

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD A. BURGESS, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 DEPARTMENT OF COMMUNITY AFFAIRS )  
 AND CITY OF EDGEWATER, ) Case No. 09-2080GM  
 )  
 Respondents, )  
 )  
 and )  
 )  
 HAMMOCK CREEK GREEN, LLC, )  
 )  
 Intervenor. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

The final hearing in the this case was held on May 17 and 18, 2010, in Edgewater, Florida, before Bram D. E. Canter, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues to be determined in this case are whether the amendments to the City of Edgewater's Comprehensive Plan, adopted by Ordinance No. 2008-0-10, and revised in part by the remedial amendments in Ordinance Number 2010-0-01 ("Plan Amendments"), are "in compliance," as that term is defined in Section 163.3184(1)(b), Florida Statutes (2009).<sup>1/</sup>

PRELIMINARY STATEMENT

On February 2, 2009, the City of Edgewater created the Restoration Sustainable Community Development District through a text amendment to the Future Land Use Element (FLUE) and an amendment of the Future Land Use Map (FLUM). Following its review of the adopted amendments, the Department of Community Affairs (Department) issued a Statement of Intent, finding the

amendments not "in compliance," and filed a petition for hearing with the Division of Administrative Hearings on April 20, 2009. Thereafter, the City, the Department, and Intervenor Hammock Creek Green, LLC (Hammock Creek), entered into a stipulated settlement agreement resolving all of their disputed issues. The City adopted a remedial amendment pursuant to the settlement agreement and on March 18, 2010, the Department issued its Cumulative Notice of Intent to find the Plan Amendments "in compliance." The case proceeded with the parties re-aligned.

Petitioner presented the testimony of Bill Greiff; James Cromer, accepted as an expert in Geographic Information Systems; Richard Burgess; Ashley Porter, accepted as an expert in land planning; Bonnie Wenzel; Darren Lear, accepted as an expert in land planning; and Charles Gauthier, accepted as an expert in land planning. Petitioner's Exhibit Nos. 1 through 9, 14, 15, 19, 23, 26 through 28, 30, 33, 35, 37 through 39, 45, 46, 50, 59 through 61, 72, and 75 were admitted into evidence. Petitioner's Exhibit No. 20 was placed in the record as a proffer only.

Hammock Creek presented the testimony of Don Mears, principal of Hammock Creek. The City presented the testimony of Ken Metcalf, accepted as an expert in land planning. City/Intervenor Exhibits 26 and 39 were admitted into evidence. The Department presented the testimony of Ashley Porter and

Charles Gauthier. Department Exhibit Nos. 6 and 7 were admitted into evidence. Joint Exhibits 1 through 4 were also admitted into evidence.

The four-volume Transcript of the final hearing was filed with DOAH. The parties filed proposed recommended orders that were carefully considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

##### The Parties

1. The Department is the state land planning agency and is statutorily charged with the duty to review comprehensive plan amendments and to determine whether amendments are "in compliance," as that term is defined in Section 163.3184(1)(b), Florida Statutes.

2. The City is a municipality in Volusia County and has adopted a comprehensive plan that it amends from time to time pursuant to Chapter 163, Part II, Florida Statutes.

3. Hammock Creek is a Delaware limited liability company registered with the State of Florida. It owns the property that is the subject of the Plan Amendments. Through its representatives, Hammock Creek submitted comments to the Edgewater City Council at the transmittal and adoption hearings for the Plan Amendments.

4. Petitioner Richard Burgess resides in the City, owns real property in the City, and operates a business in the City.

5. At the public hearings on the original amendment package adopted by Ordinance No. 2008-0-10, Petitioner made comments on behalf of Edgewater Citizens Alliance for Responsible Development, Inc. (ECARD), as its vice-president. ECARD was an intervenor in this proceeding, but voluntarily dismissed its petition before the final hearing.

6. Petitioner submitted written comments on his own behalf at the adoption hearing for the remedial amendments adopted by Ordinance No. 2010-0-01.

