STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

DAVID L. MCSHERRY et al.,	)	
Petitioners	)	
v.	)	No. DCA04-GM-224
ALACHUA COUNTY et al.,	)	
Respondents	)	
and	)	
PRESERVING RURAL PROPERTY VALUES, INC. et al.,	)	Division of Administrative Hearings Case No. 02-2676GM
Intervenors	)	

FINAL ORDER

This proceeding came before the Secretary of the Department following the issuance of a Recommended Order on October 18, 2004 by the Division of Administrative Hearings. Aside from one issue on which the Recommended Order is incomplete, the Department agrees with the recommendations and findings of the Recommended Order, and incorporates it by reference into this Final Order. A copy of the Recommended Order is appended to this Final Order as Exhibit A.

I. INTRODUCTION

Alachua County (the "County") adopted amendments to its Comprehensive Plan on April 8, 2002 and submitted them to the Department, which issued a Notice of Intent to find the

amendments (the "2002 Amendments") in compliance with the Local Government Comprehensive Planning and Land Development Regulation Act (the "Act") and the rules that implement the Act. A number of parties then filed proceedings to contest the amendments, and negotiations ensued in which the parties reached a compliance agreement. See § 163.3184(16)(a), Fla. Stat. (2002). To give effect to the compliance agreement, the County adopted the new amendments on August 26, 2003 and once more submitted them to the Department, which issued a Cumulative Notice of Intent to find these amendments (the "2003 Amendments") in compliance with the Act and rules. Additional parties filed timely petitions to contest the 2003 Amendments, and the proceeding went to final hearing before an Administrative Law Judge of the Division of Administrative Hearings for findings and recommendations. The Recommended Order was issued on October 18, 2004, recommending that the 2003 Alachua County Amendments be found "in compliance."

II. THE ROLE OF THE DEPARTMENT

The Administrative Procedure Act assumes that the Department will adopt the Recommended Order absent unusual circumstances. See Brookwood-Walton County Convalescent Center v. Agency for Health Care Administration, 845 So.2d 223 (Fla. 1st DCA 2003). The authority of the Department to alter findings of fact in the Recommended Order is narrow. §120.57(1)(l), Fla. Stat. (2004).

The Department may not reconsider the credibility of the witnesses or reweigh the evidence. See Pillsbury v. Department of Health and Rehabilitative Services, 744 So.2d 1040 (Fla. 2d DCA 1999); Bay County School Board v. Bryan, 679 So.2d 1246 (Fla. 1st DCA 1996); Heifetz v. Department of Business Regulation, 475 So.2d 1277, 1281-82 (Fla. 1st DCA 1985). If the findings are supported by competent substantial evidence, the Department will not substitute its own findings for those in the Recommended Order or make new findings. Gross v. Department of Health, 819 So.2d 997, 1000-01 (Fla. 5th DCA 2002). The Department need not rule on an exception that does not clearly identify the disputed portion of the Recommended Order, does not state the legal basis for the exception, or is not supported by appropriate citations to the Record, and will therefore deny the exception. §120.57(1)(k), Fla. Stat. (2004). Nor need the Department rule on any exception that merely reargues the issues addressed in the Recommended Order.

In the proceeding before the Division of Administrative Hearings, the Department contended that the Amendments were in compliance. After the issuance of the Recommended Order, the Department assumed a dual role in the proceeding. Legal counsel who advocated the position of the Department continued to act in that role by reviewing the Recommended Order and by filing

Exceptions and Responses urging the Department to find the amendment in compliance. The other role is performed by the Secretary of the Department and by other counsel for the Department who have taken no part in the formal proceedings, and who have reviewed the Record and the Recommended Order in light of the parties' Exceptions and Responses.

If the Secretary of the Department determines that the amendments are not in compliance, then the Secretary must submit the Order to the Administration Commission for final action. See §163.3184(9)(b), Fla. Stat. (2002). On the other hand, if the Secretary determines that the amendments are in compliance, he must enter a Final Order finding the Alachua County 2003 Amendments to be "in compliance".

III. RULINGS ON EXCEPTIONS TO THE RECOMMENDED ORDER

The Administrative Procedure Act contemplates that the Department will follow the Recommended Order barring unusual circumstances. The authority of the Department to reject or modify findings of fact is limited:

> Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

§120.57(1)(l), Fla. Stat. (2004). The Department is not allowed to reconsider the evidence addressed in the Recommended Order, nor may it reject findings of fact that are supported by competent substantial evidence in the Record. Prysi v. Department of Health,823 So.2d 823, 825 (Fla. 1st DCA 2002); Pillsbury v. Department of Health and Rehabilitative Services, supra, 744 So.2d at 1041.

Although the Department has some authority to reject or modify interpretations of statutes or rules or other legal conclusions, that authority is limited to statutes, rules, or other legal issues it has specific power to determine. See §120.57(1)(l), Fla. Stat. (2004). That is, it may only reject "conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction." Id. If it does so it must explicate its rationale:

> When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

§120.57(1)(l), Fla. Stat. (2004). The label assigned to a statement does not determine whether it is a conclusion of law or

a finding of fact. Gross v. Department of Health, supra, 819 So.2d at 1000; Kinney v. Department of State, 501 So.2d 129, 132 (Fla. 5th DCA 1987). Conclusions of law that are juxtaposed with findings of fact are considered by the same standard as other conclusions of law. The issue in this proceeding is whether the 2002 and 2003 Amendments to the Plan are in compliance with the Act and the rules that implement it.

A. Ruling on Exceptions by Sierra Club Petitioners.

Three different sets of petitioners offered evidence at the final hearing, each with its own counsel. Recommended Order, at 6-8. In this Final Order the Department will use the same nomenclature used in the Recommended Order.[1]

1. Ruling on Exception to Paragraph 64 of the Recommended Order.

The Recommended Order contained a finding upholding Policy 6.2.10.4 of the Future Land Use Element, which contemplates the

[1] In accordance with this convention, petitioners Sierra Club, Inc., Sustainable Alachua County, Inc., Holly Jensen and Dwight Adams will be called the "Sierra Club petitioners" in this Final Order. Unless otherwise specified, all references to "petitioners" in "Section A" of the Final Order will be deemed to refer to the Sierra Club petitioners.

"clustering" of residential units for the purpose of steering development away from sensitive lands and limiting urban sprawl. Exceptions at 2, ¶ 1, citing Recommended Order, ¶ 64. Petitioners argue that Policy 6.2.10.4 is not based on data and analysis, but on the contrary is "speculation" and an "experiment." Id. Yet the County had ample data and analysis to support a determination that residential density bonuses and clustering have a beneficial effect in the prevention of sprawl. Joint Ex. 1L, Future Land Use Element, at 22-24. There was competent substantial evidence in the Record to support these findings, so this exception is denied.

2. Ruling on Exceptions to Paragraphs 65 and 69 of the Recommended Order.

Petitioners next object to the related findings to the effect that the County "hopes" density incentives will promote the use of residential clusters by developers, and that it was "not unreasonable" for the County to use such incentives because mandatory clustering had not worked for the County under its original Comprehensive Plan. Exceptions, supra, at 3-5, ¶¶ 2, 3, citing Recommended Order, ¶¶ 65, 69. Petitioners object that the amendment in question was "based on hope, rather than data and analysis." Id. In this connection, petitioners take the position that clustering based on density incentives will not

have the effect the County is seeking to promote. However, as the Recommended Order states, involuntary clustering had not worked for the County under its original Comprehensive Plan. Moreover, the Recommended Order's finding that the use of density incentives to promote voluntary clustering was supported by data and analysis is backed by competent substantial evidence (T. 765-66, 770-71, 773-74, 776-78)(Feb. 4, 2004). The exceptions to Paragraphs 65 and 69 of the Recommended Order are denied.

