

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.

APPELLANTS' REPLY BRIEF

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GLOSSARY

ALJ	Administrative Law Judge J. Lawrence Johnston
Amendments	The amendments to the Plan adopted by Ordinance Nos. 2004-34 through 2004-39 and 2004-63 and 2004-64. [R 623-24]
AB	Appellees' Answer Brief
APA	Administrative Procedures Act, Chapter 120, Florida Statutes
Corbett WMA	Corbett Wildlife Management Area [R 619]
CRALLS	Constrained Roadways at Lower Levels of Service [R 624]
DCA	Florida Department of Community Affairs, the State land planning agency, § 163.3164(20), Fla. Stat. (2004).
DRI	Development of Regional Impact, § 380.06, Fla. Stat. (2004).
FLUE	Future Land Use Element of the Plan
IB	Appellants' Initial Brief
LOS	Level of Service, Fla. Admin. Code R. 9J-5.003(62)
LUSA	Limited Urban Service Area [R 612]
Mecca	Mecca Farms, proposed site of Scripps
Plan	Palm Beach County Comprehensive Plan [Jt. Ex.1]
Scripps	Scripps Research Institute of La Jolla, California [R 615]
SCO	Scientific Community Overlay [R 623]
SPW	Seminole Pratt-Whitney Road
Vavrus	Vavrus Ranch

SUMMARY OF THE ARGUMENT

Appellants do not ask the Court to overturn findings of fact, or substitute its policy judgment for that of the County, but to reverse the Final Order's legal errors that allowed it to find the plan amendments in compliance. The compliance determination must be based upon the text of the amendments.

The determination that the compliance of the amendments was "fairly debatable" depended on a finding that the potential economic benefits outweighed the adverse environmental harm, and this is legal error. Appellees' claims otherwise disregard the facts and law. Their claims that the ALJ found that the environmental benefits of the amendments would outweigh the environmental harms is false. The amendments are not based upon the amount of land required for the project. The finding that there is a "need" for the project is an incorrect legal interpretation.

The Final Order erred in finding that the traffic congestion allowed by the amendments complied with the spirit and terms of the concurrency requirement. The approval of a massive traffic-intensive development that will overwhelm the roads built for it also violates the mandate to coordinate transportation and land use decisions.

Appellees' claim that the County's action has been "scrupulously reviewed" for consistency with the law ignores the

violations of Ch. 120. The failure to find facts based on the proper standard and to make all findings necessary to resolve the disputes of material factual issues is a fatal procedural flaw in the Final Order. The use of the "fairly debatable" standard to find facts is contrary to the plain language of the law.

Appellants do not expect the plan to be frozen in time. Appellees' rhetoric should not deflect the Court from the violations of minimum legal requirements for plan amendments.

ARGUMENT

Introduction

Appellees have made several baseless challenges to Appellants' Statement of Facts. Most are bare assertions with no record citation or explanation whatsoever. Others are refuted by the ALJ's findings and the record. Appellees' claims are addressed in relevant parts of this brief.¹

ARGUMENT I. The Amendments Will Not Result In Environmental Benefits Which Outweigh The Harm To Natural Resources And Violate Planning Requirements For Natural Resource Protection.

Appellees' claim that the ALJ found that the project's roads would not be a threat to natural resources. (AB at 11)

¹ The AB correctly notes that there are discrepancies between the page citations to the Recommended Order provided in the IB and those that are in the copy of the Recommended Order transmitted by DOAH to DCA. This brief provides corrected citations to the Recommended Order for every point disputed by Appellees and every reference to the Recommended Order made herein.

Their record citations do not support the claim (R. 670-71, 681-82, 786) and fail to mention the ALJ's finding that:

"[a]s a result [of the SPW extension], the Plan Amendments will tend to reduce connectivity, increase fragmentation of natural habitats, and probably increase road kill of deer, alligators, various kinds of turtles, otters and snakes." R. 672.

