STATE OF FLORIDA
ADMINISTRATION COMMISSION

DEPARTMENT OF COMMUNITY AFFAIRS,

Petitioner,

and

KAREN ESTY, BARRY WHITE, NATIONAL PARKS CONSERVATION ASSOCIATION, and 1000 FRIENDS OF FLORIDA, INC.,

Intervenors,

vs.

MIAMI-DADE COUNTY,

Respondent,

and

DAVID BROWN and LOWE'S HOME CENTERS, INC.,

Intervenors.
_____/

AC Case No. ACC-09-003
DOAH Case No. 08-3614GM

FINAL ORDER

This cause came before the Governor and Cabinet, sitting as the Administration Commission ("Commission), on July 28, 2009, on the Second Corrected Recommended Order ("Recommended Order") entered pursuant to section 163.3184, Florida Statutes (2008)[1], in the Division of Administrative Hearings ("DOAH"), Case Nos. 08-3614GM. This proceeding is a challenge pursuant to section 163.3184(10), Florida Statutes, to comprehensive plan amendments adopted by Miami-Dade County ("County").

[1] All citations to Florida Statutes will be to the 2008 edition, unless otherwise noted.

BACKGROUND

On April 24, 2008, the County adopted two Future Land Use Map ("FLUM") amendments. Ordinance 08-44 ("Lowe's Amendment") will change Parcel A (21.6 acres) from Open Land to Business and Office, and change Parcel B (30.1 acres) from Open Land to Institution, Utilities and Office. Ordinance 08-45 ("Brown Amendment") will change a 42 acre parcel from Agriculture to Business and Office, with a site specific restriction that prohibits residential use. Both Amendments will expand the Urban Development Boundary ("UDB") to encompass the parcels.

On July 18, 2008, the Department of Community Affairs ("Department" or "DCA") issued its Notice of Intent to find the Amendments not "in compliance," as defined in section 163.3184 (1)(b), Florida Statutes. Karen Esty, Barry White, the National Parks Conservation Association ("NCPA"), and 1000 Friends of Florida, Inc. ("1000 Friends"), were granted leave to intervene in support of the Department; and David Brown and Lowe's Home Centers, Inc. ("Lowe's"), were granted leave to intervene in support of the County.

A final hearing was held on December 8 through 12, 2008, and January 28 through 30, 2009, in Miami, Florida. The Administrative Law Judge ("ALJ") entered a Recommended Order, recommending that the Administration Commission enter a final order determining that the Brown Amendment is "in compliance," and that the Lowe's Amendment is not "in compliance."

COMPLIANCE DETERMINATION

The Commission is authorized to take final agency action and determine whether the Amendments to the County's Plan are "in compliance;" and, if an Amendment is found not "in

compliance," to specify remedial actions which would bring that Amendment into compliance. § 163.3184(10)(b) & (11)(a), Fla. Stat.

STANDARD OF REVIEW OF RECOMMENDED ORDER AND EXCEPTIONS

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

> The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.
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> § 120.57(1)(*l*), Fla. Stat.

When fact-finding functions have been delegated to an ALJ, as is the case here, the Commission must rely upon the record developed before the ALJ. See Fox v. Treasure Coast Reg'l Planning Council, 442 So. 2d 221, 227 (Fla. 1st DCA 1983). As the ALJ in an administrative proceeding is the trier of fact, he or she is privileged to weigh and reject conflicting evidence. See Cenac v. Fla. State Bd. of Accountancy, 399 So. 2d 1013, 1016 (Fla. 1st DCA 1981). Therefore, "[i]t is the hearing officer's function in an agency proceeding to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." Bejarano v. State of Fla., 901 So. 2d 891, 892 (Fla. 4th DCA 2005)(quoting Heifetz v. Dep't of Bus. Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) (citing State Beverage Dep't v. Ernal, Inc., 115 So. 2d 566 (Fla. 3rd DCA 1959))). The Commission cannot reweigh evidence considered by the ALJ, and cannot reject findings of fact made by the ALJ if those findings of fact are supported by substantial competent evidence in the record. Heifetz, supra. Competent substantial evidence means "such evidence as will establish a

substantial basis of fact from which a fact at issue can be reasonably inferred," and evidence which "should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

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

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.

RULINGS ON EXCEPTIONS

The Recommended Order is 54 pages long. The parties filed 212 pages of exceptions and responses to exceptions.

Standing: DCA Exceptions 1, 2 & 17; 1000 Friends[2] Exception 2; Lowe's Exceptions 1, 15, 20 & 30[3]

The Recommended Order addresses two theories regarding the standing of 1000 Friends and NPCA to challenge the Amendments as "affected persons." The ALJ found that 1000

[2] For brevity, the Exceptions filed by Intervenors 1000 Friends of Florida and National Parks Conservation Association will be referred to as 1000 Friends Exceptions.
[3] Lowe's Exceptions were not numbered; the numbers in this Final Order refer to the order they appear in the Exceptions.

Friends and NPCA failed to establish standing under one theory, but did qualify as affected persons under the second theory. The definition of "affected person," in pertinent part, is:

> ... persons owning property, residing, or owning or operating a business within the boundaries of the local government whose plan is the subject of the review.... Each person, ... in order to qualify under this definition, shall also have submitted oral or written comments, recommendations, or objections to the local government during the period of time beginning with the transmittal hearing for the plan or plan amendment and ending with the adoption of the plan or plan amendment. § 163.3184(1)(a), Fla. Stat.

For the first theory, 1000 Friends and NPCA asserted that they each own or operate a business which consists of participation in County activities in furtherance of their declared corporate purposes. The ALJ found that 1000 Friends "has engaged in fundraising, lobbying, and litigation in the County. Its activities include efforts to promote growth management, affordable housing, and Everglades restoration." The ALJ also found that 1000 Friends does not pay the local business tax, and did not show it is licensed to conduct a business in the County. The ALJ concluded that 1000 Friends did not show that its activities in the County subject it to the provisions of the County Plan. The ALJ further concluded that, since the phrase "owns or operates a business" refers to activities of a type which might make the business potentially subject to the constraints of the local comprehensive plan, 1000 Friends had not demonstrated standing under this theory. The ALJ cited St. Joe Paper Co. v. DCA, 657 So. 2d 17 (Fla. 1st DCA 1995) and Potiris v. DCA, 947 So. 2d 598 (Fla. 4th DCA 2007) in support of his conclusion.