3. Ruling on Exception to Paragraph 83 of the Recommended Order.

Petitioners further object to the finding that the increase in the land use allocation in the 2003 Amendments to the Future Land Use Element of the Plan by some 434 acres was supported by data and analysis. Exceptions, supra, at 5, ¶ 4, citing Recommended Order, ¶ 83. Petitioners note that the 2002 Amendments to the Future Land Use Element had been based on a more conservative figure. The planner who testified for the County at the hearing cited inaccuracies in some of the earlier demographic projections, a miscalculation in some of the housing projections, and the fact that some of the new environmental policies would decrease the acreage available for development (T. 6-7, 17, 37, 38, 41-42, 61-62)(Dec. 15, 2003). The planner then added his own observation that some of the landowners "had made

it known that their land would not be available for development." Recommended Order, ¶ 83. Petitioners seize upon this passing statement as the predicate for their argument that the allocation in the 2003 Amendments is not supported by data and analysis. This finding is supported by competent substantial evidence as identified above, and, accordingly, the exception is denied.

4. Ruling on Exception to Paragraph 90 of the Recommended Order.

Petitioners' next exception is addressed to the finding in Paragraph 90 of the Recommended Order that the methodologies used by the County in the 2003 Amendments to the Future Land Use Element of the Plan and the assumed density of 1.6 dwelling units per acre were not so "unreasonable" as to be outside the range of fair debate. Exceptions, supra, at 5-8, ¶ 5, citing Recommended Order, ¶ 90; see id., ¶ 86. These objections implicate many related planning issues, and are addressed here seriatim.

Petitioners are correct in noting that as a general rule the maximum allowable densities should be used in land use allocations. In addition, petitioners cite the "more recent evidence" in the Evaluation and Appraisal Report as support for a density of 2.0 dwelling units per acre. Based on the tacit assumption that the 2.0 density is more accurate because it is more recent than the 1.6 "historical" density prevalent until

1997, petitioners argue that it reflects "the best available existing data" and is therefore controlling. See Fla. Admin. Code R. 9J-5.005(2)(c) (2003). So the issue is whether the use of the "historical" density of 1.6 rests on "the best available existing data."

While more recent data is sometimes preferable, here the County offered evidence to show that the 2.0 density assumption was flawed and that the historical density of 1.6 dwelling units per acre would provide a more accurate allocation. Petitioners further state that allowing the County to use the lower figure also represents a deviation from longstanding practice without adequate explanation for the departure in violation of the Administrative Procedure Act. Once more, the evidence supporting the use of the "historical" density figure of 1.6 also explicates the rationale of the County in allowing the use of this number. The use of the density assumption is supported by competent substantial evidence.[2]

[2] In addition, the petitioners contend that the County did not "react to" the data supporting the density assumption "in an

appropriate way" in contravention of another rule. See Exceptions, supra, at 7, ¶ 5, citing Fla. Admin. Code R. 9J-5.005(2)(a) (2003). Petitioners state that because of this the lower density figure is not supported by data and analysis. The argument does not follow, and other than the arguments discussed supra, the petitioners do not state how this use of the data by the County was inappropriate. Id.

The next issue petitioners raise concerning the land allocation for the Future Land Use Element is whether the use of the 1.6 value for density gives rise to internal inconsistencies in the Plan as a whole. Exceptions, supra, at 7, ¶ 5. For instance, petitioners take the position that the 1.6 assumption is inconsistent with the "average" density ratio of 2.0 in Objective 1.2 of the Plan, but offer no explanation for the argument based on a coherent planning rationale, aside from the self-evident fact that the numerical values are different. Id. It is likewise unclear how the value of 1.6 is inconsistent with the language in the Future Land Use Element calling for "higher average densities . . . in the urban cluster." Id. (emphasis deleted). Nor are any such inconsistencies apparent between the 1.6 value and Policy 7.1.3 of the Future Land Use Element, which calls for a "nonexcessive" quantity of land "within the Urban Cluster . . . ." Id., ¶ 5 (emphasis deleted); see Joint Ex. 1C, Future Land Use Element, at 127-28.

Petitioners also cite Policy 7.1.3(c), which requires the County first to reallocate the uses of lands within the Urban Cluster before expanding the available acreage outside it. Id. Petitioners have failed to show how the use of the notional 1.6 figure is inconsistent with any of the policies or objectives petitioners refer to, either on its face or as applied.

Last, petitioners contest the use of the 1.6 "historical" density because of the ostensible failure of the County to consider the effect of accessory uses. Exceptions, supra, at 8, ¶ 5; see Policy 1.3.6, Joint Ex. 1C, Future Land Use Element, at 10. Yet reliable data support the County's decision not to increase the 1.6 value because of accessory uses.[3]

Petitioners cite nothing in the Record to show that the findings concerning the allocation of land use is unreasonable to the exclusion of fair debate, nor do petitioners cite any statute, rule or other legal requirement to that effect. The findings concerning the allocation of land use are supported by competent substantial evidence, and, accordingly, Petitioners' exception to Paragraph 90 of the Recommended Order is denied.

5. Ruling on Exception to Paragraph 91 of the Recommended

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[3] The effect of accessory uses on land use allocations may be considered de minimis. Policy 1.3.6.1 limits the construction of any accessory use to a dwelling used by its owner as a permanent residence. Id. Policies 1.3.6.2 and 1.3.6.3 impose requirements for square footage and separate entrances. Policy 1.3.6.4 specifies a single shared driveway. Because of these limitations, the impact of accessory uses may well be negligible.

Order.

Petitioners once more contest the use of the historical density assumption of 1.6 units per acre, based on a finding in Paragraph 91 that the land use allocations in the Future Land Use Element would be more defensible if based on "maximum allowable densities in the need projections . . . ." See Exceptions, supra, at 9-10, ¶ 6, quoting Recommended Order, ¶ 91. Petitioners then argue that the 1.6 value cannot stand because of this finding. Id. Once more, petitioners' arguments do little more than articulate disagreements with the Recommended Order. Petitioners argue that the density value promotes planning techniques that aggravate urban sprawl, by "low-intensity, low-density, or single-use development or uses in excess of demonstrated need" that do not "maximize use of future public facilities and services." See Exceptions, supra, at 10, ¶ 6, quoting Fla. Admin. Code R. 9J-5.006(5)(g)1, 9J-5.006(5)(g)7 (2003). Petitioners cite nothing in the Record other than the use of the 1.6 historical density itself by way of urging that the 2003 Amendments are conducive to urban sprawl, nor do petitioners cite anything to show that any of the eleven remaining indications of urban sprawl are present.

Petitioners' argument appears to misunderstand the issue. The issue is not whether the findings or the evidence comport

with some optimal or ideal outcome; it is whether the use by the County of the 1.6 density value rather than the 2.0 value was outside the range of fair debate. The County's use of the 1.6 density value is supported by competent substantial evidence, and, accordingly, the exception to Paragraph 91 of the Recommended Order is denied.

6. Ruling on Exception to Paragraph 92 of the Recommended Order.

Next, petitioners take exception to a finding that some of the planners for the County had been concerned that the allocation of too little land for future development would cause distortions in the real estate market. Exceptions, supra, at 10-11, ¶ 7, quoting Recommended Order, ¶ 92. Petitioners further state that the County considered the effects of such "distortion" not once but twice, and that by doing so the County further magnified the over-allocation. Id. Petitioners cite nothing in the Record to support these arguments, and the Department could find nothing. §120.57(1)(k), Fla. Stat. (2004). The exception to Paragraph 92 of the Recommended Order is denied.