Appellees point to the findings that fire can be managed in alternative ways and that there was already a planned roadway extension (SPW road) that would inhibit fire management.(AB at 8). After finding that the planned development would make Mecca a "smoke-critical area" which will hinder fire management², he found "for these reasons":

"the development ...will negatively impact the management of Corbett." R. 674; FOF 164.

As to the road, the ALJ found that the "SCO [project]-related road improvements approved by the County in its five-year road program for 2005-2009 included 18 segments and three intersections at a total cost of \$179.7³ million."(R. 643, 653; FOF 94, 116). He found that the SPW extension was previously on a year 2020 roadway systems map only, but these amendments made it part of the 5-year road program and "accelerated its construction to 2007." (R. 670, FOF 154).

² R. 673-674; FOF 162-163.

³ He found that \$114.9 million of this was new or changed funding amounts for this project. R. 654, FOF 116.

Next, Appellees say that the ALJ found the flow-way "required by Pol. 2.8-c will benefit on-site natural resources" (AB at 13). The ALJ did not find that the flow-way was required by the policy. It is not:

"New FLUE Policy 2.8-c requires... protection of conservation lands to the north and west by a passive recreational wetland system to enhance the quality of surrounding environmentally sensitive lands..." (R. 682; FOF 184)

The policy mentions no flow-way and adopts no map, plan or other document requiring any flow-way of any specific size, shape or function. The "flow-way" upon which evidence was taken is not required by the amendments⁴, but only by the DRI approval.⁵ R. 669; FOF 151.

Appellees' reference to a final order of another agency granting an environmental permit for 535 acres of the subject 1919-acre site proves nothing about the compliance of the plan amendments with the legal requirements of Ch. 163.⁶ Issuance of a wetland permit for a project is irrelevant to the compliance of comprehensive plan amendments with Ch. 163. St. Marks River Prot. Ass'n. v. Wakulla County, 17 FALR 4541 (DCA 1995).⁷

⁴ This is confirmed by Respondents' witnesses. (Walter V18 @ 2718-20; Gauthier V20 @ 3116-18; Beaudet V11 @ 1763-66).

⁵ See IB at 26-29. (plan cannot rely on DRI order)

⁶ AB at 4.

⁷ "Any inference that the existence of ... a regulatory program allows a local government to abdicate its duty to address

Next, Appellees' argument that the "slew of State Planning Requirements" cited are met because the amendments "do not repeal any of the goals, objectives or policies adopted previously by the County to satisfy" them (AB at 22-23) misunderstands the law. The initial adoption of plan text to comply with the law does not ensure the compliance of future plan amendments. Plan amendments must themselves comply with the relevant requirements in the statute and the rule, and land use map amendments must "reflect the goals, objectives and policies within all elements..." Rule 9J-5.005(5)(b), F.A.C.; Austin et al .v. City of Cocoa and DCA, 1989 WL 645182, ER FALR 89:0128 (Admin. Comm. 1989). Violation of this rule renders land use map changes not in compliance.⁸ That the plan's textual goals, objectives and policies are to be achieved *through the maintenance and periodic amendment of a land use map that reflects them* is central to the "ongoing process" of planning under the Act.S. 163.3177(1) & 163.3191(1), Fla. Stat. Land use map changes cannot fly in the face of the existing goals, objectives and policies.

Finally, Appellees' claim (AB at 21) that the ALJ found:

natural resource issues in its comprehensive plan is rejected." Id. at 4544. Such inference ignores "the clear distinction between regulatory permitting and land use planning, and the Department's role and expertise in land use planning as opposed to regulatory permitting." Id. at 4545.

⁸ See case cited at IB 18 & 19.

"although there may be some adverse environmental impacts from the SCO-it is at least fairly debatable that those impacts will be outweighed by environmental benefits, so as to render the Amendments 'in compliance'"

is false. R. 681-682.

ARGUMENT II. The Land Use Map Amendments Fail to Reflect the Adopted Comprehensive Plan.

Appellees erroneously suggest that only one relevant requirement exists in the law - that each element be internally consistent with other elements. S.163.3177(2), Fla. Stat. But, a separate and additional requirement-the one violated here-is that future land use map amendments "reflect the goals, objectives and policies within all elements..." Rule 9J-5.005(5)(b), F.A.C.

