ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

SHIRLEY B. HAYNES and EGERTON K. VAN DEN BERG,

Petitioners,

v.

KGB LAKE HOWELL, LLC and ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondents.
_____/

DOAH Case Nos. 01-4250
01-4545

SJRWMD F.O.R. Nos. 2001-132
2001-133

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, the Honorable Donald R. Alexander, held a formal administrative hearing in the above-styled case on January 29-31, 2002, in Orlando, Florida.

A. APPEARANCES

For Petitioner Shirley B. Haynes:

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For Petitioner Egerton K. van den Berg:

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For Respondent St. Johns River Water Management District:

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For Respondent KGB Lake Howell, LLC:

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On March 29, 2002, the Honorable Donald R. Alexander ("Administrative Law Judge" or "ALJ") submitted to the St. Johns River Water Management District and all other parties to this proceeding a Recommended Order, a copy of which is attached hereto as Exhibit "A". Petitioners, Shirley B. Haynes and Egerton K. van den Berg, timely filed joint exceptions to the Recommended Order. Respondent, St. Johns River Water Management District ("District"), and Respondent, KGB Lake Howell, LLC ("Applicant"), filed responses to Petitioners' exceptions. This matter then came before the Governing Board on May 7, 2002 for final agency action.

B. STATEMENT OF THE ISSUES

This case involves the issue of whether the Applicant's application for an environmental resource permit ("ERP") for a surface water management system should be approved pursuant to Chapter 373, Florida Statutes ("F.S."), and Chapters 40C-4, 40C-40, and 40C-42, Florida Administrative Code ("F.A.C.").

C. STANDARD OF REVIEW

The rules regarding an agency's consideration of exceptions to a Recommended Order are well established. The Governing Board is prescribed by section 120.57(1)(l), F.S. (2000), in acting upon a Recommended Order. The Administrative Law Judge ("ALJ"), not the Governing Board, is the fact finder. Goss v. Dist. Sch. Bd. of St. Johns

County, 601 So.2d 1232 (Fla. 5th DCA 1992); Heifetz v. Dep't of Bus. Regulation, 475 So.2d 1277 (Fla. 1st DCA 1997). A finding of fact may not be rejected or modified unless the Governing Board first determines from a review of the entire record that the findings of fact are not based upon competent substantial evidence or that the proceedings on which the findings of fact were based did not comply with essential requirements of law. Section 120.57(1)(l), F.S., Goss, supra. "Competent substantial evidence" is such evidence as is sufficiently relevant and material that a reasonable mind would accept as adequate to support the conclusion reached. Perdue v. TJ Palm Associates, Ltd., 755 So.2d 660, 665 (Fla. 4th DCA 1999).

If a finding is supported by any competent substantial evidence from which the finding could be reasonably inferred, the finding cannot be disturbed. Freeze v. Dep't of Business Regulation, 556 So.2d 1204 (Fla. 5th DCA 1990); Berry v. Dep't of Envtl. Regulation, 530 So.2d 1019 (Fla. 4th DCA 1998). The Governing Board may not reweigh evidence admitted in the proceeding, may not resolve conflicts in the evidence, may not judge the credibility of witnesses or otherwise interpret evidence anew. Goss, supra; Heifitz, supra; Brown v. Criminal Justice Standards & Training Comm'n., 667 So.2d 977 (Fla. 4th DCA 1996). The issue is not whether the record contains evidence contrary to the findings of fact in the Recommended Order, but whether the finding is supported by any competent substantial evidence. Florida Sugar Cane League v. State Siting Bd., 580 So.2d 846 (Fla. 1st DCA 1991). The term "competent substantial evidence" relates not to the quality, character, convincing power, probative value or weight of the evidence, but refers to the existence of some quantity of evidence as to each essential element and as to the legality and admissibility of that evidence.

Scholastic Book Fairs v. Unemployment Appeals Commission, 671 So.2d 287, 289 (Fla. 5th DCA 1996). If competent substantial evidence supports a factual finding, the finding cannot be modified or rejected.

The Governing Board in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretations of administrative rules over which it has substantive jurisdiction, provided the reasons for such rejection or modification is stated with particularity and the Governing Board finds that such rejection or modification is as or more reasonable than the ALJ's conclusion or interpretation. Section 120.57(1)(l), F.S. (2000). Furthermore, the Governing Board's authority to modify a Recommended Order is not dependent on the filing of exceptions. Westchester General Hospital v. Dept. Human Res. Servs, 419 So.2d 705 (Fla. 1st DCA 1982). In interpreting the "substantive jurisdiction" amendment as it first appeared in the 1996 changes to the Administrative Procedures Act, courts have continued to interpret the standard of review as requiring deference to an agency in interpreting its own statutes and rules. See, e.g., State Contracting and Engineering Corporation v. Department of Transportation, 709 So.2d 607, 608 (Fla. 1st DCA 1998).

D. RULINGS ON EXCEPTIONS

Petitioners, Shirley B. Haynes and Egerton K. van den Berg, jointly filed 9 exceptions to the ALJ's findings of fact in the Recommended Order. Neither the Applicant nor the District staff filed any exceptions to the ALJ's Recommended Order. District staff and the Applicant each filed responses to the Petitioners' exceptions. The Petitioners' exceptions to the Recommended Order have been reviewed and are addressed below.

Hereinafter, references to testimony will be made by identifying the witness by surname followed by transcript page number (e.g. Pakzadian Vol. IV: 505-06). References to exhibits received by the Administrative Law Judge will be designated "Petitioners" for Petitioners, Shirley B. Haynes and Egerton K. van den Berg; "District" for Respondent, St. Johns River Water Management District; and "Applicant" for Respondent, KGB Lake Howell, LLC, followed by the exhibit number, then page number, if appropriate (e.g. Applicant 8: 7). Other references to the transcript will be indicated with a "T" followed by the page number (e.g. T. Vol. I: 104). References to the Prehearing Stipulation will be designated by "Prehrg. Stip." followed by the page number, then paragraph number (e.g. Prehrg. Stip.: p. 12, ¶ 5C). References to the Recommended Order will be designated by "R.O." followed by the page number or paragraph number (e.g. R.O.: 13 or R.O. ¶20).

RULINGS ON THE PETITIONERS' EXCEPTIONS

Petitioner's Exception No. 1:

Petitioners take exception to a statement in the Administrative Law Judge's cover letter accompanying the Recommended Order that "Petitioners' Exhibits 5A-C . . . were rejected." Petitioners point out that those exhibits were actually received into evidence. It should be noted that in addition to the ALJ's cover letter, page 3 of the Recommended Order also states that Petitioners' Exhibits 5A-C were not received into evidence. Petitioners are correct that these three exhibits, which are aerial photographs of the project site and surrounding area, were received into evidence. (Haynes Vol. V: 564-571). Nevertheless, we find that this error by the Administrative Law Judge is at worst harmless error and does not in any way affect the outcome of this case. None of the

exhibits in question were cited by Petitioners in their exceptions to the Recommended Order to support any arguments that the ALJ's findings of fact or conclusions of law should be rejected or modified by the Governing Board. We note further that in Petitioners' Exception No. 1, Petitioners do not assert that the ALJ's error in the characterization of these exhibits warrants any change of any finding of fact or conclusion of law and that Petitioner does not request any such change in this Exception. Moreover, the transcript clearly indicates that Petitioners' Exhibits 5A-C were used only for general orientation purposes to orient the Administrative Law Judge to the project site and surrounding property and to demonstrate the relationship of Petitioners' property to that site. (T. Vol. V: 564-71, 582-83). These exhibits were not otherwise used in the proceeding. The error by the ALJ appears to be a clerical error which does not in any way affect the outcome of this case. Accordingly, we hereby grant Petitioners' Exception Number 1 and modify the sentence on lines 12 and 13 of page 3 of the R.O. to replace the sentence "All were received in evidence, except Exhibit's 5A-C." with the sentence "All were received in evidence." However, because we find that this error of the ALJ was harmless error, the granting of this Exception does not change in any way the outcome of this case.