1000 Friends and DCA filed exceptions contending that the ALJ misapplied St. Joe and Potirus. In St. Joe, the First District stated that involvement in the local planning process, which was within the declared purpose of 1000 Friends' corporate existence, might constitute a business activity. In that instance, however, 1000 Friends simply physically appeared in the

County during the local planning process, and the Court held that such incidental and transient presence did not suffice. Similarly, in Potirus, the Fourth District held that providing land use related services in the city from time to time was not sufficient to qualify as owning or operating a business within the city.

Since the St. Joe decision, the Department has issued final orders which address the degree of involvement in the local planning process which demonstrates owning or operating a business in a local government. For example, in Florida Wildlife Federation, Inc. v. DCA, DOAH Case No. 03-2164GM (DCA 2004), the Department concluded that the continuing activities of environmental education and advocacy, fundraising and field trips within the local government were sufficient to demonstrate the operation of a business in the local government. Also since St. Joe, the Florida Supreme Court has stated that standing as an "affected person" under section 163.3184(1)(a) does not require allegation of an injury, thereby overruling the holding in St. Joe that an affected person must show that the business being operated is potentially subject to the constraints of the local plan. Coastal Development of North Florida, Inc. v. City of Jacksonville Beach, 788 So. 2d 204 (Fla. 2001).

The ALJ found that 1000 Friends engaged in the Miami-Dade County planning process by fundraising, lobbying, and litigation, and by promoting growth management, affordable housing, and Everglades restoration. This activity is more substantial than the transient involvement described in St. Joe and Potirus, and is similar to the ongoing activity in Florida Wildlife Federation. The continuing activities of 1000 Friends' to promote growth management, affordable housing and Everglades restoration are clearly subject to the constraints of the local comprehensive plan. The business activity described in the ALJ's findings of fact is sufficient to establish standing for 1000 Friends as a person who owns or operates a business within the

boundaries of the local government. The legal theory advanced by DCA and 1000 Friends is as or more reasonable than the ALJ's conclusion of law on standing.

DCA Exceptions 1, 2 and 17 and 1000 Friends Exception 2 are Granted with respect to 1000 Friends, but not with respect to NPCA. The ALJ did not make similar findings of fact regarding the activities of NPCA in the County, and the Commission cannot add supplemental findings of fact to those found by the ALJ. Bekiempis v. Dept. of Prof. Reg., 421 So. 2d 693 (Fla. 2d DCA 1982); Friends of Children v. Dept. of H.R.S., 504 So. 2d 1345 (Fla. 1st DCA 1987). Therefore, paragraph 14 is rejected and paragraphs 152 and 153 are replaced with the following:

> 152. Both 1000 Friends and NPCA claim standing as "affected persons," on the ground that they own and operate businesses in Dade County. Sufficient participation in the planning process may constitute a business activity that is subject to the constraints of the local comprehensive plan. St. Joe Paper Co. v. DCA, 657 So. 2d 27, 29 (Fla. 1st DCA 1995); Potiris v. DCA, 947 So. 2d 598 (Fla. 4th DCA 2007).
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> 153. 1000 Friends engaged in fundraising, lobbying, and litigation in the County, including efforts to promote growth management, affordable housing, and Everglades restoration. These activities of 1000 Friends to promote growth management, affordable housing, and Everglades restoration are subject to the constraints of the local comprehensive plan. The logical conclusion is that 1000 Friends qualifies as a business in the County. Since the ALJ did not find that NPCA engaged in similar business activity in the County, NPCA does not qualify as owning or operating a business in the County.

As a second theory of standing to challenge the Amendments, 1000 Friends and NPCA asserted associational standing, which the ALJ described as:

> 154. In general, an association has standing to sue on behalf of its members when a substantial number of them would otherwise have standing to sue in their own right and the interests that the association seeks to protect are germane to its purposes. See Fla. Home Builders Ass'n v. Dept. of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982).

The ALJ found that both NPCA and 1000 Friends submitted comments to the County during the appropriate time frame, and that the comments were made on behalf of their members who resided in the County. Paragraphs 10 and 15. The ALJ concluded that:

> 155. 1000 Friends of Florida and NPCA made comments on the Lowe's and Brown amendments during the County's comprehensive plan amendment process on behalf of a substantial number of their members who reside in the County. Lowe's argues that this was not sufficient for associational standing, because no individual member of either 1000 Friends or NPCA was shown to have presented comments to the County, so no member would have standing as an affected person in his or her own right. That argument is rejected because it would mean that no person or entity would have standing as an affected person if comments were presented to the local government on the person's or entity's behalf by a representative (such as a lawyer).
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> 156. The use of a representative should not prevent the standing of the person or entity being represented. For purposes of standing, there should be no distinction in comprehensive plan amendment cases between a corporation which presented comments to the local government through its lawyer, and members of an association who presented comments through their lawyer or an officer of the association.
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> 157. 1000 Friends and NPCA meet the requirements for associational standing.

Lowe's filed exceptions asserting that associational standing is not available in chapter 163 plan amendment challenges, and that there is no competent substantial evidence in the record that the comments made by NPCA and 1000 Friends were made on behalf of their members.

Lowe's suggests that associational standing is only available in general proceedings brought under sections 120.569 and 120.57, which allow a "party" whose substantial interests are determined to request a hearing. Lowe's contends that since the definition of "affected person" in section 163.3184(1)(a) does not mention associational or representational standing, associational standing cannot be available in plan amendment challenge proceedings.

There is no support for this proposition in the statutes. The chapter 163 definition of "person" is broad, and includes "associations" and "two or more persons having a joint or common interest." § 163.3164(17), Fla. Stat. Moreover, associational standing was first recognized by the Florida Supreme Court in a section 120.56(1) rule challenge proceeding. Florida Home Builders Association v. Dept. of Labor & Employment Security, 412 So. 2d 351 (Fla. 1982). Standing for rule challenges is available to "Any person substantially affected by a rule ...." (emphasis supplied). Thus, the Supreme Court approved associational standing for a "person" who was "affected," and there appears to be no reason why associational standing is not also available for an "affected person."