Appellees stress that the ALJ made five pages of findings on the relevant plan provisions. But those findings only recited the provisions but did not find whether they were "reflected" by the land use map amendments. R. 662-667.⁹ Contrary to Appellee's charge, Appellants do not ask the Court to reweigh the evidence on this point. The ALJ failed to make findings of fact on any of the multiple internal inconsistencies alleged below. Appellees' reliance on a single, conclusory statement that no such

⁹ The claim that Appellants "ignore the pertinent factual findings under each heading in the Recommended Order" is vague and offers no citation or explanation.

inconsistencies exist is legally inadequate under the APA.¹⁰ The balance of the ALJ's findings contradict this conclusion, as they demonstrate on their face the existence of 27 violations of existing goals, policies, and objectives. (I.B. at 19- 25)¹¹.

Appellees argue that it "logically follows" that it is fairly debatable whether the amendments are internally consistent as to natural resources because the ALJ said "it is fairly debatable whether the environmental benefits of the SCO outweigh the potential environmental harms." (AB at 25) To the contrary, the ALJ stated "Mecca will not be without some adverse impacts to natural resources and the environment", however, "the benefits of the SCO outweigh the harm of those impacts." R. 681-682; FOF 182.

Appellees point out that the ALJ found that the amendments do not discourage or inhibit infill or redevelopment. But he found that "development occurring at Mecca:

"obviously will not result in infill and redevelopment. To the extent that the availability of economic incentives for infill and redevelopment is limited, the significant economic incentives to the Mecca project will not be available for infill and redevelopment." R. 645.

¹⁰ S. 120.569(2)(m)("Findings 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.").

¹¹ See corrected citations to the Rec. Order at 617-624, 631-632, 645, 661 - 667 .

Appellees are suggesting that the removal of the parcel from the "Rural Tier"¹² is not a plan amendment subject to review under the Act, but instead a "legislative decision" to which Appellants "seem oblivious." (AB at 25-26).¹³ But, as one of the major changes effectuated by the amendments, (R. 623; Jt. Ex 2a, PP 2-3) it is indeed at issue in this proceeding and such change must comply with the law.

Next, the fact that "most" of the planned water and sewer lines were "previously planned" by the County does not insulate them from plan amendment compliance review.

Appellants ask this Court to find that the plan amendments-as a matter of law-fail to "reflect" the relevant plan provisions. On the latter, there were no factual findings made, and the "competent substantial evidence" rule does not apply.¹⁴

¹² Appellees challenge Appellants' statement that the Vavrus site is in the Rural Tier. (AB at 7, fn. 2) Yet, the ALJ found that Vavrus, which is "the land to the east is designated Rural Tier." (R. 618, 620; FOF 27, 35).

¹³ Appellees also challenge the Appellants' "implication" about when the Mecca site was taken out of the Sector Plan. This occurred "prior to county action on the amendments." (See IB at 7) The IB referenced the County planning staff observation that allowing the project required removing the land from the Sector Plan. (Jt. Ex. 20 @ Ch. 2 p. 7).

¹⁴ Appellees' other argument on this point, that the law requires consistency only among the various elements of a plan, is addressed on page 6 of this Reply Brief.

ARGUMENT III: The ALJ Relied Upon Measures External to the Amendments To Find Compliance.

Appellants do not argue that facts disclosed in a related DRI application or environmental permit could not be used as supporting data and analysis. Thus, the authority cited by Appellees is irrelevant. The supporting data and analysis are different from the adopted goals, objectives and policies required to be the plan's legally binding standards. It is the reliance on provisions of a DRI development order, an environmental permit, or anything else not expressly required by the terms of a plan amendment that violates the law.¹⁵

Appellees' claim that the relevant plan provisions satisfy the law cannot be squared with their plain terms. The amendments require none of the protections the ALJ cites in support of his findings that adequate protections have been adopted.