Petitioner's Exception No. 2:

Petitioners take exception to recommended Finding of Fact Number 20 which states that the Applicant will place 17.8 acres of wetlands and 1.2 acres of uplands under a Conservation Easement to preserve the property in its natural state in perpetuity. Petitioners allege that this is an incorrect statement of fact and point out that the Conservation Easement allows certain improvements to be performed by Seminole

County or another governmental agency in order to provide improved regional stormwater management. Petitioners further argue that because of this, the Conservation Easement is inconsistent with section 12.3.8 of the District's MSSW Applicant's Handbook (A.H.), which provides that all Conservation Easements shall be granted in perpetuity without encumbrances, unless such encumbrances do not adversely affect the ecological viability of the mitigation.

First, it must be noted that the ALJ's Finding of Fact Number 20 is based on competent substantial evidence in the record that 17.8 acres of wetlands and 1.2 acres of uplands will be placed under Conservation Easement to preserve the property in its natural state in perpetuity. (Wetzel Vol. III: 327-28). Moreover, District expert Wetzel testified that even with the additional language in the Conservation Easement, the areas proposed to be preserved will be protected in their natural state in perpetuity. (Wetzel Vol. III: 327-28). Moreover, the Conservation Easement document itself supports this finding. (District 14). The Conservation Easement states:

> "Grantor hereby voluntarily grants and conveys to Grantee a conservation easement in perpetuity over the property. . . (emphasis added)
>
> . . .
>
> 1. Purpose. The purpose of this conservation easement is to assure that the property will be retained in its existing natural condition to the maximum extent possible, and to allow certain improvements to be performed by Seminole County or another governmental agency in order to provide improved regional stormwater management. (emphasis added)
>
> . . .
>
> Grantor reserves the right to authorize Seminole County or another governmental agency to use the property for stormwater attenuation provided the County or other governmental agency first obtains all necessary permits from the Grantee in any other federal, state or local agency having jurisdiction over the Property. Prior to obtaining the permit

from the Grantee, Seminole County or other governmental agency must first show that the use of the property for stormwater attenuation will not adversely affect the environmental value of the property." (Emphasis added).

Thus, the Conservation Easement document itself grants the easement in perpetuity for the purpose of retaining the property in its natural condition. Although the easement does contemplate Seminole County or another governmental agency using the property sometime in the future for stormwater attenuation, the language of the Conservation Easement makes it clear that this use cannot occur without the proper permits from the St. Johns River Water Management District and other governmental agencies and, most importantly, the language of the easement assures that any such use of the property for stormwater attenuation cannot adversely affect the environmental value of the property.

The Petitioners are correct in their cite to Section 12.3.8(a), A.H., regarding the requirement for Conservation Easements. However, as that section states, encumbrances on Conservation Easements are allowed as long as the encumbrances "do not adversely affect the ecological viability of the mitigation." There is no evidence in the record that the reservation of right in the Conservation Easement is actually an "encumbrance" for the purposes of this rule. And, even if this reservation of right is an encumbrance, the county must prove that the proposed activity will not adversely affect the environmental value of the property prior to using the property for stormwater attenuation. Consequently, any potential future use of the property for stormwater attenuation will not adversely affect the ecological viability of the mitigation and is consistent with Section 12.3.8 of the Applicant's Handbook. Because this finding of fact is supported by competent substantial evidence, it may not be disturbed. See,

paragraph 120.57(1)(l), F.S.; Berry, supra; Fla. Chapter of Sierra Club, supra. Accordingly, Petitioners' Exception No. 2 is rejected.

Petitioner's Exception No. 3:

Petitioners take exception to the Findings of Fact in Paragraphs 6, 21 through 23, and "other" portions of the Recommended Order, which Petitioners allege are based in large measure on the premise that the wetlands to be impacted are of "low quality." Petitioners further claim that the area of wetlands to be impacted were disturbed by bush hogging activities that have occurred since 1998. Petitioners contend that if the damage was caused by activity in violation of laws or rules, then the rules are to be applied "as if the activity had not occurred." In this exception, Petitioners also question the appropriateness of the mitigation ratio proposed.

The Governing Board finds that there is competent substantial evidence in the record to support the ALJ's findings of fact that the area of wetland proposed to be impacted is of low quality. (Allerton Vol. II: 166, 169, 186, 217, 229, 239; Wetzel Vol. III: 319-20, 336-37, 345; District 6). Moreover, there is competent substantial evidence in the record to support all of the ALJ's findings of fact in paragraphs 6, 21, 22, and 23.

With respect to Finding of Fact paragraph 6, there is competent substantial evidence to support the ALJ's finding that the project will adversely impact 0.99 acres of low quality wetlands of which 0.72 acres are to be dredged and 0.27 acres are to be filled. (Allerton Vol. II: 175, Wetzel Vol. III: 318, 377; District 2, 4C, 6). There is competent substantial evidence to support the ALJ's finding that to offset this impact, the Applicant proposes to preserve 17.8 acres of forested wetlands, plus 1.2 acres of forested uplands, which constitute a mitigation ratio of 18:1. (Allerton Vol. II: 199;

Wetzel Vol. III: 326-27; District 2, 4C, 6). There is competent substantial evidence to support the ALJ's finding that the District guidelines for preservation mitigation applicable to this project are 10:1 to 60:1 for wetland preservation and 3:1 to 20:1 for upland preservation and that, thus, the mitigation plan falls within these guidelines. (Allerton Vol. II: 182; Wetzel Vol. III: 327; District MSSW Applicant's Handbook, Section 12.3.2.2).

There is competent substantial evidence to support the ALJ's finding in paragraph 21 of the R.O. that Section 12.2.1.2(a) applies because the ecological value of the functions provided by the area of wetland to be adversely affected is low and the proposed mitigation will provide greater long-term ecological value than the area of wetland to be adversely affected. (Allerton Vol. II: 166, 169 185-86, 217, 229, 239; Wetzel. Vol. III: 319-20, 324-25, 336-37, 345). The record contains competent substantial evidence to support the ALJ's finding in paragraph 22 of the R.O. that all of the proposed impacts will occur in the area of the wetland that was historically disturbed and in which nuisance and exotic species are prevalent and that due to nuisance and exotic vegetation, the ecological value provided by that area to wildlife is low. (Allerton Vol. II: 235-36; Wetzel Vol. III: 320-21). There is also competent substantial evidence in the record to support the ALJ's finding of fact in paragraph 23 of the R.O. that the mitigation for the proposed project will provide greater long-term ecological value to fish and wildlife than the part of the wetland proposed to be impacted because the proposed mitigation will preserve 18 times more wetlands that are of higher quality and provide greater value than the wetland area to be impacted. (Allerton Vol. II: 166, 169, 185-86, 199, 217, 229, 239; Wetzel Vol. III: 319-20, 324-25, 336-37, 345). Finally, there is

competent substantial evidence in the record to support the ALJ's finding that the type of wetland to be preserved, a mixed, forested wetland containing hardwoods, is rare for the area. (Wetzel Vol. III: 359; Van den Berg Vol. V: 594). Petitioners further maintain that the wetland was disturbed by illegal activity and, thus, such disturbance should not be considered in evaluating the quality of the wetland. Petitioners presented evidence of such illegal activity at the hearing, but the ALJ chose not to credit such testimony. It is not our place to reweigh the evidence or to second-guess the ALJ. Because the ALJ's findings are based on competent substantial evidence in the record, we are not free to disturb such findings.