#### The Plan Amendments

7. The Plan Amendments create a new land use category, the Restoration Sustainable Community Development District ("Restoration SCD"), which is described in a new Restoration SCD Sub-Element of the FLUE:

The Restoration SCD is the result of a conscious planning approach based on the most current New Urbanist research and advanced practices. The compact development pattern is designed to and shall provide for a diverse community with distinct place types and multiple experiences that are appealing to residents, employees, and visitors. It shall provide for walkability, a broad range of inclusive household demographics, the ability to connect the community directly to a natural experience, transit ready design, and a high level of environmental stewardship and planning.

\* \* \*

In order to facilitate this vision, the City shall recognize that density is important to the restoration SCD outcome, but no more important than the mixing of uses, the development of a diverse population through the provision of housing choice and employment centers, the connection of streets and the design of structures and spaces on a human scale.

8. The Restoration SCD land use category applies to 5,187 acres of land on the west side of Interstate 95 that are owned by Hammock Creek. The Restoration SCD site is not currently being used, but in the past was used for silviculture.

9. The Restoration SCD site was annexed into the City in 2005, but is being assigned a future land use designation for the first time. The Volusia County land use categories for the property are Environmental Systems Corridor, which allows a maximum residential density of one unit per 25 acres, and Forestry Resource, which allows a maximum residential density of one unit per 20 acres, or up to one unit per five acres with clustering.

10. The Restoration SCD Sub-Element includes the Restoration SCD Conservation/Development Areas Map, which divides the site into three areas: Conservation, SCD Conservation/Restoration, and SCD Community Development. The SCD Community Development area is also referred to as the "Build

Envelope" because it is the only area where development can occur.

11. The Build Envelope is approximately 25 percent of the total land area. At least 50 percent of the Restoration SCD site is required to be permanently protected open space.

12. The SCD District is integrally related to a Development of Regional Impact (DRI) proposed for the lands that are the subject of the Plan Amendments.

13. The Resolution SCD includes several of the development controls listed in Florida Administrative Code Rule 9J-5.006(5)(j) which discourage urban sprawl, including: open space requirements; clustering; the establishment of minimum development density and intensity; phasing of urban land use types, densities, and intensities; traditional neighborhood development form; buffering; planned unit development requirements; restriction of the expansion of the urban area; and jobs-to-housing balance requirements.

14. Edgewater is a relatively old Florida City that was developed with strip commercial along the highway and other development forms that were typical before the enactment of Chapter 163 and the requirement for comprehensive planning. The Restoration SCD introduces modern development principles and forms.

15. Within each element of the City's Comprehensive Plan, there are data and analysis summaries. There is also a separate section entitled "Population Projections." The Plan Amendments revise or add information to some of these data and analysis summaries.

16. The Plan Amendments also include some "housekeeping" changes that delete obsolete portions of the Comprehensive Plan and extend several planning horizons in the plan from 2010 to 2020.

#### Mixed Uses

17. Petitioner contends that the Restoration SCD lacks adequate policies to implement the types of land uses allowed, the percentage distribution among the mixed uses, or other objective measurement, and the density or intensity of each use as required by Rule 9J-5.006(4)(c).

18. Restoration SCD is the future land use designation for the entire site. Policy 3.1.1 describes seven subcategories of uses within Restoration SCD: Residential, Mixed-Use Town Center, Work Place, Transit-Ready Corridor, Utility Infrastructure Site, Schools, and Open Space.

19. Various policies of the Restoration SCD Sub-Element establish minimum and maximum percentages for the subcategories of uses. Table I-4 in the Plan Amendments shows the various land uses, their densities and intensities, and their acreages.



20. The Restoration SCD land use designation has an overall residential density cap of 8,500 residential units and a non-residential intensity cap of 3,300,000 square feet.

21. Policy 7.1.1 ensures a continuing balance of residential and non-residential development by tying the number of residential building permits that can be issued to the square footage of non-residential development that has been constructed. For example, residential units cannot exceed 1,500 until 180,000 square feet of non-residential uses have been constructed.

Format

22. Petitioner contends that the Plan Amendments are not consistent with the format requirements of Rule 9J-5.005(1) because the sources, dates, and other information associated with tables, figures, and other materials included in the Plan Amendments are not identified.