7. Ruling on Exception to Paragraph 93 of the Recommended Order.

Also with reference to the determination by the County of its need projections, the petitioners object that it is "beyond

fair debate that the County did not follow is [sic] adopted and unchallenged methodology." Exceptions, supra, at 11, ¶ 8, citing Recommended Order, ¶ 93. Petitioners elaborate that this other methodology is in Policy 7.1.3 of the Plan as amended, and that the County "failed to follow" Policy 7.1.3 in some unspecified manner. Id. It is not evident from the text of Policy 7.1.3 what the petitioners are referring to, and petitioners cite no legal authority or anything in the Record to throw further light on the matter. §120.57(1)(k), Fla. Stat. (2004). The exception to Paragraph 93 of the Recommended Order is denied.

8. Ruling on Exception to Paragraph 97 of the Recommended Order.

In their next exception, petitioners argue that the density assumption was improper because the County considered the unavailability of wetlands and other sensitive sites for development in arriving at this figure. Exceptions, supra, at 12, ¶ 9, citing Recommended Order, ¶ 97. Petitioners cite nothing in the Record to substantiate this argument, and accordingly, the exception to Paragraph 97 of the Recommended Order is denied. §120.57(1)(k), Fla. Stat. (2004).

9. Ruling on Exceptions to Paragraphs 101 and 104 of the Recommended Order.

Petitioners object to Paragraph 101 of the Recommended Order

based on its reference to the fact that the County has allowed adjacent lands under "common ownership" or "related ownership" into the boundaries of the Urban Services Line even though some of the lands did not come within the specified proximity to existing water and sewer infrastructure. Exceptions, supra, at 12-14, ¶ 10, citing Recommended Order, ¶ 101. Petitioners' argue that consideration of related ownership is not a "professionally accepted methodology." Id. While related ownership is not one of the variables identified in the text of the amendments to the Plan that determine placement within the Urban Services Line, the planners for the County did consider it in some cases. The ownership of adjacent lands is a legitimate planning criterion, and its use here was not irrational to the exclusion of fair debate. Petitioners do not so argue, nor do petitioners contend that this finding is not supported by competent substantial evidence. §120.57(1)(k), Fla. Stat. (2004).

Petitioners' contention with respect to Paragraph 104 of the Recommended Order is that the placement of the Urban Services Line creates internal inconsistencies in the Plan stemming from its failure to mention infrastructure other than water and sewer services. Exceptions, supra, at 14-15, ¶ 11, citing Recommended Order, ¶ 101. The legend on the map showing the Urban Services Line makes reference to the distance of lands inside it from

water and sewer services, but not from other urban services.[4] This incongruity does not rise to the level of a textual conflict within the meaning of the applicable rules. The petitioners' exceptions to Paragraphs 101 and 104 of the Recommended Order are therefore denied.

10. Ruling on Exception to Paragraph 108 of the Recommended Order.

Petitioners also take issue with the substitution of "Urban Cluster" for "Urban Services Line" in the 2003 Amendments to Policy 3.5 of the Potable Water and Sanitary Sewer Element. Exceptions, <u>supra</u>, at 15-16, ¶ 12, <u>citing</u> Recommended Order, ¶ 108; <u>see</u> Joint Ex. 1E, Potable Water and Sanitary Sewer Element, at 1. Paragraph 108 contains a finding that the use of the expression "Urban Services Line" in original Policy 3.5 was inadvertent, and that the substitution was intended to correct the error. Recommended Order, 108. This finding was supported

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[4] Policy 7.1.3(d) of the Future Land Use Element states that, in order for development outside the Urban Services Line to be allowed, a "full complement of urban services" must be available. Joint Ex. 1L at 19; Joint Ex. 1C, Future Land Use Element at 127-28. The legend on the Map states a necessary condition for development, which is consistent with Policy 7.1.3(d).

by competent substantial evidence, and petitioners do not contend otherwise. The petitioners' exception to Paragraph 108 of the Recommended Order is denied.

11. Rulings on Exceptions to Paragraphs 224, 227 and 230 of the Recommended Order.

Petitioners state that Paragraph 224 of the Recommended Order "is a mere recitation of the rules" regarding the issues, and therefore the Department should reject it. Petitioners make the same objection to Paragraphs 227 and 230 of the Recommended Order. See Exceptions, supra, at 16-17, ¶¶ 13-15. These arguments are not cognizable as exceptions under the Administrative Procedure Act. The exceptions are deficient as a matter of law, and are therefore denied. §120.57(1)(k), Fla. Stat. (2004).

12. Ruling on Exception to Paragraph 233 of the Recommended Order.

Petitioners next take issue with the determination in Paragraph 233 of the Recommended Order that the petitioners had "not shown to the exclusion of fair debate" that the 2003 Amendments to the Plan aggravate urban sprawl. Recommended Order, ¶ 233. Petitioners construe this conclusion as holding that, because the original Plan was deemed to inhibit urban sprawl, the 2003 Amendments may also be deemed to have that

effect. Because competent substantial evidence was offered on both sides of this issue, petitioners' exception to Paragraph 233 of the Recommended Order is accordingly denied.

13. Ruling on Exception to Paragraph 240 of the Recommended Order.

Last, petitioners urge the Department to reject the conclusion that petitioners "failed to prove beyond fair debate that any of the 2003 Amendments are not 'in compliance'" with the Act. Recommended Order, ¶ 240; see Exceptions, supra, at 17-18, ¶ 17, citing §163.3184(1)(b), Fla. Stat. (2002). Petitioners note further that to be "in compliance" the plan or plan amendment must be "consistent with the requirements" of the rules that implement the Act. Id. The latter state that "[t]he required elements and any optional elements shall be consistent with each other." Fla. Admin. Code R. 9J-5.005(5)(a) (2003). The argument rests on petitioners' a priori assumption that the Plan as amended has internal inconsistencies. No such inconsistencies are discernible in the text of the Plan or elsewhere in the Record, so the petitioners' exception to Paragraph 240 of the Recommended Order is also denied.

B. Rulings on Exceptions by McSherry Petitioners.

Petitioners[5] open their Corrected Exceptions with an

"Introduction" consisting of a general critique of the Recommended Order as a whole, and expressing philosophical disagreement with "several elements, themes, interpretations, attitudes, findings and applications" in it. Petitioners' Corrected Exceptions, at 2. The "Introduction" does not refer to specific matters in the Recommended Order, much less take exception to them, so it is not cognizable as an exception within the meaning of the Administrative Procedure Act and the Uniform Rules. See §120.57(1)(k),Fla. Stat. (2004); Fla. Admin. Code R. 28-106.217(1) (2004). To the extent that petitioners present it as one, it is denied for failure to cite appropriate portions of the Record and legal authorities. Id. Petitioners' other exceptions will be taken in order.

Petitioners state first that the Recommended Order is deficient because of its failure "to include the issue of whether the petitioners were afforded due process" in the proceeding. Corrected Exceptions, supra, at 3, ¶ 1. The petitioners do not support these "exceptions" with appropriate legal authorities or citations to the Record, so these arguments are not legally adequate as exceptions. §120.57(1)(k), Fla. Stat. (2004). Accordingly, these exceptions are denied.[6]

Petitioners' argument on the failure of the Recommended Order to take note of their opposition to "acceptance and

recognition of the stipulated settlement agreement" is likewise deficient as an exception. Petitioners offer no explanation of how the silence of the Recommended Order on this or any other subject makes it deficient because it is "unsupported by competent substantial evidence." Corrected Exceptions, supra, at 4, ¶ 4. Petitioners argue also that the Notice of Intent to find the 2003 Amendments in compliance did not meet the requirement in the Act of "addressing both the compliance agreement amendment and the plan amendment that was the subject of the agreement . . . ." §163.3184(16)(e), Fla. Stat.(2002); see Joint Ex. 1F at 5. Yet the Notice of Intent refers to Ordinance 03-05, and the text of Ordinance 03-05 contained all the pertinent information concerning the compliance agreement. Alachua County Ordinance 03-05. Accordingly, this exception is denied.

