STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA CHAMBER OF COMMERCE, INC.; FLORIDA LAND COUNCIL, INC.; and FLORIDA FARM BUREAU FEDERATION,	)	
Petitioners,	)	
vs.	)	Case No. 09-3488RP
DEPARTMENT OF COMMUNITY AFFAIRS,	)	
Respondent.	)	

FINAL ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on July 14, 2009, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether proposed rules 9J-5.026(3)(d), (7)(b), (7)(c)4. and 6., (8)(a), (9)(a)3., 6., 18., and 19., and 9J-11.023(2), (4), and (5), and existing Florida Administrative Code Rule 9J-5.003(80) are invalid exercises of delegated legislative authority for the reasons alleged in the Petition for Administrative Hearing to Challenge Proposed Amendments to Chapters 9J-5 and 9J-11, F.A.C. and to Challenge Existing Rule 9J-5.003(80) (Petition).[1]

PRELIMINARY STATEMENT

On June 24, 2009, Petitioners, Florida Chamber of Commerce, Inc. (Florida Chamber), Florida Land Council, Inc. (Land Council), and Florida Farm Bureau Federation (Farm Bureau), filed their Petition alleging that substantial parts of proposed rules 9J-5.026 and 9J-11.023 and existing Rule 9J-5.003(80) were invalid exercises of delegated legislative authority, as defined in Section 120.52(8), Florida Statutes.[2] In general, proposed rule 9J-5.026 establishes the substantive requirements for designating a Rural Land Stewardship Area (RLSA) and adopting related amendments in comprehensive plans. Proposed rule 9J-11.023 implements the procedural requirements for establishing RLSAs. Existing Rule 9J-5.003(80), which became effective in 1994, defines the term "new town."

On June 25, 2009, Robert S. Cohen, Chief Judge of the Division of Administrative Hearings, determined that the Petition was in compliance with the general requirements of Section 120.56(1)(b), Florida Statutes, and assigned the case to Administrative Law Judge Donald R. Alexander.

By Notice of Hearing dated June 26, 2009, a final hearing was scheduled on July 14, 2009, in Tallahassee, Florida. A Joint Pre-Hearing Stipulation was filed by the parties on July 13, 2009.

At the final hearing, Petitioners presented the testimony of Ernest A. Cox, III, Esquire, president of Family Lands Remembered, LLC, and accepted as an expert, and Dr. J. Thomas Beck, a planner who was accepted as an expert. Also, they offered Petitioners' Exhibits 1, 2, 4, 5, and 7-10. All were received in evidence except Exhibits 4 and 5, on which a ruling was reserved. The objection to those exhibits is sustained. The Department presented the testimony of Thomas G. Pelham, Secretary of the Department and accepted as an expert, and Robert A. Pennock, Department Strategic Planning Coordinator and accepted as an expert. Also, it offered Department Exhibits 1 and 2, which were received in evidence. The parties further offered Joint Exhibits 1-25, which were received in evidence. Finally, the parties' request for official recognition of Part II, Chapter 163, Florida Statutes, Section 380.06, Florida

Statutes, Florida Administrative Code Rule Chapter 9J-5, and Rule 9J-2.021 was granted.

The Transcript of the hearing (two volumes) was filed on July 31, 2009. By agreement of the parties, the time for filing proposed findings of fact and conclusions of law was extended to August 14, 2009. The same were timely filed and have been considered in the preparation of this Final Order.

FINDINGS OF FACT

Based on the evidence presented by the parties, the following findings are made:

A. The Parties

1. Petitioners are not-for-profit organizations whose members own real property throughout the State. A substantial number of their respective members own real property which could be amassed as one or more areas in the RLSA program. Some members of these organizations have taken steps in an effort to have their land designated as an RLSA. On behalf of their respective members, each Petitioner has a substantial interest in public policy relating to land use planning, growth management, and the protection of agricultural, rural, and conservation lands. Respondent, Department of Community Affairs (Department), has stipulated to the facts necessary to establish standing for each Petitioner.

2. The Department is the state agency charged with implementing the review provisions of the Local Government Planning and Land Development Regulation Act codified in Sections 163.3164, et seq., Florida Statutes.

B. The Original Statute Creating the RLSA Program

3. Because of the complexity of the subject matter, a recitation of the RLSA program's history is appropriate. In 2001, the Legislature enacted Chapter 2001-279, Laws of Florida, codified as Section 163.3177(11)(d), Florida Statutes, which created the RLSA pilot program. The law became effective on July 1, 2001, and stated:

> It is the intent of the Legislature that rural land stewardship areas be used to further the following broad principles of rural sustainability: restoration and maintenance of the economic value of rural land; control of urban sprawl; identification and protection of ecosystems, habitats, and natural resources; promotion of rural economic activity; maintenance of the viability of Florida's agriculture economy; and protection of the character of the rural areas of Florida.

§ 163.3177(11)(d)2., Fla. Stat. (2001). While the eligibility criteria and substantive requirements of the RLSA program have been amended several times, the foregoing principles have remained the same.

4. The statute provides an option, not an exception, under the State's growth management laws for local governments to

implement innovative planning and development strategies for large, rural parcels. While having many of the attributes of a traditional "transfer of development rights" program, the RLSA planning process provides additional planning and economic incentives as well as flexibility for the local government to implement this program. The program was best summarized by Secretary Pelham at hearing as follows:

> The RLSA process is an optional planning process which local governments may elect to use in rural and agricultural areas of the state. Essentially it provides incentives to landowners to preserve or conserve environmental and natural resources and agricultural lands by giving them stewardship credits that may be assigned to those lands to be preserved, but which can be used on other lands through a transfer of those credits to the receiving areas.

Tr. at 182.

5. The first step in the RLSA planning process is for the local government to "apply to the Department in writing requesting consideration for authorization to designate a [RLSA]." § 163.3177(11)(d)3., Fla. Stat. (2001). Under the original statute, if the Department chose to authorize a local government to designate an RLSA, it would do so by written agreement with the local government. See § 163.3177(11)(d)4. and (5), Fla. Stat. (2001). Because the original statute was a pilot program, the Department could authorize only five local

governments to designate RLSAs. See § 163.3177(11)(d)6., Fla. Stat. (2001).

