure 3-13, setting forth the plan for retail development within the TVC area, also were unchanged.

53. It was clear from Mr. Mulholland's testimony that the long-term analysis that modeled the Future Street Network plan, Figure 3-15, was neither replicated nor altered in connection with the Remedial Amendments. In fact, Mr. Mulholland used a different traffic analysis model, known as "Art Plan," to focus on particular links shown on Figure 3-15, and to identify any short-term infrastructure needs. Mr. Mulholland testified that no changes were made to the previously-designed transportation network necessary for build-out of the TVC area.

54. To address the five-year financial feasibility issue, Mr. Mulholland conducted a short-term traffic modeling analysis to identify improvements necessary through the year 2011. The final version of this study, dated April 5, 2007, was included in the additional data and analysis submitted in support of the Remedial Amendments.

55. The 2011 traffic study (JX 12) began with the existing transportation network and existing traffic condition in year one, and assumed an absorption rate of 375 new residential units in 2008, 2009, 2010, and 2011, for a total of 1,500 units. The study also assumed absorption of 80,000 square feet of new commercial retail space during this planning period.

Mr. Mulholland did not generate these absorption figures, but he believed they were based upon the maximum 37,500 residential units and 5,000,000 square feet of commercial/retail space capped by the Amendment. The absorption figures were provided to him by planning and economic consultants.

56. As a result of the 2011 study, necessary improvements to existing road infrastructure were identified in the first five years and were listed, along with funding sources in the Capital Improvements Element, on new Tables 11-12 and 11-12A.

57. The purpose of the study was not to design the transportation network itself; that work was already completed in connection with the previously-adopted TVC Amendments. Rather, the 2011 Transportation Study was confined to identifying those elements of the future transportation network which would be needed in the first five years of the Plan so that funding sources could be identified. Thus, the 2011 Transportation Study related to the County's demonstration of

financial feasibility, not to the adequacy of the network itself.

APA Emerson's Challenge

58. The Corrected Order on Pending Motions entered on February 1, 2008, struck several issues from APA Emerson's Amended Petition because they were not timely. The remaining issues included those set out in paragraphs 52, 53, 55, and 56 of its Amended Petition: paragraph 52 alleged a failure by the County to adequately plan for a roadway network to support development on lands designated TVC, inconsistent with Sections 163.3177(6)(a) and (6)(b), Florida Statutes, and Rules 9J-5.006(3)(b)1. and 9J-5.016(1)(a); paragraph 53 alleged a failure by the County to adequately analyze maximum development, inconsistent with Sections 163.3177(6)(a) and (8), Florida Statutes, and Rules 9J-5.005(2)(a) and 9J-5.019(3)(t); paragraph 55 alleged a failure by the County to adequately coordinate land uses with the transportation system, inconsistent with Sections 163.3177(6)(a) and (6)(b), Florida Statutes, and Rules 9J-5.006(3)(b)1. and 9J-5.019(4)(b)2.; and paragraph 56 alleged a failure of the Future Traffic Circulation Map to depict all roadways, including collector and arterial roads, which will be needed to accommodate development on lands designated TVC, inconsistent with Rule 9J-5.019(5)(a).

59. In an attempt to prove its case on those issues, APA Emerson asserted that the transportation system had to plan for the maximum theoretical build-out of the TVC area--which APA Emerson said was either in excess of 41 million square feet (arrived at by applying the floor area ratios under the pre-existing future land use map and plan provisions within the TVC area) or, alternatively, approximately 17 million square feet (using a planning "rule of thumb" of 10,000 square feet of commercial use per acre).

60. In essence, APA Emerson's assertions are just another variation of its untimely challenge to the TVC Amendments, and not a timely challenge to the Remedial Amendments. APA Emerson asserts essentially that the transportation system in the County's Plan will not meet the needs of growth contemplated in the FLUE. But both the FLUE and transportation system planned to meet it are established in the TVC Amendments and unchanged by the Remedial Amendments. The Remedial Amendments do not change either part of the equation.

61. Even if timely raised, the challenge fails to appropriately consider the implications of the "maximum allowable development program" in TVC Policy 3.1.1.2, which sets new "theoretical maximums" in the TVC area (namely, 37,500 residential units, 5,000,000 square feet of commercial use, and 464 acres of industrial use). The TVC Amendments plan to meet

the transportation needs of the new "theoretical maximum" build-out of the TVC area. (Possibly valid questions related to the implementation of the growth caps are not timely.)

62. Even without the new growth caps, the so-called "theoretical maximums" asserted by APA Emerson include hypothetical development of substantial areas with pre-existing mixed-use ("MXD") land-use classification on the unrealistic and inappropriate assumption that such areas would be developed entirely for commercial use with no residential use.