23. Exhibit A to the new Restoration SCD Sub-Element does not show a source, preparation date or name of the preparer.

24. FLUE Table I-3 shows a source and name of the preparer, but not a preparation date.

25. FLUE Table I-4 shows a source, a preparation date, and name of the preparer.

26. Within the Population Projections section of the Comprehensive Plan, Table P-1 shows a source, but not a

preparation date or name of the preparer. Table P-2, Figures P-1 and P-2, and Tables P-3 through P-5 do not show sources, preparation dates, or names of the preparers. Tables P-6 and P-7 show sources and names of the preparers, but no preparation dates. Table P-9 does not show a source, preparation date, or name of the preparer.

27. Within the Housing Element, Tables III-13 through III-15 and Tables III-17 through III-20 show sources and names of the preparers, but no preparation dates.

28. The tables and figures that Petitioner objects to are included in the Comprehensive Plan as supporting data and analysis. They are not parts of goals, objectives, or policies.

29. Rule 9J-5.005(2)(e) requires that maps include major natural and man-made geographic features and city and county boundaries. The Resolution SCD Conservation/Development Areas Map does not show geographic features or government boundaries.

30. There are other maps in the FLUE that show natural and man-made geographic features and city and county boundaries.

31. Policies 1.1.1 and 3.1.1 refer to Map "H", which is part of the DRI Development Order. Petitioner objects to the omission of Map "H" from the Comprehensive Plan.

32. The Director of the Department's Division of Community Planning stated that it is not the practice of the Department to

treat a format error or omission as requiring a determination that a plan amendment is not in compliance.

#### Adoption by Reference

33. Petitioner contends that the Plan Amendments adopt regulations and other materials by reference, but not in accordance with Rule 9J-5.005(2)(g), which requires that the reference "identify the title and author of the document and indicate clearly what provisions and edition of the document is being adopted." Petitioner asserts that the following provisions include inadequate adoptions by reference: Policy 1.1.1, Policy 3.1.1, Objective 4.1, Policy 4.1.3, Policy 4.1.7, Policy 4.1.11, Goal 5, Policy 6.1.1, Policy 8.1.4, Policy 9.1.1, Policy 10.1.1, Policy 11.1.1, Policy 11.1.4, and Policy 12.1.6.

34. Policies 1.1.1 and 3.1.1, Objective 4.1, and Policies 4.1, 4.1.3, 4.1.7, and 4.1.11 refer to state, regional, and federal laws or regulatory programs, but they do not purport to adopt these laws and programs by reference. The purpose of these provisions is not for the City to apply or have any role in the regulatory process or decision-making associated with the referenced laws and programs.

35. The wording of these provisions is consistent with the City's assertion that its intent is merely to provide notice of related permitting programs with which the developer will have to comply.

36. Goal 5 refers to New Urbanism and other land use design principles as described in the literature of the Congress of New Urbanism, the Urban Land Institute and similar organizations, but the goal does not purport to adopt this literature by reference. The goal states that design policies will be adopted by the City in the future. No specific design principles are adopted, by reference or otherwise, in Goal 5.

37. Policy 6.1.1 refers to affordable housing and defines the term as a percentage of Volusia County's Average Median Income. The policy does not purport to adopt any materials by reference.

38. Policies 8.1.4 and 11.1.1 refer to design principles which are to be adopted in the future. The policy does not purport to adopt this literature by reference. No specific design principles are adopted, by reference or otherwise, in Policies 8.1.4 or 11.1.1.

39. Policy 9.1.1 addresses school concurrency and refers to a Capacity Enhancement Agreement ("CEA") entered into by the City, the developer, and the Volusia County School Board to ensure that schools are timely planned and constructed to serve the student population. The policy does not purport to adopt the CEA by reference. Petitioner did not show that the CEA is not self-executing.

40. Policy 10.1.1 refers to "green" development practices that meet the certification programs of the United States Green Building Coalition or the Florida Green Building Code, which will be incorporated into the DRI Development Order. The policy does not purport to adopt these certification programs by reference. No specific green design practices are adopted, by reference or otherwise, in Policy 10.1.1.