Appellees argue that new Pol. 1.2-f adopts the DRI "Map H" which in turn requires a flow-way to protect the adjacent natural areas. It does not. The ALJ referred to the flow-way "as depicted on Map H of the DRI application, which is referenced in new Policy 1.2-f as a 'land use/site planning measure.'" (R. 644-45; FOF 97). But they misread the policy, which adopts only

¹⁵ DCA v. Escambia County, DOAH CASE NO. 90-7663GM, (DOAH 1992)(1992 WL 880137); Sheridan v. Lee County, 1992 WL 880138, 16 FALR 654, 688-689 (Admin. Comm. 1994); Sierra Club v. St. Johns County, 2002 WL 1592234 (DOAH); 1000 Friends of Fla., Inc. v. City of Daytona Beach, 1994 Fla. Div. Adm. Hear. LEXIS 5389.

the "mixed/multiple land uses" set forth in the DRI Master Plan (Map H) as a traffic mitigation strategy. Nothing else shown on that map is adopted by reference by the plan amendments. (Jt. Ex. 2e, P 7(Ord. No. 2004-38, P 7)]¹⁶

Appellants argue that the ALJ did not actually find that lighting from the project would harm migratory birds, but that is either the only logical implication of his findings¹⁷ or a failure to make a required finding on a material issue of disputed fact, for which a remand is necessary.

While Appellees argue that the amendments require buffers that serve a specific function, the cited Pol. 2.8-c(4) explains that they function vaguely as "protection of conservation lands to the north and west of the SCO...enhance the quality of surrounding areas of environmentally sensitive lands." (AB at

¹⁶ Appellees cite also to new Pol. 2.8-c(3), which requires that development on Mecca "have a defined edge", the policy is impermissibly vague as the word "edge" is not defined and one is left to speculate completely as to what it means.

¹⁷ The ALJ found that the amendments "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. 674; FOF 165). "Lights also can interrupt bird migration and be harmful to migratory birds." (R. 674; FOF 166). While he found that "[s]pecial downward-directed lighting that can reduce the adverse impacts from lighting", he found that "but a clear requirement to use them is not included in the ... Amendments." (R. 674-675; FOF 167).

33; R. 669-70; Jt. Ex. 2a P 10). This language fails on its face to meet the law.¹⁸

Next, Appellees' claim that the ALJ did not rely on extrinsic regulations to address habitat fragmentation, but simply noted that the SPW was planned for widening before the amendments, rendering this issue moot is not accurate. R. 672.

While the ALJ found that a four-lane SPW extension was previously shown on a year 2020 map, he found that the amendments added the extension to the 5-year program, accelerated construction to 2007 and increased it to a six lane road. R. 672. "As a result, the Plan Amendments will tend to reduce connectivity, increase fragmentation of natural habitats, and probably increase road kill of deer, alligators, various kinds of turtles, otters and snakes." R. 672. He did not find that the environmental impacts of funding and accelerating construction and widening the previously planned road were moot or not relevant to the compliance determination.¹⁹

¹⁸ See IB at 26 - 29.

¹⁹ Appellees seem to claim that the ALJ did not rely on extrinsic regulations to prevent adverse impacts from pesticides and fertilizers.(AB at 33) He found that "there are ways to control their ill effects through *land development regulation* consistent with provision in the CE of the Plan." R.675 (FOF 169).

ARGUMENT IV: The Final and Recommended Orders Found That Potential Economic Benefits Of The Project Would Outweigh Environmental Harms, and This Is Legal Error.

Appellees err in their assertion that Appellants claim that the potential economic impact²⁰ of the project was used to justify inconsistencies with environmental requirements is wrong. The ALJ stated "Mecca will not be without some adverse impacts to natural resources and the environment", however, "the benefits of the SCO outweigh the harm of those impacts." R. 681-682; FOF 182. Given the totality of his findings on environmental harms and the economic benefits of the project, it is not reasonable to infer that he was predicting a net environmental benefit.

Appellees cite Econ. Dev. Council of Broward, Inc. v. DCA & Broward County, DOAH Case No. 96-6138GM (Admin. Comm. 1998) in support of their contention that it is appropriate to give an optional plan element the same or greater weight as that of a mandatory one; this case does not support such contention.