63. The 41 million plus square feet of retail space that results from APA Emerson's so-called "theoretical maximums" represent the equivalent of 20 or more regional shopping malls, at an average of 1 to 2 million square feet per regional mall. The "rule-of-thumb" measure would result in the equivalent of almost ten such malls. Meanwhile, there already are existing regional malls in relatively close proximity to the north and south of the TVC area, the influence areas of which overlap in the TVC area. This makes it unlikely that one regional mall, much less 20, or even ten, would ever be built in the TVC area.

64. The County's retail market expert projected that retail development totaling approximately one million square feet would be adequate to serve the retail needs for the 37,500 dwelling units allowable within the TVC area, including retail needs of the larger, regional area for "highway commercial" or

"big box" retail that is likely to locate in the TVC area in the future. The remaining four million square feet of commercial use was projected to be adequate for future office uses in the area based on the expert's jobs-housing ratio analysis. APA Emerson did not prove beyond fair debate that 5 million square feet of commercial use was inadequate or inappropriate to assume for planning transportation and other public facilities.

65. APA Emerson asserted that the County had an obligation to conduct a property-by-property analysis to determine development constraints such as wetlands and stormwater management requirements in order to determine the maximum "feasible" commercial development. But such an assessment would require the collection of data that was not available to the County at the time of the TVC Amendments or the Remedial Amendments. Besides, the market demand projections undertaken by the County's expert consultants were as or more important to gauge likely future commercial development. To the extent that APA Emerson was implying that the County should have surveyed all property owners in the TVC area to attempt to ascertain the likely intensity of future commercial development, this also would have required the collection of data that was not available to the County at the time of the TVC Amendments or the Remedial Amendments.

66. Using a similar approach as for the TVC area as a whole, APA Emerson also asserted that the transportation system planned for build-out of the TVC area failed to take into account either the theoretical maximum or the "rule-of-thumb" commercial development of certain land holdings, such as APA Emerson's property. Specifically, it pointed to the theoretical maximum build-out of APA Emerson's 26 acres at over 500,000 square feet of commercial use, or "rule-of-thumb" build-out of 260,000 square feet of commercial. 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.

67. The only contrary data and analysis as to what might actually occur on APA Emerson's property was the testimony of Mr. Martinez that APA Emerson would initially plan for approximately 200,000 square feet of commercial on the property as soon as necessary approvals could be obtained to meet near-term market demand and would hope to be able to increase the intensity of its commercial use to meet future market demand. Mr. Martinez' testimony was new data not available to the County at the time of the Remedial Amendments, much less the TVC Amendments. In any event, 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 issues.

68. Using the same kind of approach, APA Emerson also asserted that the transportation system planned for build-out of the TVC area failed to take into account either the theoretical maximum or the "rule-of-thumb" commercial development of certain parts of the TVC area. Specifically, it pointed to the commercial nodes where Indrio Road intersects Emerson Avenue and Kings Highway and compared the "theoretical maximum" and the "rule-of-thumb" commercial development at those locations to the TAZ allocations used in the County's data and analysis. Those assertions likewise failed to prove beyond fair debate that the TAZ allocations were inappropriate for transportation planning purposes or that the Remedial Amendments (or the TVC Amendments) were not appropriately based on data and analysis.

69. APA Emerson also cited evidence that Wal-Mart was considering development of a store at Indrio Road and Kings Highway but was encouraged by the County to consider another location more appropriate for "warehouse retail" store because

the road network planned for the Indrio/Kings intersection "would be insufficient to achieve concurrency." However, concurrency is not a long-term planning issue and was not raised as an issue as to the Remedial Amendments. In any event, it was not proven beyond fair debate that the Remedial Amendments are somehow not based appropriately on data and analysis because of Wal-Mart's inability to achieve concurrency at that location.

70. APA Emerson also criticized the County for planning "barely sufficient roadway infrastructure to accommodate even just the 5 million square feet of commercial development" and for not leaving a "margin of error." PRO, paragraph 44. But APA Emerson presented no evidence that "barely sufficient" is insufficient or that planning for transportation planning errors is required or appropriate planning. It certainly did not prove beyond fair debate that the County's Remedial Amendments (or TVC Amendments) were not appropriately based on data and analysis or were otherwise fatally defective for that reason.