6. To be eligible for designation as an RLSA under this pilot program, a parcel of land had to be larger than 50,000 acres but not over 250,000 acres; it had to be designated as rural or a substantial equivalent on the future land use map (FLUM); and it had to be located outside the municipal and established urban growth boundaries. See § 163.3177(11)(d)6., Fla. Stat. (2001). For this reason, only counties (and not cities) were eligible to participate in the program.

7. Once it received Department authorization to designate an RLSA, the county was to then propose and adopt a plan amendment designating the RLSA. See § 163.3177(11)(d)6., Fla. Stat. (2001). This plan amendment was to be subject to full review under Section 163.3184, Florida Statutes, for a compliance determination. Also, the plan amendment was required to specifically address the following:

> a. Criteria for the designation of receiving areas within rural land stewardship areas in which innovative planning and development strategies may be applied. Criteria shall at a minimum provide for the following adequacy of suitable land to accommodate development so as to avoid conflict with environmentally sensitive areas, resources, and habitats; compatibility between and transition from higher density uses to lower intensity rural uses; the establishment of receiving area service boundaries which provide for a

> separation between receiving areas and other land uses within the rural land stewardship area through limitations on the extension of services; and connection of receiving areas with the rest of the rural land stewardship area using rural design and rural road corridors.
>
> b. Goals, objectives, and policies setting forth the innovative planning and development strategies to be applied within rural land stewardship areas pursuant to the provisions of this section.
>
> c. A process for the implementation of innovative planning and development strategies within the rural land stewardship area, including those described in this subsection and s. 9J-5.006(5)(l), Florida Administrative Code, which provide for a functional mix of land uses and which are applied through the adoption by the local government of zoning and land development regulations applicable to the rural land stewardship area.
>
> d. A process which encourages visioning pursuant to s. 163.3167(11) to ensure that innovative planning and development strategies comply with the provisions of this section.
>
> e. The control of sprawl through the use of innovative strategies and creative land use techniques consistent with the provisions of this subsection and rule 9J-5.006(5)(l), Florida Administrative Code.

8. Once the plan amendment was in place, the county was then to implement it through land development regulations. Under the original statute, the county by ordinance was to "assign to the [RLSA] a certain number of credits, to be known as 'transferable rural land use credits' . . . ." These credits

would then be transferred to designated receiving areas "solely for the purpose of implementing innovative planning and development strategies and creative land use planning techniques adopted by the local government pursuant to this section." See § 163.3177(11)(d)8.b., Fla. Stat. (2001).

9. Once transferable rural land use credits were transferred from a parcel, the underlying land uses would be extinguished, the parcel would be limited to agriculture or conservation, and the transfer would be memorialized as a restrictive covenant running with the land. See § 163.3177(11)(d)8.k., Fla. Stat. (2001).

10. The Department was granted the authority to implement this section by rule in the original statute. However, the Department did not adopt rules.

11. No county applied to participate in this pilot program.

C. Amendments to the RLSA Statute

12. The Legislature substantially amended the statute in 2004. See Ch. 2004-372, Laws of Fla. Although the program had no participants as of that time, the Legislature removed the pilot status of the program and the limitation on the number of local governments that may be authorized to designate an RLSA. See § 163.3177(11)(d)1., Fla. Stat. (2004). Although the requirement for a written agreement between the county and the

Department was deleted, the requirement for the county's application and Department's authorization prior to the designation of an RLSA remained. See § 163.3177(11)(d)1. and 4., Fla. Stat. (2004).

13. The minimum acreage for an RLSA was reduced to 10,000 acres and the maximum was removed. § 163.3177(11)(d)4., Fla. Stat. (2004). The statute also explicitly recognized that RLSAs could be multi-county. § 163.3177(11)(d)2., Fla. Stat. (2004).

14. In 2005, the Legislature again amended the statute in several respects, one of which was directed to the stewardship credit methodology. See Ch. 2005-290, Laws of Fla. However, the statute still requires that the total amount of credits is to be tied to the "25-year or greater projected population of the rural land stewardship area."

15. Although the statute was amended again in 2006, those amendments have no bearing on the issues in this case. See Ch. 2006-220, Laws of Fla.

D. Designating an RLSA Under the Statute

16. Collier County has been frequently mentioned as a local government with an RLSA program. However, that County's comprehensive plan provisions regarding rural development were not adopted under the RLSA statute; rather, they were adopted by the County in 1999 as conventional plan amendments that were later approved in 2002 by a final order issued by the

Administration Commission. Collier County's rural planning program does, however, have some of the same core attributes found in the RLSA program, including the creation of transferable land use credits to enable development in designated receiving areas.

17. The Department closely examined the Collier County program as part of its "Rural Land Stewardship Area Program 2007 Annual Report to the Legislature" (2007 Annual Report). See Joint Exhibit 4. See also § 163.3177(11)(d)8., Fla. Stat. ("[t]he department shall report to the Legislature on an annual basis on the results of implementation of [RLSAs] authorized by the department"). This examination revealed several substantial flaws in the program. First, the Collier County program is extremely complex, with over twenty general attributes that must be examined for every acre of land assigned stewardship credits. This would make it difficult and expensive for small rural counties with limited resources.

18. The Collier County program also assigns the highest stewardship credits to environmentally sensitive lands and appreciably lower values to agricultural land. The result is that development is directed to agricultural areas. For example, eighty-seven percent of the footprint of one receiving area that is currently being developed, known as Ave Maria, was in active agriculture prior to its designation for development.

In this respect, the Collier County system is directing development to agricultural lands and not protecting and conserving those lands, which the Department contends contravenes the principles of rural sustainability.

19. Another major concern with the Collier County program is the extent and distribution of receiving areas. The Collier County program does not have any requirements that the receiving area be clustered, thus allowing for the possibility of scattered, sprawling receiving areas throughout eastern Collier County. Also, there appears to be no limit on the footprint of these receiving areas. The original Collier County program envisioned development on only nine to ten percent of the entire area, for a total of approximately 16,800 acres. However, due to the complexity and "flexibility" within the Collier County stewardship credit system, "the maximum development footprint cannot be determined."

20. On September 12, 2006, St. Lucie County adopted plan amendments under the RLSA statute. Later that year, the Department reviewed the amendments and found them to be in compliance.

