

IN THE DISTRICT COURT OF APPEAL
FOR THE FOURTH DISTRICT

1000 FRIENDS OF FLORIDA, INC., a
Florida not-for-profit corporation,
FLORIDA WILDLIFE FEDERATION, a Florida
not-for-profit corporation and the
JUPITER FARMS ENVIRONMENTAL COUNCIL, INC.,
a Florida not-for profit corporation
d/b/a LOXAHATCHEE RIVER COALITION,
AUDUBON SOCIETY OF THE EVERGLADES and
MARIA WISE-MILLER, an individual,

Appellants,

Case No. 4D05-2068
Final Order DCA 05-GM-082
DOAH Case No. 04-4492 GM

v.

STATE OF FLORIDA, DEPARTMENT OF
COMMUNITY AFFAIRS AND PALM BEACH
COUNTY,

Appellees.

INITIAL BRIEF OF APPELLANTS

Environmental and Land Use Law Center, Inc.

Richard Grosso, General Counsel
Florida Bar No. 592978
Shepard Broad Law Center
Nova Southeastern University
3305 College Avenue
Fort Lauderdale, Fl 33314
(954) 262-6140

Lisa Interlandi
Florida Bar No. 146048

Robert Hartsell
Florida Bar No. 0636207

Environmental and Land Use Law Center, Inc.
330 U.S. Highway 1, Suite 3
Lake Park, Fl 33403
(561) 844-5222

Attorneys for Appellants

TABLE OF CONTENTS

	<u>Page Number</u>
Table of Contents.....	i
Table of Authorities.....	iii
Introduction.....	1
Statement of the Case and Facts.....	1
Standard of Review.....	14
Summary of Argument.....	14
Argument One: The Amendments Violate the Mandatory Minimum Standards for Natural Resource Protection.....	15
Argument Two: Internal Inconsistencies.....	17
Argument Three: The Final Order Erred By Allowing The Compliance of the Plan Amendments to Rely Upon Standards Not Adopted As Part Of The Comprehensive Plan.....	26
Argument Four: The Final Order Erred In Allowing the Goals of an Optional Element to Override Inconsistencies With Mandatory Requirements.....	31
Argument Five: The Final Order Erred In Using The "Fairly Debatable" Test for Making Factual Determinations when it is to Apply Only to Legal Conclusions.....	35
Argument Six: Failures to Make Findings on Material Facts Impacted the Fairness of the Proceeding	38
Argument Seven: The Final Order Erred in Finding a Land Use Amendment in Compliance Without a Showing that the Amount of Land Is Required To Accommodate the Project.....	41

Argument Eight: The Final Order and the Amendments Violate the Requirement that Future Land Uses be Coordinated With Adequate Infrastructure.....	50
Argument Nine: The Final Order Erred in Allowing A Violation of the Mandatory Adequate Roadway Facilities (Concurrency) Requirement.....	54
Conclusion.....	59
Certificate of Service.....	60

Table of Authorities

United States Supreme Court Cases

<u>City of Memphis v. Greene,</u> 451 U.S. 100, 126-29 (1981).....	42
<u>Golden v. Planning Bd. of Ramapo,</u> 285 N.E.2d 291 (1972).....	42

Federal Appellate Cases

<u>Corn v. Lauderdale Lakes,</u> 997 F.2d 1369, 1375 (11th Cir. 1993).....	42
---	----

Florida Supreme Court Cases

<u>Citizens of the State of Florida v. PSC,</u> 425 So. 2d 534 (Fla. 1982).....	34
<u>City of Miami Beach v. Weiss,</u> 217 So.2d 836 (Fla. 1969).....	41
<u>Martin County v. Yusem,</u> 690 So.2d 1288 (Fla. 1997).....	53
<u>St. Petersburg Bank & Trust Co. v. Hamm,</u> 414 So.2d 1071 (Fla. 1982).....	34
<u>Towerhouse Condominiums, Inc. v. Millman,</u> 475 So.2d 674, 676 (Fla. 1985).....	47
<u>Williams v. State,</u> 492 So.2d 1051, 1054 (Fla. 1986).....	35

Florida Appellate Cases

<u>B & H Travel Corp. v. State Dep't of Community Affairs,</u> 602 So.2d 1362 (Fla. 1st DCA 1992).....	53
<u>Davis v. Sails,</u> 318 So. 2d 214, at 225 (Fla. 1st DCA 1975).....	53

<u>Devin v. City of Hollywood,</u> 351 So.2d 1022, 1025 (Fla. 4 th DCA 1976)	47
<u>Finlayson v. Broward Co.,</u> 471 So. 2d 67, 68 (Fla. 4 th DCA 1985)	41
<u>Fla. Dept. of Health v. Career Services,</u> 289 So.2d 412 (Fla. 4 th DCA 1974)	51
<u>Friends of the Hatchineha v. State DEP,</u> 580 So.2d 267 (Fla. 1 st DCA 1991).	55
<u>Harun v. Department of Children and Families,</u> 37 So.2d 537, 538 (Fla. 4 th DCA 2003)	55
<u>Home Builders and Contractors Ass'n v.</u> <u>Dep't. of Community Affairs,</u> 585 So. 2d 965 (Fla. 1 st DCA 1991)	48
<u>Island v. City of Bradenton, 884 So.2d 107</u> (Fla. 2 nd DCA 2004)	54
<u>McDonald v. Dept. of Banking and Finance,</u> 346 So.2d 569 (Fla.1 st DCA 1977)	54
<u>Memorial Healthcare v. State of Fla.,</u> 879 So.2d 72 (Fla. 1 st DCA 2004)	55
<u>Norwood-Norland Homeowners Assoc. v. Dade County,</u> 511 So.2d 1009, 1012 (Fla. 3d DCA 1987).....	54
<u>SCAID v. DCA, and Sumter County, et al,</u> 730 So. 2d 370 (Fla. 5 th DCA 1999)	19
<u>WCI Communities, Inc. v. City of Coral Springs,</u> 885 So. 2d 912 (Fla. 4th DCA 2004).....	42
<u>Watson v. Mayflower Property, Inc.,</u> 223 So.2d 368 (Fla. 4th DCA 1969).....	42
<u>White Construction Co v. FDOT,</u> 535 So. 2d 684 (Fla. 1st DCA 1988).....	55

Florida Administrative Cases

<u>1000 Friends of Florida, Inc. v.</u> <u>City of Daytona Beach, 1994 Fla. Div. Adm. Hear.</u> LEXIS 5389, 16 FALR 2428, 2456 (DCA 1994).....	28
<u>Austin et al .v. City of Cocoa and DCA,</u>	

1989 WL 645182, ER FALR 89:0128 (Admin. Comm. 1989).....	18
<u>Burke v. DCA,</u> 1992 Fla. ENV LEXIS 140; 92 ER FALR 166 (FLWAC 1992).....	22
<u>Cooper v. City of St. Petersburg Beach,</u> 14 FALR 3589 Admin. Comm. 1991) (1991 WL 833308)..	39, 52
<u>DCA, et al v. City of Islandia,</u> 1990 Fla. ENV. LEXIS 132; 90 ER FALR 44 (Admin. Comm. 1990).....	58
<u>DCA v. Escambia County,</u> DOAH CASE NO. 90-7663GM, (DOAH 1992), 1992 Fla. Div. Adm. Hear. (1992 WL 880137).....	27, 35
<u>DCA vs. Hillsborough County,</u> Case Nos. 89-5157GM, 90-6639GM 1992 WL 880113 (Fla. Div. Admin. Hrgs.).....	28
<u>DCA et. al v. Monroe County,</u> 1995 Fla. ENV. LEXIS 129y Admin. Comm. 1995).....	27
<u>DCA v. St. Lucie County,</u> 1993 WL 943708, 15 FALR 4744 (Admin. Comm. 1993).....	18,22, 35
<u>DCA vs. Walton County,</u> Case No. 91-1080GM, 1992 Fla. Env. LEXIS 186 (Fla. Div. Adm. Hear).....	28
<u>Geraci, Nick, et al.vs. DCA,</u> Case No. 95-0259GM, 1999 WL 65454 (Fla. Div. Admin. Hrgs.).....	28
<u>Growth and Envntl. Org., Inc. et al v.</u> <u>Sarasota County, et al,</u> 1997 WL 1052570, R:FALR 97:108 (DCA 1997)	35, 36
<u>Hiss v. Sarasota County and DCA,</u> 1992 WL 880868, 15 FALR 830 (Admin. Comm. 1991), aff'd 602 So. 2d 5353 (Fla. 1st DCA 1992).....	18
<u>Palm Beach County et al v. DCA et al,</u> DOAH Case Nos. 95-5939GM & 96-2563GM (DOAH 1997).	58
<u>Pope v. City of Cocoa Beach et al.,</u>	

1990 WL 749217, 12 FALR 4758 (1990).....	19
<u>Sheridan v. Lee County,</u> 16 FALR 654, 689 (Admin. Comm. 1994) (1992 WL 880138).....	28
<u>Sierra Club v. St. Johns County,</u> 2002 WL 1592234 (Fla. Div. Admin. Hrgs.).....	28
<u>Wilson et al. v. City of Cocoa and DCA,</u> 1991 WL 832930 at 45, ER FALR 91:142 (DCA 1991).....	58
<u>Florida Statutes</u>	
§ 120.57, Fla. Stat.....	51
§ 120.57(1)(j), Fla. Stat.....	15, 53
§ 120.57(1)(k), Fla. Stat.....	54
§ 120.68(7)(b), Fla. Stat.	14
§ 120.68(7)(c), Fla. Stat.....	14, 38
§ 120.68(7)(d), Fla. Stat.....	26, 28, 51
§ 120.68(7)(e)2, Fla. Stat.....	14
§ 120.68(7)(e)3, Fla. Stat.....	14
§ 120.569, Fla. Stat.....	51
§ 120.569(2)(m), Fla. Stat.....	51, 55
§ 163.2517, Fla. Stat.....	48
§ 163.3161(7), Fla. Stat.	17, 33
§ 163.3177(2), Fla. Stat.....	17, 18
§ 163.3177(3)(a)3, Fla. Stat.....	43
§ 163.3177(6), Fla. Stat.....	33
§ 163.3177(6)(a), Fla. Stat.....	35, 39, 59
§ 163.3177(6)(b), Fla. Stat.....	33
§ 163.3177(6)(d), Fla. Stat.....	16, 33, 58

§ 163.3177(7)(j), Fla. Stat.....	33, 34
§ 163.3177(8), Fla. Stat.....	37, 58
§ 163.3177(10)(e), Fla. Stat.....	58
§ 163.3177(10)(h), Fla. Stat.....	43
§ 163.3177(11)(a), Fla. Stat.....	10
§ 163.3177(11)(b), Fla. Stat.....	10
§ 163.3177 (11)(c), Fla. Stat.....	10
§ 163.3177(11)(e), Fla. Stat.....	10
§ 163.3180, Fla. Stat.....	43, 48
§ 163.3180(5)(a), Fla. Stat.....	48
§ 163.3180(5)(b), Fla. Stat.....	48
§ 163.3180(5)(c), Fla. Stat.....	48
§ 163.3180(7), Fla. Stat.....	49
§ 163.3180(9), Fla. Stat.....	49
§ 163.3184(1)(b), Fla. Stat.....	1
§ 163.3184(3)-(10), Fla. Stat.....	26
§ 163.3184(9), Fla. Stat.....	15, 52, 53
§ 163.3184(9)(a), Fla. Stat.....	51, 52
§ 163.3184(11)(a), Fla. Stat.....	18
§ 163.3187(2), Fla. Stat.....	17, 18
§ 163.3213, Fla. Stat.....	27
§ 163.6177(6)(a), Fla. Stat.....	57
§ 187.201(7)(a), Fla. Stat.....	10
§ 187.201(7)(b)(2), Fla. Stat.....	10
§ 187.201(9)(a), Fla. Stat.....	10

§ 187.201(9)(b), Fla. Stat.....	10
§ 187.201(9)(b)(7), Fla. Stat.....	10
§ 187.201(15)(a), Fla. Stat.....	10
§ 187.201(15)(b), Fla. Stat.....	10
§ 187.201(15)(b)(1), Fla. Stat.....	10
§ 187.201(15)(b)(2), Fla. Stat.....	10
§ 187.201(15)(b)(6), Fla. Stat.....	10
§ 187.201(17)(a), Fla. Stat.	10
§ 403.973, Fla. Stat.....	10