41. Policy 11.1.4 refers to vehicle trips as calculated by the Institute of Transportation Engineers Trip Generation Manual. This is the standard manual used by all traffic engineers. The policy does not purport to adopt the manual by reference.

#### Planning Timeframes

42. Petitioner contends that the Plan Amendments cause the Comprehensive Plan to be internally inconsistent because there are different planning horizons in the Plan. The Plan Amendments extend several planning horizons to 2020, but the planning horizon in the Recreation and Open Space Element remains 2010, the water supply work plan has a planning horizon of 2018, and the Public School Facilities Element has a planning horizon of 2025.

43. Petitioner did not identify an adverse effect created by the different planning horizons.

44. The City is currently preparing its Evaluation and Appraisal Report (EAR)-based amendments. The EAR process is

statutorily mandated, periodic review and update of the entire Comprehensive Plan. It is the logical process for reviewing and revising planning horizons in the plan.

Conservation Element and Housing Element Data

45. Petitioner contends that the support documentation that is included as part of the Conservation Element is not the best available data. However, Petitioner did not produce better data, except for the Florida Fish and Wildlife Conservation Commission's more recent listed species rules, or show how better data do not support the Plan Amendments.

46. Similarly, Petitioner contends that some of the support documentation that is included as part of the Housing Element is not the best available data. Petitioner did not produce better data or show how better data do not support the Plan Amendments.

Need

47. Petitioner contends that the best available data do not show a need for the residential and nonresidential land uses allowed by the Plan Amendments.

48. The Population Projections section in the Comprehensive shows a projected City population of 34,481 by 2020. The Department determined that the 2020 population forecast was reasonable.

49. It is not the practice of the Department to require local governments to update their population projections every time an amendment is adopted.

50. The 2020 population projection is derived from forecasts of the University of Florida's Bureau of Business and Economic Research BEBR. BEBR forecasts county populations, from which city population projections must be extrapolated. BEBR frequently under-forecasts population growth for cities. BEBR forecasts do not account for localized factors that can change the attractiveness of a particular area to prospective new residents and, therefore, stimulate population growth.

51. Applying an "allocation factor," the Department determined that the number of residential units allowed by the Plan Amendments was reasonably in line with the 2020 forecast. An allocation factor is a multiplier applied to account for factors that prevent the full or efficient use of densities allowed by a FLUM.

52. In addition, population projections are not the sole consideration in determining the need for a plan amendment. In the case of the Restoration SCD, higher densities and intensities are necessary as a part of the intended development form. Higher densities and intensities are also necessary to achieve the objectives of Section 163.3177, Florida Statutes, including the

encouragement of transit-oriented and energy-efficient communities.

53. A need analysis for non-residential land uses in the Resolution SCD was not conducted by the City because the non-residential uses are intended to serve and be integrated with the residential uses, and are required to be developed in pace with the residential development. The Department found this approach acceptable.

#### CONCLUSIONS OF LAW

##### Standing

54. For standing to challenge a plan amendment, a challenger must be an "affected person," which is defined in Section 163.3184(1)(a), Florida Statutes, as a person who resides, owns property, or owns or operates a business within the local government whose comprehensive plan amendment is challenged, and who submitted comments, recommendations, or objections to the local government during the period of time beginning with the transmittal hearing and ending with amendment's adoption.

55. The City and Hammock Creek assert that Petitioner has standing to challenge the remedial amendments adopted by Ordinance No. 2010-0-01, but not the original amendments adopted by Ordinance No. 2008-0-10 because Petitioner's comments on the latter were made as vice-president of ECARD. However,



Petitioner's comments to the City Council for ECARD were made on behalf of all of the individual members of ECARD, including Petitioner himself. The intent of Chapter 163 to limit standing to persons who participated in the local government proceedings on a plan amendment is satisfied. Petitioner has standing as an affected person to challenge the Plan Amendments.