21. In preparing the 2007 Annual Report, the Department undertook a detailed analysis of the St. Lucie RLSA amendments. Even though the amendments had been previously found to be in compliance, the new analysis revealed several shortcomings in

the amendments, including their failure to discuss, analyze, or demonstrate how they further the principles of rural sustainability, a primary focus of the program. Also, the amendments were not supported by an analysis of land use need. Instead of projecting population and need, the RLSA adopted an arbitrary cap of 13,248 dwelling units with "no known planning basis."

22. The St. Lucie RLSA is similar to the Collier County program in two respects: it is very complex, and it places no spacial limits on the footprint of the development area.

23. Due to these shortcomings, the Department has placed little, if any, reliance on the St. Lucie County RLSA amendments as an example of proper planning under the RLSA statute. There is no evidence that any development has occurred under the St. Lucie program, and its most recent Evaluation and Appraisal Report dated October 2008 indicated that none may ever occur.

24. In 2007, Highlands and Osceola Counties both applied for and were granted authorization by the Department to designate RLSAs. However, both counties later notified the Department that they would no longer pursue the RLSAs, and the authorizations were withdrawn by the Department.

E. The Rule Development Process

25. In early 2007, the Department became aware of assertions by some landowners that the RLSA program provides for

unlimited development within a stewardship area; that RLSA plan amendments were not subject to the growth management provisions in Chapter 163, Florida Statutes; and that RLSAs were not subject to a needs analysis, as required by the law.

26. At the same time, the Department received numerous inquiries from large landowners and/or their representatives regarding RLSA proposals, some as large as 750,000 acres, and for two "new towns" with 100,000 and 60,000 dwelling units, respectively. It also became aware of concerns and criticisms leveled against the one adopted RLSA program in St. Lucie County and rural planning efforts in Collier County. The main criticism was that the system being used for RLSA planning was too complex, which resulted in an expensive, consultant-intensive process that lacked transparency and was largely incomprehensible.

27. Based on the above concerns and criticisms, the Department began gathering information in early 2007 in preparation for rulemaking. On July 19, 2007, it conducted its first workshop. Two other workshops were held, and the first draft of proposed rule 9J-5.026 was issued in January 2008. That proposed rule set forth the minimum substantive requirements for RLSA planning. In September 2008, the Department issued its first draft of proposed rule 9J-11.023, which sets forth the procedural requirements for a local

government to seek authorization from the Department to designate an RLSA.

28. After receiving comments from interested parties, the Department noticed the rules for adoption and conducted a rule adoption hearing. On January 7, 2009, Petitioners filed a Petition challenging most of the provisions in the proposed rules. See DOAH Case No. 09-0048RP.

29. Based upon that challenge, which raised new issues not previously brought to the attention of the Department, the Department withdrew the rules and made substantial revisions to address these concerns. This rendered moot Petitioners' earlier challenge.

30. After the revised rules were noticed for adoption, Petitioners filed their Petition challenging numerous provisions within the proposed rules as well as one existing rule.

F. The Objections

31. As summarized in their Proposed Final Order, Petitioners contend (a) that proposed rules 9J-11.023(2), (4), and (5) are invalid because they exceed the Department's grant of rulemaking authority;[4] (b) that proposed rules 9J-5.026(7)(b), (7)(c)4., 6., (8)(a), and (9)(a)3., 6., 18., and 19. enlarge, modify, or contravene the specific provisions of law implemented; (c) that proposed rule 9J-5.026(3) is vague and fails to establish adequate standards for agency decisions; (d)

that proposed rule 9J-5.026(9)(a)18. is arbitrary; and (e) that existing Rule 9J-5.003(80) contravenes the specific provisions of law implemented. The remaining allegations have been voluntarily dismissed.

a. Does proposed rule 9J-11.023 exceed the grant of legislative authority?

32. Petitioners first contend that subsections (2) and (4) in their entirety and the words "If authorized to proceed" in the first sentence of subsection (5) of proposed rule 9J-11.023 are an invalid exercise of delegated legislative authority because they exceed the Department's specific grant of legislative authority. The challenged subsections of the proposed rule read as follows:

> 9J-11.023 Procedure for the Designation of a Rural Land Stewardship Area.
>
> * * *
>
> (2) Pre-Notification Actions.
> (a) Prior to giving official notification of intent to designate a RLSA to the Department, the county(ies) shall conduct at least one noticed public workshop to discuss and evaluate the appropriateness of establishing a RLSA. The county(ies) shall invite the Department of Community Affairs, Department of Agricultural and Consumer Affairs, Department of Environmental Protection, Department of Transportation, Florida Fish and Wildlife Conservation Commission, affected regional planning council(s), and affected water management district(s) (collectively referred to as the "RLSA Interagency Technical Advisory Team") to participate in the workshop. Potentially affected landowners and other interested

parties shall be given notice and invited to participate in the workshop. The workshop shall address: the statutory process for designating a RLSA; the planning issues that are likely to arise; and the technical assistance that will be available from state and regional agencies if the county(ies) proceed to designate a RLSA. The county(ies) shall provide opportunities for broad public participation in the RLSA process, which may include a series of public meetings or workshops.

(b) The county(ies), in coordination with the affected landowners, shall host a site visit of the RLSA for the RLSA Interagency Technical Advisory Team in conjunction with the workshop or after the notification of intent to designate pursuant to paragraph (4)(b).

* * *

(4) Review of Notification of Intent to Designate.

(a) The Department will provide members of the RLSA Interagency Technical Advisory Team with a copy of the notification of intent to designate within five days after receipt of the notification.

(b) If a site visit was not made prior to the notification of intent to designate, the Department will contact the county(ies) within ten days after receipt of the notification of intent to arrange a site visit of the proposed RLSA and surrounding lands. The county(ies) shall ensure proper coordination with the affected landowners. The Department will coordinate the scheduling of the site visit with the members of the RLSA Interagency Technical Advisory Team and request their participation in the site visit.

(c) Members of the RLSA Interagency Technical Advisory Team shall be asked to provide the Department oral and/or written comments on the proposed RLSA within 30 days of the receipt of the notification of intent to designate or the site visit, if it occurs after the notification. The Department may

also request meetings with the members of the RLSA Interagency Technical Advisory Team to discuss and evaluate the notification and site visit. The Department may also request a conference with the county's(ies') staff(s) to discuss issues and questions that have arisen as a result of the site visit, comments from members of the Interagency Technical Advisory Team and other stakeholders, and the Department's evaluation of the RLSA proposal.