Florida Administrative Code

Fla. Admin. Code R. 9J-5.....	28, 42, 53
Fla. Admin. Code R.9J-5.013(1).....	59
Fla. Admin. Code R.9J-5.003(82).....	26
Fla. Admin. Code R.9J-5.003(90).....	27
Fla. Admin. Code R.9J-5.005(2)(a).....	59
Fla. Admin. Code R.9J-5.005(2)(c).....	58
Fla. Admin. Code R.9J-5.005(3).....	43
Fla. Admin. Code R.9J-5.005(5).....	59
Fla. Admin. Code R.9J-5.005(5)(b).....	17
Fla. Admin. Code R.9J-5.005(6).....	26
Fla. Admin. Code R.9J-5.005(7).....	26
Fla. Admin. Code R.9J-5.0055.....	42, 43
Fla. Admin. Code R.9J-5.0055(2)(c).....	43
Fla. Admin. Code R.9J-5.006(k).....	22
Fla. Admin. Code R.9J-5.006(2).....	59
Fla. Admin. Code R.9J-5.006(2)(b).....	57
Fla. Admin. Code R.9J-5.006(2)(c).....	35
Fla. Admin. Code R.9J-5.006(3)(b)1	16, 39, 40
Fla. Admin. Code R.9J-5.006(3)(b)4.....	16
Fla. Admin. Code R.9J-5.006(3)(c)(2).....	16
Fla. Admin. Code R.9J-5.006(4).....	17
Fla. Admin. Code R.9J-5.006(5).....	57
Fla. Admin. Code R.9J-5.006(5)(g)2.....	57
Fla. Admin. Code R.9J-5.006(5)(g)3.....	57
Fla. Admin. Code R.9J-5.006(5)(g)4.....	58
Fla. Admin. Code R.9J-5.006(5)(g)8.....	56
Fla. Admin. Code R.9J-5.006(6).....	17
Fla. Admin. Code R.9J-5.011(2)(b)(5).....	17
Fla. Admin. Code R.9J-5.011(2)(c)(4).....	17

Fla. Admin. Code R.9J-5.013(2)(b)(3).....	17
Fla. Admin. Code R.9J-5.013(2)(b)(4).....	17
Fla. Admin. Code R.9J-5.013(2)(c)3.....	16
Fla. Admin. Code R.9J-5.013(2)(c)(9).....	16
Fla. Admin. Code R.9J-5.013(2)(c)5	16
Fla. Admin. Code R.9J-5.013(3)	16, 17
Fla. Admin. Code R.9J-5.016(3)(b)3.....	39,40
Fla. Admin. Code R.9J-5.019(3)(a)	46
Fla. Admin. Code R.9J-5.019(3)(f).....	46
Fla. Admin. Code R.9J-5.019(4)(b)2	39,40
Fla. Admin. Code R.9J-5.019(4)(c).....	43

Other Authority

<u>Theodore C. Taub, Transportation and Parking</u> <u>Regulations as Growth Management,</u> 431 ALI-ABA 429(1989).....	39, 42
---	--------

INTRODUCTION

In this appeal from a Final Order of the Florida Department of Community Affairs (Department), the issue is whether amendments to the Palm Beach County Comprehensive Plan (Plan) to allow a biotechnology research park and other uses on 1,919 acres known as Mecca Farms are in compliance with the "Growth Management Act", as defined in Section 163.3184 (1)(b), Fla. Stat. Unless otherwise indicated, all statutory citations are to the 2004 Statutes, and all rule citations are to the current codification of the Florida Administrative Code.

STATEMENT OF THE CASE AND FACTS

A. Statement of the Case

The administrative hearing was held under the expedited permit review process of §403.973, Fla. Stat. (R. 777). The parties had 10 days from the filing of the transcript to file proposed recommended orders (R. 607). The ALJ recommended that the amendments be found in compliance. (Id.) The parties had two days to file exceptions (R.701). Petitioners filed 41 exceptions (R. 698-737). The Final Order ruled upon three of them and adopted the Recommended Order after modifying two paragraphs, finding the amendments "in compliance." (R. 781-782).

B. Statement of the Facts¹

The Initiation and Approval of the Amendments

¹ Unless indicated otherwise, all facts described in this section are as found by the ALJ and adopted by the Final Order.

In 2003, the Scripps Research Institute (Scripps), a biotechnology research company, decided to expand its operations into Palm Beach County, taking a \$310,000,000 state subsidy to do so (R. 616).

The County's Purchase of Mecca Farms

The County's Business Development Board (BDB) obtained an option to purchase the site for \$60,000,000, if government approvals could be obtained. The County acquired that option from the BDB for \$60,500,000, waived the government approval clause, and exercised it (R. 618; TR. v.XI@1663-1664, 1748-1749).

The Scripps Contract

Scripps and the County entered into a 30 year contract, under which the County agreed to pay for or provide, among other things, a 100-acre campus for Scripps on the 1,919-acre site at Mecca Farms (Mecca), the construction of facilities at the site, 400 adjacent acres for "related uses", and other things. The total cost the County was set at \$209,000,000 (R. 617, FOF 20). In exchange, the contract requires Scripps to create or relocate 545 new jobs to the site. (Id.) The County Commission then directed staff to process plan amendments needed to allow the project.(Jt. Ex. 3a, p. 5; Jt. Ex. 3f, p.4; PBC Ex. 159, p.2; TR.v.II@ 212-214; TR.v.XI @ 1665). The County then adopted Plan amendments for the project (R. 605).

Overview of the Comprehensive Plan

The County's 1989 Plan was adopted to comply with the 1985 Growth Management Act. In general, the Plan directs growth towards the eastern part of the County to encourage infill and redevelopment.(R. 608). The Plan contains directives to "provide the basis for preparation of the Goals, Objectives, and Policies," which in turn "direct the location, pattern, character, interrelationships and timing of development, which ultimately affects the distribution of facilities and services to support it." (R. 609).

The primary tool of the FLUE is a Tier System, which defines distinct geographical areas within the County that currently either support or are anticipated to accommodate various types of development patterns and service delivery provisions that, together, allow for a diverse range of lifestyle choices, and livable, sustainable communities." Id. The Future Land Use Map "graphically depicts the future distribution, general use and densities and intensities of [land use] within each tier." Id. When the amendments were adopted, the County was preparing a Sector Plan for the 56,820 acre (89 square mile) "Central-Western Communities," region, where the site is located (R. 610, 622).

The County "**Directions**" include, among other things, to "provide for sustainable urban, suburban, exurban and rural communities and lifestyle choices by: (a) directing . . . development that respects the characteristics of a particular

geographic area; (b) ensuring smart growth . . . ; and (c) providing for facilities and services in a cost efficient timely manner"); Infill Development; Land Use Compatibility; Neighborhood Integrity; Level of Service Standards ("to accommodate an optimal level . . . needed as a result of growth"); to "[e]ncourage restoration and protection of viable, native ecosystems and endangered and threatened wildlife by limiting the impacts of growth on those systems; direct incompatible growth away from them; encourage environmentally sound land use planning and development and recognize the carrying capacity and/or limits of stress upon these fragile areas") (R. 610-611).

FLUE Goal 1 establishes the Tier System, to:

"direct the location and timing of future development to **preserve, protect, and improve the quality of natural resources, environmentally sensitive lands and systems by guiding the location, type, intensity, and form of development**; prohibit further urban sprawl, enhance existing communities, **facilitate and support infill development, protect agricultural land for farm uses**, including equestrian uses; and provide development timing and phasing mechanisms in order to **prioritize the delivery of adequate facilities and services to correct deficiencies in existing communities and accommodate projected growth in a timely and cost effective manner.**" (R. 611)(emphasis added).

Obj. 1.1 recognizes five geographic tiers of land with "distinctive physical development patterns with different needs for services to ensure a diversity of lifestyle choices", including (1) Urban/Suburban (land within the Urban Service Area

(USA), generally along the east coast, having urban or suburban density and intensity and afforded urban levels of service); (2) Exurban (land outside the USA and generally between the Urban and Rural Tiers, platted prior to the 1989 Plan and developed at densities greater than 1 dwelling unit per 5 acres; (3) Rural (land outside the USA and adjacent and to the east of the Everglades, the J.W. Corbett Wildlife Management Area, including the subject parcel; (4) Agricultural Reserve; and (5) Glades. (R. 611-612).

The Plan depicts three service areas to guide delivery of public services:(1) the Urban Service Area (USA), which essentially follows the boundaries of the Urban/Suburban Tier; (2) Rural Service Area (RSA), and (3) the Limited Urban Service Areas (LUSA). County centralized water and sewer services cannot be provided in the RSA (R. 613).

Existing Comprehensive Plan Goals, Objectives and Policies

"As a whole" the Comprehensive Plan:

"reflects a desire to accommodate growth in the Urban/Suburban Tier, especially in the eastern part of the County."

"promotes and encourages infill and redevelopment."
(R.614).

"implements the direction provided by the BCC to:

strengthen and facilitate revitalization and redevelopment and infill development programs; protect agricultural land and equestrian based industries; * * * establish a timing and phasing program to provide for orderly growth; * * * coordinate growth with the provision of infrastructure", among other things. (R. 667-668).

Mecca Farms and Surroundings

Mecca Farms is a citrus grove in the north-central part of the County, in the Rural Tier.(R. 619-620). It is accessible only by Seminole Pratt-Whitney Road (SPW), which is a dirt road as it runs along the property, on its west side (R. 619-620). The Regional Planning Council described the site as:

"[s]urrounded by...thousands of large lot residential units and tens of thousands of acres of preserve lands. It is also substantially distanced from the interstate ...ports, major airports, ...rail; ..institutional, cultural, recreational, educational, and entertainment amenities and city life."(Pet. Ex. 20 @ 15, 18).

The land to the west is designated Conservation, and the land to the north and south is designated Exurban Tier. The land to the east is designated Rural Tier. The area is a "mosaic" of uses, including undeveloped agricultural lands, conservation lands, and an antiquated subdivision, known as "The Acreage", with a maximum density allowance of 1 house per 1.25 acres which pre-dated the 1989 Plan (R. 619-620). To the south and west of The Acreage are large citrus groves in the Rural Tier and Loxahatchee Groves, an antiquated subdivision in the Exurban Tier, with a maximum density of 1 house per 5 acres.

The 60,288-acre, State-owned Corbett Wildlife Management Area (Corbett) adjoins Mecca to the west. It is managed for hunting and recreation, and "has a variety of habitats for endangered or threatened species (wood storks, eagles, red-cockaded woodpeckers, gopher tortoises and indigo snakes), including wet prairie, freshwater marsh and pine flatwoods." It

"could provide habitat for Florida panthers", but there are no recent confirmed sightings. (R. 620-621).

Immediately north of Mecca is Hungryland Slough, which the County is buying for preservation, as it "contains habitat similar to that found in Corbett." To the northeast of Hungryland is Caloosa, a large-lot residential area, in the rural tier, with a maximum density of 1 house per 5 acres. To the northeast of Caloosa is Jupiter Farms, another large, antiquated area with a maximum density of 1 house per 2 acres, in the Rural Tier (R. 621). The 4,600-acre Vavrus Ranch is located immediately east of Mecca, also in the Rural Tier. Approximately half of it is wetlands and half is improved pasture (R. 622).

The Plan Amendments

The scope and impact of the amendments at issue are substantial. As described by County planning staff, Scripps' decision to locate here is a "major event" (Jt. Ex. 20 @ Ch. 2 p. 3) - an "unanticipated change" and "catalyst to increase urban development and land speculation in the western area of the county" that will increase development pressure in the Rural Tier (Jt. Ex. 20 @ Ch. 2 p. 7), and will affect the [sector] plan outcome. (Jt. Ex. 20 @ Ch. 2 P. 24). Approval requires "additional text amendments to the [Plan] in recognition of the impact of Scripps on the County". (Jt. Ex. 20 @ Ch. 3 p.3). Allowing the project requires removing the land from the Sector Plan (Jt. Ex. 20 @ Ch. 2 p. 7), and changing the plan to allow

"the urban levels of service required by the intensity of the development" (Jt. Ex. 20 @ Ch. 2 p. 5), requiring "an adjustment as to how facilities and services are allocated among the tiers." (Jt. Ex. 20 @ Ch. 3 p. 39). The County adopted the following Plan amendments:

Ord. 2004-34 removes the site from the Rural Tier; creates a scientific community overlay (SCO) with specially allowed uses; allows urban services; and makes related changes to the FLUE and Economic Element and the FLUE Map Series. It allows research and development (R&D), a university campus, a hospital/clinic, residential development, and onsite commercial and retail uses, and a town center (R. 623-624). **Ord. 2004-36** amends the Land Use Map designation from Rural Residential, with a density of 1 house per 10 acres (RR-10) to Economic Development Center, which allows 2 houses per acre (EDC/2). **Ord. 2004-35** exempts the project from FLUE Policy 3.5-d, which prohibits land use changes expected to generate significant impacts on any road projected to fail to operate at LOSS "D" (R. 625). **Ord. 2004-37** changes the Land Use Map for 28 acres within Corbett from Conservation to Transportation and Utilities Facilities, to allow power and utility lines for the project. **Ord. 2004-38** amends the Transportation Element (TE) to lower the adopted level of service (LOSS) on 37 road segments and 6 intersections from the generally applicable standard of "D" to "Constrained Roadway at Lower Level of Service" (CRALLS).(R. 626, FOF 49). **Ord. 2004-39** amends the

Thoroughfare Right of-Way (ROW) Identification Map (TIM) and the 2020 Roadway System Map to allow major road improvements to serve the project. **Ord. 2004-63** updates the 2005-2010 Capital Improvement Schedule, and includes road, water, and sewer facilities to serve the project. (R. 626).