There is no dispute that 1000 Friends and NPCA submitted comments regarding the Amendments during the appropriate period of time. It was reasonable for the ALJ to infer that these comments were submitted on behalf of the members of 1000 Friends and NPCA.

Lowe's Exceptions 1, 15, 20 and 30 are Denied.

County Need Analysis

One of the pivotal issues in this case is whether there is a need for more commercially designated land in the ("UDB"), and whether the UDB should be expanded at this time. Future Land Use Element Policy LU-8F provides that the supply of nonresidential land within the Urban Development Boundary ("UDB') should be "adequate," but does not define adequacy nor establish a methodology for determining an adequate nonresidential land supply. Paragraphs 55 through 87 of the Recommended Order address the need issue, and discuss the County's methodology to determine the adequacy of nonresidential land supply, as described in the Planning Considerations Report (DCA Ex. 21) prepared for the amendment cycle. The ALJ

accepted most of the methodology and conclusions in the Planning Commission Report, and the parties filed several exceptions regarding need for additional commercial land within the UDB.

Adjustments to the County Need Methodology: Market Factor and Industrial Land Supply: DCA Exception 3 and Lowe's Exceptions 3, 4 & 5

In paragraphs 60 through 64, the ALJ addressed countervailing critiques of the County's methodology by the parties. The Department contended that the County methodology did not take into account the Industrial designated land that could be used for commercial development, nor did it take into account the potential of more intensive redevelopment of existing commercial sites, and therefore the County underestimated the existing supply of commercial land. Lowe's contended that the County did not use a market factor for its estimate of needed commercial land, and that a reasonable market factor would have resulted in a larger estimate of demand for commercial land. After addressing both critiques, the ALJ found that:

> 65. The evidence indicates that the County's exclusion from its analysis of industrial lands that can be used for commercial purposes, and additional commercial opportunities that could be derived from the redevelopment of existing sites, is offset by the County's exclusion of a market factor. If the supply of commercial land had been increased 25 percent to account for industrial lands and redevelopment, it would have been offset by a 1.25 market factor on the demand side. The calculations made by the County in its Planning Considerations Report would not have been materially different.

Lowe's and the Department take exception to different portions of finding of fact 65. Both contend that there is no competent substantial evidence in the record to support the facts alleged by the other. However, DCA witness McDaniel testified that a market factor of 1.25 is generally advocated by the Department. Tr 730-733, 1418. The Planning Commission Report cited two earlier studies, one of which found that 61 percent of industrial land "was either changed to a designation other than industrial or actually put to another use," while the second found that "23 percent was in non-industrial uses." DCA Ex 21, page 23. The Planning

Considerations Report concluded that, "It is highly probably that as land for commercial and/or residential uses is depleted, the conversion of industrial land will also increase." Id. The remainder of these exceptions asks the Commission to reweigh the evidence, and reach different findings of fact than those reached by the ALJ.

Since the Commission cannot reweigh the evidence, and since the inferences drawn by the ALJ are supported by competent, substantial evidence in the record, DCA Exception 3 and Lowe's Exceptions 3, 4 and 5 are Denied.

Lowe's Commercial Needs Analysis: Lowe's Exceptions 6, 7, 8, 9, 10, 12, 21; County Exception 2[4]

In order to determine if there is a need for more commercial land under Policy LU-8F, the County analyzes commercial demand by minor statistical area ("MSA"), by Tiers of MSAs, and countywide. Paragraphs 56 and 66. The ALJ found in paragraph 70, which was not challenged by an exception, that, "The County's depletion year analysis at all three levels, MSA, Tier and countywide, indicates no need for more commercial lands in the area of the Lowe's site."

Paragraphs 78 though 82 of the Recommended Order address Lowe's contention that the County should also have considered whether there is a need for larger community commercial uses in the area of the Lowe's site. "Lowe's planning expert testified that there are few undeveloped commercial parcels in MSAs 3.2 and 6.1 that are ten acres or more, or could be aggregated with contiguous vacant parcels to create a parcel bigger than ten acres." Paragraph 79. The ALJ rejected Lowe's argument, finding in paragraph 78 that "Policy LU-8F refers only to the need to consider (by 'Tiers, Half-Tiers and combinations thereof') the adequacy of land supplies for 'regional commercial activities.'"

[4] The County's Exceptions were not numbered; the numbers in this Final Order refer to the order they appear in the Exceptions.

Lowes and the County filed exceptions challenging the ALJ's conclusion of law regarding Policy LU-8F. Lowe's and the County's argument that an appropriate analysis of commercial need must include consideration of parcel size is based on two words in the portion of Policy LU-8F that addresses non-residential land supplies:

> The adequacy of non-residential land supplies shall be determined on the basis of land supplies in subareas of the County appropriate to the type of use, as well as the Countywide supply within the UDB. The adequacy of land supplies for neighborhood- and community-oriented business and office uses shall be determined on the basis of localized subarea geography such as Census Tracts, Minor Statistical Areas (MSAs) and combinations thereof. Tiers, Half-Tiers and combinations thereof shall be considered along with the Countywide supply when evaluating the adequacy of land supplies for regional commercial and industrial activities. (emphasis supplied)

The ALJ's conclusion of law concerning Policy LU-8F is more reasonable than the theory advanced by the County and Lowe's. The language of Policy LU-8F does not support the theory that parcel size is a necessary criterion for analysis of non-residential land supplies.

Despite his rejection of the Lowe's interpretation of Policy LU-8F, the ALJ went on to consider the evidence submitted by Lowe's regarding the need for "community-oriented" business uses. The ALJ rejected the evidence submitted by Lowes, because the market analyses submitted by Lowes focused on a particular commercial use (home improvement store), rather than on serving a general public need (paragraphs 80 and 81), and because the assumptions used in the market analyses were unreasonable and biased (paragraph 82), and therefore the Commission determines this is professionally unacceptable. The ALJ determined that, "[T]he more persuasive evidence shows that there is no need for more commercial land, and no need for a home improvement store, in the area of the Lowe's site." Paragraph 82.