(d) Not later than 60 days following the receipt of the notification of intent to designate or the site visit, whichever is later, the Department shall issue a written notification to the county(ies).

(e) The Department's notification shall authorize the county(ies) to proceed with a plan amendment to designate the RLSA or inform the county(ies) of the Department's decision not to authorize. The decision shall be based on the information contained in or gained from the notification, site visit, other agency comments, and other information received. The Department shall authorize the county(ies) to proceed if it determines that the proposed RLSA meets the threshold eligibility requirements of subsection 9J-5.026(4), F.A.C. and that there is a reasonable likelihood that the RLSA will further the principles of rural sustainability. If the Department decides to authorize the county(ies) to proceed with a plan amendment to designate a RLSA, the notification will set forth the facts on which the authorization is based, and may include recommendations to the county(ies) regarding the RLSA. The notification will not guarantee that a comprehensive plan amendment(s) to designate a RLSA will be found in compliance by the Department. It will only constitute the Department's authorization to designate a RLSA if the necessary comprehensive plan amendment(s) are adopted and found in compliance pursuant to Section 163.3184, F.S. If the Department decides not to authorize the county(ies) to

> proceed with a plan amendment to designate a RLSA, the agency's notification will explain the reasons for the decision.
>
> (5) Amendment to the Comprehensive Plan: If authorized to proceed, the county(ies) may prepare and process a plan amendment(s) that will be reviewed by the Department pursuant to Section 163.3184, F.S. The county(ies) may, in preparing the plan amendment(s), establish a local visioning process to facilitate the development of a RLSA plan amendment. The Department encourages the county(ies) to seek and utilize technical assistance from the members of the RLSA Interagency Technical Advisory Team in preparing a RLSA plan amendment.

33. Sections 120.52(8)(b) and 120.54(3)(a)1., Florida Statutes, require that the agency list in the rulemaking notice the purported rulemaking authority for the proposed rule. To comply with this requirement, the Department's rulemaking notice cites Sections 163.3177(9) and (11)(h), Florida Statutes, as the specific authority for adopting the rule and Section 163.3177(11)(d)1., Florida Statutes, as the law being implemented. In its Proposed Final Order, the Department relies on Section 163.3177(11)(h) as the specific statutory authority for rulemaking. It provides that the Department "may adopt rules necessary to implement the provisions of [subsection 163.3177(11)]," including the RLSA provisions found in Section 163.3177(11)(d). On the other hand, the law being implemented is quite lengthy and reads as follows:

(11)(d)1. The department, in cooperation with the Department of Agriculture and Consumer Services, the Department of Environmental Protection, water management districts, and regional planning councils, shall provide assistance to local governments in the implementation of this paragraph and rule 9J-5.006(5)(l), Florida Administrative Code. Implementation of those provisions shall include a process by which the department may authorize local governments to designate all or portions of lands classified in the future land use element as predominately agriculture, rural, open, open-rural, or a substantively equivalent land use, as a rural land stewardship area within which planning and economic incentives are applied to encourage the implementation of innovative and flexible planning techniques, including those contained herein and in rule 9J-5.006(5)(l), Florida Administrative Code. Assistance may include, but is not limited to:

a. Assistance from the Department of Environmental Protection and water management districts in creating the geographic information systems land cover database and aerial photogrammetry needed to prepare for a [RLSA];

b. Support for local government implementation of rural land stewardship concepts by providing information and assistance to local governments regarding land acquisition and assistance to local governments regarding land acquisition programs that may be used by the local government programs that may be used by the local government or landowners to leverage the protection of greater acreage and maximize the effectiveness of rural land stewardship areas; and

c. Expansion of the role of the Department of Community Affairs as a resource agency to

> facilitate establishment of [RLSAs] in smaller rural counties that do not have the staff or planning budgets to create a [RLSA].

34. Proposed rule 9J-11.023 describes in detail the process by which a local government is to request Department authorization to designate a RLSA. At issue here are provisions in subsections (2), (4), and (5) of the rule that require a local government wishing to designate an RLSA to conduct a public workshop; cover particular topics during the workshop; host a site visit with designated agencies; and based on the information gathered from this process to then allow the Department, in its discretion, to either authorize or not authorize the local government to begin to prepare and process an RLSA amendment. The latter decision is based on whether the local government has shown "a reasonable likelihood that the RLSA will further the principles of rural sustainability." Petitioners contend that there is no specific grant of rulemaking authority that authorizes the Department to mandate these procedures in the rule or to prevent a local government from proposing and processing an RLSA plan amendment. Instead, they contend that the enabling statute only allows the Department to promulgate rules that are "necessary" to implement the RLSA program, those being a requirement that the county provide notice to the Department that it intends to propose a

RLSA plan amendment and a description of the subsequent review process by the Department to determine whether the amendment is in compliance.

35. Section 163.3177(11)(d)1., Florida Statutes, authorizes the Department to provide "assistance to local governments in the implementation of this paragraph and rule 9J-5.006(5)(l)." (The cited rule, among other things, encourages "innovative and flexible planning and development strategies" that allow conversion of rural and agricultural lands to other uses.) The statute also includes specific authority to establish a "process by which the department may authorize local governments to designate all or portions of lands classified in the future land use element (FLUE] as predominately agricultural, rural, open, open-rural, or a substantively equivalent land use, as a [RLSA] . . . ." The rule accomplishes this purpose by requiring state agency technical assistance, establishing the process for a workshop and site visit, requiring that the county's notification describe the basis for the designation, requiring broad public participation, and assuring, by approval or disapproval of the county's preliminary proposal, that the proposed RLSA will promote the principles of rural sustainability. Notably, had the Legislature intended this authorization process to be the same as the existing

compliance review process for conventional plan amendments, there would be no need for this statutory language.

36. The proposed rule does not exceed the Department's grant of rulemaking authority.

b. Do certain provisions within proposed rule 9J-5.026(7) and (9) enlarge, modify, or contravene the law implemented?