71. APA Emerson took issue in paragraphs 62-63 of its PRO with two alleged differences in the transportation plan between the TVC Amendments and the Remedial Amendments. One was that Table 3-9 of the TVC Amendments identified the widening of Johnston Road by 2030 extending as far south as "W Angle Road," while Table 11-11 in the Remedial Amendments identified those improvements as extending as far south as "Immokalee Road." But

there was no evidence as to the significance of that difference, other than the statement of Mr. Mulholland on cross-examination: "They are slightly different." The other alleged difference actually was not a difference at all. Both Table 3-9 of the TVC Amendments and Table 11-11 in the Remedial Amendments state that they are improvements planned to occur by 2030, notwithstanding a footnote to Table 11-11 that the improvements were "[b]ased on maximum build-out identified in Table 3-1 of the TVC Element." APA Emerson certainly did not prove beyond fair debate that the Remedial Amendments were not appropriately based on data and analysis or were otherwise fatally defective for those reasons.

72. Another fault APA Emerson found with the data and analysis supporting the Remedial Amendments in paragraph 66 of its PRO was that Mr. Mulholland's 2006 transportation planning analysis was based on 2004 traffic counts, but Mr. Mulholland testified on cross-examination that "it's common practice to routinely update your traffic counts." Regardless of "common practice," there was no evidence whether updated traffic counts were available at the time of adoption of the Remedial Amendments or whether updated traffic counts, if they existed, would not have supported Mr. Mulholland's analysis. APA Emerson certainly did not prove beyond fair debate that the County's Remedial Amendments were not appropriately based on data and

analysis or were otherwise fatally defective for alleged failure to use updated traffic counts.

73. APA Emerson also attacked Mr. Mulholland's transportation planning analysis in paragraph 69 of its PRO based on Mr. Mulholland's testimony on cross-examination that a roadway-by-roadway analysis would be required to determine whether the capacity of a specific roadway would be doubled by widening or whether a new parallel road was required. But there was no evidence as to the relevance or necessity of such determinations. APA Emerson certainly did not prove beyond fair debate that the County's Remedial Amendments were not appropriately based on data and analysis or were otherwise fatally defective because Mr. Mulholland did not make those determinations.

74. APA Emerson asserted in paragraph 73 of its PRO that the data and analysis also were somehow deficient because Mr. Mulholland's "analysis of what volumes and capacities would be on the proposed new roads (as opposed to the improved existing roads) once the Future Street Network Plan was implemented . . . was not included in the data and analysis supporting the Remedial Amendments." Actually, Mr. Mulholland's testimony was that there was technical analysis of those matters. The technical analysis was not "submitted to DCA" but the modeling derived from the technical analysis was submitted.

There was no evidence that there was any requirement to submit the technical analysis to the Department. In any event, APA Emerson certainly did not prove beyond fair debate that the County's Remedial Amendments were not appropriately based on data and analysis or were otherwise fatally defective for alleged failure to submit the technical analysis to the Department.

75. The allegations remaining after the Corrected Order on Pending Motions entered on February 1, 2008, also included allegations that the Remedial Amendments were internally inconsistent with the TVC Amendments and other parts of the Comprehensive Plan. APA Emerson presented no evidence of the alleged internal consistencies other than the Comprehensive Plan provisions themselves. Without any other evidence, APA Emerson did not prove any alleged internal inconsistency beyond fair debate.

76. Paragraphs 74-79 of APA Emerson's PRO reflect that, as with the vast majority of APA Emerson's challenge, much if not all of the alleged internal inconsistency relies on the assertion that the County's long-term transportation plan is insufficient to meet the needs of its future land use. All of those contentions already have been addressed. No internal inconsistency was proven.

CONCLUSIONS OF LAW

77. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.569, 120.57(1), and 163.3184, Fla. Stat.

Issues and Burden of Proof

78. The ultimate issue in these proceedings is whether the Remedial Amendments are "in compliance" as that term is defined in Section 163.3184(1)(b), Florida Statutes. Since the Department issued a Cumulative Notice of Intent to find the Remedial Amendments to be "in compliance," the provision relating to burden of proof in Section 163.3184(9)(a), Florida Statutes, governs and provides that the Remedial Amendments "shall be determined to be in compliance if the local government's determination of compliance is fairly debatable." See § 163.3184(16)(f), Fla. Stat. This language shifts the burden of proof to APA Emerson to establish noncompliance. See Current v. Town of Jupiter and Department of Community Affairs, DOAH Case No. 03-0718GM (DOAH Oct. 24, 2003; DCA Apr. 8, 2004).