To the extent that Petitioners are attempting to argue in this exception that the ALJ improperly applied the "out" provision in Section 12.2.1.2(a), A.H., a conclusion that must be premised on the findings that the area of wetland proposed to be impacted is of low quality, we find that Petitioners' argument has no merit. The ALJ's conclusion regarding the "out" provision of the reduction and elimination requirement of Section 12.2.1.2(a), A.H., was proper and comports with the Governing Board's interpretation of this rule. Moreover, the Governing Board finds that the record contains competent substantial evidence to support the factual underpinnings that form the basis of the ALJ's conclusion.

To qualify for an ERP, generally, an applicant must first eliminate or reduce adverse impacts to the functions of wetlands or other surface waters caused by a proposed system by implementing practicable design modifications as described in Section 12.2.1.1, A.H. However, Section 12.2.1.1, A.H., only requires an elimination and reduction analysis when: (1) a "proposed system will result in adverse impacts to

wetland functions and other surface water functions such that it does not meet the requirements of subsections 12.2.2 through 12.2.3.7," or (2) neither exception within section 12.2.1.2, A.H., applies. Section 12.2.1.2, A.H., provides:

> **12.2.1.2** The District will not require the applicant to implement practicable design modifications to reduce or eliminate impacts when:
>
> a. the ecological value of the functions provided by the area of wetland or other surface water to be adversely affected is low, based on a site specific analysis using the factors in subsection 12.2.2.3, and the proposed mitigation will provide greater long term ecological value than the area of wetland or other surface water to be adversely affected, or
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> b. the applicant proposes mitigation that implements all or part of a plan that provides regional ecological value and that provides greater long term ecological value than the area of wetland or other surface water to be adversely affected.

As part of analyzing whether one of the two exceptions in Section 12.2.1.2 applies, the District must evaluate the long-term ecological value of the mitigation proposed by the applicant. If the mitigation is not adequate under the relevant parts of Sections 12.3 through 12.3.8, A.H., to offset the adverse impacts of the proposed system, then it is unlikely either exception in Section 12.2.1.2 will apply. The question of whether mitigation is "adequate" is separate, albeit related, to the question of whether mitigation provides greater long-term ecological value than a wetland that is proposed to be impacted.

In this case, the proposed filling of 0.99 acres of the on-site wetland will be adequately offset by the preservation of 17.8 acres of higher quality wetlands and 1.2 acres of uplands on-site. On the issue of whether the adequacy of the proposed mitigation adequately offsets the functions provided by the wetland to be impacted, the

ALJ found that the Applicant's mitigation plan will fully replace the types of functions that the part of the wetlands proposed to be impacted provides to fish and wildlife. (R.O. ¶ 20). The ALJ also concluded that the mitigation will offset the adverse impacts that the project will have on the value and functions provided to fish and wildlife by the impacted part of the wetlands and that the mitigation will provide greater long-term ecological value than the area of wetland to be adversely affected. (R.O. ¶s 20 and 21). We agree with the ALJ's conclusions regarding the mitigation.

The determination of whether mitigation for a proposed project is sufficient is an ultimate conclusion of law and rests with the agency. Florida Power Corp. v. State Dept. of Envtl. Regulation, 638 So.2d 545, 561 (Fla. 1st DCA 1994); VanWagoner v. Dept. of Transportation, 18 FALR 2277 (DEP 1996) [1996 WL 405159, 16], *approved*, 700 So.2d 113 (Fla. 2nd DCA 1997); 1800 Atlantic Developers v. Dept. of Envtl. Regulation, 552 So.2d 946, 955 (Fla. 1st DCA 1989). The Governing Board upholds the ALJ's conclusion that the proposed mitigation will compensate for the project's adverse impacts to wetlands and surface waters and will provide greater long-term ecological value than the area of wetland to be impacted. The competent substantial evidence described above in the discussion of paragraphs 6, 21, 22 and 23 support the factual underpinnings for the ALJ's findings regarding mitigation and supports his conclusion that the mitigation will offset the project's adverse impacts to the functions of wetlands and surface waters. See, Section 12.3, A.H.

In this case, the second exception, under Section 12.2.1.2 (b), A.H., does not apply to the Project: the issue is whether the ALJ correctly concluded that the second exception, under Section 12.2.1.2(a), A.H., applies.

There are two requirements for Section 12.2.1.2(a) to apply. First, the ecological value of the functions provided by the area of wetland or other surface water to be adversely affected is low, based on a site-specific analysis using the factors in subsection 12.2.2.3. Second, the proposed mitigation must provide "greater long-term ecological value than the area of wetland or other surface water to be adversely affected." As described above in our discussion of paragraphs 6, 21, 22 and 23 of the R.O., there is competent substantial evidence in the record to support the ALJ's findings that the "out" provision in section 12.2.1.2(a), A.H., applies.

For edification purposes, the Governing Board wants to make clear that it is not our position that any time a wetland is disturbed or contains nuisance or exotic vegetative species the wetland is necessarily of low quality and qualifies for the "out" provision. To the contrary, many wetlands that have been disturbed or that contain some nuisance or exotic vegetation are not low quality overall and thus do not qualify for the "out". The specific facts of each case must be analyzed and the factors in Section 12.2.2.3, A.H., must be considered to determine whether the "out" applies. Here, we are not persuaded by the mere evidence of disturbance or the mere presence of exotic or nuisance species in the wetland to be impacted. Instead, we find compelling evidence in the record relating to a number of factors that contribute to the conclusion that the wetland area to be impacted is of low quality. Both the District's expert and the Applicant's expert concluded that the area of wetland to be impacted was of low quality. (Allerton Vol. II: 186; Wetzel Vol. III: 319). As required by rule 12.2.1.2(a), the District based this determination on a consideration of the factors in subsection 12.2.2.3, A.H. (District 6). Specifically, District expert Wetzel, accepted as

an expert in the fields of biology, wetland ecology, wetland delineation and environmental resource permitting, after visiting the site three to fours times and inspecting the wetlands to be impacted, and considering factors such as the vegetative composition, surrounding land use, hydrology, buffers, water quality, historic activities, and disturbance effects, concluded that the area of the wetland to be impacted is of low quality. (Wetzel Vol. III: 319-20). Wetzel found that the area of wetland to be impacted is a disturbed area that contains exotic and nuisance vegetation, including air potato vine, muscadine vine, and other exotic and nuisance vegetative species, including overstory canopy species such as Chinaberry and Chinese tallow. (Wetzel Vol. III: 319). He also found the area to be impacted had diminished wildlife habitat value and diminished fisheries habitat value. (Wetzel Vol. III: 336-37). In his analysis, Wetzel also considered the land use surrounding the wetland system. (Wetzel Vol. III: 345).

The Applicant's expert Allerton, accepted as an expert in wetland delineation, threatened and endangered species, wildlife analysis, environmental mitigation, and environmental resource permitting, visited the site approximately five times. (Allerton Vol. II: 163, 236). Allerton determined that the overall wetland area historically was divided into two separate areas, the southern most portion being choked and dominated with nuisance species. (Allerton Vol. II: 165-66). Moreover, Allerton found that the area of wetland to be impacted had very little wildlife value and was highly disturbed. (Allerton Vol. II: 167, 175). She also found that based on her observations of the condition of the ground and the area of the wetland to be impacted, it appeared that the wetland had been mowed or bushhogged. (Allerton Vol. II: 225). She concluded that the disturbance could have been caused by citrus grove operations. (Allerton Vol. II:

229). In addition to the mowing and bushhogging, Allerton observed canopy removal, tree removal, and storage and disposal of various items in the area of wetland to be impacted. (Allerton Vol. II: 229). Allerton found that the nuisance and invasive species compete for food and light and can prohibit growth of native vegetation and provide less food for wildlife. (Allerton Vol. II: 236).