37. Petitioners further contend that proposed rules 9J-5.026(7)(b), (7)(c)4., 6., (8)(a), and (9)(a)3., 6., 18., and 19. enlarge, modify, or contravene the specific provisions of law implemented. The challenged rules read as follows:

> 9J-5.026 Rural Land Stewardship Area (RLSA)
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> * * *
>
> (7) Data and Analysis Requirements.
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> * * *
>
> (b) Population Projections and Analysis of Land Use Need. Population projections and analysis of land use need shall be prepared in accordance with Rule 9J-5.006, F.A.C., with the following modifications: The amount and extent of allowable development in the RLSA must be based on the 25-year or greater projected population of the RLSA; the anticipated effect of the proposed RLSA must receiving areas, including any committed catalyst projects, infrastructure improvements, or other projects that would attract and support development; the furtherance of the statutory principles of rural sustainability; and the goals, objectives, and policies of the RLSA plan amendment.
>
> * * *
>
> (c)4. Land development and other conversion threats whereby rural resources under threat require more incentives via stewardship credits and less threatened resources require lesser incentives. This includes

the future threat of low-density sprawl on lands within and surrounding Eligible Receiving Areas; and

* * *

6. Values shall be assigned to all of the land in the RLSA. The highest values shall be assigned to the most environmentally valuable land, and to open space and agricultural land where the retention of such lands is a priority. The assignment of values shall be submitted with the RLSA plan amendment as part of the supporting data and analysis.

* * *

(8) Stewardship Credit System Criteria.

(a) Each credit shall represent a defined number of residential units or a defined amount of non-residential square footage. The credit transferee may decide whether to use the credit for a residential or non-residential use in accordance with the land use standards established for the Designated Receiving Area.

* * *

(9) Goals, Objectives, Policies, and Map.

* * *

(a) The goals, objectives, and policies shall include the following:

* * *

3. Identification of the innovative planning and development strategies to be used within the RLSA, and a process for implementing the strategies, including the adoption of implementing plan amendments, land development regulations, and the issuance of development orders. The process shall include provision for the Department's review of a proposed land development regulation to designate a receiving area for consistency with the RLSA plan amendment.

* * *

6. A requirement that Eligible Receiving Areas shall be located on land that is suitable for development and have the lowest land values based on the land values

analysis conducted pursuant to paragraph (7)(c).

* * *

18. Policies for new towns which comply with the following:

a. As required by subsection 9J-5.003(80) and paragraph 9J-5.006(5)(1), F.A.C., a new town shall be designated on the future land use map. A new town shall be located within a Designated Receiving Area. The plan amendment designating a new town shall include a master development plan that establishes the size of the new town, the amount, location, type, density and intensity of development, and the design standards to be utilized in the new town.

b. Any increase in the density or intensity of land use required to achieve the proposed new town may occur only through the use of stewardship credits assigned or transferred to the Designated Receiving Area either prior to or subsequent to the designation of the new town on the future land use map.

c. New towns shall be surrounded by greenbelts, except for any connecting rural road corridors and to the extent that new towns are adjacent to existing or planned urban development or incorporated areas.

d. A future land use map amendment to designate a new town shall be internally consistent with RLSA provisions of the comprehensive plan.

e. A future land use map amendment to designate a new town shall be accompanied by an amendment to the capital improvements element to incorporate a financially feasible five-year capital improvements schedule for the public facilities necessary to serve the new town and an amendment to the transportation or traffic circulation element to designate any new rural road corridors required to connect the new town with the rest of the RLSA.

19. Provisions to ensure that any use of the underlying densities and intensities of land uses assigned to parcels of land by the

> county comprehensive plan prior to designation of the RLSA furthers the principles of rural sustainability.
>
> * * *

38. The grant of authority for this rule is cited as Sections 163.3177(9) and (11)(h), Florida Statutes, while Sections 163.3177(2), (3), (6)(a), (8), (10)(e), (11)(a), (b), and (d)1., 2., 4., 5., and 6., Florida Statutes, are cited as the laws being implemented.

39. Subsection (2) of the law being implemented provides that "[c]oordination of the several elements of the local comprehensive plan shall be a major objective of the planning process"; subsection (3) is a lengthy provision requiring that a comprehensive plan include a capital improvements element; paragraph (6)(a) describes in detail the matters that must be contained in the FLUE; subsection (8) requires that all elements of the comprehensive plan be based on data appropriate to the element involved; paragraph (10)(e) generally provides that support data and analysis shall not be subject to the compliance review process, but they must be based on appropriate data; paragraph (11)(a) describes the Legislature's recognition of using innovative planning and development strategies; paragraph (11)(b) expresses the intent of the Legislature to allow the conversion of rural lands to other uses, where appropriate, including urban villages, new towns, satellite communities,

area-based allocations, clustering, and open space provisions, mixed-use development, and sector planning; and subparagraphs (11)(d)1., 2., 4., 5., and 6. describe the statutory process for creating an RLSA.

40. Subsection (7) of the proposed rule sets forth the data and analysis requirements that apply to all RLSA plan amendments, including data and analysis of existing conditions (subparagraphs (7)(a)1. through 10.); population projections and analysis of land use (paragraph (7)(b)); and a land values analysis (subparagraphs (7)(c)1. through 6.).

41. A land use needs analysis is an integral part of the planning process. Paragraph (7)(b) requires that an RLSA amendment be supported by population projections and an analysis of land use need such that the amount and extent of allowable development must be based on the 25-year or greater projected population of the RLSA, other items, and the anticipated effect of proposed RLSA receiving areas. Petitioners contend that this language contravenes Section 163.3177(11)(d)6., Florida Statutes, amended in 2005, which provides in part that the total amount of development "must enable the realization of the long-term vision and goals for the 25-year or greater projected population of the [RLSA], which may take into consideration the anticipated effect of the proposed receiving areas." See Ch. 2005-290, Laws of Fla.

42. Paragraph (7)(b) does not contravene the terms of the statute. As expressed in the law being implemented, the rule directs that the need analysis shall be based upon, among other things, "the anticipated effect of the proposed RLSA receiving areas . . . ."

43. As a part of the data and analysis to be supplied, paragraph (7)(c) requires that an RLSA amendment be supported by a land values analysis that considers six components described in subparagraphs 1. through 6. This in turn requires a comprehensive analysis of rural resources that exist within the RLSA. Subparagraph 4. requires that the analysis include the development threats to rural resources and that resources under threat of conversion receive more incentives from stewardship credits than resources under less of a threat. Petitioners contend that the rule contravenes Section 163.3177(11)(d)6.j., Florida Statutes, because it requires a greater value to be assigned to resources under threat of conversion and would result in other rural and natural and agricultural resources which may have a higher intrinsic value being assigned fewer credits. Specifically, the cited statute requires that "the highest number of credits per acre" should be "assigned to the most environmentally valuable land, or, in locations where the retention of open space and agricultural land is a priority, to such lands."