79. While most administrative proceedings conducted under Chapter 120 are de novo, the Florida Legislature has treated administrative review of comprehensive plan amendments differently. See Brown, et al. v. Department of Community Affairs, et al., DOAH Case No. 06-0881GM (DOAH Dec. 5, 2006; DCA Apr. 3, 2007). Under Sections 163.3184(9)(a) and (16), Florida

Statutes, APA Emerson bears the burden of demonstrating "beyond fair debate" that the Remedial Amendments are not "in compliance."

80. The term "fairly debatable" is not defined in Chapter 163 or in Rule 9J-5. However, the Florida Supreme Court has held the term to be synonymous with the common law "fairly debatable" standard used to review decisions of local governments acting in their legislative capacity. Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997). The "fairly debatable" standard of review is a highly deferential standard requiring approval of the local government's comprehensive planning decision, "if reasonable persons could differ as to its propriety," id., or if, "for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity." City of Miami Beach v. Lachman, 71 So. 2d 148, 152 (Fla. 1953).

Timeliness of APA Emerson's Assertions

81. Initially, it is clear from the record that the allegedly inadequate roadway network was planned, designed, and analyzed as part of the TVC Amendments and was not altered in any significant respect by the Remedial Amendments. The proposed roadway network is identical before and after the Remedial Amendments, as shown by Figure 3-15 in the original TVC Amendments and Figure 3-15 in the Remedial Amendments. The

long-term transportation modeling done in support of the future roadway network was not amended or re-submitted in connection with the Remedial Amendments. The cap of 5 million square feet on commercial development remained unchanged by the Remedial Amendments.

82. The focus of the Remedial Amendments was to adopt Table 11-13 in the Capital Improvements Element, which is a tabular representation of the future roadway network already depicted on Figure 3-15, and to comply with Senate Bill 360 by addressing five-year financial feasibility of the roadway improvements necessary in that shorter time-frame. These efforts were different from the long-term regional traffic analysis that was performed to support the TVC Amendments.

83. APA Emerson has not asserted, either in its Amended Petition or in its proof at hearing, that the proposed transportation network is not financially feasible. APA Emerson put on no evidence to suggest that the five-year study of financially feasible transportation improvements was flawed, inadequate, or inappropriate.

84. Much of APA Emerson's case focused on the alleged failure to plan roadway improvements to serve commercial development well in excess of the "maximum allowable" 5 million square feet under Policy 3.1.1.2. To that extent, for the reasons expressed in the Corrected Order on Pending Motions,

entered February 1, 2008, APA Emerson's attempts to attack the County's planning for a long-term future roadway network, and the data and analysis that support that planning, is untimely. APA Emerson is attempting to "reach back" and challenge aspects of the previously-adopted TVC Amendments that it did not challenge within the statutory time limitations for such challenges. Rossignol v. Islamorada, Village of Islands and Dept. of Community Affairs, DOAH Case No. 01-2409GM, 2001 Fla. ENV LEXIS 274 (DCA Dec. 6, 2001); 2001 Fla. Div. Adm. Hear. LEXIS 3139 (DOAH Nov. 16, 2001).

Internal Consistency

85. The Remedial Amendments can be found to be internally inconsistent only if it were proven beyond fair debate that they are "in conflict with" the TVC Amendments or other provisions of the Comprehensive Plan. See Sheridan, et al. v. Lee County, et al., DOAH Case No. 90-7791GM, RO ¶¶ 242-244 (DOAH Jan. 27, 1992; Admin. Comm'n Feb. 10, 1994). To extent that the internal inconsistency issues were timely, APA Emerson failed to meet its burden of proof.

Adequacy of Data and Analysis

86. In support of its contention that the County did not adequately plan the roadway network to accommodate projected development, APA Emerson cited Section 163.3177(6)(a)-(b) and (8), Florida Statutes, and Rules 9J-5.005(2)(a) and (3)(b)1.,

9J-5.016(1)(a), and 9J-5.019(3)(t)[sic][f], (4)(b)2. and (5)(a). All of these provisions relate to the requirement that comprehensive plans and plan amendments be supported by adequate data and analysis. To the extent that the data and analysis issues were timely, APA Emerson did not prove beyond fair debate that the Remedial Amendments are inconsistent with any of those provisions.

87. APA Emerson contends that the data and analysis do not support the Remedial Amendments essentially because the County has not planned a transportation system capable of serving well in excess of the 5 million square feet of "maximum allowable" commercial development under Policy 3.1.1.2, which also is the amount of commercial growth that is realistic based on the data and analysis. It is inappropriate to plan for public facilities based growth projections well in excess of the maximum allowable and what is realistic to expect to occur in the future. See Dept. of Community Affairs v. Lee County, DOAH Case No. 95-0098GM, ACC-96-002, (DOAH RO Jan. 31, 1996; Admin. Comm'n FO Jul. 25, 1996)(public facilities must be planned based on realistic projections, while land use allocations must be based on FLUE theoretical maximums).