Petitioners' contention that the Recommended Order failed to "relate the handling of the cases, including their consolidation, notice, and setting a hearing" is likewise unavailing. Corrected Exceptions, supra, at 4, ¶ 5. Petitioners state that the silence of the Recommended Order on these procedural issues contravenes one unspecified Uniform Rule. Moreover, petitioners do not state how the failure to mention these matters influenced the proceeding. This exception is denied.

Petitioners' argument that they were not allowed "to adopt

the position of the original petitioners in the case" is no more than an attempt to reargue the Recommended Order, which disposed of this issue. Recommended Order, ¶¶ 26, 220; see Corrected Exceptions, supra, at 4-5, ¶ 6. Petitioners' further argument that the Recommended Order is deficient for its failure to state that the petitioners "made comments or objections" to the 2002 Amendments is immaterial. Corrected Exceptions, supra, at 5, ¶ 7. Once more, petitioners cite no legal authority in support of the exception, much less demonstrate how the failure of the Recommended Order to refer to these matters contravenes any legal requirement. See § 120.57(1)(k), Fla. Stat.(2004). Both exceptions are denied.

1. Ruling on Exception to the Other Aspects of the Recommended Order.

Petitioners also take issue with what they characterize as the use of "florid" language in the Recommended Order, and with its ostensible failure to consider the effects of the 2002 elections upon the composition of the Alachua County Board of County Commissioners and upon the 2003 Amendments to the Plan. Corrected Exceptions at 5-6, ¶ 8. In this connection petitioners also state, without citation to the Record, that one or more "secret meetings" occurred between the County, the Department, and other interests. Id. at 6, ¶ 9. Petitioners cite no

evidence in the Record to substantiate this assertion, and the Department could find none. Nowhere do petitioners cite to any language in the Recommended Order that could be considered inappropriate, nor could the Department locate any.[7] Petitioners' argument that the Recommended Order is not based on competent substantial evidence is neither supported by citation to the Record nor by pertinent legal authority, and accordingly the Petitioners' exception is denied. §120.57(1)(k), Fla. Stat. (2004).

2. Ruling on Exception to Paragraph 21 of the Recommended Order.

Petitioners object to the Recommended Order because the mediation meetings that led to the adoption of the Compliance Agreement and the 2002 Amendments to the Plan were somehow flawed in that there was "no evidence that the sessions were open to the press." Corrected Exceptions at 6, ¶ 10. The presence or absence of the press at mediation meetings resulting in a Compliance Agreement has no bearing on whether the 2002 Amendments were in compliance; the requirements of the Act for public participation in the negotiations that led up to the Compliance Agreement were met. See §§ 163.3184(16)(a), 163.3184(16)(d), Fla. Stat. (2002). Moreover, as the parties urging the proposition that the County breached this legal

obligation, the petitioners had the burden of going forward with evidence on this issue. See Young v. Department of Community Affairs, 625 So.2d 831, 834-35 (Fla. 1993); Diaz de la Portilla v. Florida Elections Commission, 857 So.2d 915, 925 (Fla. 3d DCA 2003), rev. denied, 872 So.2d 899 (Fla. 2004); Environmental Trust v. Department of Environmental Protection, 715 So.2d 493, 497 (Fla. 1st DCA 1998). It was not incumbent on the County to prove the validity of its own mediation meetings, and accordingly the exception to Paragraph 21 of the Recommended Order is denied.

3. Ruling on Exception to Paragraph 27 of the Recommended Order.

Petitioners next take the position that the Recommended Order is deficient for its failure to mention the limitations upon the admission of evidence concerning the validity of the 2002 Amendments to the Plan. Corrected Exceptions at 7, ¶ 11; see Recommended Order, ¶ 27. The Recommended Order in fact addresses this issue. Id., ¶¶ 220, 221. The exception to Paragraph 27 of the Recommended Order is accordingly denied.

4. Ruling on Exception to Paragraph 36 of the Recommended Order.

Petitioners also take exception to the finding in the Recommended Order that Policy 1.2.1.1 of the Comprehensive Plan as amended was intended to promote "interconnectivity" between

subdivisions and like developments. Corrected Exceptions at 8, ¶ 12; see Recommended Order, ¶ 36. In addition, petitioners take issue with more than seventy other findings in the Recommended Order that are alleged to be deficient for upholding Policy 1.2.1.1. The sum and substance of petitioners' argument here is that Policy 1.2.1.1 is unsupported by adequate data and analysis, so that it is not in compliance with the Act and its rules. Corrected Exceptions at 8-9, ¶ 13; see § 163.3177(6)(a), Fla. Stat. (2002); Fla. Admin. Code R. 9J-5.005(2)(a) (2003). Petitioners do not cite to anything in the Record to show how any of the findings are deficient, nor do petitioners' legal authorities shed any light on the matter.[8] Moreover, the "interconnectivity" test is a routine planning device.

The fact that Policy 1.2.1.1 identifies interconnectivity as its purpose does not negate the validity of values such as the encouragement of alternate modes of transportation and the reduction of traffic, as the Recommended Order itself states. Id., ¶ 35. Substantial competent evidence was offered in support of Policy 1.2.1.1. Id., ¶¶ 41, 42. Accordingly, the exceptions to Paragraph 36 and exceptions to the other portions of the Recommended Order that relate to Policy 1.2.1.1 are denied.

5. Ruling on Exception to Paragraph 50 of the Recommended Order.

The petitioners next object to the finding in Paragraph 50 of the Recommended Order that the clustering options for developers in the Comprehensive Plan approved in 1991 were a failure. Corrected Exceptions at 13, ¶ 14; see Recommended Order, ¶ 50. Petitioners state: "There is no competent substantial evidence that 'clustering failed because developers tend to [be] conservative in designing subdivisions.'" Id., quoting Recommended Order, ¶ 50. Petitioners are mistaken; this finding rests on substantial evidence in the Record that came in without objection (T. 765-66, 775-78)(Feb. 4, 2004). Accordingly, the exception to Paragraph 50 of the Recommended Order is denied.

6. Ruling on Exceptions to Paragraphs 59, 63, 64 and 65 of the Recommended Order.

Petitioners' next exceptions dwell on the validity of the clustering option that will be available to developers under the 2002 and 2003 Amendments. Petitioners contend that Policy 6.2.9 of the Future Land Use Element, added to the Plan by the 2003 Amendments, is unsupported by adequate data and analysis. Corrected Exceptions at 13, ¶ 15; see Joint Ex. 1E, Future Land Use Element, at 2-3. Petitioners first take issue with a finding that the Sierra Club petitioners attached central importance to a publication by the American Farmland Trust. See Recommended

Order, ¶ 59. What significance other parties may attribute to the evidence has no arguable materiality to the compliance issue at hand.

Petitioners also object to the finding that the ultimate test of the practical feasibility of clustering inducements is whether the developers in fact use them, as this is in effect turning the Act and its rules "upside down." Id.; see Recommended Order, ¶ 63. Petitioners misconceive the issue, which is whether Policy 6.2.9 is supported by adequate data and analysis. Petitioners present no argument that it is not. Petitioners' argument ignores the other considerations supporting Policy 6.2.9, which include inducements to the development of affordable housing and proximity to transportation infrastructure. The studies by the County that support the use of clustering show that Policy 6.2.9 is supported by competent substantial evidence (T. 765-66, 770-71, 773-74, 776-78, 803-04) (Feb. 4, 2004). The exceptions to Paragraphs 59, 63, 64 and 65 of the Recommended Order are denied.