44. The purpose of the rule is straightforward: to protect those resources that are under the greatest threat and those that are most susceptible to harm over time through land development or other changes, including urban sprawl. Contrary to Petitioners' assertion, the overall analysis does in fact consider all forms of rural resources in determining how the credits will be assigned. The rule implements the statutory directive of attaining the principles of rural sustainability.

45. Subparagraph (7)(c)6. requires, among other things, that the local government submit as a part of the data and analysis supporting the plan amendment "the assignment of values" of all lands in the RLSA. Petitioners contend that assigning values at the time of the amendment "locks in these values" and would require a subsequent plan amendment in contravention of Section 163.3177(11)(d)6., Florida Statutes, which Petitioners argue contemplates the creation of credits after the adoption of the plan amendment. At hearing, however, the Department explained that because conditions will obviously change over time, the land values analysis will be periodically updated and can be changed without a new plan amendment. In their Proposed Final Order, Petitioners concede that given this interpretation of the rule, it "would not be an invalid exercise of delegated legislative authority." See Petitioners' Proposed Final Order, par. 73.

46. Paragraph (8)(a) of the proposed rule requires each stewardship credit to represent either a defined number of residential units or non-residential square footage. Once the credits are created in sending areas, they can be transferred to designated receiving areas to be used to enable development that is consistent with the RLSA goals, objectives, and policies. Petitioners contend that the rule will prohibit mixed-use development in contravention of Section 163.3177(11)(d)4.c., Florida Statutes, which requires that the RLSA goals, policies, and objective provide for a "functional mix of land uses."

47. There is no prohibition of a mix of land uses. In fact, the opposite is true. As clarified by a Department witness, "a mix is essentially required, as you can see from [sub]paragraph (9)(a)17., which describes that a mix of use must be addressed." Tr. at 273. The rule does not contravene the statute.

48. Subsection (9) of the proposed rule generally requires that the RLSA plan amendment contain goals, objectives, policies, and a map. Subparagraphs (9)(a)1. through 21. require that the goals, objectives, and policies identify the innovative planning and development strategies to be used in the RLSA process, including the adoption of implementing plan amendments, land development regulations, and the issuance of development orders. Petitioners allege that subparagraphs 3., 6., 18., and

19. enlarge, modify, or contravene the law implemented.

49. Subparagraph 3. requires "implementing plan amendments" because the Department recognized the fact that the RLSA planning process will consume years or even decades and will require implementing plan amendments to accomplish its purpose. This is especially true here as the RLSA process involves the development of large tracts of land (as much as 100,000 acres or more) that will take years or decades to fully implement and build out. At a minimum, under current law, the "implementing plan amendments" will include a capital improvements element annual update; water supply planning, and the designation of new towns. Except for the requirement that an implementing plan amendment designate a new town pursuant to existing Rule 9J-5.003(80), Petitioners agree that the proposed rule is valid. Because the cited existing rule has been determined to be valid, Petitioners' contention is rejected. See Findings 62-65, infra.

50. Subparagraph 6. provides that the goals, policies, and objectives shall contain "a requirement that the Eligible Receiving Areas shall be located on land that is suitable for development and have the lowest land values on the land values analysis conducted pursuant to paragraph (7)(c)." Petitioners contend that this provision limits the flexibility of local governments to determine the best location for Eligible

Receiving Areas and therefore contravenes the provisions in various parts of Section 163.3177, Florida Statutes, that emphasize flexibility.

51. The rule implements the principles of rural sustainability contained in Section 163.3177(11)(d)2., Florida Statutes. Only by directing development to land with the lowest environmental, agricultural, and rural resource value will an RLSA protect ecosystems, habitat, natural resources, and the agricultural economy. The rule does not contravene this statute.

52. Subparagraph 18. requires an RLSA plan amendment to include policies for "new towns," including a requirement that a new town be designated on the FLUM. Petitioners contend that the requirement to designate a new town on the FLUM contravenes Section 163.3177(11)(4)(d)4., Florida Statutes, which provides for the implementation of the innovative planning and development strategies included in existing Rule 9J-5.006(5)(l) through zoning and land development regulations. At hearing, Petitioners narrowed their argument to this one feature in the rule. Because the Department may lawfully require that new towns be designated on the FLUM, subparagraph 18. is consistent with the statute implemented. See Findings 62-65, infra.

53. Subparagraph 19. requires that RLSA plan amendments contain goals, objectives, and policies "to ensure that any use

of the underlying densities and intensities of land uses assigned to parcels of land by the county comprehensive plan prior to designation of the RLSA furthers the principles of rural sustainability." Petitioners contend this provision contravenes Section 163.3177(11)(d)6., Florida Statutes, because it "impinges on existing land use rights which is contrary to one of the statutory principles of rural sustainability, namely the 'restoration and maintenance of the economic value associated with rural lands.'" The rule, however, furthers the principles of rural sustainability, as required by Section 163.3177(11)(d)1., Florida Statutes, since it requires that all lands within an RLSA, whether or not in a Designated Receiving Area, be developed in a manner that furthers those principles. It does not contravene the cited statute.

54. Petitioners also contend that subparagraph 19. contravenes Section 163.3161(9), Florida Statutes, which requires, among other things, that all programs be applied "with sensitivity for private property rights and not be unduly restrictive." Petitioners surmise that the rule may operate to displace underlying density within the RSLA regardless of the use of the RLSA credit system. However, the rule does not displace any underlying density; it only requires that underlying rights be exercised consistent with the RLSA. More specifically, existing densities may be used in any manner that

furthers the principles without displacing any of those densities. The rule does not contravene either statute.

c. Is proposed rule 9J-5.026(3) vague and does it have inadequate standards for agency decisions?

55. Petitioners next contend that subsection (3) of proposed rule 9J-5.026, and specifically certain words within the definition of the term "greenbelt," are vague and fail to establish adequate standards for agency decisions. That provision reads as follows:

> 9J-5.026 Rural Land Stewardship Area (RSLA)
>
> * * *
>
> (3) Definitions
>
> * * *
>
> (d) "Greenbelt" means a border of permanently undeveloped land sufficient in size to effectively preclude the expansion of urban development into the surrounding rural lands and to provide an effective buffer to protect the surrounding rural resources from development impacts.