Extension of Infrastructure

The County will provide central water and sewer service to the project extending from the nearest lines about 12.5 miles away, at "substantial" cost of approximately \$15 million (R. 654-655). The road improvements for the project include 18 segments and three intersections at a total cost of \$141 million (R. 658).

"Development closer to existing roads and, to a lesser extent, the existing USA and LUSA might make more use of existing facilities and services possible." (R. 646 - 647). "A disproportionate increase in the cost in time, money, and energy may result from providing and maintaining facilities and services to the project." (R. 648).

Community Character and Compatibility

The amendments "will result in a complete change in the character and use of the Mecca site. Without question, development of the [project] will impact adjacent lands and the character of the nearest communities." (R. 688; FOF 183).

Over-capacity Roadways: Exemption From FLUE Pol. 3.5-d

The County's generally applicable level of service is "D" (R. 659), which is the level when a road's capacity equals its traffic loads. (TR.v. XIII@2036-2039, 2072). The County's generally applicable level of service is "D" (R. 659), which is the level when a road's capacity equals its traffic loads. (TR.v.

XIII@2036-2039, 2072). FLUE Policy 3.5-d prohibits land use changes expected to generate significant impacts on any roadway segment projected to fail to operate at LOSS "D". If not for the exemption, the project would violate this policy (R. 657).

Exemption From Adopted Level of Service

For this project only, "CRALLS" level of service designations have been assigned to 37 different road segments and 6 intersections, not only near Mecca but also as far north as Indiantown Road, as far south as Okeechobee Boulevard, and as far east as I-95. These levels of service "are set at vehicle loadings that match the traffic loads expected with development of the [project]" (R. 655). Of the 43 CRALLS designations, all but two are permanent (R. 662).

Infill and Redevelopment

The development:

"will not result in infill or redevelopment. To the extent that the availability of economic incentives for infill and redevelopment is limited, the significant economic incentives committed to the Mecca project will not be available for infill and redevelopment." (R. 649).²

² As a whole the Act encourages infill and redevelopment. This is the intent of the State Comprehensive Plan as a whole, including 187.201(7)(a); 187.201(7)(b)(2); 187.201(9)(a); 187.201(9)(b); 187.201(9)(b)(7); 187.201(15)(a); 187.201(15)(b); 187.201(15)(b)(1); 187.201(15)(b)(2); 187.201(15)(b)(6); Policy (19)(b) 9; Policy (19)(b) (12); S.187.201(17)(a); Policy (17)(b)1; Goal (16)(a) and Policies (16)(b) 1 and 2. Plans must "maximize the use of existing facilities and services through redevelopment, urban infill development, and other strategies for urban revitalization. 163.3177(11)(a) -(c). Also, while not a minimum standard, 163.3177(11) (e) finds that "mixed-use, high-density development is appropriate for urban infill and redevelopment areas."

Natural Resource Impacts

The main wildlife use of the site is "localized foraging by species such as sandhill cranes and wood storks...." (R. 673; FOF 147).

"The lands surrounding Mecca are significant environmentally, including Corbett WMA, Hungryland Slough, the Vavrus property, and the North County Airport Preserve (Conservation lands to the west, south, and southeast of that Airport) east of the Vavrus property. Farther away to the east and northeast is the Loxahatchee Slough and the Northwest Fork of the Loxahatchee River, a federally-designated Wild and Scenic River, and Outstanding Florida Water. Farther away to the southeast is the Grassy Waters Water Preserve Area, which is both a high quality natural wetlands area and an important source of drinking water for ... West Palm Beach." (R. 674; FOF 150).

"In addition to the impacts of development on Mecca itself, the Plan Amendments also affect road construction offsite that have environmental impacts." (R. 675-676; FOF 153). The extension of Seminole Pratt Whitney Road ... through the Hungryland Slough has been added..., and the amendments enlarged the planned roadway from four to six lanes and accelerated its construction to 2007 (R. 676, FOF 154). The amendments extend PGA Blvd. west from the Beeline to Mecca, establishing a 260-foot wide ROW that could accommodate 10 lanes, with a six-lane road shown on the new 2020 Roadway Map. "This road construction will impact a number of wetlands, but the exact extent of this impact is not known as its precise alignment has not been selected." If the extension were completed in a straight-line from the Beeline to Mecca, "it would directly impact over 45 acres of wetlands, and have an indirect impact upon another 56 acres of wetlands." (R. R. 676)

"The integrity of natural areas is very important to wildlife. For one thing, the ability of wildlife to move around and mix to enlarge the gene pool increases the structural stability of wildlife populations. Loss of enough integrated habitat can be very damaging to particular species of wildlife. As habitat becomes further and further fragmented by development, the remaining connections among areas of quality habitat become increasingly important in general and especially for particular species of wildlife. Development and roads built through natural areas result in road kill and habitat fragmentation, which compromises the quality of the natural areas." (R. 677; FOF 158).

Currently, wildlife are able to use Mecca and especially Hungryland to move between Corbett, Vavrus, the North County Airport Preserve, without having to cross any major roads until coming to the Beeline and Northlake Blvd. (R. 677-678). The SPW Road extension:

"will reduce connectivity, increase fragmentation of natural habitats, and probably increase road kill of deer, alligators, various kinds of turtles, otters, and snakes." (R. 678: FOF 159). "Unfortunately, fencing and wildlife crossings and bridging will probably not be 100 percent effective for larger animals, and many smaller animals will benefit little from them if at all." "In particular, increased road kills of listed indigo snakes should be expected due to their large habitat home range (200-acre home range for males)." (R. 678-679).

"Virtually all plant communities in the vicinity of Mecca are fire dependent--in order to be maintained in their natural state, they must be burned approximately every three years, or they will be invaded by exotic species, and their habitat values will be reduced. The inability to maintain a regular burn schedule also poses a public safety threat due to the increased risk of wildfires (R. 679; FOF 162). Fire management is compromised near roadways and developed areas due to health concerns, reduced visibility, and increased wildfire threat. Caution is used when burning near roadways so as not to cause (traffic accidents,) or to be blamed unfairly for causing them, which can be just

as bad for the public relations that have to be maintained to successfully fire-manage natural lands. If an airport, hospital, school, or community is within two miles of a burn area, it is considered a smoke-critical area. If Mecca is developed as proposed, it will be considered a smoke-critical area for many burns in Corbett, which will not be able to be burned if the wind is blowing from the west. In Corbett, which has a lot of lighter wood, fires often smolder for weeks, further constraining fire management." (R. 679-680; FOF 162 -163). "For these reasons, the development ...will negatively impact the management of Corbett." (R. 680; FOF 164).

"The proposed development will add light sources that will alter the nighttime sky viewable from Corbett, Hungryland, and the Loxahatchee Slough. Depending on the extent, such an alteration would reduce recreational values of Corbett." (R. 680; FOF 165). "Lights also can interrupt bird migration and be harmful to migratory birds." (R. 680; FOF 166).

The area surrounding Mecca is important for migratory birds, as the lack of lighting provides a dark sky and safe route for migration.

"Special downward-directed lighting that can reduce the adverse impacts from lighting, but a clear requirement to use them is not included in the ... Amendments (R. 680-681; FOF 167). "Noise and other roadway disturbance cause behavioral problems in wildlife, disrupt bird-nesting for considerable distances, and negatively impact prey and predator by interfering with offensive and defensive mechanism. In most cases, they probably will disturb the human recreational users of these public lands more than the wildlife." (R. 681; FOF 168).

"Fertilizer and pesticide use on Mecca may be harmful to wildlife on adjacent properties." (R. 681, FOF 169). "Mosquito control is typically required in urban developments, ... through the use of pesticides that are not only targeted towards mosquitoes, which are an important part of the food chain, but also kill a wide variety of insects, spiders, and invertebrates. This reduces the populations of these species, negatively impacts species that rely on them for food, can be expected to result in less food for birds such as tree

swallows, which feed heavily on mosquitoes, as well as dragonflies, and numerous species that rely on mosquito larvae in the aquatic environment." (R. 681-682, FOF 170).

Summarizing these impacts, the ALJ found that the project "will not be without some adverse impacts to natural resources and the environment. However, the County's determination that the benefits ... outweigh the harm of those impacts ... is a policy decision that is at least fairly debatable." (R. 688).

STANDARD OF REVIEW

A court shall remand a case to the agency for further proceedings or set aside agency action, when (1) the agency's action depends on any finding of fact that is not supported by competent, substantial evidence in the record (120.68(7)(b)); (2) the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure (120.68(7)(c)); the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action (120.68(7)(d)); or the agency's exercise of discretion was inconsistent with agency rule, or violates a statute. (120.68(7)(e)2 & 3).

SUMMARY OF THE ARGUMENT

The plan amendments are not in compliance. While the Recommended Order and the Final Order which adopted it (hereafter "the Orders"), find the project will cause significant environmental impact, the Orders fail to protect natural resources by concluding that economic gain can outweigh environmental protection. The Orders err further by approving the

amendments despite numerous internal inconsistencies and making compliance determinations based on standards not contained within the Plan. The Orders improperly allow the goals of an optional plan element to override consistency with mandatory statutory requirements. The ALJ erred when it found a land use amendment in compliance without a showing of need. The Orders also permit a violation of the requirement that future land uses be coordinated with adequate infrastructure. The Orders erred by allowing a violation of the mandatory adequate roadway facilities (concurrency) requirement and by basing the compliance decision for the traffic levels of service on traffic levels that might occur, and not the traffic levels allowed to occur by the amendments. By applying the "fairly debatable" test to factual determinations the orders committed reversible legal error as the "fairly debatable" test is only applicable only to the conclusions of law, while the findings of fact in a Section 163.3184(9) proceeding are controlled by the preponderance standard under S. 120.57(1)(j). This error is compounded by the ALJ's failure to make findings on material facts which impacted the fairness of the proceeding.

ARGUMENT ONE: THE AMENDMENTS VIOLATE THE MANDATORY MINIMUM STANDARDS FOR NATURAL RESOURCE PROTECTION

As described above, the Final Order found that the amendments will adversely impact natural resources in numerous, profound ways. While this violates many minimum requirements, the Final Order nevertheless approves the amendments on the theory

that the "County's determination that the benefits of the [project] outweigh the harm of those impacts. . . is at least fairly debatable". This is legal error, as the Act and Rule include numerous minimum standards requiring the protection of natural resources.³

The Act mandates several ways in which Plans must prevent development from encroaching upon or degrading natural resources. Plans are required to include goals, objectives and policies which "protect, conserve and appropriately use natural resources and other areas with development constraints, coordinate land uses with topography [and] soils..., and provide for the compatibility of adjacent land uses." S. 163.3177(6)(d), Fla. Stat.; Rules 9J-5.006(3)(b)1 & (3)(c)(2); & 9J-5.013(3)F.A.C.

Rule 9J-5.013(2)(c)5 F.A.C. requires that comprehensive plans "restrict activities known to adversely affect the survival of endangered and threatened wildlife."

Plans must also "ensure the protection of natural resources," provide "protection of native vegetative communities from destruction by development activities," and "designat[e] environmentally sensitive lands for protection based on locally determined criteria which further the goals and objectives of the conservation element." Rules 9J-5.006(3)(b)4 and Rule 9J-5.013(2)(c)3 & (c)9, F.A.C.

³ Argument 4 demonstrates the error of allowing an optional plan element to support violations of minimum standards for mandatory elements.

Planning under the Act requires the prevention of indirect or secondary adverse impacts, by keeping development away from natural areas. Rule 9J-5.013(3), FAC. requires plans to "direct incompatible future land uses - based on type, intensity, location and other factors- away from wetlands." Finally, specific rules require plans to "ensure" the protection of conservation land (Rule 9J-5.006(4) and (6)) the quality and quantity of water , (Rule 9J-5.011(2)(b)(5) & (2)(c)(4), wildlife habitat, endangered species, and other adjacent natural resources (Rule 9J-5.013(2)(b)(3)&(4)).

Based on the facts found as described above, each of these statutes and rules are violated by the amendments. Compliance with these requirements is not optional, subject to being offset by a promise of potential economic gain:

"The provisions of this act in their interpretation and application are declared to be the minimum requirements necessary to accomplish the stated intent, purposes, and objectives of this act; to protect ...environmental ... resources...."S. 163.3161(7) Fla. Stat.