Although the record does reflect some conflicting evidence regarding the quality of the wetland area proposed to be impacted and the cause of the disturbance, the decision on which of the conflicting evidence to credit is left to the ALJ as the fact finder and cannot be altered absent a complete lack of competent substantial evidence from which the finding could be reasonably inferred. Fla. Chapter of Sierra Club v. Orlando Utility Comm., 436 So.2d 383 (Fla. 5th DCA 1983). These are evidentiary matters within the province of the ALJ. Fla. Dept. of Corrections v. Bradley, 510 So.2d at 1122 (Fla. 1st DCA 1987). The Governing Board is not free to reweigh the evidence, but rather we are limited to determining whether some competent substantial evidence was presented to support the ALJ's findings. South Florida Water Management District v. Caluwe, 459 So.2d 390 (Fla. 4th DCA 1989). The Governing Board finds that there is competent substantial evidence in the record to support the ALJ's finding of fact.

The ALJ's factual findings related to the low quality of the area of the wetland proposed to be impacted, which support his conclusion that the "out" provision in Section 12.2.1.2(a), A.H., applies, are supported by competent substantial evidence and, as such, cannot be disturbed. As to the ALJ's interpretation of this rule, the Governing Board finds that it is a proper interpretation and is consistent with this Board's prior interpretations. Accordingly, Petitioners' Exception No. 3 is rejected.

Petitioner's Exception No. 4:

Petitioners take exception to the Findings of Fact in Paragraph 16 of the Recommended Order, which provides that under Section 12.2.1.1, A.H., a proposed modification, which is not technically capable of being done, is not economically viable or which adversely affects public safety through the endangerment of lives or property, is not considered practicable. Petitioners point out that the relevant portion of this section is whether proposed modifications are economically viable and contend that the Applicant could construct nine buildings instead of ten, thereby eliminating all wetland impacts. Petitioners argue that with ten buildings the developer would receive a twenty-three percent (23%) annual return on his investment, whereas with nine buildings the developer would receive a twenty-one percent (21%) annual return on his investment. Further, Petitioners assert there is no other competent evidence in the record as to economic viability.

We find that this exception is without merit. First, in Finding of Fact No. 17, the Administrative Law Judge made a finding of fact that the Applicant's design for the proposed project went through a number of iterations prior to submittal to the District to reduce adverse impacts to wetland. The ALJ further found that the Applicant did consider a number of suggestions from the District to modify the plans to reduce wetlands impacts and that the Applicant provided proof as to why those suggestions were not practicable. This finding of fact is based on competent substantial evidence in the record that the proposed suggestions from the District to reduce wetland impacts were either not technically feasible due to local codes or were not economically viable. (Allerton Vol. II: 193-95, 204; Wetzel Vol. III: 322-24; District 4C). Although the record

does reflect some conflicting evidence presented by Petitioners regarding the economic viability of alternative design modifications, the decision on which of the conflicting evidence to credit is left to the ALJ as the fact finder and cannot be altered absent a complete lack of competent substantial evidence from which the finding could be reasonably inferred. Fla. Chapter of Sierra Club v. Orlando Utility Comm., 436 So.2d 383 (Fla. 5th DCA 1983). These are evidentiary matters within the province of the ALJ. Fla. Dept. of Corrections v. Bradley, 510 So.2d at 1122 (Fla. 1st DCA 1987). The Governing Board is not free to reweigh the evidence, but rather we are limited to determining whether some competent substantial evidence was presented to support the ALJ's findings. South Florida Water Management District v. Caluwe, 459 So.2d 390 (Fla. 4th DCA 1989). The Governing Board finds that there is competent substantial evidence in the record to support the ALJ's finding of fact.

In any event, even if the proposed changes were economically viable and therefore practicable, the Applicant still met the requirements of the District's permitting criteria by meeting one of the "out" provisions in the Elimination and Reduction of Impacts Rule as stated in Section12.2.1, A.H., as discussed in our ruling on Petitioners' Exception No. 3.

For the foregoing reasons, Petitioners' Exception No. 4 is rejected.

Petitioner's Exception No. 5:

Petitioners take exception to the Findings of Fact in Paragraph 13 in the Recommended Order and contend that the presumptions referred to in this paragraph are not irrefutable and, in fact, have been rebutted. However, Petitioners do not provide any citations to the record or argument to support their assertion that the presumptions

have been rebutted. In paragraph 13 of the R.O., the Administrative Law Judge found that the Applicant met the presumption that the proposed system complies with the requirements of Rule 40C-4.301(a) through (c), F.A.C., by meeting the requirements of Section 10.2.1(a) through (d), A.H. The ALJ is correct that there is a presumption that a surface water management system complies with the requirements of paragraphs 40C-4.301(1)(a)-(c), F.A.C., if the system meets the requirements of sections 10.2.1 (a) through (d), A.H.[1] The Administrative Law Judge found that this presumption was met because the post-development rate of discharge will be lower than the pre-development peak rate of discharge for a 24-hour, 25-year storm event. This finding of fact was based on competent substantial evidence in the record. (Einhouse Vol. I: 32-37, Pakzadian Vol. IV: 439-53; Applicant 8, 9A, 9B, 9C:7). Paragraphs 40C-4.301(1)(b)-(d) and sections 10.2.1 (b) through (d), A.H., are not applicable to Applicant's system. Section 10.2.1 (b), A.H., does not apply because the system will not be discharging to a landlocked lake and it is not located in an area for which separate basin criteria have been established. (Pakzadian Vol. IV: 441-42, 445-47). See, §§ 10.4.2 and 10.4.3, A.H. Section 10.2.1(c), A.H., does not apply because the system will not be located downstream on a point or watercourse where the drainage area exceeds five square miles. (Pakzadian Vol. IV: 447). See, §§ 10.5.2 and 10.5.3(a), A.H. Section 10.2.1 (d), A.H., does not apply because the system will not impound a stream or other watercourse. (Pakzadian Vol. IV: 447-48). Therefore, under section 10.2.1, A.H.,

[1] There is a presumption in section 10.2.1, A.H., that if the requirements of sections 10.2.1 (a) through (d), A.H., are met, then the requirements in sections 9.1.1(a) through (c), A.H., are met. The requirements in section 9.1.1, A.H., are identical to the requirements of rule 40C-4.301(1), F.A.C., and sections 9.1.1(a) through (c), A.H., correspond to paragraphs 40C-4.301(1)(a) through (c), F.A.C.

Applicant's surface water management system meets the requirements of paragraphs 40C-4.301(1)(a)-(c), F.A.C.

The Petitioners fail to cite to any evidence in the record that Finding of Fact No. 13 is not supported by competent substantial evidence or to provide any explanation whatsoever as to why they believe this presumption was not met. Petitioners also fail to cite to any statute, rule, or case to argue that the presumption as stated in Section 10.2.1(a) through (d), A.H., does not apply to this project. Accordingly, Petitioners' Exception No. 5 is rejected.

Petitioner's Exception No. 6:

Petitioners take exception to the findings of fact contained in Paragraph 26 of the Recommended Order and contend that these findings of fact are not supported by the record. In Finding of Fact Number 26, the ALJ found that the Applicant met the second prong of Rule 40C-4.301(d), as elucidated in Section 12.2.2.4, Applicant's Handbook, that the project will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters by proving that the proposed activity will not change the hydroperiod of the wetlands on site so as to affect wetland functions.

This finding of fact is supported by competent substantial evidence in the record. The District expert testified that the placement of the stormwater pond between the buildings and wetlands will not adversely affect the wetlands. (Wetzel Vol. III: 333). As the wetland system is primarily groundwater influenced, the stormwater system will not adversely affect the hydroperiod of the receiving wetlands. (Einhouse Vol. I: 135; Wetzel Vol. III: 340). The stormwater pond will impound the runoff from the project, but

water will still laterally flow into the wetlands from the stormwater pond. The soil around the pond is porous with a high infiltration and percolation rate. (Allerton Vol. II: 195-96; Wetzel Vol. III: 349-50).