56. A greenbelt is an undeveloped area that surrounds an urban area, a new town, or other urban development and is meant to separate the urban developed area from the surrounding area to provide a border that protects surrounding rural lands from urban development. Petitioners contend that the use of the adjectives "sufficient," "effectively," and "effective" to

describe the greenbelt buffer are vague and lack standards to guide agency determinations.

57. In common usage, the word "sufficient" means that the greenbelt is sufficient in size to accomplish its purpose of precluding the expansion of urban development into the surrounding rural lands. Similarly, the word "effectively" means that the use or creation of a buffer to protect urban encroachment on rural lands will be accomplished in an effective manner. Likewise, the word "effective" simply means that the greenbelt achieves the purpose of creating a buffer. These phrases are easily understood by persons of ordinary intelligence, particularly when read in context with other provisions of the rule. See, e.g., Cole Vision Corp., et al. v. Dept. of Bus. and Prof. Reg., 688 So. 2d 404, 410 (Fla. 1st DCA 1997).

58. Petitioners contend, however, that the rule fails to explicitly include the standard that site-specific data would be considered in determining the "sufficiency" of a buffer. However, this level of detail is not needed since site-specific information is typically considered and applied by the local government and Department through the planning process and might include, for example, the nature of the urban area, the potential impacts if the urban area is extended, the nature of

the surrounding land, and other similar factors. The rule is not so vague or lacks sufficient standards as to be invalid.

d. Is proposed rule 9J-5.026(9)(a)18. arbitrary?

59. Petitioners further contend that subparagraph (9)(a)18. of proposed rule 9J-5.026 is arbitrary. That rule reads as follows:

> 18. Policies for new towns which comply with the following:
> a. As required by subsection 9J-5.003(80) and paragraph 9J-5.006(5)(1), F.A.C., a new town shall be designated on the future land use map. A new town shall be located within a Designated Receiving Area. The plan amendment designating a new town shall include a master development plan that establishes the size of the new town, the amount, location, type, density and intensity of development, and the design standards to be utilized in the new town.
> b. Any increase in the density or intensity of land use required to achieve the proposed new town may occur only through the use of stewardship credits assigned or transferred to the Designated Receiving Area either prior to or subsequent to the designation of the new town on the future land use map.
> c. New towns shall be surrounded by greenbelts, except for any connecting rural road corridors and to the extent that new towns are adjacent to existing or planned urban development or incorporated areas.
> d. A future land use map amendment to designate a new town shall be internally consistent with RLSA provisions of the comprehensive plan.
> e. A future land use map amendment to designate a new town shall be accompanied by an amendment to the capital improvements element to incorporate a financially feasible five-year capital improvements schedule for the public facilities necessary

> to serve the new town and an amendment to the transportation or traffic circulation element to designate any new rural road corridors required to connect the new town with the rest of the RSLA.

60. As noted earlier, this rule sets forth the requirements for policies in the RLSA plan amendment that are applicable to new towns. Petitioners contend that the rule is arbitrary because it "selectively emphasizes" a new town as only one of several innovative and flexible planning strategies set forth in existing Rule 9J-5.006(5)(l).

61. To be arbitrary, a rule must not be supported by logic or the necessary facts. See § 120.52(8)(e), Fla. Stat. Here, the more persuasive evidence shows that new towns are much larger development types; they are more intense than other development forms; and they will likely generate greater impacts. In an RLSA, they take on even more significance since the planning goal is to further the principles of rural sustainability. Collectively, these factors form a sufficient basis and rationale for giving new towns different treatment than other development forms that are smaller, have fewer uses, are less intense, and are more likely to have lesser impacts. The proposed rule is not arbitrary.

e. Does existing Rule 9J-5.003(80) contravene the specific provisions of law implemented?

62. Finally, Petitioners have challenged existing Rule 9J-5.003(80), which became effective in 1994, on the ground that it contravenes the specific provisions of law implemented. That rule defines the term "new town" as follows:

> (80) "New town" means a new urban activity center designated on the future land use map and located within a rural area, distinct and geographically separated from existing urban areas and other new towns. A new town is of sufficient size, population and land use composition to support a variety of economic and social activities consistent with an urban area designation. New towns include basic economic activities; all major land use categories; and a centrally provided full range of public facilities and services. New towns are based on a master development plan.

63. The specific authority for the rule, when adopted, was Section 163.3177(9) and (10), while the law being implemented was identified as Sections 163.3177 and 163.3178, Florida Statutes. Because Section 163.3178 involves coastal management, and a new town would probably not be located in a coastal zone, it has marginal relevance to this proceeding. The Department relies principally on Section 163.3177(6)(a), Florida Statutes, which requires, among other things, that "various categories of land use shall be shown on a land use map or map series."[6]

64. The existing definition provides, in part, that a new town will include "all major land use categories, with the possible exception of agricultural and industrial." Because they include numerous land use categories, new towns are by definition a mixed-use land use category. See Fla. Admin. Code R. 9J-5.006(4)(c). Mixed-use land use categories must be designated on the FLUM. See § 163.3177(6)(a), Fla. Stat.("The future land use plan may designate areas for future planned development use involving combinations of types of uses").

65. As noted above, a new town is recognized in existing Rule 9J-5.006(5)(l) as an innovative and flexible planning option. Because the Legislature referenced this rule provision with approval four times in the RLSA statute, it must be presumed that the Legislature was expressing approval of the existing definition with the mapping requirement. See §§ 163.3177(11)(d)1. (two separate references); 163.3177(11)(d)4.c.; and 163.3177(11)(d)4.e. The rule does not contravene the statute being implemented.

CONCLUSIONS OF LAW

66. The Division of Administrative Hearings has jurisdiction over this matter pursuant to Sections 120.56, 120.569, and 120.57(1), Florida Statutes.

67. Petitioners have challenged the proposed rules in accordance with the definition of "invalid exercise of delegated

legislative authority" in Section 120.52(8)(b), Florida Statutes, which provides:

> (8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation which is required by s. 120.54(3)(a)1;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or
>
> (f) The rule imposes regulatory costs on the regulated person, county or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory directives.