The theory that natural resource protections can be waived for economic benefit is a major misinterpretation of the law.

ARGUMENT TWO: THE FINAL ORDER ERRED IN APPROVING THE AMENDMENTS, AS THEY VIOLATE THE INTERNAL CONSISTENCY REQUIREMENT

The Act requires that plan amendments be consistent with the existing plan, and, specifically, that land use map amendments reflect the existing goals, objectives and policies. Section 163.3177(2) and 163.3187(2), Fla. Stat.; Rule 9J-5.005(5)(b), F.A.C. The Final Order violates this law by approving the

amendments despite several facial internal inconsistencies proven by the ALJ's factual findings. Also, the ALJ failed to make numerous other factual determinations necessary to resolve several additional internal consistency issues. Nevertheless, the facts that were found show a violation of the minimum requirements of law.

Section 163.3177(2), Fla. Stat. states that:

"The several elements of the comprehensive plan shall be consistent...."

§163.3187(2), Fla. Stat. states that:

"Comprehensive plans may only be amended in such a way as to preserve the internal consistency of the plan...."

This internal consistency requirement is most stringent as it applies to the Future Land Use Map, which must:

"reflect goals, objectives, and policies within all elements and each such map must be contained within the comprehensive plan." §163.3184(11)(a) Fla. Stat.

The Administration Commission has explained that the FLUM:

"is a critical component of the Plan. [It] provides an essential visual representation of the commitment to uphold ... goals, objectives, and policies, ..." Austin et al .v. City of Cocoa and DCA, 1989 WL 645182, ER FALR 89:0128 (Admin. Comm. 1989).

Future Land Use Map decisions that do not reflect a plan's goals, objectives and policies are not in compliance. Hiss v. Sarasota County and DCA, 1992 WL 880868, 15 FALR 830 (Admin. Comm. 1991), aff'd 602 So. 2d 5353 (Fla. 1st DCA 1992)(allowing extensive development on septic tanks in flood plains fails to reflect objective to coordinate land uses with topography and soil types); DCA v. St. Lucie County, 1993 WL 943708, 15 FALR

4744 (Admin. Comm. 1993)(converting farmland to urban use fails to reflect policies discouraging urban sprawl, and promoting agricultural protection, land use compatibility and other objectives); Pope v. City of Cocoa Beach et al., 1990 WL 749217, 12 FALR 4758 (1990) (increased density fails to reflect objective to direct population away from the coastal high hazard area).

In SCAID v. DCA, and Sumter County, et al, 730 So. 2d 370 (Fla. 5th DCA 1999), the court reversed the Department's approval of a FLUM amendment for land outside of the Urban Expansion Area, ruling that it was error to find the amendment in compliance with internal provisions discouraging urban sprawl.

The Facts Show Multiple Internal Inconsistencies

The changes that were made to accommodate Scripps at Mecca are so extensive as to undermine fundamental major principles of the County's Comprehensive Plan. The ALJ made findings identifying the relevant goals, objectives and policies the amendments are required to reflect (R. 667-673; FOF 141-145). Yet, he made no express findings of fact on any of them, seeking to dispose of all of them with a single, conclusory finding that:

"The evidence did not prove beyond fair debate that the plan Amendments cause the elements of the Plan to be internally inconsistent, or cause the depictions of future conditions in the FLUE Atlas not to reflect the GOP's within all elements of the Plan" (R.673;FOF 145).

To the extent the Court might view this blanket statement as a finding of fact to which it should defer, clear factual findings otherwise made by the ALJ demonstrate several obvious, facial inconsistencies with several of these provisions:

Inconsistencies Regarding Natural Resource Protection

The ALJ's extensive findings that there will be adverse environmental impacts are in the Statement of the Facts.

By changing the Plan to locate this project and its roads adjacent to and through the natural areas where it will have the wildlife (road mortality, mosquito and insect eradication, city lights), habitat (bi-section, restrictions on burning) and other recreational and environmental impacts found by the ALJ, the amendments are inconsistent with FLUE **Goal 1**, as they do not "preserve, protect, and improve the quality of natural resources and environmentally sensitive lands by guiding the location, type, intensity, and form of development." The designation of Mecca Farms as a TDR receiving area violates **Pol. 2.6-b**, *requiring the TDR program to be the method for increasing density within the County unless an applicant can justify and demonstrate need and that the current designation is inappropriate...* (R. 669). It also fails to reflect:

**Pol. 2.6-f, limiting potential TDR receiving areas to the Urban/Suburban Tier...* (R. 669).

**Pol. 2.6-h, prohibiting designation of receiving areas which would result in a significant negative impact upon adjacent Environmentally Sensitive Land.* (R. 669-670)

**Pol. 2.6-i, prohibiting designation of receiving areas which would be incompatible with surrounding existing and future land uses, based upon ... (1) The character of the proposed development in relation to the adjacent properties including building type and size and the gross and net densities of the proposed receiving area and the adjacent properties; and, (2) Proximity of the*

proposed receiving area to environmentally sensitive lands." (R. 670)."⁴

Taking citrus land out of production, and the project's environmental impacts are inconsistent with **Goal 2**, as this does not "provid[e] for the continuation of agriculture and the protection of the environment and natural resources".

The amendments are inconsistent with **CE Obj. 2.1**, "to":

"preserve and protect native communities and ecosystems to ensure that representative communities remain intact, giving priority to significant native vegetation." (R. 671).

The intensity of the land use, the extension of roads, and the environmental impacts is inconsistent with:

Pol. 2.1-f, that:

"future land use designations, and corresponding density and intensity assignments, shall not exceed the natural ... constraints of an area..." (R. 668-669).

CE Obj. 2.4, to:

"protect and preserve endangered and threatened species, species of special concern, and their associated habitats." (R. 672).

CE Goal 5, "to:

"provide for the continual protection, preservation, and enhancement of the County's various high quality environmental communities." (R. 671).

Inconsistent With Provisions Promoting Infill & Redevelopment

The ALJ found that:

⁴ The County Planning Director said the existing land use designation remains appropriate for the site. (Tr.V. II @ 161-162).

"...development occurring at Mecca obviously will not result in infill or redevelopment. [Further], the significant economic incentives committed to the Mecca project will not be available for infill and redevelopment." (R. 649).

This is inconsistent with FLUE Goal 1.

Inconsistencies Regarding Changing Uses and Increasing Densities in the Rural Tier

The ALJ found that the amendments remove a citrus grove (R. 673) from the Rural Tier where limited rural uses are allowed, to allow intense urban uses (R. 625; R. 639) that may constitute urban sprawl (R. 633).⁵ This shows that the amendments are inconsistent with:

FLUE Goal 1, to:

"preserve and protect natural resources, and guide the location, type, intensity and form of development to discourage urban sprawl, support infill development, and protect agricultural and equestrian uses of the land. (R. 668)

Pol. 1.1-d, "not to modify the Tier System"

⁵ The Order reasons that the existence of the large-lot subdivisions, which pre-date the County's Plan, justified the urban uses allowed by the amendments. (R. 619-622, 634-635). Any claim that existing urban sprawl supports the amendments is refuted by Rule 9J-5.006(k), which states that an amendment which exacerbates existing indicators of sprawl is an indicator of sprawl. Prior "sprawl-like" patterns cannot justify additional sprawl; the notion that plan amendments that exacerbate existing sprawl are in compliance violates the requirement "to discourage urban sprawl". Burke v. DCA, 1992 Fla. ENV LEXIS 140; 92 ER FALR 166 (FLWAC 1992); DCA v. St. Lucie County, et al., 1993 WL 943708, (Admin. Comm. 1993).

"if redesignation would exhibit the characteristics of urban sprawl." (R. 668)

Obj. 1.4, for a Rural Tier to:

"protect and maintain rural residential, equestrian, and agricultural areas." (R. 669).

Next, the density increase is inconsistent with **FLUE Pol. 1.4-k**, which prohibits future land use decisions which increase density in the Rural Tier. It also violates **Pol 2.2-b** and **2.6-b**, which requires a showing that the current land use, citrus growing and mining, is inappropriate. This is inconsistent with **Pol.2.6-i**, prohibiting "development which would result in incompatibility with the surrounding land uses based on the adjacent property's type, size, and proximity to sensitive lands", and **Obj. 3.5**, which requires urban type expansion to be "consistent with the type of uses and development established within the tier." (R.671).

Inconsistencies As To Limiting Extension of Infrastructure

The ALJ found that site is in the Rural Service Area (R.613), and that the amendments bring substantial infrastructure to the site. (R. 626, 646-647, 654). This is inconsistent with:

CIE Pol.1.4-a, to "fund":

"projects and programs to ...: correct public hazards; eliminate existing deficiencies in LOS's; provide capacity for projects in the USA ...; provide for renewal and replacement of, and improvement to, existing public infrastructure and physical assets; maintain LOS's as new growth occurs; increase existing LOS's to desired LOS's; ..." (R. 672).

CIE Pol. 1.5-c, "not to:

"provide urban LOS's in the RSA ..." (R. 672).

FLUE Pol 1.4-k, "to not":

"make future land use decisions that increase density and/or intensity requiring major new public investments in capital facilities and related services in the Rural Tier."(R. 668).

Goal 3, "to define"

"graduated service areas for directing services to the County's diverse neighborhoods and communities in a timely and cost-effective manner." (R. 670)."

Obj. 3.1, "to establish":

"graduated service areas to distinguish levels and types of services needed in a Tier."(R. 670)".

Pol. 3.1-a, "to establish":

"the USA, LUSA, and RSA considering: the density and intensity of land uses depicted in the FLUE Atlas; the cost and feasibility of extending services; the necessity to protect natural resources; and the objective of encouraging reinvestment in the Revitalization and Redevelopment Overlay." (R. 670).

Obj. 3.4. "to require a":

"rural level of service which meets the needs of rural development and uses without encouraging the conversion of rural areas to more intense uses."(R. 670).

Pol. 3.4c, which is "not to":

"provide or subsidize centralized potable water or sanitary sewer in the RSA..." (R. 670-671).

FLU Obj. 3.5, which requires "urban expansion...decisions":

to "ensure consistency with the type, uses, and development established in each Tier."

Inconsistencies Concerning Roadway Capacity

Given the findings that amount of traffic to be generated from the project will not meet the adopted levels of service, and the lowered LOSS on 37 road segments and 6 intersections set to

match the project's traffic volumes, the amendments are inconsistent with FLU **Pol. 2.1-f**, which precludes land use from exceeding an area's manmade constraints, and with **Pol 2.2-b**, which requires the County to take into account the availability of the facilities and services. This is also inconsistent with **Pol 2.2d**, which precludes development which degrades adopted levels of service.

They are also inconsistent with **FLU Obj. 3.5**, "to:

"require availability of services concurrent with impacts of development, to ensure consistency of decisions regarding location, extent, and intensity of future land use (particularly urban expansion), with types of land use and development established in each Tier; "requires that future land use decisions be based on the physical constraints and financial feasibility of providing areas with services at levels of service (LOS) that meet or exceed the minimum standards adopted in the Comprehensive Plan." (R. 671).

Due to the facial internal inconsistencies proven by the ALJ's factual findings, the amendments are not internally consistent with the balance of the Plan's adopted goals, objectives, and policies, and thus are not in compliance.

Inconsistencies As To Justification and Need for Land Use Changes

Given the above facts, the amendments are inconsistent with: **Pol 2.2-b**, requiring "an adequate":

*"**justification and a demonstrated need for the proposed ...land use, and for residential density increases; demonstrate that the current land use is inappropriate, based on ... the availability of facilities and services; the adjacent and surrounding development; [and] the prevention of urban sprawl.**" (R. 669).*

ARGUMENT THREE: THE FINAL ORDER ERRED BY ALLOWING THE COMPLIANCE OF THE PLAN AMENDMENTS TO RELY UPON STANDARDS NOT ADOPTED AS PART OF THE COMPREHENSIVE PLAN.

A court must set aside or remand a final order if the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action. 120.68(7)(d), Fla. Stat. The Final Order must be reversed because the amendments fail to contain the minimum standards required by law to protect nearby and adjacent natural resources and agricultural lands, but were approved in reliance upon non-comprehensive plan "protections" which can be changed outside of the formal Plan amendment process. See S.163.3184(3)-(10), Fla. Stat.

The Law

Plans and amendments must contain within their four corners "goals", "objectives", and "policies" that meet the minimum standards of law. While the specific content of plans is not always mandated (assuming they are calculated to achieve the required end results) the Act requires that Plans set explicit clear, enforceable standards. They must "establish":

"meaningful and predictable standards for the use and development of land...." Rule 9J-5.005(6), F.A.C..

There must also be "**[s]pecific measurable objectives**"⁶, defined as:

"a specific, measurable, intermediate end that is achievable and marks progress toward a goal." Rule. 9J-5.003(82), F.A.C.