The ALJ's findings of fact are supported by competent substantial evidence in the record. Therefore, Lowe's Exceptions 6, 7, 8, 9, 10, 12 and 21, and County Exception 2 are Denied.

Brown Commercial Need Analysis: DCA Exceptions 6, 10, 13 & 21; 1000 Friends Exception 3

The ALJ found in paragraph 72 that "[T]he County's depletion year analysis, at the MSA and Tier levels, indicates a need for more commercial lands in the area of the Brown site."

1000 Friends and DCA contend that, even though the County's depletion year analysis indicates a need for more commercial land, "this fact does not conclusively prove that there is a need for additional commercial at this time...," 1000 Friends Exceptions ¶21, and "[c]ommercial 'need' under the CDMP encompasses more than a numerical analysis of the depletion year...." DCA Exception 6.

The Exception filed by 1000 Friends does not propose an alternative methodology or standard for commercial need analysis. DCA asserts that a commercial needs analysis "requires the consideration of infill and redevelopment and the conservation of environmentally-sensitive and agricultural lands." DCA Exception 6. However, Policy LU-8F does not mention these factors, and it is not clear why these factors should be part of a commercial lands need analysis. The conservation of environmentally-sensitive and agricultural lands is considered under Policy LU-8G, which comes into play after it is demonstrated, in accordance with Policy LU-8F, that a need exists.

The ALJ's interpretation of LU-8F is more reasonable than the theory advanced by 1000 Friends and DCA. Therefore, DCA Exceptions 6, 10, 13 and 21, and 1000 Friends Exception 3 are Denied.

Balancing Approach for Policies LU-8F and LU-8G: DCA Exception 5; Lowe's Exception 11

Paragraph 90 is a conclusion of law which interprets the interplay of Policies LU-8F and LU-8G:

> 90. Policies LU-8F and LU-8G appear to call for a balancing approach, where the extent of the need for a particular expansion must be balanced against

> the associated impacts to UEA lands and related CDMP policies. The greater the needs for an expansion of the UDB, the greater are the impacts that can be tolerated. The smaller the need, the smaller are the tolerable impacts.

DCA and Lowe's both contend that this interpretation is not supported by the plain words of the Policies, and that there is no evidence in the record that suggests a balancing approach. Indeed, the opening sentence of Policy LU-8G provides that the LU-8G should be considered, "after demonstrating that a need exists, in accordance with foregoing Policy LU-8F." Neither Policy provides for a balancing approach.

Since the theory advanced by DCA and Lowes is more reasonable that the ALJ's conclusion of law, DCA Exception 5 and Lowe's Exception 11 are Granted, and paragraph 90 is rejected and replaced with:

> 90. Policy LU-8G provides that the locational criteria in that Policy are to be considered after demonstrating that a need exists, in accordance with Policy LU-8F.

Policy LU-8G, Locational Criteria for UDB Expansion: Lowe's Exception 2 and 14; County Exception 1 and 3

The last sentence of paragraph 44 states, "If the supply of land becomes inadequate, Policy LU-8G addresses where expansion of the UDB should occur." Lowe's contends that this sentence is incorrect, because it does not include the role of the Urban Expansion Area ("UEA"). However, the role of the UEA is discussed in paragraphs 49 and 50. There is no requirement that any single sentence, or any single paragraph, must address all aspects of a particular issue.

The County and Lowe's also contend that the ALJ misapplied the locational criteria in Policy LU-8G because he did not give proper weight to the paragraphs describing the UEA on page I-58 of the County Plan. However, the UEA description states that the UEA is outside the UDB, and that the UEA is the area where further urban development "is likely to be warranted between the year 2015 and 2025." There is no statement that the locational criteria in Policy LU-

8G do not apply to the UEA, and Policy LU-8G itself states that its locational criteria apply "when considering land areas to add to the UDB...." The legal theory advocated by the County and Lowe's is not as reasonable as the ALJ's conclusions of law regarding Policy LU-8G and the UEA.

Lowe's Exception 2 and 14,and County Exception 1 and 3 are Denied.

Urban Sprawl, Plan as a Whole: 1000 Friends Exception 1

In paragraphs 172 and 173, the ALJ concluded that the Brown Amendment does not, and the Lowe's Amendment does, cause the County Plan "when considered as a whole, to fail to discourage the proliferation of urban sprawl." 1000 Friends contend that the ALJ incorrectly applied the urban sprawl rule to the comprehensive plan as a whole only, and not to the individual plan amendments. The Petitioners correctly point out that the urban sprawl rule, 9J-5.006(5), explicitly applies to both comprehensive plans and to plan amendments:

> (5) Review of Plans and Plan Amendments for Discouraging the Proliferation of Urban Sprawl.
>
> (a) Purpose. The purpose of this subsection is to give guidance to local governments and other interested parties about how to make sure that plans and plan amendments are consistent with relevant provisions of the state comprehensive plan, regional policy plans, Chapter 163, Part II, F.S., and the remainder of this chapter regarding discouraging urban sprawl, including provisions concerning the efficiency of land use, the efficient provision of public facilities and services, the separation of urban and rural land uses, and the protection of agriculture and natural resources.
>
> (b) Determination. The determination of whether a plan or plan amendment discourages the proliferation of urban sprawl shall be based upon the standards contained in this subsection." (emphasis added)

However, in paragraphs 109 through 128 the ALJ applied the urban sprawl rule to both the Brown Amendment and the Lowe's Amendment individually. The ALJ concluded that the

Lowe's Amendment fails to discourage urban sprawl (paragraph 127), and that the Brown Amendment does not fail to discourage urban sprawl (paragraph 128).

Since the ALJ correctly applied the urban sprawl rule to the plan amendments and to the plan as a whole, 1000 Friends Exception 1 is Denied.

Urban Sprawl Indicator 1, Uses In Excess of Demonstrated Need: Lowe's Exception 16

Urban Sprawl Primary Indicator 1 is,

> Promotes, allows or designates for development substantial areas of the jurisdiction to develop as low intensity, low density, or single use development or uses in excess of demonstrated need. 9J-5.006(5)(g)1., F.A.C.