56. Hammock Creek is an affected person with standing to intervene in this proceeding.

Standard and Burden of Proof

57. Pursuant to Chapter 163.3184, Florida Statutes, the Department is to determine whether comprehensive plan amendments are "in compliance." The term "in compliance" is defined in Section 163.3184(1)(b), Florida Statutes:

In compliance" means consistent with the requirements of ss. 163.3177, when a local government adopts an educational facilities element, 163.3178, 163.3180, 163.3191, and 163.3245, with the state comprehensive plan, with the appropriate strategic regional policy plan, and with chapter 9J-5, Florida Administrative Code, where such rule is not inconsistent with this part and with the principles for guiding development in designated areas of critical state concern and with part III of chapter 369, where applicable.

58. The standard of proof to establish a finding of fact is preponderance of the evidence. See § 120.57(1)(j), Fla. Stat.

59. The Department found the Plan Amendments to be "in compliance." Therefore, pursuant to Section 163.3184(9)(a), Florida Statutes, the plan amendment "shall be determined to be in compliance if the local government's determination of compliance is fairly debatable."

60. The term "fairly debatable" is not defined in Chapter 163, Part II, Florida Statutes. The Florida Supreme Court in Martin County v. Yusem, 690 So. 2d 1288 (Fla. 1997), held that "[t]he fairly debatable standard is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety." Id. at 1295.

#### Mixed Uses

61. Section 163.3177(6)(a), Florida Statutes, provides that "[t]he future land use plan may designate areas for future planned development use involving combinations of types of uses for which special regulations may be necessary to ensure development in accord with the principles and standards of the comprehensive plan and this act."

62. Rule 9J-5.006(4)(c) encourages mixed uses and, when they are used, requires these categories to be implemented through policies for the percentage distribution among the various uses or other objective measurement, and the density or intensity of each use.

63. Petitioner apparently objects to the flexibility that the Plan Amendments provide through the use of minimum and maximum densities and intensities. The Department does not interpret Section 163.3177(6)(a) or Rule 9J-5.006(4)(c) to prohibit this kind of flexibility, and the Department's interpretation is a reasonable one.

64. Petitioner failed to prove that the Plan Amendments do not adequately identify or regulate the distribution of mixed uses allowed in the Restoration SCD as required by Section 163.3177(6)(a) and Rule 9J-5.006(4)(c).

#### Format

65. Rule 9J-5.005(1)(d) states that "The comprehensive plan format shall include," among other things:

6. Titles and sources for all tables, maps, and figures;
7. A preparation date; and
8. Name of the preparer.

66. Petitioner assumes that tables, maps, and figures require not only "titles and sources" as stated in 6., above, but also a preparation date and name of the preparer. No evidence was presented to show that the practice of the Department is to require tables, maps, and figures to include more than titles and sources. The plain language of the rule does not require tables,

maps, and figures to include preparation dates and names of the preparers.

67. Support documents do not have to be adopted in a comprehensive plan. See Fla. Admin. Code R. 9J-5.005(1)(c). Whether adopted in a plan or not, data and data summaries are not subject to compliance review. See § 163.3177(10)(e), Fla. Stat.

68. The practice of the Department to treat format errors as not requiring a "not in compliance" determination is based on a reasonable interpretation and application of the relevant law.

#### Adoption by Reference

69. Rule 9J-5.005(2)(g) provides in part:

A local government may include, as part of its adopted plan, documents adopted by reference but not incorporated verbatim into the plan. The adoption by reference must identify the title and author of the document and indicate clearly what provisions and edition of the document is being adopted.

70. The references in the Plan Amendments of which Petitioner complains do not adopt materials by reference and, therefore, are not inconsistent with Rule 9J-5.005(2)(g).

#### Planning Timeframes

71. Subsection 163.3177(2), Florida Statutes, requires the elements of a comprehensive plan to be internally consistent. Plan amendments must preserve the internal consistency of the plan. See § 163.3187(2), Fla. Stat. The requirement for

internal consistency is repeated in Florida Administrative Code Rule 9J-5.005(5)(a).