"Policies" adopted to meet minimum requirements must:

⁶9J-5.005(7), F.A.C.

"answer the question of how programs and activities are conducted to achieve an identified goal." Rule 9J-5.003(90), F.A.C.

The provisions relied upon to meet these standard do not.

First, the compliance of an amendment must be based exclusively on the terms within its four corners, and cannot rely on future land development regulations or criteria outside of the plan. DCA et. al v. Monroe County, 1995 Fla. ENV LEXIS 129y (Admin. Comm. 1995). Regulations, required by the Act to *implement the plan* can be amended or repealed without the procedural safeguards applicable to plan amendments. They have inferior legal status to the Plan, which sets the standards the regulations must meet.⁷ Also, the conditions of a Development of Regional Impact approval cannot support a compliance determination as they must implement and be consistent with adopted plans. Section 380.06(14) F.S.⁸

The law is set forth in DCA v. Escambia County, DOAH CASE NO. 90-7663GM, (DOAH 1992)(1992 WL 880137):

"[T]he required policy or objective itself must meet the minimum requirements without deferring identification of the measurable intermediate end or program until adoption of a land development regulation." (P. 39; FOF 265) (emphasis added).

"The plan's goals, objectives and policies aimed at meeting current requirements of the Act and [rule] cannot defer action to some future date, such as the adoption of ... regulations. Equally important, relegation to ... regulations of programs required by

⁷ See §163.3201 Fla. Stat., which establishes the requirement that LDRs implement comprehensive plans, and §163.3213 Fla. Stat., which does not provide for mandatory state review of LDRs.

⁸ Section 380.06(14) F.S.

the Act and Chapter 9J-5 defeats the purpose of the law." (P. 39; FOF 266).⁹

Next, compliance decisions must be strictly based on the maximum impacts authorized by the terms of the amendment, and not speculation that a lesser impact might. Sheridan v. Lee County, 1992 WL 880138, 16 FALR 654, 688-689 (Admin. Comm. 1994; Sierra Club v. St. Johns County, 2002 WL 1592234 (Fla. Div. Admin. Hear.); 1000 Friends of Florida, Inc. v. City of Daytona Beach, 1994 Fla. Div. Adm. Hear. LEXIS 5389.

The Final Order committed reversible error by basing his determination on speculation that the amendments would result in less traffic than they actually allow. The adopted levels of service will govern concurrency decisions - not some potentially less congested result that may - or may not- occur in the future.

A court is required to set aside, or remand a final order if the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, 120.68(7)(d), Fla. Stat.

The Final Order finds the amendments consistent with the various requirements to protect surrounding lands based on either(1) policies that defer to subsequent regulations; (2) development standards that are in a development order, but not the plan or amendments; or (3) provisions in the amendments that

⁹ See also, DCA vs. Hillsborough County, Case Nos. 89-5157GM, 90-6639GM, 1992 WL 880113 (Fla. Div. Adm. Hear.); DCA vs. Walton County, Case No. 91-1080GM, 1992 Fla. Env. LEXIS 186 (Fla. Div. Adm. Hear. (1992)); and Nick Geraci, et al. vs. DCA, Case No. 95-0259GM, 1999 WL 1592234 (Fla. Div. Adm. Hear.)

on their face do not meet the minimum requirements. The entirety of the amendment language that is relevant to the issues discussed below is:

New FLUE Policy 2.8-c:

The County shall adopt and implement design standards for all development in the [project], reflecting principles set forth under Objective 2.8 of the Future Land Use Element. These design standards shall, at a minimum, address the following issues:

4) Protection of conservation lands to the north and west of the SCO and include a passive recreational wetland system to enhance the quality of surrounding areas of environmentally sensitive lands.

Inadequate Amendment Language

1. The ALJ expressly relies on new **Obj.2.8** and its policies to meet the requirements to protect adjacent and surrounding natural resources and built communities (R. 662, 665-666, 674-675, 689).
2. To protect Corbett, Hungryland and the Loxahatchee River, **Finding 151** relies on **New FLUE Policy 2.8-c**, above.
3. **Finding 152** incorrectly states that the amendments require a flowway on the west of SPW road.
4. To prevent the adverse lighting impacts on the surrounding ecosystem, the ALJ relies on light management techniques that could be adopted, but which are not required by the amendments. (R. 680-681).

However, as admitted by the County witnesses, the plain language of Obj. 2.8 or Pol. 2.8-c do not require these measures. (TR.v.XXIII@2719; TR.v.XVI@1761-2, 1766).

Development Order Condition: Map H

This project was also granted development order approval under Ch. 38 as a Development of Regional Impact. Impermissibly, the ALJ relied on a Map H of that development order as providing the standards the rules require to be in the plan amendments to:

1. Provide for the required "clear separation between rural (the wetlands and farmlands on the adjacent Vavrus Ranch) and urban (Mecca) use." (R. 648-649)
2. Provide the required "defined edge" for the urban uses on Mecca. (R. 689)
3. Protect Hungryland Slough and Corbett, "by designat[ing] a 247-acre ... flow-way along the entire north and west sides of Mecca.(R. 674-675; FOF 151-152). He describes what the flow-way will consist of and that it "will help protect adjacent environmental lands to the west and north..."(R. 674-675).
4. Buffer Corbett and Hungryland Slough. (R. 689)

Neither the natural areas and buffers shown on Map H, nor any such areas of any specific size, location, configuration or function are required by the terms of the amendments, as admitted consistently by the Appellees' witnesses. Each witness who testified at on the point (including those for the county and the state) agreed that the compliance of the amendments could not be supported by reference to the DRI Order.(TR.v. VIII@1241-1242; TR.v.XIX@2904).

The reliance on Map H to meet minimum legal standards is impermissible.

Implementing Regulations

The ALJ relied on subsequent **regulations** to:

1. Prevent the harmful pesticide and fertilizer pollution he found could occur (R. 681)¹⁰
2. Mitigate habitat fragmentation by roads. (R. 678-679).

The findings identified above were relied upon to argue that the amendments are consistent with either a statutory, rule or internal plan requirement to protect natural resources, agricultural land, or adjacent properties. The adverse impacts to the Corbett, Hungryland, Loxahatchee ecosystem, including the adjacent Vavrus Ranch that the ALJ found would occur, depend upon the provisions described above. As a matter of law, they are incompetent to do so. Based on what the plain terms of the plan and amendments themselves allow and require (or do not require), they are inconsistent with the legal requirements. To conclude otherwise, the Final order had to rely upon things that, as a matter of law, it cannot rely upon, thus committing reversible error.

ARGUMENT FOUR: THE FINAL ORDER ERRED IN ALLOWING THE GOALS OF AN OPTIONAL ELEMENT TO OVERRIDE INCONSISTENCIES WITH MANDATORY REQUIREMENTS.

¹⁰ The ALJ identifies no specific provision of the Conservation Element, and Appellants represent that none exist to prevent the impacts he describes.

In approving the amendments because the economic benefits outweigh the adverse impacts and legal inconsistencies, the Final Order erroneously interpreted a provision of law. A correct interpretation compels reversal and a finding that the amendments are inconsistent with mandatory minimum standards.

The County asserted that the project was being pursued to further the goals of the Plan's optional Economic Element. (TR.v.XI@1609 L1; P.1610 L.4-8; P. 1623 L. 14). As stated by the County's Scripps Project Manager, the County is striving to "capture that overarching economic element." (TR.v.XI@1622 L.2).

The ALJ made the following findings:

1. *The Economic Element is optional under the Act. (R 614)*
2. *"Development of the SCO at Mecca will not be without some adverse impacts to natural resources and the environment. However, the County's determination that the benefits of the SCO outweigh the harm of those impacts, so as not to cause the Plan Amendments to be "in compliance," is a policy decision that is at least fairly debatable." (R. 688).*
3. *"It is fairly debatable whether the likelihood of economic benefit is enough to justify the planned use of Mecca's 1,919 acres." (R643).*
4. *"The County's vision of a positive economic impact from this venture "is not guaranteed success as planned and ... there are significant risks involved. (R. 637).*

In approving the amendments because the economic benefits might outweigh the adverse land use and environmental impacts¹¹,

¹¹ The ALJ did not actually find that there would be positive economic impacts which outweighed the negative impacts. Instead, he found that:

"The County's vision of a positive economic impact from this venture "is not guaranteed success as planned and ... there are significant risks involved. . . . Over the last 30 years or so,

the Final Order erroneously interpreted a provision of law. A correct interpretation compels a reversal and a determination that the plan amendments are not "in compliance" with the Act's mandatory minimum standards. S. 163.3161(7) Fla. Stat. provides:

"The provisions of this act in their interpretation and application are declared to be the minimum requirements necessary to accomplish the stated intent, purposes, and objectives of this act; to protect human, environmental, social, and economic resources; and to maintain, through orderly growth and development, the character and stability of present and future land use and development in this state."

The Act establishes mandatory plan elements, goals, objectives and policies, including Future Land Use elements meeting specified requirements (§163.3177(6)), Conservation elements (163.3177(6)(d)) and Capital Improvements (S. 163.3177(3)(a)) and Traffic Circulation elements (163.3177(6)(b)), regarding concurrency.

The Act allows additional, optional elements, such as an optional "economic element setting forth principles and guidelines for the commercial and industrial development...."§163.3177(7)(j), Fla. Stat. "The element may

significant economic benefits from biotechnology clusters achieving effective commercialization have been concentrated in just nine areas of the country. None are in Florida. The biotech industry has become increasingly concentrated in these nine areas of the country, and they continue to have competitive advantages that the County would have to overcome. There also is competition from many other cities and counties throughout the country desiring to develop a biotechnology cluster. (R. 638-639). The ALJ found that "it is fairly debatable whether the likelihood of economic benefit is enough to justify the planned use of Mecca's 1,919 acres."(R. 642).

detail the type of commercial and industrial development sought ..., and may set forth methods by which the balanced and stable economic base will be pursued." Id. The Act also requires a Transportation Element, which requires, among other things, roadway "concurrency", or that adequate transportation facilities be available for all development. §163.3177(7)(j), Fla. Stat.

Legislative intent is determined primarily from the plain language of a statute. St. Petersburg Bank & Trust Co. v. Hamm , 414 So. 2d 1073 (Fla. 1982). The plain language of the Act is that the economic element is optional, and the future land use, conservation and transportation elements are mandatory. The "compliance" decision is determined by consistency with the mandatory elements, which can not be outweighed or overridden by optional elements. Where the language of a statute is unambiguous it must be accorded its plain meaning. Citizens of the State of Fla. v. PSC, 425 So. 2d 534 (Fla. 1982).

It is absurd to find that the optional economic element could be used to outweigh inconsistencies with mandatory requirements. Under the theory advanced by the Department, no project could ever be out of compliance. If the minimum legal standards can be disregarded in favor of potential economic gain, there would be no binding standards, as virtually every development project is based to some extent on the provision of economic gain. Any project that might create jobs or generate tax base could always be said to create at least a "fairly

debatable" economic benefit, thus making the local government's "policy" decision that those benefits offset inconsistencies off limits to judicial review. Statutes can not be interpreted so as to yield an absurd result, Williams v. State, 492 So.2d 1051, 1054 (Fla. 1986), or to fail to give force to legal requirements. The Final Order erred in finding the amendments in compliance because the economic benefit might outweigh the adverse impacts to mandatory requirements. It tramples Legislative intent to allow optional plan elements to trump mandatory ones.

ARGUMENT FIVE: THE FINAL ORDER ERRED IN FINDING A LAND USE AMENDMENT IN COMPLIANCE WITHOUT A SHOWING THAT THE AMOUNT OF LAND IS REQUIRED TO ACCOMMODATE THE PROJECT

Future land uses must "be allocated based upon"... "surveys, studies, and data regarding the area, including the amount of land required to accommodate anticipated growth; the projected population of the area" and other factors. S.163.3177(6)(a), Fla. Stat.; Rule 9J-5.006(2)(c), F.A.C. (Emphasis added). Land use map changes that are not needed are not in compliance. DCA v. St. Lucie County, et al., 1993 WL 943708, 15 FALR 4744 (Admin. Comm. 1993); Growth and Env'tl. Org., Inc. et al v. Sarasota County, et al, 1997 WL 1052570, ER:FALR 97:108 (DCA 1997); DCA et al., v. Walton County, 1992 WL 880475 (Admin. Comm. 1992) DCA v. Escambia County, 1992 WL 880137 (Admin. Comm. 1992) not in compliance due to over-allocation).