Appellees also cite Rule 9J-5.001(4), FAC., which actually refutes their argument. It says that the Act and Rule are "minimum criteria" for compliance, and authorizing the adoption

²⁰ The potential economic benefit of a project is not relevant to its "need", i.e. whether it is "required to accommodate anticipated growth" and "the projected population of the area." S.163.3177(6)(a), Fla. Stat.; Rule 9J-5.006(2)(c), F.A.C.

of a plan "which is more specific, detailed, or strict, or which covers additional subject areas", including optional elements, "as long as the ... plan is in compliance with Ch.9J-5 F.A.C. [and], Ch. 163, F.S..."²¹

ARGUMENT V: The ALJ Did Not Find A Need For The Amount Of Land Dedicated to the Project By The Amendments.

Appellees rely on vague findings about a "tight" land use supply in the eastern part of the county²², and ignore the issue: Is there a demonstrated need for a 1919 acre site for the proposed project or would a much smaller parcel accommodate the project? There are no findings even by inference that found that the amount of land dedicated to the project is needed.²³²⁴ Everything cited in the AB as supporting "need" is either a County-stated *belief* that it needed this much land (and not the

²¹ S. 163.3177(2) does not speak to this issue. S. 163.3177(2) requires simply that the elements be consistent with each other.

²² AB at 5, 6. While the ALJ found that the eastern section of the County may build out in 20 years, 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).

²³ Appellants' IB directs the Court to the testimony which confirms there is no data and analysis demonstrating that anything near 1919 acres is needed for this project. (IB at 37)

²⁴ Finally, Appellees boldly assert that the Appellants "blatantly misquote or take out of context the testimony by County witnesses Pennock and Aghemo and DCA witness Gauthier." (AB at 38) Yet, they simply make this statement but fail to provide any support for their claim. (AB at 39).

data and analysis required by the Act) or an alternatives analysis which took the 1919-acre need as a given.(AB at 37-38).

Finally, Appellees' argument that "need" is relevant only to the legal requirement to discourage urban sprawl (AB at 36) is offered without citation, and is not supported by the relevant statute. S.163.3177(6)(a), Fla. Stat.

ARGUMENT VI: The Amendments Do not Coordinate Land Use And Transportation Plans.

Appellees' argument is premised upon the notion that FLUE Pol.3.5-d is "self-imposed," and not mandated by the law. Whether or not this is true, the amendments violate S. 163.3177(6)(a), Fla. Stat., and Rules 9J-5.006(3)(b)1; 9J-5.016(3)(b)3; and 9J-5.019(4)(b)2, FAC. See IB at 39. The rule requirement is the law, whether or not a local government has actually adopted a policy to implement the rule. It is self-executing rule with which plan amendments must comply. If Pol. 3-5.d never existed in the Plan, the amendments would still be inconsistent with the Act and rule.

Appellees argue that the land use amendments have been coordinated with the availability of roads. However, the improvements²⁵ will not be adequate to handle the traffic from the project. Hence the need for the widespread use of CRALLS. Next, the claim that simply reducing the LOS constitutes

²⁵ AB at 40. (The \$205.7 million in road improvements)

adequate coordination²⁶ cannot be accepted without rendering the law a nullity.²⁷ Finally, the "implementation of 'best planning practices'" and "mitigation measures" cited by Appellees²⁸ are non-binding strategies which do not change the traffic levels allowed by the amendments.

ARGUMENT VII. Policy Considerations Cannot Excuse Non-Compliance With the Mandatory Concurrency Requirements Or Determine the Adequacy of a Traffic Level of Service.

It is an admitted fact that the amendments will allow many of the roads to operate over-capacity, as demonstrated by the testimony of the County Engineer²⁹ and the ALJ's findings³⁰.

²⁶ AB at 41.