7. Ruling on Exception to Paragraph 86 of the Recommended Order.

Petitioners object to the finding in Paragraph 86 of the Recommended Order upholding the use of the historical density ratio of 1.6 dwellings per acre as the density assumption for the

amendments to the Future Land Use Element of the Plan. Corrected Exceptions, supra, at 14, ¶ 16; Recommended Order, ¶ 86. Petitioners' argument here is that the local government must use a ratio of 2.0 because a standing interpretation of the Act by the Administration Commission specifies the use of the maximum allowable ratio.[9] In the present record, one of the planners for the County testified to a number of circumstances warranting the use of the historical density ratio of 1.6 rather than the 2.0 value. Paragraph 86 of the Recommended Order is supported by competent substantial evidence, and accordingly the exception is denied.

8. Ruling on Exceptions to Paragraphs 77 through 104 of the Recommended Order.

With further reference to the 1.6 density ratio, petitioners contend that the findings in the Recommended Order are "legally incorrect". Corrected Exceptions, supra, at 15-16, ¶ 17. Petitioners further state that the real issue is not whether this component of the 2003 Amendments is supported by acceptable methodologies, but whether it was "based on data and analysis and satisfies minimum criteria." Id. The Department rejects the argument that the amendment is not supported by adequate data and analysis; the same evidence supporting Paragraph 86 of the Recommended Order also constitutes an abundance of data and

analysis supporting the density ratio on which to determine the allocation of land uses. Accordingly, these exceptions are denied.

The petitioners additionally take issue with almost thirty findings in the Recommended Order, but do not state what "minimum criteria" the County failed to meet, nor do petitioners either indicate any legal infirmities in the Recommended Order or cite any other legal authority for this argument. As these are not cognizable as exceptions as a matter of law, they are denied. See §120.57(1)(k), Fla. Stat. (2004).

9. Ruling on Exception to Paragraph 108 of the Recommended Order.

Petitioners take exception to Policy 3.5 of the 2003

Amendments to the Potable Water and Sanitary Sewer Element of the Plan because in it the County amended the label used to denote one of its planning boundaries from "Urban Services Line" to "Urban Cluster." Corrected Exceptions, supra, at 16, ¶ 18. The County contended that this change in nomenclature was needed to correct an inadvertent contradiction between Policy 3.5 and Policy 7.1.3.B of the Future Land Use Element, and the Recommended Order contains a finding to that effect. Id., ¶ 108. This finding is supported by competent substantial evidence in the Record. Petitioners further state that this is more than a mere change in nomenclature, in that it affects "more than 10,000 acres of land" and thus goes to the substance of the Plan. Corrected Exceptions, supra, at 16, ¶ 18. Petitioners cite nothing in the Record to substantiate this assertion; once more, the exception is deficient as a matter of law, and accordingly is denied. §120.57(1)(k), Fla. Stat. (2004).

Petitioners further argue that Paragraph 108 of the Recommended Order rests on hearsay. Id. at 18-21. Yet the planner for the County had been qualified as an expert witness in urban planning and was testifying as such, so he was allowed to consider any ordinary and customary source of information used by planners in general (T. 685-87, 690-92)(Feb. 4, 2004); see § 90.704, Fla. Stat. (2002). Petitioners did not object to his use

of it. The Record does not reflect that any objection to the testimony was made by Petitioners (T. 950-1082, 1082-1143, 1143-51)(Feb. 4, 2004). Petitioners' argument is untenable, and even if it had arguable validity, petitioners have waived it by not objecting at the time. Last, petitioners contend that, by conforming the boundaries of the Urban Cluster in Policy 3.5 of the Future Land Use Element, the County has abdicated its independent planning responsibilities to the City of Gainesville in contravention of the rules that implement the Act, because development activities undertaken by Gainesville Regional Utilities will move that line outward. Corrected Exceptions, supra, at 22, ¶ 18; Fla. Admin. Code R. 9J-5.005(2)(g) (2003). Nothing in the text of Policy 3.5 incorporates or refers to future development activities undertaken by other entities. Like other components of the Plan, the Act clothes Policy 3.5 with a presumption of validity. §163.3184(10)(a), Fla. Stat. (2002). Petitioners cite no other legal authority or evidence in the Record to overcome that presumption. The petitioners' exceptions to Paragraph 108 of the Recommended Order are therefore denied.

10. Ruling on Exceptions to Paragraphs 116 through 142 of the Recommended Order.

Petitioners' next argument addresses the Strategic Ecosystems Maps used by reference in the Conservation and Open

Space Element of the Plan as amended. Corrected Exceptions, supra, at 22, ¶ 19, citing Recommended Order, ¶¶ 126-42. Petitioners' argument is unclear.[10]

Regardless of whether petitioners are contesting 17 different findings or 27, the exception is unfounded. Petitioners urge that it is impossible to determine from the Strategic Ecosystems Maps whether lands are available for development, so "there is no way to measure their impact on the environment." Corrected Exceptions, supra, at 23, ¶ 19. However, the County's testimony does not indicate that Strategic Ecosystem maps alone would determine whether land is available for development. Large-scale maps nor orthophotographic studies alone cannot be used to determine whether a site is appropriate for development without the biological "ground-truthing" called for by the amendment to the Conservation and Open Space Element. While the Maps and the orthophotographic studies can provide initial notice that a parcel of land has the potential to contain a Strategic Ecosystem, Policy 4.10.1 specifies that the actual assessment and determination is made by ground-truthing, using the Map only as a guide. The County's testimony is that there must be ground-truthing in order to make a determination as to whether a strategic ecosystem exists; the KBN/Golder report alone is only a guide. Recommended Order ¶ 136. Depending on the

outcome of that process and on what the biologists discover by walking the site, some portions of the site may be suitable for development and some may not be.

Petitioners also contend that the Strategic Ecosystems Map is unsupported by data and analysis. Id. Petitioners cite neither legal authority nor evidence in the Record to substantiate this assertion, and therefore the exception is deficient as a matter of law. §120.57(1)(k), Fla. Stat. (2004). The petitioners' exceptions to Paragraphs 116 through 142 of the Recommended Order are denied.

11. Ruling on Exceptions to Paragraphs 148 through 195 of the Recommended Order.

In their next argument, petitioners take exception to every one of the 48 findings in the Recommended Order on the subject of upland habitat. Corrected Exceptions, supra, at 24, ¶ 20, citing Recommended Order, ¶¶ 148-195. Without citation to anything in the Record, petitioners merely state that these findings "are not based on competent substantial evidence." Id. The findings in question are supported by an abundance of evidence, and petitioners cite no legal authority or other explanation contra. Petitioners also state, without citation to the Record or other argument linking it to the issue of compliance, that it may take a year to discover all the species resident on a site. Id.

Petitioners cite neither legal authority nor evidence in the Record to substantiate this assertion. §120.57(1)(k), Fla. Stat. (2004). The exceptions to Paragraphs 148 through 195 of the Recommended Order are denied.

12. Ruling on Exceptions to Paragraphs 148 through 210 of the Recommended Order.

In these exceptions petitioners object wholesale to 63 separate findings in the Recommended Order based on the assertion that the latter "are not based on competent substantial evidence" in the Record.[11] Corrected Exceptions, supra, at 25-26, ¶ 22, citing Recommended Order, ¶¶ 148-210. Nowhere in the exceptions do petitioners refer to any evidence in the Record tending to lend credence to this statement. The exceptions to Paragraphs 148 through 210 of the Recommended Order are deficient as a matter of law, and are denied. §120.57(1)(k), Fla. Stat. (2004).