In this case, there was nothing supporting the claimed need for any amount of acreage close to the 1919 acres at the Mecca

site to meet the acreage demands of the Scripps project which these amendments provide for. This was a vigorously contested issue, as the Petitioners and the Treasure Coast Regional Planning Counsel asserted that the project could be accommodated on a 582 acre infill site¹². The Department's initial objections to the amendments (which Petitioners contend still apply) were that they could violate the "need" and "urban sprawl" requirements if an infill or redevelopment site were available. (Pet. Ex. 37 pgs. 1-5).

The ALJ's only relevant factual finding regarding this issue, although wholly unsupported by competent substantial evidence, is finding 92 which states that the County could run out of land in 30 years. This obviously fails on its face to demonstrate the need to amend a land use map intended to meet needs through 2020. A map change has been found not in compliance where there was enough land to accommodate needs for the next 10 years. Growth and Env'tl. Org., Inc. et al v. Sarasota County, et al, 1997 WL 1052570, ER:FALR 97:108 (DCA 1997).

Repeatedly, each witness with knowledge of this issue was asked to identify anything that supported the claimed need for 1919 acres for the intended uses. Despite the law cited above and the requirements that data and analysis about land use needs meet

¹² Starnes v. V 649-653; Busha v. IV at 477-483, Petitioner's Exhibit 28 @ 35.

prescribed standards, subject to state review and available for public inspection¹³, the answers were as follows:

* County Planning Director:

"I don't know of a specific report" that identifies how much land we need to meet the economic development goals. (TR.v.II@225).

* County Scripps Project Manager:

"Q. Now, what documents tell us exactly how many acres are needed to accommodate enough of those things to attract the 500 acres worth of biotech? Where can I look and see those figures? A. I don't know of any such documents." (TR.v.XI@1681).

* Department Expert:

"There is not a numerical assessment of the exact acreage". (TR.v.XX@3086).

As this clear testimony, and other testimony and evidence shows, the County witnesses agreed that there is no data and analysis demonstrating a need for any part of the 1400 acres beyond the 500 called for in the contract (TR.v.II@221-222, 225-226, 228, 243; TR.v.IV@482-483; TR.v.XI@1679-1681, 1688-1689; TR.v.V@649-650, 652-653; TR.v.XX@3085-3086).

The experts who testified for the Petitioners, including the Director of the Treasure Coast Regional Planning Council, testified that nothing demonstrated that the project could not be accommodated on the infill site and required 1919 acres, and this

¹³ S. 163.3177(8), Fla. Stat.

was confirmed by the testimony of Appellee's witnesses.¹⁴

Appellants do not ask the Court to find the facts we assert, particularly in light of the other dispositive points of error. But, at a minimum, the failure to make findings on this material factual issue requires a remand.

By adopting a recommended order that fails to make material findings of fact, the Final Order committed a material error in procedure, and failed to follow prescribed procedure, thus impairing the fairness of the procedure and correctness of the

¹⁴ Appellant's expert testified that this 1919 acre site is not needed and the claims to the contrary are not supported by data and analysis. (TR.v.V @ 649-650, 652-653). The County witnesses admitted that there is a significant supply of developable land Countywide (Jt.Ex. 20 at Ch. 1 @ 2; TR.v.III@ 440), that there is no need for the residential uses being allowed (TR.v.XX@ 3064-3065). The Department's expert admitted there is no need for the Industrial land uses being approved. (Pet. Ex. 129; TR.v.XX@ 3082-3083; Pet. Ex. 38, p. 1). Scripps facility in California occupies only 102 acres (TR.v.XVII@ 2659; TR.v.XII@ 1792, 1812) and that the entire San Diego area has only 400 acres of biotech-related uses (TR. v. XIII@1813), and that its needs here are for 100 acres for all primary and accessory uses. (TR.v.II@ 215-6; Pet. Ex.20, p. 41). Under Scripps contract with the State, an additional 400 gross acres are all that is needed for all primary, accessory and related uses. (TR.v.XVII @ 2632-2633, TR.v.XVIII@ 2684; Jt. Ex. 13). The County witnesses agreed that there is no data and analysis demonstrating a need for any part of the 1400 acres beyond the 500 called for in the contract (TR.v.II@221-222, 225-226, 228, 243; TR.v.IV@482-483; TR.v.XI@1679-1681, 1688-1689; TR.v.V@649-650, 652-653; TR.v.XX@3085-3086), and that siting the project on Mecca instead of an urban site, where residential and supporting commercial areas already exist, and where less land would be needed for environmental protection, significantly increased the amount of land "needed" for the project. (TR.v.XVII@ 2666-2671, 2727-2728, 2742; TR.v.XI@ 1716-1717, 1729).

action. Thus, the court must set aside the final order or remand it for further fact finding proceedings. s. 120.68(7)(c).

ARGUMENT SIX: THE FINAL ORDER VIOLATES THE REQUIREMENT THAT FUTURE LAND USES BE COORDINATED WITH INFRASTRUCTURE.

The Act requires that Future land uses be allocated"

"based upon [among other things] the availability of public services...". Section 163.3177(6)(a), Fla. Stat.

Rule 9J-5.006(3)(b)1, FAC requires an objective to:

"coordinate future land uses with the availability of facilities and services".

Rule 9J-5.016(3)(b)3 requires:

"the coordination of land use decisions and available and projected fiscal resources with a schedule of capital improvements which maintains adopted level of service standards and meets existing and future facility needs...."

Rule 9J-5.019(4)(b)2 requires an objective to:

"coordinate the transportation system with the future land use map ...and ensure that existing and proposed population densities, housing and employment patterns, and land uses are consistent with the transportation modes and services proposed to serve those areas."

In Sunshine Ranches, et al v. City of Cooper City, et al, 1997 WL 1432204 (Admin. Comm. 1997) the Administration Commission found that it is mandatory for plan amendments, which must consider whether development orders for the development allowed by the amendment will be able to meet adopted levels of service. Because effective planning requires close coordination between the demand for public services caused by development and the availability of adequate public services, transportation has become one of the most important elements in growth management.

Taub, Transportation and Parking Regulations as Growth Management, 431 ALI-ABA 441(1989)

Existing FLUE Pol. 3.5-d prohibits land use changes expected to generate significant impacts on any roadway segment projected to fail to operate at LOSS "D". The ALJ found that the project would violate this policy (R. 657). Unable to comply with the policy, the County and state simply exempted the project from it, in violation of the Act and Rule. This policy, or at least its functional equivalent, is necessary to comply with mandatory legal requirements; its waiver for the instant project is an unauthorized exemption from the law. Said policy is the meaning of and result required by the Act and Rule. The Final Order all but acknowledges this, stating that:

"Petitioners are correct that a policy similar to FLUE Policy 3.5-d is required by FLA. ADMIN. R. 9J-5.006(3)(b)1., .016(3)(b)3., and .019(4)(b)2. However, this specific policy, including the choice of LOSS "D", is not required. Therefore, the conclusion of law advocated by the Petitioners is not as reasonable as the ALJ's conclusion of law...." (R. 782)

By interpreting this requirement to allow the approval of plan amendments which substantially increase density when adequate facilities cannot be provided, the Final Order has rendered this requirement meaningless.

The intent and terms of the law are violated, or are rendered meaningless, if a local government can adopt a land use change knowing that it can not provide the adequate roadway level of service. The notion that these requirements have been met, when the project required both an exemption from Pol. 3.5-d and

an expansive use of unauthorized exemptions from the adopted levels of service for the impacted roads and intersections, renders these legal requirements meaningless. These land use amendments have not been "coordinated" in any way with the availability of road facilities, as they urbanize an area "completely disconnected from the paved roadway network",¹⁵ and then drastically overload the new roads built for them. The extent of the "coordination" of land use and infrastructure in this case was to simply reduce the required level of service to the level necessary to be able to approve the project. If the law does not mean that proposals such as this can not be approved, it means nothing. Such a result is not an option. Statutes can not be read to render them meaningless. Finlayson v. Broward Co., 471 So. 2d 67, 68 (Fla. 4th DCA 1985).

ARGUMENT SEVEN: THE FINAL ORDER ERRED IN ALLOWING A VIOLATION OF THE MANDATORY ADEQUATE ROADWAY FACILITIES (CONCURRENCY) REQUIREMENT

The Final Order erred by allowing an unauthorized exemption from the mandatory traffic "concurrency" requirement. It approved roadway levels of service for the project which were set to match the amount of traffic generated by it, in violation of the terms and intent of the law.

A. Importance of Traffic Concurrency Requirements

¹⁵ The Regional Planning Council identified the site as "3 miles from the nearest arterial road, [with] its only access is a dirt road" and 11 miles from the turnpike, and 14 miles from I-95. (TR.v. IV@ 568-569; TR.v. VI@ 930-931; TR.v. XIII@ 2034-2035;TR.v. I@ 47-48).

Transportation is a major factor determining the appropriate use of land. City of Miami Beach v. Weiss, 217 So.2d 836 (Fla. 1969). This District has recognized the avoidance of traffic congestion as a rational basis for land use restrictions. Watson v. Mayflower Property, Inc., 223 So.2d 368 (Fla. 4th DCA 1969). The US Supreme Court is in accord, City of Memphis v. Greene, 451 U.S. 100, 126-29 (1981), as is the Eleventh Circuit. Corn v. Lauderdale Lakes, 997 F.2d 1369, 1375 (11th Cir. 1993).

The avoidance of undue traffic congestion is an important enough objective that this District has upheld a moratorium based on the lack of roadway capacity. WCI Communities, Inc. v. City of Coral Springs, 885 So.2d 912 (Fla. 4th DCA 2004). With the recognition that "timing" and "sequence" requirements are constitutional, transportation has evolved into a growth management tool which rivals the land use element in importance. Taub, Transportation and Parking Regulations as Growth Management, 431 ALI-ABA 429(1989)(citing Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291 (1972)).

In Citizen's Political Committee, Inc., et al v. Collier County et al, the Administration Commission ruled that:

"The strong language of Rule 9J-5.0055 is evidence that the concurrency requirement of the Act and Chapter 9J-5 plays a key role within the Act and Chapter 9J-5. The Act discloses that the concurrency requirement is . . . the 'teeth of growth management' that 'distinguishes growth management from mere planning.'" 1992 WL 880097(DOAH 1992)(FOF 21)

"Consequently," the Commission said:

"the determination whether a plan provision is consistent with the concurrency requirement is vital." *Id.*(FOF 68)

B. The Statutory Concurrency Requirement

The Act mandates that all public facilities and services needed to support development be available concurrent with the impacts of such development. This "concurrency" requirement prohibits a local government from issuing development orders that would create traffic beyond an adopted level of service, and requires a concurrency management system meet this requirement. § 163.3177(10)(h), Fla. Stat; Rule 9J-5.0055, F.A.C.

C. The Levels of Service Are Inconsistent With Law

S. 163.3177(3)(a)3., Fla. Stat. requires "standards to ensure the availability of public facilities and the adequacy of those facilities, including acceptable levels of service." The express "concurrency" requirement is found in S. 163.3177(10)(h) and 163.3180, Fla. Stat., and Rule 9J-5.005(3), F.A.C. S. 163.3177(10)(h) mandates that:

"public facilities and services needed to support development shall be available concurrent with the impacts of such development...."

Rule 9J-5.019(4)(c), F.A.C, requires level of service standards that "ensure that adequate facility capacity will be provided"

D. The Inadequacy of the LOSS

Rule 9J-5.0055(2)(c), FAC mandates that level of service standards:

"shall ...ensure that adequate facility capacity will be provided" (Emphasis added).