72. Section 163.3177(5)(a), Florida Statutes, requires a comprehensive plan to include at least two planning periods, one covering at least the first five-year period after the plan's adoption and one covering at least a ten-year period. There is no express requirement in Chapter 163 or Rule Chapter 9J-5 that a comprehensive plan maintain uniform planning timeframes.

73. Petitioner's claim that the use of different planning timeframes in different elements of the Comprehensive Plan causes the plan to be internally inconsistent requires more than merely pointing out that different timeframes are being used. Petitioner failed to prove that an adverse effect is caused by the use of different planning timeframes in the City's Comprehensive Plan.

74. The City's determination that the Plan Amendments are internally consistent is fairly debatable.

#### Data and Analysis

75. Section 163.3177(10)(e), Florida Statutes, requires plan amendments to be based upon "appropriate" data. Florida Administrative Code Rule 9J-5.005(2)(a) requires all amendments to be based on relevant and appropriate data and analysis.

76. Petitioner argues that the Plan Amendments must be supported by the data and analysis submitted to the Department of

Community Affairs. Petitioner's argument is based on his interpretation of the transmittal requirements set forth in Rule Chapter 9J-11, which is contrary to the Department's interpretation of these requirements. Rule 9J-5.005(2)(c) states that a plan amendment must be based on data available "at the time of the adoption" of the plan amendment. It does not impose the additional limitation that all the supporting data must have been in the transmittal package(s) sent to the Department. Furthermore, it is well-established that the analysis of data may be conducted up to the time of the final administrative hearing. See Zemel v. Lee County, Case No. 90-7793 (Dep't of Comty. Affairs June 22, 1991) aff'd, 642 So. 2d 1367 (Fla. 1st DCA 1994).

77. Petitioner contends that the inclusion within the Plan Amendments of data that are not the best available data is a violation of the requirement of Rule 9J-5.005(2)(c) that a plan amendment be based on the best available data. That contention is misplaced, because whether a plan amendment is based on the best available data and whether a plan amendment publishes the best available data are two different matters. If a plan amendment is based on the best available data, the fact that other data are published in the comprehensive plan is not a violation of Rule 9J-5.005(2)(c).

78. Furthermore, as stated above, data and data summaries in a comprehensive plan are not subject to compliance review. See § 163.3177(10)(e), Fla. Stat.

79. Petitioner's use of more recent population projections to attack the Plan Amendments conflicts with Florida Administrative Code Rule 9J-5.005(5)(a), which requires that, where data such as population projections are relevant to several elements, the same data shall be used. The most recent population projections are not the "best" available data if use of the data would cause internal inconsistency.

80. Comprehensive planning involves more than matching residential densities with population projections. It also seeks to achieve high-quality communities, economic vitality, efficient provision of public services, and other important objectives. See § 163.3177, Fla. Stat. Unless a comprehensive plan makes population projections the sole criterion for allowing an increase in residential or non-residential uses,<sup>2/</sup> other factors may be considered in determining the need for a particular plan amendment. These Plan Amendments are needed to serve the projected population of Edgewater and the other objectives identified in Section 163.3177, Florida Statutes.

81. Petitioner failed to prove beyond fair debate that the Plan Amendments are not based on relevant and appropriate data, including data and analysis regarding need.

82. In summary, Petitioner failed to prove beyond fair debate that the Plan Amendments are not in compliance.

RECOMMENDATION

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

RECOMMENDED that the Department of Community Affairs enter a Final Order finding that the amendments to the City of Edgewater's Comprehensive Plan, adopted by Ordinance No. 2008-0-10 and revised by Ordinance Number 2010-0-01, are "in compliance."

DONE AND ENTERED this 27th day of July, 2010, in Tallahassee, Leon County, Florida.



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BRAM D. E. CANTER  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 27th day of July, 2010.

ENDNOTES

1/ All references to the Florida Statutes are to the 2009 codification unless otherwise stated.



2/ See Woods v. Marion County, Case No. 08-1576GM (Admin. Comm'n Sept. 17, 2009); Dep't of Comty. Affairs v. Miami-Dade County, Case No. 08-3614GM (Admin. Comm'n Jul. 30, 2009). These cases involved comprehensive plans that imposed a specific method or formula for determining need.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.