The ALJ found that, "the County had a reasonable basis to determine there was a need for the Brown Amendment, but not for the Lowe's Amendment. Therefore, this indicator is triggered only by the Lowe's Amendment."

Lowe's contends that its Amendment will not affect substantial areas of the jurisdiction, nor will it approve low intensity, low density nor single use development. However, Indicator 1 also applies to amendments which promote, allow or designate for development "uses in excess of demonstrated need." It is clear that the ALJ's finding regarding Indicator 1 addresses this portion of the Indicator, and the ALJ found that no need for the Lowe's amendment was demonstrated.

Lowe's Exception 16 is Denied.

Urban Sprawl Indicator 4, Premature Development of Rural Land; DCA Exception 12 and Lowe's Exception 17

Urban Sprawl Primary Indicator 4 is,

> As a result of premature or poorly planned conversion of rural land to other uses, fails adequately to protect and conserve natural resources, such as wetlands, floodplains, native vegetation, environmentally sensitive areas, natural groundwater aquifer recharge areas, lakes, rivers, shorelines, beaches, bays, estuarine systems, and other significant natural systems. 9J-5.006(5)(g)4., F.A.C.

The ALJ stated in the second sentence of paragraph 114 that, "This indicator is frequently cited by challengers when an amendment site contains wetlands or other natural resources, without regard to whether the potential impact to these resources has anything to do with sprawl." The Department contends that there is no competent substantial evidence in the record to support this statement, which is apparently based on the ALJ's experience in other cases. None of the responses to exceptions pointed to any evidence in the record to support the statement, and the Commission's review of the record found none.

Therefore, DCA Exception 12 is Granted, and the second sentence of paragraph 114 is rejected. The granting of this exception does not change the conclusion of the Recommended Order.

The ALJ found, in paragraph 115, that the Lowe's Amendment "intrudes into an area dominated by wetlands and, therefore, its potential to affect wetlands is an indication of sprawl." Lowe's contends that this statement ignores the opening phrase of Indicator 4, "As a result of premature or poorly planned conversion of rural land to other uses ...." If the ALJ had agreed that there was a demonstrated need for the Lowe's Amendment, or if this Final Order rejected the ALJ's findings concerning need, Lowe's exception would be well-founded. Since neither occurred, Lowes Exception 17 is Denied.

Urban Sprawl Indicator 9, Clear Separation of Urban and Rural Uses: Lowe's Exception 18

Urban Sprawl Primary Indicator 9 is, "Fails to provide a clear separation between rural and urban uses." 9J-5.006(5)(g)9., F.A.C. The ALJ found in paragraph 119 that, "The Lowe's Amendment would create an irregular and less clear separation between urban and rural uses in the area and, therefore, the Lowe's Amendment triggers this indicator." Lowe's contends that

the ALJ improperly added the words "irregular" and "less clear" to the rule, so as to create a standard different than the rule standard.

An ALJ is not required to use only the rule language in the Recommended Order. The phrase "an irregular and less clear separation" is clearly intended to explain his determination that the Lowe's amendment fails to provide a clear separation between rural and urban uses. Exhibit D 11A supports the finding that the Lowe's Amendment would create an irregular and less clear separation.

Since paragraph 119 is supported by competent substantial evidence in the record, Lowe's Exception 18 is Denied.

Urban Sprawl Indicator 10, Discouraging Urban Infill and Redevelopment: Lowe's Exception 19

Urban Sprawl Primary Indicator 10 is, "Discourages or inhibits infill development or the redevelopment of existing neighborhoods and communities." 9J-5.006(5)(g)10., F.A.C. The ALJ found in paragraphs 121 and 123 that the expansion of the UDB would diminish, at least to a small degree, the incentive for infill and the incentive to redevelop existing small properties. The ALJ concluded that indicator 10 is triggered to a small degree by both Amendments. Lowe's contends that the ALJ misapplied indicator 10, because a lessening of an incentive does not constitute discouragement or inhibition.

Lowe's argument is merely semantics. The lessening of an incentive for infill development or redevelopment is the equivalent of increasing the discouragement of infill development or redevelopment. The finding of fact portions of paragraphs 121 and 123 regarding indicator 10 are supported by the testimony of Michael McDaniel. Tr. 652-653. To the extent paragraphs 121 and 123 contain a conclusion of law, the interpretation of indicator 10 advanced by Lowe's is not as reasonable as the ALJ's conclusion.

Lowe's exception 19 is Denied.

State Comprehensive Plan and Strategic Regional Policy Plan: DCA Exceptions 15, 16 & 22, Lowe's Exceptions 22, 23, 24, 25, 26, 27, 28 and 29

In paragraphs 133 through 149 of the Recommended Order, the ALJ addressed the consistency of the Amendments with the provisions of the State Comprehensive Plan and the South Florida Strategic Regional Policy Plan raised by the Department and the Petitioner-Intervenors. For each determination, the ALJ referred to reasons stated previously in the Recommended Order. DCA and Lowe's each filed exceptions based on other exceptions to previous paragraphs in the Recommended Order. Since those exceptions to previous paragraphs have been denied, these exceptions to the paragraphs regarding provisions of the State Comprehensive Plan and the Strategic Regional Policy Plan should also be denied.

Section 187.101(3), Fla. Stat., provides that, "The [state comprehensive] plan shall be construed and applied as a whole, and no specific goal or policy in the plan shall be construed or applied in isolation from the other goals and policies in the plan." Section 163.3177(10)(a), Fla. Stat., provides that, "For the purposes of determining consistency of the local plan with the state comprehensive plan or the appropriate regional policy plan, the state or regional plan shall be construed as a whole and no specific goal and policy shall be construed or applied in isolation from the other goals and policies in the plans."