The County's transportation engineer testified that, even with the new roads to be built to the project, several of the levels of service adopted as the standard for the project would exceed the capacity of the roads and intersections.¹⁶ Appellants

¹⁶The County's expert testified that:

- * The LOS for the segment of PGA Blvd. from the Turnpike to Central Blvd. is F, with volume exceeding capacity by 40-50%. (Jt. Ex. 2e, p. 4, ¶j; Tr. Vol. XIII @ 2076).
- * The LOS for the segment of PGA Blvd. from Central Blvd. to Military Trail is F, with volume exceeding capacity by about 35%. (Jt. Ex. 2e, p. 4, ¶k; Tr. Vol. XIII @ 2076).
- * The LOS for the segment of PGA Blvd. from I-95 to Alternate A1A is F. (Jt. Ex. 2e, p. 5, ¶m; Tr. Vol. XIII @ 2079).
- * The LOS for the segment of Northlake Blvd. from Coconut Blvd. to SR 7 is F, with volume exceeding capacity by about 60%. (Jt. Ex. 2e, p. 5, ¶q; Tr. Vol. XIII @ 2080-2081).
- * The LOS for the segment of Northlake Blvd. from SR 7 to Beeline Highway is F, with volume double the capacity. (Jt. Ex. 2e, p. 5, ¶r; Tr. Vol. XIII @ 2083-2084).
- * The LOS for the segment of Orange Blvd. from Coconut Blvd. to Royal Palm Beach Blvd. is E or F. (Jt. Ex. 2e, p. 5, ¶z; Tr. Vol. XIII @ 2083-2084).
- * The LOS for the segment of Coconut Blvd. from Northlake Blvd. to Orange Blvd. is F, with volume 67% over capacity. (Jt. Ex. 2e, p. 6, ¶hh; Tr. Vol. XIII @ 2086-87).
- * The LOS for the segment of Royal Palm Beach Blvd. from 60th St. to Persimmon Blvd. is F, with volume exceeding capacity by 80-90%. (Jt. Ex. 2e, p. 6, ¶jj; Tr. Vol. XIII @ 2087-2088).

put on significant evidence, that the new levels of service significantly exceeded the capacity of the roads, and the opinion of their traffic expert that they were inadequate.¹⁷ The regional planning council report found that the project "will overload the ..roadway network (Pet Ex 20 @ 15), and that "even with roadway expansions, the magnitude of traffic impact is substantial" and "go significantly beyond the desired LOS and capacity normally considered acceptable by the county." (Pet. Ex. 20 @ 18). The ALJ did not make a finding that the levels of service were adequate, other than to find that the County Engineer gave an opinion that they were "adequate". But his opinion is incompetent, as it is based on the following erroneous legal assumptions. The County Engineer admitted that 8 of the roadway segment traffic levels and all six of the intersection traffic levels authorized by the amendment would exceed the capacity of the affected roadway or intersection. (See footnote 17 at p. 45)

1. The Traffic Concurrency Requirement Is Mandatory and Cannot Be "Outweighed By Competing Considerations.

The ALJ found the CRALLS LOS to be appropriate because:

"The County Engineer supported an exemption from this policy for the SCO because traffic considerations should not outweigh the economic and other land use goals the County is pursuing....." (R. 657)

* Each of the 6 intersection CRALLS allowed by the amendments are for LOS F. (Tr. Vol. XIII @ 2088-2089)

¹⁷ The Petitioner/ Appellants' expert testified that the adopted LOS are inadequate, and some are un-achievable. (Hall V6 @ 949-950,952-958, 960-961-966-968; Jt. Ex. 2e, p.5-6).

The Final Order approved this approach:

"In analyzing an LOSS for adequacy, a local government should consider both technical and policy issues. *** Policy issues involve comparing increased congestion to other planning principles, such as preventing sprawl, promoting economic development, and neighborhood opposition to wider roads. There is not a limiting list of planning principles to consider in evaluating adequacy." (R. 660-661).

There are three legal errors here. First, the "traffic considerations" the Order shrugs off are mandatory "concurrency" requirements, as explained above. Second, nowhere does the law indicate that the technical adequacy of a LOSS for roads can be a "policy" decision. Rules 9J-5.019(3)(a) and (f) identify only technical issues as relevant to a transportation LOS. Finally, the only policy considerations allowed by law to impact levels of service do not apply here, as shown below.

Revealingly, the ALJ states that:

"DCA and the County seemed to come close to defending the CRALLS in part on the ground that the County has absolute discretion to establish these CRALLS and that they are not even subject to review for adequacy. Such a legal position would be untenable."(R.656).

The ALJ's legal conclusion is correct, as shown above, but in recommending approval of the LOSS based on "policy considerations" he commits legal error. The CRALLS LOSS can only be upheld if the law is interpreted to either repeal the concurrency requirement or allow a local government to set any

level of service it desires. The CRALLS designations are a subterfuge for an unauthorized exemption.¹⁸

The ruling that a violation of a mandatory, minimum requirement can be approved as a "policy" decision violates the Act, and is reversible error. The notion that a grossly over-capacity LOS can be approved as a "policy" decision to authorize development deemed beneficial on other grounds has no support in the law - except, quite importantly - for very specific exemptions created by the Legislature for policy considerations enumerated in the Act. None of them apply here, as admitted by the Appellees, and as shown below.

The "CRALLS" LOS Are an Invalid Exemption from Transportation Concurrency Requirements. It Is Absurd to Approve Levels of Service That Are Lower Than Those Allowed by Statutory Exemptions That Are Not Applicable Here

The Legislature has spoken in establishing 4 instances where traffic levels of service can be waived or reduced, none of which apply here. Each requires specific criteria, regarding location, time limits, and measures taken to make impacts acceptable, or some combination thereof. It is an absurd result to rule that a plan amendment, as has been done here, can allow a development to proceed without meeting the existing level of service without having to meet any of those criteria or take the measures

¹⁸ The amount of traffic expected from the project was simply adopted as the LOS to allow a project desired by the County even though it could not meet the adopted level of service. (TR.v. XIII@ 2091, 2093-2094. Neither County nor Department experts could articulate how CRALLS differed from outright exemptions. (TR.v. XIII@ 2091, 2093-2094; TR.v.XX@ 3124).

required for those mechanisms. Legislative direction on how something is to be done prohibits doing it any other way. Towerhouse Condominiums, Inc. v. Millman, 475 So.2d 674, 676 (Fla. 1985); Devin v. City of Hollywood, 351 So.2d 1022, 1025 (Fla. 4th DCA 1976).

The transportation concurrency "flexibility" authorizations are found in s. 163.3180, Fla. Stat. S. 163.3180 (5)(a) says:

"The Legislature finds that under limited circumstances dealing with transportation facilities, countervailing planning and public policy goals may come into conflict with the requirement that adequate public facilities and services be available concurrent with the impacts of such development. The Legislature further finds that often the unintended result of the concurrency requirement for transportation facilities is the discouragement of urban infill development and redevelopment. Such unintended results directly conflict with the goals and policies of the state comprehensive plan and the intent of this part. Therefore, exceptions from the concurrency requirement for transportation facilities may be granted as provided by this subsection. "

In other words, transportation concurrency may discourage the very kind of urban development that is supported in the state's compact urban development policy. Home Builders and Contractors Ass'n v. Dep't. of Community Affairs, 585 So.2d 965 (Fla. 1st DCA 1991).

The first exemption is granted by S. 163.3180 (5)(b):

"A local government may grant an exception from the concurrency requirement for transportation facilities if the proposed development is otherwise consistent with the adopted local government comprehensive plan and is a project that promotes public transportation or is located within an area designated in the comprehensive plan for:

1. Urban infill development,
2. Urban redevelopment,
3. Downtown revitalization, or
4. Urban infill and redevelopment under s. 163.2517."

The next is granted in S. 163.3180 (5)(c), and applies to developments within urban infill or redevelopment areas "which pose only special part-time demands."

The third exemption is granted in S. 163.3180 (7):

"In order to promote infill development and redevelopment, one or more transportation concurrency management areas may be designated in a local government comprehensive plan. A transportation concurrency management area must be a compact geographic area with an existing network of roads where multiple, viable alternative travel paths or modes are available for common trips. A local government may establish an area wide level-of-service standard for such a transportation concurrency management area based upon an analysis that provides for a justification for the area wide level of service, how urban infill development or redevelopment will be promoted, and how mobility will be accomplished within the transportation concurrency management area."

Finally, S. 163.3180(9) provides:

"(a) Each local government may adopt ... pecially designated districts where significant backlogs exist. The plan may include interim level-of-service standards on certain facilities and may rely on the local government's schedule of capital improvements for up to 10 years as a basis for issuing development permits in these districts. It must be designed to correct existing deficiencies and set priorities for addressing backlogged facilities. It must be financially feasible and consistent with other portions of the adopted local plan, including the future land use map.

(b) If a local government has a transportation backlog for existing development which cannot be adequately addressed in a 10-year plan, the state land planning agency may allow it to develop a plan of up to 15 years for good and sufficient cause...."

The Legislature has specified the circumstances that allow reduced traffic levels of service or exemptions, and none of them apply here. It is absurd and contrary to the plain meaning of the law to approve permanently and significantly reduced levels of service for extensive areas of the County. The amendments are not "in compliance".

ARGUMENT EIGHT: THE FINAL ORDER ERRED IN USING THE "FAIRLY DEBATABLE" TEST FOR MAKING FACTUAL DETERMINATIONS WHEN IT IS TO APPLY ONLY TO LEGAL CONCLUSIONS.

The Final Order erred in approving the "fairly debatable" test to make fact determinations when the fairly debatable test applies only to the legal conclusions, and facts were to be found by a "preponderance of evidence."

The Recommended Order makes the following material "findings of fact" that are stated, not as statements of fact, but in terms that certain facts are "fairly debatable":

* *"[I]t is at least fairly debatable whether [the project] is premature in light of the Scripps opportunity and existing development pressures in the area. (R. 635)*

* *While there was evidence from which Petitioners reasonably could argue that the Plan Amendments promote urban sprawl, all of the Rule's indicators are at least fairly debatable. (R. 633).*

* *"[It is] fairly debatable whether 'leaping over' those undeveloped lands should be considered an indicator of sprawl. In that sense, those conservation lands are similar to bodies of water." (R. 634).*

**"It is fairly debatable whether the likelihood of economic benefit is enough to justify the planned use of Mecca's 1,919 acres." (R643).*

**"...It is at least fairly debatable whether measures in the Plan and Plan amendments to protect and conserve natural resources are adequate." (R. 646).*

**{I}t is at least fairly debatable whether the ... Amendments provide a clear separation between rural and urban uses. (R. 648).¹⁹*

¹⁹ Map H is simply not referenced in Obj. 2.8 or its policies, and the finding otherwise is not supported by competent, substantial evidence. See objective 2.8 of Jnt. Exh. 2A.

**The evidence did not prove beyond fair debate that the Plan Amendments cause the elements of the Plan to be internally inconsistent, or cause the depictions of future conditions in the FLUE Atlas not to reflect the GOPs within all elements of the Plan. (R. 673).*

**Petitioners' evidence ...did not prove beyond fair debate that the totality of the data and analysis supporting the Plan Amendments were not "professionally accepted" or were inadequate. (R. 666-667).*

Petitioners' witnesses also criticized the modeling relied on by SFWMD to eliminate the Mecca option. * [A]s for reducing high flows during the wet season, it is fairly debatable whether the plan to use the Palm Beach Aggregates rock mine pits alone for water storage will work well enough. (RO at 87; FOF 180).*

These material facts are necessary to make a rational decision based upon competent substantial evidence. An agency decision not so based must be reversed. Slusher v. Martin County, 859 So. 2d 545 (Fla 4th DCA 2003). The use of the "fairly debatable" test to find facts is reversible legal error, and as the Final Order erroneously interpreted a provision of law. A correct interpretation compels a remand. 120.68(7)(d), Fla. Stat.

The Statute

The proceeding below was a formal administrative hearing under s. 120.569 and 120.57, Fla. Stat. (See S. 163.3184(9)(a); R. 699; R. 177). S. 120.571(j), Fla. Stat. states that:

"Findings of fact shall be based upon a preponderance of the evidence, ... except as otherwise provided by statute....". See Fla. Dept. of Health v. Career Services, 289 So.2d 412, 415 (Fla. 4th DCA 1974)

S. 120.569(2)(m) states that:

"Finding of facts, if set forth in a manner which is no more than mere tracking of the statutory language, must be accompanied by a concise and explicit

statement of the underlying facts of record which support the findings."

These statutes governed the proceeding and the findings of fact required below. The Final Order failed to comply with them, erroneously substituting the legal test for review of the local government's legal determination under Ch. 163 for the standard by which factual determinations are to be made.

The hearing below was based on a cause of action under s. 163.3184(9), Fla. Stat., for "affected persons" to challenge the determination that a comprehensive plan amendment "in compliance." S.163.3184(9)(a) states that: "In this proceeding, the local plan or plan amendment shall be determined to be in compliance if the local government's determination of compliance is fairly debatable."

This "fairly debatable" standard governs an administrative law judge's legal determination of whether plan amendments comply with the substantive law in Ch. 163; it is not the standard to be used to determine the facts.

The Final Order misapplies the administrative order in Cooper v. City of St.Petersburg Beach, 14 FALR 3589 Admin. Comm. 1991) (1991 WL 833308) in attempting to justify its approach to the factual determinations. Cooper holds simply that the "fairly debatable" test applies to the underlying legal conclusions (in that case, to the issue of whether amendments are "internally consistent") as well as to the ultimate question of "compliance." Yet, in no way does Cooper hold that the "fairly debatable" test

is to be used to measure proof or weigh evidence when determining the facts - not could it be read that way given the plain language of s.120.57(1)(j) and s. 163. 3184(9)(a), Fla. Stat. Indeed, Cooper refutes the Department's claim and proves Appellants correct, by stating that the "fairly debatable test":

"requires that the persons reaching different conclusions are informed by relevant facts and law ..."
(Cooper, 1991 WL 833308 (para. 74 at 14)).

Obviously, there must be appropriately found facts first, before the application of the test even becomes relevant.