In addition, Petitioners argue that the record contains testimony by the District's engineer to the effect that the "base" flow or "low" flow analysis within the wetlands below the project site "was not [of] any significance on the property." Petitioners' reference to statements concerning "base flow" and "low flow" are immaterial to this finding of fact because base flow or low flow analysis is used to determine whether the proposed project meets the standards listed in Section 40C-4.301(a) through (c), F.A.C., and thus the presumption as outlined in Section 10.2.1, A.H. See sections 10.2.1(d) and 10.6, A.H. Those rule sections are not material to Finding of Fact No. 26 that the Applicant met the rule criteria for Section 40C-4.301(d), F.A.C. Furthermore, there is competent substantial evidence in the record that the proposed project will not decrease groundwater flows in the project site or decrease surface water flows to Lake Howell. (Pakzadian Vol. IV: 447-450). For the foregoing reasons, Petitioners' Exception No. 6 is rejected.

Petitioner's Exception No. 7:

Petitioners take exception to the Finding of Fact in Paragraph 36 of the Recommended Order, which provides that adverse secondary impacts as proscribed by Section 12.2.7(d) will not occur because no evidence was presented that there would be additional phases or expansion of the proposed system or that there are any on-site or off-site activities that are closely or casually linked to the proposed system. Petitioners contend that the approval given to Seminole County within the Conservation Easement

to construct stormwater works is clear evidence of a prohibited secondary impact which would not exist but for the project.

Section 12.2.7(d), A.H., requires an applicant to provide reasonable assurance that additional phases or expansion of the proposed system for which plans have been submitted to the District and other governmental agencies, and on-site and off-site activities regulated under Part IV, Chapter 373, F.S., or other activities described in Section 403.813(2), F.S., that are closely linked and causally related to the proposed system, will not result in water quality violations of adverse impacts to functions of wetlands and other surface water bodies.

In paragraph 36 of the R.O., the ALJ found that adverse secondary impacts as proscribed by Section 12.2.7(d), A.H., will not occur because no evidence was presented that there would be additional phases or expansion of the proposed system or that there are any on-site or off-site activities that are closely linked or causally related to the proposed system. There is competent substantial evidence in the record that the project will not cause adverse secondary impacts to wetland resources. (Wetzel Vol. III: 316, 328). Thus, this finding cannot be disturbed. In any event, to the extent that the potential future use of the wetland to be preserved in a Conservation Easement by Seminole County or some other governmental entity for stormwater attenuation can be considered to be closely linked and causally related to the project, such potential future use will not result in an unacceptable secondary impact because the ALJ made a specific finding that the Conservation Easement will preserve the property in its natural state in perpetuity. (R.O.: ¶ 36). As set forth in our ruling on Petitioners' Exception No. 2, the language of the Conservation Easement document prohibits any future use of the

property for stormwater attenuation that would adversely affect the environmental viability of the property. By prohibiting activities that would adversely affect the environmental viability of the property, the Conservation Easement by its very terms ensures that unacceptable adverse secondary impacts will not occur.

Because this finding of fact is supported by competent substantial evidence, it may not be disturbed. See, paragraph 120.57(1)(l), F.S.; Berry, supra; Fla. Chapter of Sierra Club, supra. Further, we find that the ALJ properly applied the District's secondary impacts rule. Accordingly, Petitioners' Exception No. 7 is rejected.

Petitioner's Exception No. 8:

Petitioners take exception to Paragraph 47 of the Recommended Order, which provides that the permit is not dependent on the Seminole County pond site, that nothing in the application ties the project with that site, and that the transfer of density rights from the county property is not relevant to the District permitting criteria. Petitioners argue to the contrary that there is a clear nexus between the proposed density transfer and the District's review of the proposed project under applicable rules. Petitioners assert that the District is aware of the existing commitment of the county pond site to stormwater detention and treatment and that the District has a duty to monitor the county's compliance with the District permit issued for construction and operation of a wet detention system on that site.

In paragraph 47 of the R.O., the Administrative Law Judge found that the proposed permit is not dependent on or tied to the county pond site and the proposed transfer of density rights from Seminole County to the Applicant is not relevant to the District's permitting criteria. There is competent substantial evidence in the record that

the proposed project does not need the county pond site except for determining allowable density on the project site. (Einhouse Vol. I: 27-29; Van den Berg Vol. V: 631-32). The Applicant is not proposing any impacts to wetlands at the county pond site and the county pond site is not part of the proposed mitigation plan for this project. (Van den Berg Vol. V: 631-32).

While Petitioners may be correct that there is a nexus between the proposed density transfer and the project at issue, Petitioners have failed to site to any statute or rule that would implicate the District's permitting requirements in any transaction between the Applicant and Seminole County. District staff testified that they did not review this project in terms of any local government rules or ordinances. (Wetzel Vol. III: 334). Petitioners also allege that the District would be a "party" to the transaction between the Applicant and the county, yet fail to cite to any evidence in the record, such as a written agreement or contact, that either places a responsibility on the District or gives the District a right it did not have before due its status as a "party" in the transaction. Although, as Petitioners allege, the District may have a duty to monitor Seminole County's compliance with the earlier permit issued by the District for operation and maintenance of the county pond site, Petitioners offer no evidence from the record that the proposed transfer of density rights will either violate that earlier permit or affect the ability of the permittee to maintain the county pond site in compliance with the permit.

Because this finding of fact is supported by competent substantial evidence, it may not be disturbed. See, paragraph 120.57(1)(l), F.S.; Berry, supra; Fla. Chapter of Sierra Club, supra. Accordingly, Petitioners' Exception No. 8 is rejected.

Petitioner's Exception No. 9:

Petitioners take exception to the Recommended Order to the extent to which it omits discussion or action with respect to the 48-inch concrete pipe which Petitioners allege extends into the project site, passes under a proposed building site and discharges into the Kasik wetlands at a point where the Applicant proposes to deposit fill material. Petitioners contend that this pipe is not shown in the application in violation of the District rules. Petitioners further assert that the application contains no indication whether or how that pipe might be strengthened or relocated and that this is a material failure on the part of the Applicant since the pipe carries a large amount of untreated stormwater from off-site projects which were developed prior to enactment of stormwater rules.

In this exception, Petitioners are in essence taking exception to the lack of a specific finding of fact regarding the 48" concrete pipe. There is no legal requirement to make a finding of fact on every subject requested by a party, especially where the subject is immaterial, unnecessary, or irrelevant. See §120.57(1)(k), F.S. Under section 120.57(1)(k), F.S., the Administrative Law Judge need only "complete and submit to the agency and all parties a recommended order consisting of finding of fact, conclusions of law, and recommended disposition or penalty, if applicable, and any other information required by law to be contained in the final order." Section 120.57(1)(k) does not require findings regarding immaterial, unnecessary, or irrelevant facts. "Simply because some evidence is disregarded, that does not mean that the findings themselves are not based on other substantial, competent evidence, which the

finder in his judgment relied upon." Fla. Ch. Of Sierra Club v. Orlando Util. Comm'n, 436 So.2d 383, 388-89 (Fla. 5th DCA 1983).

In this case, evidence was presented during the hearing regarding the 48" concrete pipe and the Administrative Law Judge did make findings of fact that took into consideration of the 48" concrete pipe:

> 28. Finally, stormwater runoff from the surrounding basins that currently discharge into the wetlands will not be affected by the construction of the stormwater system. That runoff will continue to flow into the wetlands on the project site.

(R.O.: 16, ¶28). There is competent substantial evidence in the record to support those findings of fact. (Einhouse Vol. I: 21; Pakzadian Vol. IV: 488-89, 497-502; Applicant 10, 14A).