68. In a proceeding to challenge a proposed rule, the petitioner has the burden of going forward initially with proof that supports the allegations in the petition. The agency then has the burden to prove by a preponderance of the evidence that

the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. See § 120.56(2), Fla. Stat.; St. Johns River Water Management District v. Consolidated-Tomoka Land Co. et al., 717 So. 2d 72, 76 (Fla. 1st DCA 1998). The proposed rule is not presumed to be valid or invalid. See § 120.56(2)(c), Fla. Stat. When an existing rule is challenged, a petitioner has the burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority. See § 120.56(3), Fla. Stat.

69. Section 120.52(8)(b), Florida Statutes, states that a proposed rule is invalid where "[t]he agency has exceeded its grant of rulemaking authority, citation to which is required . . . ." The same statute provides a set of general standards applicable to all subsections in determining rule validity. These standards are contained in the closing paragraph of the statute (and Section 120.536(1), Florida Statutes) and read as follows:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious and is within the agency's

> class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of any agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

70. Under these general standards, the primary issue is "whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough." Southwest Fla. Water Management District, et al. v. Save the Manatee Club, Inc., et al., 773 So. 2d 594, 599 (Fla. 1st DCA 2000). A rule must be based on an explicit power or duty identified in the enabling statute. Id. at 599. If it does not implement or interpret a specific power or duty conferred by the statute, the rule is invalid. Id. at 600. At the same time, a rule may not be invalidated simply because the governing statute, as opposed to the challenged rule, confers discretion upon the agency. Fla. Public Service Comm., et al. v. Fla. Waterworks Association, et al., 731 So. 2d 836, 843 (Fla. 1st DCA 1999).

71. For the reasons given in the Findings of Fact, the preponderance of the evidence supports a conclusion that subsections (2), (4), and the first four words of (5) of

proposed rule 9J-11.023 do not exceed the Department's grant of rulemaking authority.

72. A proposed rule may be invalidated if the "rule enlarges, modifies, or contravenes the specific provisions of law implemented . . . ." See § 120.52(8)(c), Fla. Stat. For the reasons given in the Findings of Fact, the preponderance of the evidence supports a conclusion that proposed rules 9J-5.026(7)(b), (7)(c)4., 6., (8)(a), (9)(a)3., 6., 18., and 19. and existing Rule 9J-5.003(80) do not enlarge, modify, or contravene the statutes being implemented.

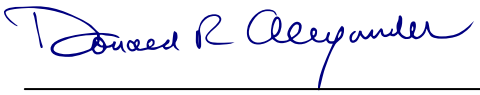
73. A rule is arbitrary if it is not supported by logic or necessary facts, while a rule is capricious if it is adopted without thought or reason. See § 120.52(8)(e), Fla. Stat. The burden of proving that the challenged provisions are neither arbitrary nor capricious is upon the Department. Consolidated-Tomoka at 77. For the reasons given in the Findings of Fact, the preponderance of the evidence supports a conclusion that proposed rule 9J-5.026(9)(a)18. is not arbitrary.

74. Finally, a proposed rule may be invalidated if it is vague or fails to establish adequate standards for the agency. See § 120.52(8)(d), Fla. Stat. For the reasons given in the Findings of Fact, proposed rule 9J-5.026(3) is not so vague or lacks adequate standards for a Department decision as to violate this requirement.

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

ORDERED that the Petition challenging proposed rules 9J-11.023(2), (4), and the first four words of (5); 9J-5.026(7)(b), (7)(c)4., 6., (8)(a), and (9)(a)3., 6., 18. and 19.; 9J-5.026(3); and existing Rule 9J-5.003(80) is dismissed.

DONE AND ORDERED this 14th day of September, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 14th day of September, 2009.

ENDNOTES

1/ In the Pre-Hearing Stipulation, or during the hearing, Petitioners withdrew their allegations that proposed rules 9J-5.026(7)(b) and (9)(a)10. were vague, and that proposed rules 9J-5.026(9)(a)17. and 21. enlarged, modified, or contravened the specific provisions of law being implemented.

2/ Except where otherwise noted, all references are to the 2008 version of the Florida Statutes.

3/ In their Petition and paragraph 19 of their Proposed Final Order, Petitioners argue that proposed rule 9J-11.023 in its entirety is an invalid exercise of delegated legislative authority. In paragraph 15 of their Proposed Final Order, however, they assert only that subsections (2), (4), and (5) are invalid. In the closing paragraph of their Proposed Final Order, they request that subsections (2) and (4) and "that part of (5) which states 'If authorized to proceed'" be declared invalid. Given these statements, only subsections (2), (4), and the first four words in subsection (5) will be addressed.

4/ At hearing, the Department filed a Motion in Limine (Motion) to exclude all evidence regarding an allegation by Petitioners that paragraph (7)(b) enlarges, modifies, or contravenes the law being implemented on the ground this allegation was not raised as a factual dispute in the initial pleading. Petitioners included this issue, however, in the Joint Pre-Hearing Stipulation on the theory that it was implicitly raised in another part of the Petition. A ruling on the Department's Motion was reserved and evidence on the issue was presented subject to the Department's objection. After the hearing was concluded, Petitioners filed a Motion to Conform the Pleadings to the evidence presented at hearing, which is opposed by the Department. This type of relief is not sanctioned by the Uniform Rules of Procedure, but rather is derived from Florida Rule of Civil Procedure 1.190, which was not adopted for use in administrative proceedings. The Motion in Limine is granted. Even so, for purposes of appellate review, if appropriate, findings relative to this issue are included in this Final Order. See Findings 40-42, infra.

5/ A majority of Section 163.3177(9), Florida Statutes, involves the original 1986 promulgation of minimum criteria rules for the review and determination of compliance of local government comprehensive plans with the Growth Management Act and is, therefore, inapplicable here. The subsection also contains a provision that the Department "may adopt procedural rules that are consistent with [§ 163.3177] and chapter 120 for the review of local government comprehensive plan elements." Because proposed rule 9J-11.023 does not directly address the review of local government comprehensive plans, this portion of the statute also appears to be inapplicable here.

6/ That portion of Section 163.3177(6)(a), Florida Statutes (1993), which the rule implemented when it became effective in 1994, has not been changed in any material respect since that time.

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NOTICE OF RIGHT TO APPEAL

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.