The phrase "fairly debatable" is not defined in the Act or Chapter 9J-5, F.A.C. In addition to the statutes cited above - which are dispositive-the judicial discussions of the phrase make clear that it applies to a review of a legal determination, not to the resolution of underlying factual disputes.

In B & H Travel Corp. v. State Dep't of Community Affairs, 602 So.2d 1362, 1365 (Fla. 1st DCA 1992), the court interpreted the fairly debatable standard in s. 163.3184(9):

"[a]n ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity."

Similarly, the Supreme Court has stated that the test of "approval of a planning action if reasonable persons could differ as to its propriety." Martin County v. Yusem, 690 So.2d 1288 (Fla. 1997). The First District, in Davis v. Sails, 318 So.2d 214 at 225 (Fla.1st DCA 1975) explained that, under the fairly debatable rule:

"if application of zoning classification to a specific parcel of property is reasonably subject to disagreement, ... the application of the ordinance ... should not be disturbed by the courts."

The Second District, in Island v. City of Bradenton, 884 So.2d 107 (Fla. 2nd DCA 2004), characterizes the fairly debatable standard as a "rule of reasonableness."

The Third District says it applies only to the end result:

"The fairly debatable test asks whether reasonable minds could differ *as to the outcome* of a hearing." Norwood -Norland Homeowners Ass. v. Dade County, 511 So.2d 1009,1012 (Fla. 3rd DCA 1987). (Emphasis added).

These cases describe the test as one that applies to review of policy and legal conclusions and not to initial fact determinations. The Dade County case clearly explains that the question of what the facts are is the initial question, with those facts then used to decide whether the compliance of the amendment is "fairly debatable".²⁰ That is the law under Chapters 120 and 163.

ARGUMENT NINE: FAILURES TO MAKE FINDINGS ON MATERIAL FACTS IMPACTED THE FAIRNESS OF THE PROCEEDING

This case was a formal administrative hearing with disputed issues of material fact, conducted under S. 120.57(1), Fla. Stat. The following statutes applied:

120.57(1)(k):

²⁰ Administrative jurisprudence also reveals a distinction between underlying facts and ultimate legal conclusions. McDonald v. Dept. of Banking and Finance, 346 So.2d 569 (Fla.1st DCA 1977) explained that the former - determined by a preponderance of the evidence - provide the basis for making the latter.

"The presiding officer shall complete and submit ... a recommended order consisting of findings of fact...."

120.569 (2)(m):

"Findings of fact, if set forth in a manner which is no more than mere tracking of the statutory language, must be accompanied by a concise and explicit statement of the underlying facts of record which support the findings." (emphasis added).

In Memorial Healthcare v. State of Fla., 879 So.2d 72 (Fla. 1st DCA 2004) the court reversed and remanded a final order denying standing where the recommended order's findings "addressed only the first of Appellant's three arguments" in support of standing. 879 So.2d 72 at 74. The Court held that "ALJs are required to make specific factual findings on substantial issues as here...."Id. The law is the same in the Fourth District. Harun v. Department of Children and Families, 837 So.2d 537, 538 (Fla. 4th DCA 2003)(remanding the case because the hearing officer failed to make necessary findings of fact).

Ch. 120 is based on "the principles of basic fairness which should surround all governmental activity, such as ... the right to know the factual bases ... for the agency action." Friends of the Hatchineha v. DEP, 580 So.2d 267 (Fla. 1st DCA 1991). Because the ALJ ignored and made no findings on the material factual issues identified below, the Final Order fails to fulfill the legal responsibility to find the facts. White Construction Co v. FDOT, 535 So. 2d 684 (Fla. 1st DCA 1988).

Failures to Make Findings of Material Fact

The Recommended Order failed to make findings on the following disputed issues of material fact raised by the Petitioners/Appellants:

1. *How the costs of providing infrastructure to Mecca compared to the cost of developing a biotechnology park farther east. (R476-477)*
2. *Whether the nearest potable water main and sewer mains are 12 and 18 miles away. (R5474)*
3. *Whether the site is "completely disconnected from the paved roadway network", is 3 miles from the nearest arterial road, and its only access is a dirt road. (R474)*
4. *Whether the site is 11 miles from the turnpike, and 14 miles from I-95, a substantial distance. (R474)*

These facts are relevant to whether the amendments are consistent with (a) the Plan provision to manage the development of land and service delivery, so that its use is appropriate, orderly, timely and cost effective. **FLUE Goal 1(8); and (b)** the rule criteria discouraging "land use patterns or timing which disproportionately increase the cost in time, money and energy, of providing and maintaining facilities and services". (9J-5.006(5)(g)8))

5. *Whether the increase in the Right of Way for the two major roadway extensions through natural areas could allow an increase in the size of the highway from 6 to 8 lanes. (R. 497)*
6. *Whether the amendments will encourage sprawl on the neighboring Vavrus site, and the nearby Callery Judge and Walsey Groves. (R. 479-481)*
7. *Whether land values in the region will rise as a result of the amendments and what impact such a rise would have on rural and agricultural lands. (R. 479-481)*

8. *Whether there is an increased likelihood of approval future applications for similar development in nearby agricultural and rural lands as a result of the amendments. (R. 479-481).*

These facts are relevant to whether the amendments "promote ... development" ... "in rural areas at substantial distances from existing urban areas while leaping over undeveloped lands which are available and suitable for development" or "in strip, isolated patterns", which would trigger the urban sprawl criteria in Rules 9J-5.006(5)(g)2 and 9J-5.006(5)(g)3.

9. *Whether the amendments cause or contribute to urban sprawl.(R. 476-482)*

This is relevant to whether the amendments are inconsistent with (a) the Plan's Principle to "prevent urban sprawl"; and (b) the Rule's limits on urban sprawl. Rule 9J-5.006(5), F.A.C.

10. *Whether the amendments allow 6,000 housing units to be developed, and not just the 2,000 calculated in the traffic study.(R. 476)*

This is relevant to whether the county properly analyzed the full extent of the development, as required by S. 163.6177(6)(a).

11. *Whether there is an analysis of the impact of the amendments on the Vavrus parcel because it was assumed that Vavrus would be jointly developed similarly to Mecca.(R. 479)*

This is relevant because Rule 9J-5.006(2)(b) requires an analysis of the relevant vacant or undeveloped land, and S. 163.6177(6)(a), Fla. Stat. Requires land uses to be based upon the character of undeveloped land.

12. *The extent to which the Seminole Pratt - Whitney Road extension will have an adverse impact on Corbett Wildlife Management[1] (R. 498-499)*

13. *Whether the increasing interaction of humans and feral animals will impact the wildlife conservation areas in the region.*(R 502)

Fact issues 12 and 13 are relevant to whether the amendments adequately protect and conserve natural resources. S. 163.3177(6)(d), Fla. Sta., 5.006(3)(b)(1), (c)(2) and Rule 9J-5.006(5)(g)4, FAC.

14. *Whether the project is likely to positive economic impact.*(R 515-522)

This is relevant because the ALJ found recommended a finding of compliance because the County' s decision that potential economic impacts outweighed the environmental impacts was "fairly debatable." (R. 688).

15. *Whether the adopted roadway levels of service are adequate.*[2](R. 508-512).

This is material, as the statute and rule require them to be adequate. (See Argument 7).

16. *Whether there exists professionally accepted data and analysis to support the material aspects of the amendments.*

The ALJ failed to render a complete set of findings on the multiple facts and conclusions that are challenged as not being based upon professionally accepted data and analysis. Finding of Fact 138 was that: "Some parts of the data and analysis would not be 'professionally accepted'²¹ and, standing alone, would not be adequate to support the Plan Amendments."

²¹ Plan amendments must be "clearly based" upon the "best available", "professionally accepted" data and analysis. S. 163.3177(8), and 163.3177(10)(e), Fla. Stat; Rule 9J-5.005(2)(c), FAC. Plans and amendments that are unsupported by data and analysis are not in compliance. Wilson, et al. v. City of Cocoa and DCA, 1991 WL 832930 at 45, ER FALR 91:142 (DCA 1991). DCA,

While the ALJ stated that other data and analysis corrected the errors in that particular report²², he made no further findings on the multiple other documents that could possibly have supported a finding that this project is reasonably likely to attract an economically beneficial biotech cluster, each of which appellant's vigorously assert are not professionally accepted. By citing only one "example" of how the data and analysis is not professionally accepted, the findings reveal that there are more, but do not identify them. The findings do not identify which of the County's factual assertions are not supported by data and analysis. On these material factual disputes, one does not know what the ALJ found, and a remand is required.

CONCLUSION

The Court should vacate the Final Order and find the amendments not in compliance for the reasons demonstrated in

et al v. City of Islandia, 1990 Fla. ENV LEXIS 132; 90 ER FALR 44 (Admin. Comm. 1990); Palm Beach County et al v. DCA et al., DOAH Case Nos. 95-5939GM & 96-2563GM, WL 1052409 (DOAH 1997). As shown at pages 36-37, 58-49 of this Brief, Appellants assert that multiple objectives, policies, standards and conclusions in the amendments, related to the basic land use, and transportation approvals, and the protection of surrounding land are not supported by data and analysis. The amendments are inconsistent with S. 163.3177(6)(a), (8), & (10) Fla. Stat., and Rules 9J-5.005(2)(a), and (5) and 9J-5.006(2) and 9J-5.013(1), F.A.C. because they are not clearly based on the best available professionally acceptable data and analysis.

²² Appellants assert this finding is not based upon competent, substantial evidence. No other data and analysis or record evidence corrected these errors. See relevant discussion in TR.v.VI@867-873, 876-877, 880, 887, 889; TR.v.XII@1873, TR.v. XIII@1924-1927; PBC Ex. 19; Jt. Ex. 7, Ex. 39, Ex. 4; TR.v.XIV @2183-2184; Pet. Ex. 129.

arguments 1-7. In the alternative, the Court should vacate the Final Order and remand the matter back to the Agency with instructions to remand the matter for a fact finding hearing to remedy the legal errors demonstrated in arguments 8-9.

Respectfully submitted this 5th day of July 2005.

Richard Grosso, Esq.
Florida Bar No. 0592978
General Counsel
ENVIRONMENTAL AND LAND USE LAW
CENTER, INC.
Shepard Broad Law Center
3305 College Avenue
Fort Lauderdale, Florida 33314
954-262-6140 / Fax: 954-262-3992

Lisa B. Interlandi, Esq.
Regional Counsel
Robert N. Hartsell, Esq.
Staff Counsel
ENVIRONMENTAL AND LAW USE LAW
CENTER, INC.
330 U.S. Highway 1, Suite 3
Lake Park, Florida 33403
561-844-5222 / Fax: 561-844-5004

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by United States mail to all parties listed below on this 5th day of July, 2005.

Richard Grosso, Esq.
Florida Bar No. 0592978
General Counsel

ENVIRONMENTAL AND LAND USE LAW
CENTER, INC.
Shepard Broad Law Center
3305 College Avenue

Fort Lauderdale, Florida 33314
954-262-6140
954-262-3992 (fax)
E-mail: richard@elulc.org

Lisa B. Interlandi, Esq.
Regional Counsel
E-mail: lisa@elulc.org

Robert N. Hartsell, Esq.
Staff Counsel
E-mail: robert@elulc.org

ENVIRONMENTAL AND LAW USE LAW
CENTER, INC.
330 U.S. Highway 1, Suite 3
Lake Park, Florida 33403
561-844-5222
561-844-5004 (fax)

Janet Bowman, Legal Director
1000 FRIENDS OF FLORIDA, INC.
Post Office Box 5948
Tallahassee, Florida 32314

Barry Silver, Esq.
BARRY SILVER, P.A.
1200 So. Rogers Circle, Suite 8
Boca Raton, FL 33487

Shaw P. Stiller, Esq.
Leslie E. Bryson, Esq.
DEPARTMENT OF COMMUNITY AFFAIRS
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

Andrew J. McMahon, Esq.
Chief Assistant County Attorney
PALM BEACH COUNTY ATTORNEYS'
OFFICE
Post Office Box 1989
West Palm Beach, Florida 33402

Gary P. Sams, Esq.
David L. Powell, Esq.
Frank E. Matthews, Esq.
Carolyn S. Raepple, Esq.
HOPPING GREEN & SAMS, P.A.
Post Office Box 6526
123 South Calhoun Street
Tallahassee, Florida 32314

Edwin Thom Rumberger, Esq.
RUMBERGER, KIRK & CALDWELL
108 South Monroe Street
Tallahassee, Florida 32301

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief was prepared in accordance with the font requirements of Rule 9.100, Fla. R. App. P.

Richard Grosso, Esq.
Florida Bar No. 0592978
General Counsel
ENVIRONMENTAL AND LAND USE LAW
CENTER, INC.
Shepard Broad Law Center
3305 College Avenue
Fort Lauderdale, Florida 33314
954-262-6140
(F) 954-262-3992