The ALJ concluded that, "when the State Comprehensive Plan is construed as a whole, the County's adoption of the Lowe's Amendment is inconsistent with the State Comprehensive Plan." ¶ 180. Lowe's contends that, since the ALJ did not address all the policies of the State Comprehensive Plan, he must not have really construed the State Comprehensive Plan as a whole. Lowe's also contends that there is no competent substantial evidence regarding the State Comprehensive Plan as a whole. There is no need for the ALJ to address every policy in the

State Comprehensive Plan because many of the policies have no applicability to the Lowe's Amendment. The ALJ stated that he construed the State Comprehensive Plan as a whole, and there is no indication that he did not. The testimony of DCA witness McDaniel supports the ALJ's determination regarding the State Comprehensive Plan as a whole. Tr 620.

The ALJ determined that the Lowe's Amendment is inconsistent with the Strategic Regional Policy Plan. However, in contrast to his statements regarding the State Comprehensive Plan, the ALJ did not state that he construed the Strategic Regional Policy Plan as a whole. Therefore, it appears that the ALJ's findings of fact regarding the Strategic Regional Policy Plan cannot be used to support his ultimate recommendation that the Lowe's Amendment is not in compliance. However, this conclusion does not justify rejection of the ALJ's findings regarding individual provisions of the Strategic Regional Policy Plan, since rejection or modification of a conclusion of law cannot form the basis for rejection or modification of a finding of fact. §120.57(1)(*l*), Fla. Stat. Granting Lowe's Exception 26 will not require modification of the recommendation by the ALJ.

Therefore, DCA Exceptions 15, 16 and 22, and Lowe's Exceptions 22, 23, 24, 25, 27, 28 and 29 are Denied, and Lowe's Exception 26 is Granted. The following sentence is added to the end of paragraph 182: "However, since no determination was made construing the Strategic Regional Policy Plan as a whole, the findings regarding the Strategic Regional Policy Plan are not relied upon to support the determination that the Lowe's Amendment is not in compliance."

Professionally Acceptable Analysis: DCA Exception 18 and Lowe's Exception 9

The ALJ stated:

> 163. Unfortunately, the statute's reference to data that is professionally acceptable assures that, in nearly every growth management case, parties will criticize the work and testimony of opposing expert witnesses as being not professionally acceptable. In most cases, the disputes are over differences of

> opinion that are common in all professions. Two widely different methodologies with widely different results can both be professionally acceptable. Therefore, rather than pronouncing a party's evidence as professionally unacceptable, it is usually more appropriate to simply give less weight to the evidence that is less persuasive. That is what the Administrative Law Judge did in this case.

Both DCA and Lowe's contend that paragraph 163 is contrary to section 163.3177(10)(e), Fla. Stat., which states:

> It is the Legislature's intent that support data or summaries thereof shall not be subject to the compliance review process, but the Legislature intends that goals and policies be clearly based on appropriate data. The department may utilize support data or summaries thereof to aid in its determination of compliance and consistency. The Legislature intends that the department may evaluate the application of a methodology utilized in data collection or whether a particular methodology is professionally accepted. However, the department shall not evaluate whether one accepted methodology is better than another. Chapter 9J-5, Florida Administrative Code, shall not be construed to require original data collection by local governments; however, local governments are not to be discouraged from utilizing original data so long as methodologies are professionally accepted.

The wording of paragraph 163 appears to be contrary to the mandate of the statute, but the overall thought expressed in paragraph 163 is consistent with the statute. The ALJ observed that the parties often argue as if the limitation on review of methodologies used for collection of data also applies to review of whether the data is relevant and appropriate and whether the plan reacts to the data in an appropriate way and to the extent necessary. It does not.

Section 163.3177(10)(e) is directed to review of methodologies for collection of data, and requires that any data collected using a professionally acceptable methodology must be accepted by the Department, the ALJ and this Commission. However, the Department, the ALJ, and this Commission must assess whether a particular data set is "appropriate to the element involved" §163.3177(8), Fla. Stat., and whether comprehensive plan "is clearly based on appropriate data," §163.3177(10)(e), Fla. Stat. They must also assess whether a plan amendment is "based upon relevant and appropriate data," is based upon "analyses applicable to each element," and whether

the plan amendment reacts to the data "in an appropriate way and to the extent necessary indicated by the data available on that particular subject at the time of adoption...." Rule 9J-5.005(2)(a), F.A.C. The Department, the ALJ and this Commission are not required to accept any professionally acceptable analysis. As the ALJ observed in paragraph 163, the finder of fact is often presented with two widely different methodologies and analyses with widely different results that are both professionally acceptable. It is appropriate for the finder of fact to "simply give less weight to the evidence that is less persuasive" regarding the appropriateness of data and analysis, as the ALJ stated in paragraph 163.

Since paragraph 163 is unclear, DCA Exception 18 and Lowe's Exception 9 are Granted in part, and paragraph 163 of the Recommended Order is rejected and replaced with:

> 163. Unfortunately, the statute's reference to data that is professionally acceptable assures that, in nearly every growth management case, parties will criticize the work and testimony of opposing expert witnesses as being not professionally acceptable. It is true that as long as data is collected using a professionally acceptable methodology, the data cannot be rejected by the Department or by an ALJ. However, the Department and the ALJ must determine whether the plan amendment is based upon relevant and appropriate data, whether the amendment reacts to the data in an appropriate way and to the extent necessary, and whether the amendment is based on appropriate analyses. Therefore, rather than pronouncing a party's evidence as professionally unacceptable, it is more appropriate to simply give less weight to the evidence that is less persuasive, and to assess whether data and analyses presented by a party are appropriate and relevant to the plan amendment. That is what the Administrative Law Judge did in this case.

Lowe's Exception 13

Lowe's Exception 13 is directed to paragraph 94 of the Recommended Order. The facts found by the ALJ in paragraph 94 are supported by competent substantial evidence in the record. Even if Lowe's legal argument in exception 13 were more reasonable than a conclusion of law in the Recommended Order, rejection of a conclusion of law cannot form the basis for rejection or modification of findings of fact. § 120.57(1)(*l*), Fla. Stat. Lowe's Exception 13 is Denied.

County Exception 4

The County asserts that 14 paragraphs of the Recommended Order are based on a fundamental misinterpretation of the Urban Expansion Area. The County asserts that the Urban Expansion Area has previously been chosen as appropriate for expansion of the UDB; therefore, since the Lowe's and Brown parcels are located in the Urban Expansion Area, the only relevant issue is the need determination under Policy LU-8F, and LU-8G does not apply.