²⁷ Appellees do not have the discretion to make a "local choice" to "accept increased traffic congestion" to approve land use amendments that create traffic impacts for which there will not be adequate roadway capacity. The mandate for traffic concurrency are mandatory, minimum criteria. Appellees' claim that Rule 9J-5.001 subjects this requirement to the "weighing and balancing of local needs and desires" misrepresents the rule, which includes no such language. Rule 9J-5.001 does not support Appellees. It says that the Act and rule the "minimum criteria" for compliance. They authorize a local government to adopt a plan "which is more specific, detailed, or strict, or which covers additional subject areas", including optional elements, "as long as the ... plan is in compliance with Chapter 9J-5, F.A.C., Chapter 163, F.S., and any other applicable statutes, laws or rules." Rule 9J-5.001(4), FAC.

²⁸ AB at 41 (citing R 658).

²⁹ The IB at p. 44, fn. 16, cites the relevant testimony.

³⁰ (1) The CRALLS LOSS "are set at vehicle loadings that match the traffic loads expected with development of the [project]" (R. 651; FOF 110); (2) "The [project] would generate trips beyond

Appellees' bare claim that Appellants "grossly misquote" the County Engineer is unaccompanied by citation or support.³¹

Appellants do not ask the Court to resolve any dispute about the amount of traffic allowed by the amendments, but only as to their legal sufficiency. The "findings" of the ALJ and agency, for which appellants seek deference, are erroneous legal interpretations which the Court can and should overturn. First, the rules cited by Appellees show that the determination of an "adequate" LOS³² is a technical, not a policy, determination, and thus refute their claim. Rule 9J-5.0055(1)(b), F.A.C. sets the general requirements for concurrency management systems to:

"ensure that issuance of a development order ... is conditioned upon the availability of public facilities and services necessary to serve new development"

Rules 9J-5.005(2)(a) and 9J-5.019(3), F.A.C., which sets data and analysis requirements for the future land use and

the significance thresholds in FLUE Policy 3.5-d" (R. 653, FOF 114); (3) impacted road segments will be "over generalized LOS 'D'"... (R. 655; FOF 124).

³¹ AB at 44.

³² Appellees claim that Appellants' Brief had said that "a level of service" is "the level when a roads capacity equals its traffic loads." (AB at 10, fn 5) This misrepresents the IB, which stated that level of service "D" is the level when a road's capacity equals its traffic loads."(IB at 9)(citing TR.V13 @ 2036-2039, 2072).

transportation elements directly refute Appellees' claim.³³ App. A & B. Given the plain language of the law and rules³⁴, allowing policy considerations to support the "adequacy" of a LOS standard is an unreasonable interpretation of law.

As to the issue of whether the Act authorizes such reduced levels of service, Appellees' own argument³⁵ lays bare the error of law, where they argue:

"Nowhere has the Legislature said that [the specific transportation concurrency exemption and flexibility provisions] are the only ways in which local governments may address the myriad planning issues and administrative problems that arise from implementing this complex requirement." (AB at47).

The Act mandates a strict concurrency requirement, then identifies a specific number of defined circumstances when it can be waived. Exemptions³⁶ are limited to those enumerated.

³³ Appellees also cite Rule 9J-5.003(5), which defines "Airport obstruction", and may be a typographical error, and Rule 9J-5.002(1), which does not speak to the issue.

³⁴ Appellants do not ask the Court to find a violation of Rule 9J-5.019(4)(c), so that rule's absence from the petition for hearing means nothing. That rule is cited to counter the claim that policy considerations can determine an adequate" LOS.

³⁵ Bollum v. DCA, 23 F.A.L.R. 2081 (DCA 2001) does not support Appellees. In that case, the plan amendments were found not to allow the adopted LOS to be exceeded. Id. at 2093-4.

³⁶ Appellees challenge Appellants' use of the word "exemption" in the Statement of Facts, as impermissible argument. The ALJ found that the CRALLS LOSS "are set at vehicle loadings that match the traffic loads expected with development of the [project]" (R.

The levels of service adopted here were plainly set low enough to allow a development that otherwise could not comply with the existing LOS. Appellees' characterization of enforcement of the law as a "narrow exercise in bean-counting" and a "straight-jacket" approach cannot save the amendments. Complying with concurrency may be hard. But it is the law.