Petitioners failed to expressly state what concern they had regarding the 48" concrete pipe and they failed to state which rules of the District would be violated thereby. Petitioners have admitted that the project will not cause adverse water quantity impacts or adverse flooding, because in their Proposed Recommended Order they stated that the project meets the requirements of Rule 40C-4.301(1)(a)-(b), F.A.C. (See, Petitioners' P.R.O.: 11). The best we can discern is that Petitioners' concern appears to be that if the 48" concrete pipe is revised or relocated that there may be some "wetlands or other environmental impacts of any such revision or relocation of a 48" pipe." (Petitioners' P.R.O.: 11). However, Petitioners have failed to articulate the nature of the wetland or other environmental impact that concerns them. There is no evidence in the record that the Applicant has proposed to modify or relocate the 48" concrete pipe depicted in Applicant's Exhibit No. 10. Accordingly, the permit for the project that is issued by this Final Order does not authorize the alteration or relocation

of that pipe. Therefore, the Applicant cannot lawfully alter or relocate that pipe without seeking a separate permit modification and demonstrating that such modification meets all applicable District permitting criteria. Any potential wetland impacts would be addressed at that time under the applicable rules.

Finally, Petitioners contend that the alleged failure to show the 48" concrete pipe in the initial application is a violation of the District rules and warrants denial of the permit application. However, the alleged failure to show that pipe in the initial application is irrelevant because the location of that pipe is depicted in Applicant's Exhibit 10. The fact that the pipe may not have been depicted in an earlier version of the application is irrelevant to this proceeding. This is a de novo proceeding intended to formulate final agency action, not to review preliminary agency action. See, Department of Transportation vs. JWC, Inc., 396 So.2d 778, 786-87(Fla. 1st DCA 1981).

The District staff in their Responses to Petitioners' exceptions have suggested that we consider adding a new permit condition to the permit to allay Petitioners' fears. The proposed condition would require the Applicant, prior to construction, to submit plans showing that no building construction will occur within 10 feet of the centerline of the 48-inch pipe. We are not inclined to entertain such a suggestion. The ALJ, after hearing all of the evidence, did not make any findings that such a condition was appropriate. Moreover, as stated above, under the terms of this permit, the Applicant may not alter or relocate the 48" pipe without first obtaining a permit modification. Thus, the District staff's suggested condition is rejected.

For the foregoing reasons, Petitioners' Exception No. 9 is rejected.

FINAL ORDER

ACCORDINGLY, IT IS HEREBY ORDERED:

The Recommended Order dated March 29, 2002, attached hereto, is adopted in its entirety except as modified by the final action of the Governing Board of the St. Johns River Water Management District in its rulings on Petitioners' Exceptions 1 through 9. KGB Lake Howell, LLC's application number 40-117-71671-1 for an Environmental Resource Permit is hereby granted under the terms and conditions contained in the District's proposed agency action as set forth in the draft permit dated October 8, 2001, attached hereto, with the addition of the following revised condition no. 26 as recommended by the ALJ:

> Condition 26. This permit authorizes construction and operation of a surface water management system as shown on the plans received by the District on June 14, 2001, and as amended by plan sheet C4 (Sheet 07 of 207) received by the District on January 23, 2002~~August 13, 2001~~.

DONE AND ORDERED this 8th day of May, 2002, in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

BY: _____
Duane L. Ottenstroer
CHAIRMAN

RENDERED this 8th day of May, 2002.

BY: Kyia Tiffany
SANDRA BERTRAM
Asst. DISTRICT CLERK

Copies to:

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHIRLEY B. HAYNES and EGERTON K. VAN DEN BERG,	)	
Petitioners,	)	
vs.	)	Case Nos. 01-4250 01-4545
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT and KGB LAKE HOWELL, LLC,	)	
Respondents.	)	

RECOMMENDED ORDER

Pursuant to notice, these matters were heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on January 29, 30, and 31, 2002, in Orlando, Florida.

APPEARANCES

For Petitioner: Shirley B. Haynes, pro se
2764 Lake Howell Road
Winter Park, Florida 32792-5725

For Petitioner: Egerton K. van den Berg, pro se
1245 Howell Point
Winter Park, Florida 32792-5706

For Respondent: (Applicant)
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For Respondent: Charles A. Lobdell, III, Esquire
(District) Thomas I. Mayton, II, Esquire
St. Johns River Water Management District
Post Office Box 1429
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STATEMENT OF THE ISSUE

The issue is whether an Environmental Resource Permit should be issued to KGB Lake Howell, LLC, authorizing the construction of a surface water management system to serve an apartment complex known as the Estates at Lake Howell in the City of Casselberry, Florida.

PRELIMINARY STATEMENT

This matter began on September 18, 2001, when Respondent, St. Johns River Water Management District, issued its Written Notice of Intended District Decision on Permit Application 40-117-71671-1 authorizing Respondent, KGB Lake Howell, LLC, to construct a stormwater management system for an apartment complex in the City of Casselberry, Florida. On October 11, 2001, Petitioners, Shirley B. Haynes and Egerton K. van den Berg, who reside near the project, submitted a joint letter requesting an administrative hearing to contest the issuance of the permit. In addition, Haynes submitted a separate letter the same date requesting that her letter be treated as a petition for an administrative hearing. The latter letter was forwarded to the Division of Administrative Hearings on

October 30, 2001, with a request that an Administrative Law Judge be assigned to conduct a hearing. That matter was assigned Case No. 01-4250. Thereafter, both Petitioners filed an Amended Petition for Administrative Proceeding on November 19, 2001. The Amended Petition was forwarded to the Division of Administrative Hearings on November 26, 2001, and has been assigned Case No. 01-4545. By Order dated December 12, 2001, the two cases were consolidated.

By Notice of Hearing dated November 14, 2001, a final hearing was scheduled on January 9 and 10, 2002, in Orlando, Florida. At the request of Shirley B. Haynes, the hearing was continued to January 29-31, 2002, at the same location.

At the final hearing, Petitioners both testified on their own behalf and offered Petitioners' Exhibits 1-3, 5A-C, 6-8, 13, 41, 46A-C, and 51-54. All were received in evidence except Exhibits 5A-C. Respondent, KGB Lake Howell, LLC, presented the testimony of Jeffrey D. Einhouse, a professional engineer accepted as an expert; Kimberly M. Allerton, an environmental consultant accepted as an expert; and Robert R. Russell, a professional engineer accepted as an expert. Also, it offered Applicant's Exhibits 2-4, 6A and B, 8, 9A-C, 10, 14A-D, 17, and 35. All were received in evidence. Respondent, St. Johns River Water Management District, presented the testimony of James Hollinghead, a hydrologist

accepted as an expert; Rod Pakzadian, a professional engineer accepted as an expert; and Timothy Wetzel, a regulatory scientist accepted as an expert. Also, it offered District Exhibits 1-16, which were received in evidence. Finally, the undersigned took official recognition of the St. Johns River Water Management District Applicant's Handbook for Management and Storage of Surface Waters, and Chapters 40C-4, 40C-40, and 40C-42, Florida Administrative Code.

The Transcript of the hearing (five volumes) was filed on February 13, 2002. At the request of Petitioners, the time for filing proposed findings of fact and conclusions of law was extended to March 1, 2002. The same were timely filed by the parties, and they have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

A. Background

1. In this proceeding, Respondent, St. Johns River Water Management District (District), proposes to issue an Environmental Resource Permit to Respondent, KGB Lake Howell, LLC (Applicant), authorizing the construction of a stormwater management system to serve a 240-unit apartment complex known as the Estates of Lake Howell. The project will be located on

an undeveloped tract of land in the City of Casselberry (City), Seminole County, Florida, just north of the Orange County line. It will include ten three-story buildings, parking, clubhouse/ administration building, amenity complex, and wet detention pond.

2. The project also incorporates a 3.62-acre stormwater pond, now owned and used by Seminole County (County), lying east of Lake Ann Lane across from the project site, which was included in the overall acreage calculations for the purpose of increasing apartment density on the site. The Applicant has authorization from the County to apply for the permit incorporating that tract of land. The pond will continue to function as a stormwater facility for the County and will not accommodate stormwater from the project site.