13. Ruling on Exceptions to Paragraphs 156 through 161 and 167 through 170 of the Recommended Order.

Petitioners' exceptions to these findings center upon a document prepared by one of the planners for the County addressing a number of the issues raised by the 2002 Amendments to the Plan. Corrected Exceptions, supra, at 26, ¶ 23. The document made use of information in the Evaluation and Appraisal Report the County prepared in 1998. Recommended Order, ¶ 156.

Petitioners object to the paper as not based upon data and analysis. Corrected Exceptions, <u>supra</u>, at 26, ¶ 23. Once more, petitioners cite no legal authority to support their oblique argument that the information in the document is not data or analysis, nor do petitioners cite anything in the Record that disqualifies it from being such. §120.57(1)(k), Fla. Stat. (2004). Petitioners' exceptions to Paragraphs 156 through 161 and to Paragraphs 167 through 170 of the Recommended Order are denied.

C. Rulings on Exceptions by Jonesville Petitioners.

By way of introduction, the Jonesville petitioners[12] take issue both with the Order of Consolidation and the statement in the Recommended Order to the effect that the parties filed only portions of the transcribed final hearing. The latter issue cannot affect the outcome of this proceeding, so the exception is denied as immaterial. Whether to consolidate the cases rests in the discretion of the tribunal, and petitioners do not argue that this discretion was abused or exceeded here, nor do petitioners even make any showing that the consolidation was prejudicial to their interests. This exception is denied as well.

1. Ruling on Exceptions to Absence of Findings in Recommended Order that the Strategic Ecosystems Map Creates an Irrebuttable Presumption.

At the outset, petitioners take overall exception to the fact that not all their proposed findings of fact as such were addressed in the Recommended Order. Jonesville Petitioners' Joint Exceptions at 2, ¶ 2(a), citing Memorial HealthCare Group, Inc. v. Agency for Health Care Administration, 879 So.2d 72 (Fla. 1st DCA 2004); Stuckeys of Eastman v. Department of Transportation, 340 So.2d 119 (Fla. 1st DCA 1976). In substance, petitioners argue that the Recommended Order should have contained specific findings "that inclusion of property on the Strategic Ecosystems map may constituted [sic] an unconstitutional, irrebuttable presumption . . . ." Joint Exceptions, supra, at 3.

The evidence in the Record does not support any such finding; on the contrary, the text of Policies 3.3.4 and 4.10.1 of the 2002 and 2003 Amendments to the Conservation and Open Space Element of the Plan is unequivocal: any landowner is allowed to show that his tract of land should not be classified as a strategic ecosystem based on ground-truthing. See Recommended Order, ¶¶ 130-36. The KBN/Golder Map and the orthophotographic study merely provide notice to the landowner that his land may possibly contain one or more strategic ecosystems. Policy 4.10.1 clearly states that the actual determination is only made through ground-truthing.

Petitioners' "irrebuttable presumption" argument is not supported by the evidence in the record.[13] Accordingly, the exception is denied.

2. Ruling on Exceptions to Absence of Findings in Recommended Order on Whether the Amendment to the Plan Has Retroactive Effect.

Petitioners next argue that the Recommended Order is deficient because it contains no express findings on the issue of whether the 2003 Amendments to the Future Land Use Element of the Plan are retroactive. Joint Exceptions, <u>supra</u>, at 4, ¶ 2(b). Retroactivity is disfavored, but no such interpretation is possible here in any event. Recommended Order, ¶¶ 144-46. Petitioners cite nothing in the text of the 2002 or 2003 Amendments to the Plan that could be either construed or applied to give it retroactive effect, and the Department can find none. Petitioners' further argument that the County denied them an opportunity to participate in the hearings that led to the adoption of the 2003 Amendments is likewise untenable. The petitioners were notified of the hearings and afforded an opportunity to participate, and in fact did so. Recommended Order, ¶¶ 29-33. Indeed, the petitioners themselves do not contend otherwise. This exception is denied.

3. Ruling on Exceptions to Absence of Findings in

Recommended Order on the Suitability of Specific Tracts of Land for Development.

Petitioners' next argument is that the Recommended Order is incomplete because it should have contained findings addressing the suitability of specific tracts of land for development.[14] Petitioners argue that the hearing on whether the 2002 and 2003 Amendments are in compliance should have been transformed into a proceeding to determine site-by-site suitability for development. The issue of whether the amendments to the Plan are in compliance with the Act does not embrace the suitability of individual tracts of land for development; that is not the function of a Comprehensive Plan. See Fla. Admin. Code R. 9J-5.005(6) (2003). The exception is denied.

4. Ruling on Exception to the Scale of the Strategic Ecosystems Map.

Petitioners argue that the scale of the Strategic Ecosystems Map makes it improper. Joint Exceptions, supra, at 5, ¶ 2(d). Petitioners cite no evidence in the Record tending to show that the scale of the Map is inappropriate, nor do petitioners cite any legal authority that the scale is inconsistent with the Act or the rules that implement it. The exception is deficient as a matter of law, and is denied. §120.57(1)(k), Fla. Stat. (2004).

5. Ruling on Exception to the Failure of the Recommended Order to Require the Adoption of Significant Geological Features or Listed Species Habitat Maps.

Next, the petitioners take the position that the County should have adopted a Significant Geological Features Map and a Listed Species Habitat Map. Joint Exceptions, supra, at 5, ¶ 2(e). In support of their argument, petitioners contend that the failure of the County to use such maps violates a "clear statutory requirement." Id. The petitioners cite no statutory requirement violated. Like the preceding exception, this exception is deficient as a matter of law, and therefore is denied. §120.57(1)(k), Fla. Stat. (2004)

6. Ruling on Exception to the Failure of the Recommended Order to Make Findings on Whether the Amendments are Vague and Inconsistent.

Petitioners make the further argument that the Recommended Order is flawed for its failure to include specific findings responding to petitioners' contention that the amendments are "vague and inconsistent" with respect to the uses allowed in Conservation Areas. Joint Exceptions, supra, at 5, ¶ 2(f). Petitioners cite no evidence from the text of the Plan or elsewhere in the Record to substantiate this exception, so the exception is denied. §120.57(1)(k), Fla. Stat. (2004).

7. Ruling on Exception to the Failure of the Recommended Order to Consider all Petitioners' Proposed Findings.

Petitioners next "take exception to the Recommended Order for failure to provide rulings on each of the proposed findings" the petitioners submitted. Joint Exceptions, supra, at 5, ¶ 3. Nothing in the Administrative Procedure Act imposes any such requirement. On the contrary, the Administrative Procedure Act was amended almost nine years ago to delete that very requirement. §24, Ch. 96-159, Laws of Florida; see §120.59(2), Fla. Stat. (1995). The exception is denied.

8. Ruling on Exceptions to Paragraphs 123 and 125 through 127 of the Recommended Order.

Petitioners take issue with the findings in the Recommended Order concerning the function of the "strategic ecosystems" under the Conservation and Open Space Element of the amended Plan, contending that the findings in question rest upon an incorrect characterization of petitioners' arguments. Joint Exceptions, supra, at 6, ¶ 4. The exception is deficient as a matter of law, and therefore is denied. §120.57(1)(k), Fla. Stat. (2004).

Petitioners then argue that the Recommended Order overlooked inconsistencies between Policy 3.1.1 and Policy 4.10.1 of the 2003 Amendments to the Conservation and Open Space Element of the Plan in the definition of "strategic ecosystem." See Joint Ex.