ARGUMENT VIII: The ALJ Improperly Applied The Fairly Debatable Standard To Fact Issues and Did Not Make Findings Of Fact Based On A Preponderance Of Evidence.

The use of the incorrect legal standard to find facts renders the final order fatally flawed and requires remand. Appellees falsely claim that the ALJ used the "preponderance" standard for factual findings³⁷, but then also argue that the use of the "fairly debatable" standard to find facts should be affirmed as reasonable.³⁸ These contradictory claims are refuted by the Recommended Order and S. 120.57(1)(j).

Appellants next argue that the examples of facts found using the wrong standard are "consistency determinations", suggesting perhaps that they are legal conclusions and not

651; FOF 110). This as an exemption from the concurrency requirements, for the reason articulated in the IB.

³⁷ This factual claim is made only in the title of Appellees' argument. They do not argue in the body of their brief that the ALJ used the "preponderance" standard to find the facts or cite to anything in the Order that could support such a claim.

³⁸ AB at 49-50.

facts.(AB at 51). Even if these statements are mixed questions of law and fact, they are still questions of material fact.³⁹

Appellees' argument that the Cooper⁴⁰ and Norwood-Norland cases support their position is belied by the language in both cases stating that the fairly debatable test applies to the outcome - the legal conclusions. Appellees offer no colorable factual or legal argument to refute the fact that the ALJ used the "fairly debatable" and not the "preponderance" standard to find facts. They do not refute the plain language of S. 120.57(1)(j), Fla. Stat.

ARGUMENT IX. The ALJ Did Not Make All Findings Of Fact Necessary to Discharge His Duties Under the APA

ALJs must make findings to resolve disputes of material fact.⁴¹ The ALJ failed to do so for at least 16 such disputed facts. Coupled with the use of the incorrect standard to make those findings that are in the Recommended Order, the Final

³⁹ 1800 Atlantic Developers v. DER, 552 So.2d 946 (Fla. 1st DCA 1989) Collier Dev. Corp. v. DER, 592 So.2d 1107 (Fla. 2d DCA 1991); Save Anna Maria, Inc. v. DOT, 700 So.2d 113 (Fla. 2d DCA 1997)(hearing officer responsible for fact-finding as to subordinate fact disputes underlying ultimate legal conclusion).

⁴⁰ Appellees do not argue, as Appellees insist, that the fairly debatable determination applies only to the ultimate "compliance" determination. We agree with Cooper that it applies to the constituent legal conclusions of consistency with Ch. 163, Rule 9J-5, the Regional Policy Plan and the State Comprehensive Plan. S. 163.3184(1)(b), Fla. Stat.

⁴¹ See statutes and cases cited in IB at 54-55.

Order simply does not provide adequate factual support for its ultimate legal conclusions and must be remanded.

Appellees' argument that four of these issues were not alleged in the petition for hearing means nothing, as neither Cosid, 288 So. 2d at 277 nor any other case holds that every conceivable material fact that might be later addressed in a post-hearing proposed order must be alleged in a petition. Next, the claim that this point on appeal is a "thinly veiled attempt to have this Court reweigh the evidence" misses the point. There were no factual findings on these issues. Appellants seek only a remand on these points.

Appellees argue that factual findings were in fact made on these disputed points or that they were immaterial, but this attempt fails. The unresolved factual issues and legal relevance of these material facts are fully explained and are addressed in the Initial Brief.

Conclusion

The Court should vacate the Final Order and find the amendments not in compliance. At a minimum, the Court should vacate the Final Order and remand the matter for fact finding consistent with Ch. 120.

Respectfully submitted this 26th day of August, 2005.

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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 26th day of August, 2005.

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

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APPENDIX

- A. Fla. Admin. Code R.9J-5.005(2)(a)*
- B. Fla. Admin. Code R.9J-5.019(3)

*<http://fac.dos.state.fl.us/faconline/chapter09.pdf>