3. The project site consists of 38.9 acres located on the north side of Howell Branch Road, east of State Road 436 (also known as Semoran Boulevard), and west of Lake Ann Lane in the City. The site is currently undeveloped and includes an abandoned orange grove and upland pine flatwoods community, which make up approximately 14.6 acres, while the remaining 24.3 acres is a mixed forested wetland system. The property is now owned by the Harold Kasik Living Trust (Kasik property), which has a contract for purchase with the Applicant.

4. The Kasik property is in the shape of a rectangle, 648 feet by 2,530 feet, with its long sides running north-south. It is bordered on the north and east by single-family residential and vacant land, to the south by commercial development, and to the west by high-density residential and commercial development. The property has a high elevation of approximately 83 feet on its southeastern corner and falls to the north/northeast, where the edge of the wetland system is at an elevation of 63 or 64 feet.

5. The major development constraint on the site is the large wetland tract on the northern portion of the property. In order to minimize proposed impacts to the wetlands, the Applicant proposed the transfer of the development entitlements from the County land to benefit the Applicant's property. More specifically, the Applicant will acquire the County property, the Applicant will simultaneously grant a perpetual drainage easement over the property to the County, the Applicant will maintain the landscaping of the property in perpetuity, the Applicant will convey around five acres of wetlands on the northern end of the Kasik property to the County in fee simple, and the City will allow the transfer of development rights from the property.

6. The project will adversely impact 0.99 acres of low-quality wetlands, of which 0.72 acres are to be dredged and

0.27 acres are to be filled to provide the fencing around the wet detention facility. To offset this impact, the Applicant proposes to preserve 17.8 acres of forested wetlands, plus 1.2 acres of forested uplands, or a mitigation ratio of 18:1. The District's guidelines for preservation mitigation applicable to this project are 10:1 to 60:1 for wetland impacts and 3:1 to 20:1 for upland impacts; thus, the mitigation plan falls within these guidelines.

7. Under current conditions, stormwater runoff from the project site sheet flows into the on-site wetland and ultimately Lake Howell (the Lake), a Class III water body which meets all applicable water quality standards and is not an Outstanding Florida Water. After development occurs, stormwater from the developed portions of the property will be conveyed to a wet detention pond for required water quality treatment and peak discharge rate attenuation. After treatment in the detention pond, the water will discharge to the on-site wetland, as it does now, and eventually will be conveyed into the Lake. Off-site flows will continue to be conveyed into the on-site wetland.

8. The wet detention pond, which has a minimum depth of twelve feet and a permanent pool of water with a mean depth of two to eight feet, has been designed to accommodate a 25-year, 24-hour storm. Post-development discharge will be less than

pre-development, and the outfall structure has been designed to avoid channelization in the wetlands after the point of discharge.

9. Since at least the late 1940's, Petitioner, Shirley B. Haynes, or her relatives, have owned, or resided on, a multi-acre tract of land just north of the project site at 2764 Lake Howell Lane. She has substantial frontage on the south side of the Lake. The southern portion of her property, which are wetlands, adjoins the northern boundary of the project site. For the past three years, Petitioner, Egerton K. van den Berg, has resided on a ten-acre tract of land at 1245 Howell Point, which is northeast of the project site. He has approximately 235 feet of frontage on the south side of the Lake.

10. As argued in their Proposed Recommended Order, Petitioners generally contend that the application is "materially deficient" in several respects in violation of Rule 40C-4.101; that the Applicant has failed to satisfy Rule 40C-4.301(1)(c) and (d), which in turn constitutes a failure to meet the requirements of Rule 40C-4.302(1)(a)-(c); that the Applicant failed to satisfy the criteria in Sections 12.2.3(a)-(f), 12.2.1, 12.2.1.1, 12.2.1.3, 12.2.2.3(a)-(e), 12.2.2.4(a) and (b), 12.3.2.2(c), and 12.3.8(a) of the Applicant's Handbook: Management and Storage of Surface Waters

(Applicant's Handbook); that the District did not adequately consider the cumulative impacts of the project as required by Section 373.414(8)(a), Florida Statutes; that a low flow analysis of the Lake was not performed, as required by Rule 40C-8.011(5); that the Applicant did not submit detailed mitigation plans as required by Section 12.3.3.2 of the Applicant's Handbook; that the 18:1 ratio for mitigation proposed by the Applicant is inappropriate; and that the District should not approve the density of the apartments established by the City. These concerns, to the extent they have been identified as issues in the parties' Pre-Hearing Stipulation, are addressed in the findings below. Where contentions have been raised by Petitioners, such as the placement of the detention pond over a depressional area, and they have not been argued in the Proposed Recommended Order, they have been deemed to be abandoned.

B. Conditions for issuance of permits

11. Rule 40C-4.301(1)(a)-(k), Florida Administrative Code, specifies eleven substantive requirements for which reasonable assurance must be given in order for a standard permit to be issued. Subsection (3) of the same Rule provides that the standards and criteria contained in the Applicant's Handbook shall determine whether the foregoing reasonable assurances have been given. Additional conditions for the

issuance of a permit are found in Rule 40C-4.302(1) when the project, or any part of it, is located in, on, or over wetlands or other surface waters. Therefore, because a part of the Applicant's system will be located in wetlands, the Applicant must also give reasonable assurance that the project will not be contrary to the public interest, and that it will not cause unacceptable cumulative impacts upon the wetlands or surface waters.

a. Rule 40C-4.301

12. Paragraphs (a)-(c) of the Rule require that an applicant provide reasonable assurance that the project will not cause adverse water quantity impacts to receiving waters and adjacent lands, adverse flooding to on-site or off-site property, or adverse impacts to existing surface water storage and conveyance capabilities.

13. If a system meets the requirements of Section 10.2.1(a) through (d) of the Applicant's Handbook, there is a presumption that the system complies with the requirements of Paragraphs (a) through (c). This presumption has been met since the evidence supports a finding that the post-development peak rate of discharge will be lower than the pre-development peak rate of discharge for a 24-hour, 25-year storm event. Therefore, the Applicant's system meets the requirements of these Paragraphs.

14. Paragraph (d) of the Rule requires that an applicant give reasonable assurance that the project "will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters." To satisfy this requirement, an applicant must also demonstrate compliance with the two-prong test in Sections 12.2.2 and 12.2.2.4 of the Applicant's Handbook.

15. Section 12.2.2 requires that an applicant provide reasonable assurance that a regulated activity will not impact the values of wetlands and other surface water functions so as to cause adverse impacts to the abundance, diversity, and habitat of fish, wildlife, and listed species. In its proposal, the Applicant proposes to fill a total of 0.99 acres of wetlands. Since these impacts will eliminate the ability of the filled part of the on-site wetland to provide functions to fish and wildlife, the filling will cause adverse impacts. Under these circumstances, Section 12.2.1.1 requires that the Applicant either implement practicable design modifications to reduce or eliminate these adverse impacts or meet one of the exceptions under Section 12.2.1.2.

16. Under Section 12.2.1.1, a proposed modification which is not technically capable of being done, is not economically viable, or which adversely affects public safety

through the endangerment of lives or property is not considered practicable.

17. The Applicant's design for the proposed project went through a number of iterations prior to submittal to the District to reduce adverse impacts to the wetlands. During the permitting process, the District requested that the Applicant consider a number of other suggestions to reduce or eliminate the adverse impacts to wetlands such as adding a fourth floor to the apartment buildings to eliminate the need for one apartment building, building a parking garage for the tenants, and eliminating the tennis and volleyball courts. Because the Applicant provided detailed reasons why none of those suggestions were practicable, it was not required to implement any of those design modifications. In addition, the Applicant's decision not to include a littoral zone around the stormwater pond did not increase the amount of wetland impacts as that engineering decision resulted in a stormwater pond that was simply deeper and not wider. Therefore, the Applicant has met the requirement to reduce or eliminate adverse wetland impacts.