1E, Conservation and Open Space Element, at 6, 10. Indeed, petitioners go so far as to say that the findings in the Recommended Order "virtually concede" the inconsistencies.[15] Joint Exceptions, supra, at 6, ¶ 4, citing Recommended Order, ¶ 127. The contested findings derive ample support from competent substantial evidence in the Record. Joint Ex. 1E, Conservation and Open Space Element, at 6; id. at 10. These exceptions are accordingly denied.

9. Ruling on Exceptions to Paragraphs 129 and 130 of the Recommended Order.

Petitioners object to the findings in the Recommended Order upholding the use of straight-line boundaries on the Strategic Ecosystems Map, because such approximations will create instances of overinclusiveness and underinclusiveness in mapping the true ecological boundaries of specific sites. Joint Exceptions, supra, at 6-7, ¶ 5, citing Recommended Order, ¶¶ 129-30. As the Recommended Order states, the use of straight-line boundaries is intended only as an approximation, and "the County will use . . . the more detailed information provided by additional ground-truthing" to locate the sensitive portions of individual tracts of land, with clustering available to relieve consequent density pressures. Recommended Order, ¶¶ 131-32. Policy 4.10.1 is clear that the actual determination as to whether a specific parcel is

or contains a Strategic Ecosystem can only be made through ground-truthing. Recommended Order ¶136. These exceptions are denied.

10. Ruling on Exception to Paragraph 132 of the Recommended Order.

Next, the petitioners take exception to the finding in the Recommended Order that approves the use of clustering to alleviate density restrictions. Joint Exceptions, supra, at 7, ¶ 6, citing Recommended Order, ¶ 132. Petitioners' argument in opposition to clustering is untenable for the simple reason that petitioners are attacking this device as it existed under the original Plan as the County approved it in 1991. The density clustering incentives available to developers under the 2002 and 2003 Amendments to the Future Land Use Element of the Plan may or may not have the desired effect, but competent substantial evidence in the Record supports the use of the incentives. The exception is denied.

11. Ruling on Exceptions to Paragraphs 133 and 134 of the Recommended Order.

Once more, petitioners' argument centers on the validity of ground-truthing to determine the environmental suitability of individual sites for development. In this exception, petitioners seize upon the finding that it is "technically correct" to say

that the Strategic Ecosystems Map classifies sites as sensitive, and that "subsequent ground-truthing does nothing to remove the property from that definition." Joint Exceptions, supra, at 7, ¶ 7, citing Recommended Order, ¶ 133. Petitioners' argument is based on the unsupported assumption that once a site is classified as a strategic ecosystem under the KBN/Golder Report, the classification is irreversible. Petitioners neglect to state that the Recommended Order clearly rejects this interpretation as unsupported by the County's testimony or by the clear language in Policy 4.10.1. Recommended Order, ¶¶ 134-135. Policy 4.10.1 requires subsequent ground-truthing to determine whether and the extent to which any portion of that property contains a strategic ecosystem which is subject to conservation. Id., ¶¶ 135-36. These site-specific suitability determinations are further amplified in Policy 3.3.4 and Policy 3.4.2. Id., ¶¶ 136-37. These portions of the Future Land Use Element foreclose petitioners' argument that subsequent ground-truthing cannot be used to determine the fitness of a site for development or for conservation.[16] This exception is denied.

12. Ruling on Exception to Note 14 of the Recommended Order.

Petitioners' next exception is addressed to the interpretation in the Recommended Order of Policy 3.1.1 of the

Conservation and Open Space Element. Joint Exceptions, supra, at 8-9, ¶ 9, citing Recommended Order, n. 14. Policy 3.1.1 enumerates a series of biological and topographical characteristics that make a piece of land a conservation area, linking them at the end with the conjunction "and." Petitioners contend that because of the use of "and" in the listing, a given piece of land must have all six of the listed characteristics in order to be deemed a "conservation area." The clear interpretation in the Recommended Order is that the wording of Policy 3.1.1 as a whole provides that the existence of any one of the listed characteristics on the land makes it a conservation area. The Department agrees with the Administrative Law Judge's interpretation, because the use of the verb "include" in Policy 3.1.1 denotes a nonexclusive listing, meaning that the County intended it to be disjunctive rather than conjunctive. The exception is denied.

13. Ruling on Exceptions to Paragraphs 135 and 136 of the Recommended Order.

Petitioners next reiterate that statutory construction requires a tribunal to follow the plain meaning of any unambiguous language. The Petitioners object to the finding in the Recommended Order that the 2003 Amendments to the Conservation and Open Space Element contemplate the use of the

Strategic Ecosystems Map in conjunction with ground-truthing to determine the suitability of individual sites for development. Joint Exceptions, supra, at 9, ¶ 10, citing Recommended Order, ¶¶ 135-36. Yet as the Recommended Order states, the unequivocal text of Policy 4.10.1 in the Conservation and Open Space Element specifically requires ground-truthing in order to determine whether a particular site may be developed. Policy 4.10.1 clearly states that the KBN/Golder report is only to be used as a guide, and the actual determination is made through the ground-truthing.[17] See Joint Ex. 1E, Conservation and Open Space Element, at 8. Similarly, Policy 3.3.4 and Policy 3.4.2 of the 2002 Amendments require that there be ground-truthing. Joint Ex. 1C, Conservation and Open Space Element, at 16-17; Recommended Order, ¶¶ 136-37. The findings in question are supported by competent substantial evidence; accordingly, the exceptions are denied.

14. Ruling on Exception to Paragraph 138 of the Recommended Order.

Petitioners lodge the further objection to Policy 4.10.1 that it also creates internal inconsistencies because of its alleged failure to incorporate into its text the same criteria on which the Strategic Ecosystems Map was based, such as hydrological criteria. Joint Exceptions, supra, at 9-10, ¶ 11,

citing Recommended Order, ¶ 138. Once more, petitioners are mistaken, because Policy 4.10.1 incorporates by reference the Report used to prepare the Strategic Ecosystems Map, which identifies all the criteria to be used in the ground-truthing process, so no inconsistencies are present. The exception is denied.

15. Ruling on Exceptions to Paragraphs 139 and 140 of the Recommended Order.

On the same theme, petitioners argue that inconsistencies are present in the Strategic Ecosystems Map due to the failure of the Map to delineate tracts of twenty acres or less. Joint Exceptions, supra, at 10, ¶ 12, citing Recommended Order, ¶¶ 139-40. The Recommended Order found that the County's policy choice to focus its conservation efforts on larger, more contiguous properties was a reasonable policy decision that was well within the County's right and authority. Recommended Order, ¶ 140. Petitioners' exceptions are denied.

16. Ruling on Exceptions to Paragraphs 141 and 147 of the Recommended Order.

Petitioners take exception to the finding in the Recommended Order that the use of the Plan to make site-specific determinations of suitability for development not only would be impracticable, but would also render the designation of

conservation areas in the Plan impracticable. Joint Exceptions, supra, at 10-11, ¶ 13, citing Recommended Order, ¶ 141. The findings of the Administrative Law Judge on this subject are supported by an abundance of competent substantial evidence, so this exception is denied as well.

Petitioners also take issue with a passing statement in the Recommended Order that petitioners have no "pending development applications" with the County.[18] Joint Exceptions, supra, at 11, ¶ 14, citing Recommended Order, ¶ 147. Petitioners then renew their argument that the hearing on the issue of compliance should somehow be transformed into a site-by-site quasi-judicial investigation into suitability for development, an argument the Department rejects supra. The exception is deficient as a matter of law, and therefore is denied. §120.57(1)(k), Fla. Stat. (2004).