The Urban Expansion Area is located outside the UDB. Policy LU-8G applies, "When considering land areas to add to the UDB...." Nothing in the Comprehensive Plan states that Policy LU-8G does not apply to UDB additions within the Urban Expansion Area. The legal theory advanced by the County is not as reasonable as the conclusions of law in the Recommended Order. County Exception 4 is Denied.

1000 Friends Exception 4 and DCA Exception 7

1000 Friends and DCA contend that the ALJ mistakenly interpreted the single Goal of the Comprehensive Plan and the Policies regarding protection of agricultural lands. The portions of the Comprehensive Plan cited by the ALJ are accurate. The legal theory advanced by 1000 Friends and DCA is not as reasonable as the conclusions of law in the Recommended Order. 1000 Friends Exception 4 and DCA Exception 7 are Denied.

1000 Friends Exception 5

1000 Friends contends that the ALJ improperly concluded in paragraph 100 that the viability of farmland is purely an economic determination. The overall viability of farmland is affected by soil quality, climate, hydroperiod, and history of use for agriculture. However, the Recommended Order does not reach the conclusion suggested by 1000 Friends. Instead the ALJ

made a finding of fact regarding the economic viability of the agricultural activities on the Brown parcel without addressing the other aspects of viability.

1000 Friends also contends, correctly, that the economic viability of the current agricultural operation on the Brown parcel mentioned in paragraph 100 is not relevant, because the Comprehensive Plan provides that land designated as Agriculture on the Land Use Plan map should be avoided. However, irrelevancy is not a basis for the Commission to reject a finding of fact. Since paragraph 100 is supported by competent substantial evidence in the record, 1000 Friends Exception 5 is Denied.

DCA Exception 8

DCA contends that the last phrase of the first sentence of paragraph 101, which states the certain factors detract from the suitability of the Brown site for agriculture, is not supported by competent substantial evidence in the record. As stated above, this finding by the ALJ is supported by competent substantial evidence, but is not relevant to the determination of whether to expand the UDB under Policies LU-8F and 8G.

However, the main thrust of paragraph 101 is that the Brown parcel has certain characteristics that do not apply to most land designated Agriculture in the County. The Brown site is located within the Urban Expansion Area, is relatively small, has a triangular shape, and is wedged between a major residential development and a major arterial road, Kendall Drive. The major residential development is the 1200 unit Vizcaya Traditional Neighborhood Development, which is within the UDB. The ALJ concluded that the Brown Amendment will have little precedential value for future applications to expand the UDB, and the Commission agrees with this conclusion. DCA Exception 8 is Denied.

1000 Friends Exception 6

Without reference to any particular paragraphs in the Recommended Order, 1000 Friends contends that "the ultimate determination of whether the amendment is internally consistent with the CDMP or otherwise in compliance is a policy and legal determination to be based on facts in addition to those related to *need*." (emphasis in original exception). 1000 Friends implies that the Recommended Order fails to address any facts, policy or law other than need. However, the Recommended Order addresses the Urban Expansion Area language, the locational criteria in Policy LU-8G, the Department's Urban Sprawl Rule, the State Comprehensive Plan, and the Strategic Regional Policy Plan.

The legal theory advocated by 1000 Friends in Exception 6 is not as reasonable as the conclusions of law in the Recommended Order. 1000 Friends Exception 6 is Denied.

DCA Exception 9

Paragraph 103 states that, "The County's determination that the Brown Amendment is consistent with Policy LU-8G is fairly debatable." Paragraph 103 is a logical conclusion drawn from the preceding paragraphs that either were not the subject of exceptions or were subject to exceptions that have been denied. To the extent that paragraph 103 is a conclusion of law, it is more reasonable than the legal theory advanced by the Department. DCA Exception 9 is Denied.

DCA Exception 11

DCA contends that a small portion of paragraph 113 finding that the Brown site is at a major intersection is not supported by competent substantial evidence. Brown's response concedes that the Brown parcel is not currently at a major intersection, and the Commission could not find evidence in the record to support that portion of paragraph 113. Therefore, DCA Exception 11 is Granted, and the words "and Brown" are rejected from the fifth sentence of

paragraph 113. Granting this exception does not require any further modification of the Recommended Order.

DCA Exceptions 14 and 20

Paragraphs 132, 174 and 175 of the Recommended Order conclude that certain provisions of Rule 9J-5 relating to natural resources only require that the local comprehensive plan contain certain goals, objectives and policies, and do not apply to future land use map amendments. The Department contends that this conclusion of law is incorrect.

Rule 9J-5 is included in the list of requirements necessary for a determination of "in compliance." Section 163.3184(1)(b), Fla. Stat. The definition does not exclude future land use map amendments. The opening sentence of Rule 9J-5.006 provides:

> The purpose of the future land use element is the designation of future land use patterns as reflected in the goals, objectives and policies of the local government comprehensive plan elements. Future land use patterns are depicted on the future land use map or map series within the element.

Rule 9J-5.005(5)(a) provides that, "Each map depicting future conditions must reflect goals, objectives, and policies within all elements...." Therefore, the designation of future land use patterns on the future land use map is intimately linked to the substantive requirements of Rule 9J-5. Many of the requirements for goals, objectives and policies cannot be accomplished unless the future land use patterns on the future land use map reflect these requirements, such as:

> - Coordinate future land uses with the appropriate topography and soil conditions, and the availability of facilities and services. 9J-5.006(3)(b)1.
> - Ensure the protection of natural resources and historic resources. 9J-5.006(3)(b)4.
> - Coordinate coastal planning area population densities with the appropriate local or regional hurricane evacuation plan, when applicable. 9J-5.006(3)(b)5.
> - Ensure the availability of suitable land for utility facilities necessary to support proposed development. 9J-5.006(3)(b)9.
> - Ensure the availability of dredge spoil disposal sites for coastal counties and municipalities that have spoil disposal responsibilities. 9J-5.006(3)(b)11.
> - Identification, designation and protection of historically significant properties. 9J-5.006(3)(c)8.