88. In addition, transportation planning is not driven solely by traffic modeling; other planning considerations are relevant. See, e.g., Dept. of Community Affairs v. City of Ft.

Myers, Case No. 89-2159 (DOAH RO Jan. 7, 1992); Zemel v. Lee County, DOAH Case No. 90-7793GM, DCA93-154-FOF-CP (DOAH RO Dec. 16, 1992; DCA FO June 22, 1993). Besides being supported by the traffic modeling, the long-term transportation network planned by the County furthered the desire to maintain a rural, pedestrian-friendly character of roads in the area and to meet transportation needs with a dense network of smaller roadways rather than a sparse, hierarchical network that depends on a few large, multi-lane roads.

89. In paragraph 116 of its PRO, APA Emerson cites the Zemel case for the proposition that "data supporting assumptions underlying comprehensive plan amendments must be in existence at the time of adoption of those amendments." APA Emerson then contends that "the data supporting the assumptions of the Remedial Amendments, including the TVC roadway plan and the Traffic Study, was [sic] not in existence at the time of the adoption of the Remedial Amendments."

90. It is not clear exactly what APA Emerson is arguing here. It is clear under the Zemel case that the County was not required to react to data not in existence at the time of adoption of the Remedial Amendments. If APA Emerson is asserting that the Remedial Amendments require the support of data not in existence at the time of adoption in order to be "in compliance," it is possible that APA Emerson's reference is to

an allegation that the County "failed to collect data and conduct analyses to support the assumptions made in the Remedial Amendments." PRO, at paragraph 67. If so, it is clear that the County was not required to collect original data. See Rule 9J-5.005(2)(b). It also was not proven beyond fair debate that the County failed to use the most up-to-date data (i.e., traffic counts), or that the failure to use them made any significant difference. As to analyses, APA Emerson did not prove beyond fair debate that the County's analyses were inadequate.

91. APA Emerson also contends that the County's data and analysis were inadequate because the County did not submit to the Department the technical analysis supporting the transportation modeling that was submitted in support of the long-term transportation plan in the TVC Amendments. Besides being untimely to the extent that the challenge is directed to the TVC Amendments, there is no requirement that all data and analysis must be submitted to the Department. In fact, under the Zemel case, new analyses can be considered as support for a plan amendment up to the time of the final hearing.

92. In support of its contention that failure to submit the technical analyses to the Department was a fatal defect, APA Emerson cites to the case of Sheridan, et al. v. Lee County, et al., supra, at RO ¶ 263. But in that case, it appears that the local government was unable to produce for consideration at the

final hearing evidence of baseline existing land use data and analysis that was necessary to resolve factual issues regarding the adequacy of the data and analysis supporting the plan amendments. As stated in the Recommended Order in that case: "Without reasonable certainty as to the starting point in terms of existing land uses, the 2010 overlay is meaningless." Id. at RO ¶ 267. There was no evidence in this case that the County was unable to produce data and analysis that was necessary to resolve an important factual issue, or that the Remedial Amendments are meaningless.

RECOMMENDATION

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

RECOMMENDED that the Department of Community Affairs enter a final order denying APA Emerson's Amended Petition and finding the Remedial Amendments to be "in compliance."

DONE AND ENTERED this 13th day of May, 2008, in
Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of May, 2008.

COPIES FURNISHED:

Thomas Pelham, Secretary
Department of Community Affairs
2555 Shumard Oak Boulevard, Suite 100
Tallahassee, Florida 32399-2100

Shaw P. Stiller, General Counsel
Department of Community Affairs
2555 Shumard Oak Boulevard, Suite 325
Tallahassee, Florida 32399-2160

Glenn N. Smith, Esquire
Ruden, McClosky, Smith,
Schuster & Russell, P.A.
Post Office Box 1900
Fort Lauderdale, Florida 33302-1900

Daniel S. McIntyre, Esquire
St. Lucie County
Third Floor Administrative Annex
2300 Virginia Avenue
Fort Pierce, Florida 34952-5632

Andrew J. Baumann, Esquire
Lewis, Longman and Walker, P.A.
1700 Palm Beach Lakes Boulevard, Suite 1000
West Palm Beach, Florida 33401-2006

H. Michael Madsen, Esquire
Vickers, Madsen & Goldman, LLP
1705 Metropolitan Boulevard, Suite 101
Tallahassee, Florida 32308-3765

Richard E. Shine, Esquire
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

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.