17. Ruling on Exception to Paragraph 142 of the Recommended Order.

Petitioners further object to the portion of the Recommended Order finding that the Strategic Ecosystems Map is adequate to place landowners on notice that site-specific ground-truthing in accordance with Policy 4.10.1 may be appropriate. Joint Exceptions, supra, at 11-12, ¶ 15, citing Recommended Order, ¶ 142. The validity of petitioners' argument rests on the

unsupported assumption that the Strategic Ecosystems Map creates inconsistencies in the Plan, which is incorrect. Petitioners cite no evidence in the Record to support this assertion. Accordingly, this exception is likewise denied.

18. Ruling on Exceptions to Paragraphs 144 and 145 of the Recommended Order.

Petitioners also object to the findings in the Recommended Order responding to their argument that the 2001 orthophotographic series would have a retroactive impact. Other than the fact that the orthophotographic series on which the Map is based bears a date of March 1, 2001, petitioners cite no evidence in the Record or legal authority for the contention that a landowner could not bring in evidence of subsequent changes to the land since the orthophotographic study. To the contrary, Policy 4.10.1 specifically requires that there be subsequent ground-truthing to determine the current state of the land. Joint Exceptions, supra, at 12, ¶ 16, citing Recommended Order, ¶¶ 144-45. The exceptions to Paragraphs 144 and 145 of the Recommended Order are accordingly denied.

19. Ruling on Exception to Paragraph 146 of the Recommended Order.

Petitioners next object to the finding in the Recommended Order that the adoption by the County of the

Strategic Ecosystems Map passes muster under the "fairly debatable" test in the Act. Joint Exceptions, supra, at 12, ¶ 17, citing Recommended Order, ¶ 146. Petitioners contend that the "fairly debatable" test for Plans or portions of Plans is "irrelevant." Id. This is contrary to the law. See §163.3184(10)(a), Fla. Stat. (2002); Martin County v. Yusem, 690 So.2d 1288, 1290 (Fla. 1997). Petitioners cite no authority or evidence in the Record for this proposition, other than to renew once more their contention that the Plan has internal inconsistencies. The exception to Paragraph 146 of the Recommended Order is deficient as a matter of law, and therefore is denied. §120.57(1)(k), Fla. Stat. (2004).

20. Ruling on Exception to Paragraph 210 of the Recommended Order.

Petitioners' next exception is addressed to the finding in the Recommended Order that the County "used the best available data and reacted to it appropriately . . . by applying professionally accepted analysis . . . ." Joint Exceptions, supra, at 12-13, ¶ 18, citing Recommended Order, ¶ 210. Petitioners once more resurrect their contention that the

Recommended Order should have addressed all of petitioners' proposed findings of fact. Once more, no such requirement exists, having been repealed some nine years ago by an amendment to the Administrative Procedure Act. §24, Ch. 96-159, Laws of Florida; see §120.59(2), Fla. Stat. (1995). The exception is denied.

21. Ruling on Exceptions to Paragraphs 217 through 219 of the Recommended Order.

Petitioners object to the determinations in Paragraphs 217 through 219 of the Recommended Order that the 2003 Amendments to the Plan meet the "fairly debatable" test because reasonable persons could disagree on the correctness of the amendments. Joint Exceptions, supra, at 13-14, ¶ 19, citing Recommended Order, ¶¶ 217-219. Petitioners elaborate: "The fairly debatable test does not absolve a local government that summons forth . . . impermissible explanations of inconsistencies . . . by imposing ultra vires, subjective interpretations of sliding maps and criteria at a later stage of the planning process." Id. Petitioners have failed to show any inconsistencies, nor do petitioners cite anything in the Record to show any ultra vires act by the County or any "subjective interpretations" of the Plan as amended. The exception is deficient as a matter of law, and is denied. §120.57(1)(k), Fla. Stat. (2004).

22. Ruling on Exceptions to Paragraphs 230 and 240 of the Recommended Order.

Petitioners take issue with the determination in Paragraphs 230 and 240 of the Recommended Order that the 2003 Amendments to the Plan did not create any internal inconsistencies in it. Joint Exceptions, supra, at 14-15, ¶ 20, citing Recommended Order, ¶¶ 230, 240. Petitioners reiterate that the Recommended Order concedes the presence of such inconsistencies. Id., citing Recommended Order, ¶¶ 133, 135-36; Recommended Order, n. 16. Once more, nothing in the Recommended Order concedes that such inconsistencies are present. These exceptions are denied.

23. Ruling on Exception to Paragraph 231 of the Recommended Order.

Last, petitioners take exception to the conclusion in the Recommended Order that the Plan as amended offers adequate standards and guidance because petitioners allege that the County will depend on land use regulations "as a substitute" for the Plan. Joint Exceptions, supra, at 15, ¶ 21, citing Recommended Order, ¶ 231. On the contrary, the Recommended Order states that the Plan as amended provides adequate internal standards and guidance. Fla. Admin. Code R. 9J-5.005(6) (2003). That conclusion is supported by competent substantial evidence in the text of the 2003 Amendments to the Plan. The exception is

denied.

D. Ruling on Exception by the Builders Association of North Central Florida, Inc., Preserving Rural Property Values, Inc., the County, and the Department.

The County, the Department, and Intervenors Builders Association of North Central Florida, Inc. and Preserving Rural Property Values, Inc. take exception to the proposed disposition in the Recommended Order that the Department find only the 2003 Amendments to the Plan in compliance with the Act. The Cumulative Notice of Intent covered not only the 2003 Amendments, but the 2002 Amendments as well. The 2002 Amendments merged into a Compliance Agreement approved by the County; the "Recommendation" section of the Recommended Order should have advised the Department to find the 2002 Amendments in compliance as well as the 2003 Amendments. This exception is sustained, and the Department hereby determines that the 2002 Amendments, as modified by the 2003 Amendments, and the 2003 Amendments are in compliance with the Act.

IV. ORDER

1. The finding of facts and conclusions of law in the Recommended Order are adopted, except: that the Department hereby determines that the 2002 Amendments to the Alachua County Comprehensive Plan, as modified by the 2003 Amendments to the

Alachua County Comprehensive Plan, and the 2003 Amendments to the Alachua County Comprehensive Plan, are both in compliance with the Local Government Comprehensive Planning and Land Development Regulation Act.

2. The Administrative Law Judge's recommendation is accepted with the foregoing modification.

THADDEUS L. COHEN, A.I.A.
Secretary
Department of Community Affairs, State of Florida
Sadowski Building
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NOTICE OF RIGHTS

ANY PARTY TO THIS FINAL ORDER HAS THE RIGHT TO SEEK JUDICIAL REVIEW OF THE ORDER PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND FLORIDA RULES OF APPELLATE PROCEDURE 9.030(b)(1)(C) AND 9.110.

TO INITIATE AN APPEAL OF THIS ORDER, A NOTICE OF APPEAL MUST BE FILED WITH THE DEPARTMENT'S AGENCY CLERK, 2555 SHUMARD OAK BOULEVARD, TALLAHASSEE, FLORIDA 32399-2100, WITHIN 30 DAYS OF THE DAY THIS ORDER IS FILED WITH THE AGENCY CLERK. THE NOTICE OF APPEAL MUST BE SUBSTANTIALLY IN THE FORM PRESCRIBED BY FLORIDA RULE OF APPELLATE PROCEDURE 9.900(a). A COPY OF THE NOTICE OF APPEAL MUST BE FILED WITH THE APPROPRIATE DISTRICT COURT OF APPEAL AND MUST BE ACCOMPANIED BY THE FILING FEE SPECIFIED IN SECTION 35.22(3), FLORIDA STATUTES.

Certificate of Service

I HEREBY CERTIFY that true copies of the foregoing Final Order have been served by sending the same by U.S. Mail to the following this May ___ , 2005:

____
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