- Designation of dredge spoil disposal sites for counties and municipalities located in the coastal area and include the criteria for site selection established in consultation with 9J-5.013(2)(c)9.navigation and inlet districts and other appropriate state and federal agencies and the public. Site selection criteria shall ensure sufficient sites to meet future needs, be consistent with environmental and natural resource protection policies established in the elements of this plan and meet reasonable cost and transportation requirements. 9J-5.006(3)(c)9.
- Conserve, appropriately use and protect the quality and quantity of current and projected water sources and waters that flow into estuarine waters or oceanic waters. 9J-5.013(2)(b)2.
- Conserve, appropriately use and protect minerals, soils and native vegetative communities including forests. 9J-5.013(2)(b)3.
- Conserve, appropriately use and protect fisheries, wildlife, wildlife habitat and marine habitat. 9J-5.013(2)(b)4.
- Protection of existing natural reservations identified in the recreation and open space element; 9J-5.013(2)(c)7.
- Designation of environmentally sensitive lands for protection based on locally determined criteria which further the goals and objectives of the conservation element. 9J-5.013(2)(c)9.
- Wetlands and the natural functions of wetlands shall be protected and conserved. The adequate and appropriate protection and conservation of wetlands shall be accomplished through a comprehensive planning process which includes consideration of the types, values, functions, sizes, conditions and locations of wetlands, and which is based on supporting data and analysis. 9J-5.013(3)(a).
- Future land uses which are incompatible with the protection and conservation of wetlands and wetland functions shall be directed away from wetlands. The type, intensity or density, extent, distribution and location of allowable land uses and the types, values, functions, sizes, conditions and locations of wetlands are land use factors which shall be considered when directing incompatible land uses away from wetlands. Land uses shall be distributed in a manner that minimizes the effect and impact on wetlands. 9J-5.013(3)(b).

The Commission has previously held that these requirements are applicable to future land use map amendments. *DCA v. Lee County*, Final Order No. AC-06-006, DOAH Case No. 06-0049GM (2006).

The legal theory advanced by the Department is as or more reasonable than the conclusions of law in the Recommended Order. DCA Exceptions 14 and 21 are Granted, and paragraphs 132, 174 and 175 are rejected and replaced with the discussion above. Since the

Lowe's Amendment is determined to be not incompliance on other grounds, it is not necessary to remand the case to the Administrative Law Judge for findings of fact on this issue.

DCA Exceptions 19 and 23

Paragraphs166 and 185 are both logical conclusions of law drawn from earlier paragraphs that either were not the subject of exceptions or were subject to exceptions that have been denied. Paragraphs 166 and 183 are more reasonable than the legal theories advanced by the Department. DCA Exceptions 19 and 23 are Denied.

CONCLUSION

The Commission hereby adopts the ALJ's findings of fact and conclusions of law in the Second Corrected Recommended Order except as modified herein.

Upon review of the entire record, the Second Corrected Recommended Order, and after considering the parties' exceptions thereto, the Commission determines that Miami-Dade County Ordinance 08-45 (Brown Amendment) is "in compliance."

Upon review of the entire record, the Second Corrected Recommended Order, and after considering the parties' exceptions thereto, the Commission further determines that Miami-Dade County Ordinance 08-44 (Lowe's Amendment) is not "in compliance." In accordance with Section 163.3189(2)(b), Fla. Stat., the Commission directs Miami-Dade County to 1) rescind Miami-Dade County Ordinance 08-44; and 2) provide a report to the Commission on the status of Ordinance 08-44 within 60 days of this Final Order.

The Brown Amendment and the Lowe's Amendment are factually and legally distinct and are independent of each other. Accordingly, each Amendment has been considered separately and independently by the Commission. In the event of an appeal by any party, the Commission considers the cases to be severable.

SANCTIONS

Pursuant to Section 163.3189(2)(b), Fla. Stat., the County may elect to make the Lowe's Amendment effective notwithstanding the finding of not in compliance stated in this Final Order. In the unlikely event the County elects to make the Lowe's amendment effective without taking the required remedial actions, the County shall be subject to sanctions pursuant to section 163.3184(11), Fla. Stat. The Commission retains jurisdiction for the purpose of imposition of sanctions.

NOTICE OF RIGHTS

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

DONE AND ORDERED this 30th day of July, 2009.

for JERRY L. MCDANIEL, Secretary
Administration Commission

FILED with the Clerk of the Administration Commission on this 30th day of July, 2009.

Clerk, Administration Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was delivered to the following persons by United States Mail, facsimile, electronic mail, or hand delivery this 30th day of July, 2009.

Barbara Leighty
Clerk, Administration Commission

Honorable Charlie Crist
Governor
The Capitol
Tallahassee, Florida 32399

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

Honorable Bill McCollum
Attorney General
The Capitol
Tallahassee, Florida 32399

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

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

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

Honorable Bram D. E. Canter
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

Linda Shelley, Esquire
Karen A. Brodeen, Esquire
Fowler White Boggs Banker, P.A.
101 North Monroe Street, Suite 1090
Tallahassee, Florida 32301

Robert N. Hartsell, Esquire
Everglades Law Center, Inc.
818 US Highway 1, Suite 8
Lake Park, Florida 33408

Martha Harrell Chumbler, Esquire
Daniel Hernandez, Esquire
Carlton Fields
Post Office Drawer 190
Tallahassee, Florida 32302

Richard Grosso, Esquire
Everglades Law Center, Inc.
3305 College Avenue
Ft. Lauderdale, Florida 33314-7721

Dennis A. Kerbel, Esquire
Assistant County Attorney
111 Northwest First Street, Suite 2810
Miami, Florida, 33128-1930

Michael A. Pizzi, Jr., Esquire
Michael A. Pizzi, P.A.
15271 Northwest 60th Avenue, Suite 206A
Miami Lakes, Florida 33014-2433

Samuel S. Goren, Esq.
Goren, Cherof, Doody & Ezrol, P.A.
3099 East Commercial Boulevard, Suite 200
Fort Lauderdale, Florida 3308-4311

Thomas E. Warner, Esquire
Carlton Fields
City Park Tower
525 Okeechobee Boulevard, Suite 120
West Palm Beach, Florida 33401-6149

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