18. Section 12.2.1.1 only requires an elimination and reduction analysis when: (1) a proposed system will result in adverse impacts to wetland functions and other surface water functions so that it does not meet the requirements of

Sections 12.2.2 through 12.2.3.7, or (2) neither one of the two exceptions within Section 12.2.1.2 applies.

19. In determining whether one of the two exceptions in Section 12.2.1.2 applies, the District must evaluate the long-term ecological value of the mitigation proposed by the Applicant. If the mitigation is not adequate to offset the adverse impacts of the proposed system, then it is unlikely either exception in Section 12.2.1.2 will apply.

20. As noted above, the Applicant's proposed dredging and filling of the southern edge of the wetlands on the project site will eliminate the ability of that wetland area to provide functions to fish and wildlife. However, the Applicant's mitigation plan of placing 17.8 acres of wetlands and 1.2 acres of uplands under a conservation easement to preserve that property in its natural state in perpetuity will fully replace the types of functions that the part of the wetlands proposed to be impacted provides to fish and wildlife. The mitigation plan will also offset the adverse impacts that this project will have on the value and functions provided to fish and wildlife by the impacted part of the wetlands.

21. In this case, the first exception under Section 12.2.1.2(a) applies as it meets that Section's two requirements: the ecological value of the functions provided

by the area of wetland to be adversely affected is low, and the proposed mitigation will provide greater long-term ecological value than the area or wetland to be adversely affected.

22. Also, the quality of the wetland to be impacted is low. All of the proposed impacts will occur in the area of the wetland that was historically disturbed and in which nuisance and exotic species are prevalent. Due to nuisance and exotic vegetation, the ecological value provided by that area to wildlife is low.

23. The mitigation for the proposed project will provide greater long-term ecological value to fish and wildlife than the part of the wetland proposed to be impacted because the proposed mitigation will preserve eighteen times more wetlands that are of higher quality and provide greater value than the wetland area to be impacted. The type of wetland to be preserved, a mixed forested wetland containing hardwoods, is rare for the area.

24. Although the mitigation plan will provide greater long-term ecological value to fish and wildlife than the part of the wetland proposed to be impacted, the Applicant did not meet the second exception in the elimination and reduction rule under Section 12.2.1.2(b) because the wetlands to be preserved are not regionally significant.

25. In addition to meeting the elimination and reduction rule through implementation of practicable design modifications, the Applicant also satisfied the same rule by meeting the first exception found in Section 12.2.1.2(a). Thus, the Applicant has satisfied Section 12.2.2, which is the first prong of the test to determine compliance with Paragraph (d).

26. The second prong of the test to determine whether Paragraph (d) of the Rule has been satisfied is found in Section 12.2.2.4. That Section requires that an applicant give reasonable assurance that the activity will not change the hydroperiod of a wetland so as to affect wetland functions. For the following reasons, that prong of the test has been satisfied. Since the wetlands are primarily groundwater-influenced, the construction of the stormwater pond between the project and the wetlands will not adversely affect the wetlands. As the soils surrounding the pond are very porous with a high infiltration and percolation rate, water from the stormwater pond will still reach the wetlands through lateral seepage.

27. Further, the Applicant will install an energy dissipating device on the outfall spout at the point of discharge so that water will be spread out from the stormwater

pond as it discharges into the receiving wetlands. As noted earlier, this will prevent an adverse channelization effect.

28. Finally, stormwater runoff from the surrounding basins that currently discharge into the wetlands will not be affected by the construction of the stormwater system. That runoff will continue to flow into the wetlands on the project site.

29. Because the Applicant has satisfied Sections 12.2.2 and 12.2.2.4, Paragraph (d) of the Rule has been met.

30. Paragraph (e) of the Rule generally requires that an applicant provide reasonable assurance that a project will not adversely affect the quality of receiving waters. Here, the Applicant has provided such assurance. This is because the system has been designed in accordance with all relevant District criteria. Also, the Applicant has proposed to revise Permit Condition 26 as follows:

> Condition 26. This permit authorizes construction and operation of a surface water management system as shown on the plans received by the District on June 14, 2001, and as amended by plan sheet C4 (Sheet 07 of 207) received by the District on January 23, 2002.

In view of this revision, the Applicant's wet detention system complies with all of the design criteria contained in Rule 40C-42.026(4).

31. Under Rule 40C-42.023(2)(a), compliance with the design criteria contained in Rule 40C-42.026 creates a presumption that state water quality standards, including those for Outstanding Florida Waters, will be met. This presumption has not been rebutted; therefore, the requirements of Paragraph (e) of the Rule have been satisfied.

32. Further, Sections 12.2.4.1 and 12.2.4.2 state, in part, that reasonable assurance regarding water quality must be provided both for the short term and the long term, addressing the proposed construction, alteration, operation, maintenance, removal, and abandonment of the system. The Applicant has provided reasonable assurance that this requirement is met through the design of its surface water management system, its long-term maintenance plan for the system, and the long and short-term erosion and turbidity control measures it proposes. If issued, the permit will require that the surface water management system be constructed and operated in accordance with the plans approved by the District. The permit will also require that the proposed erosion and turbidity control measures be implemented.

33. Section 12.2.4.5 does not apply because there are no exceedances of any water quality standards at the proposed receiving water. Also, Sections 12.2.4.3 and 12.2.4.4 do not

apply because the Applicant has not proposed any docking facilities or temporary mixing zones.

34. Paragraph (f) of the Rule requires that an applicant not cause adverse secondary impacts to the water resources. Compliance with this requirement is determined by applying the four-part test in Section 12.2.7(a) through (d).

35. As to Section 12.2.7(a), there are no secondary impacts from construction, alteration, and intended or reasonably expected uses of the proposed system that will cause water quality violations or adverse impacts to the wetland functions. The Applicant chose not to provide buffers abutting the wetlands but rather chose measures other than buffers to meet this requirement. The Applicant has provided reasonable assurance that secondary impacts will not occur by placing the stormwater pond between the planned project and the wetlands, so that the pond itself will serve as a buffer by shielding the wetland from the lighting and noise of the project, and by acting as a barrier to keep domestic animals out of the wetlands. In addition, the Applicant increased the amount of property to be preserved as mitigation by adding 2.97 acres of wetlands and 1.2 acres of uplands to the mitigation plan to mitigate for any remaining secondary impacts. Accordingly, the first part of the secondary impacts test in Section 12.2.7(a) is satisfied.

36. As to Section 12.2.7(b), because there is no evidence that any aquatic or wetland-dependent listed animal species use uplands for existing nesting or denning adjacent to the project, the second part of the test has been met. No adverse secondary impacts will occur under the third part of the test in Section 12.2.7(c) because the proposed project will not cause impacts to significant historical or archaeological resources. Finally, adverse secondary impacts as proscribed by Section 12.2.7(d) will not occur because no evidence was presented that there would be additional phases or expansion of the proposed system or that there are any onsite or offsite activities that are closely or causally linked to the proposed system. Therefore, the proposed project satisfies Paragraph (f) of the Rule.

37. Paragraph (g) of the Rule requires that an applicant provide reasonable assurance that a project will not adversely impact the maintenance of surface or ground water levels or surface water flows established in Chapter 40C-8. Minimum (but not maximum) surface water levels have been established for the Lake pursuant to Chapter 40C-8 for the basin in which the project is located. The project will not cause a decrease of water to, or cause a new withdrawal of water from, the Lake. Therefore, the project satisfies this requirement.

38. Finally, Petitioners have acknowledged in their Proposed Recommended Order that the Applicant has given reasonable assurance that the requirements of Paragraphs (h), (i), (j), and (k) have been met. The parties have also stipulated that the receiving water (Lake Howell) meets all Class III water quality standards. Therefore, the project satisfies the requirements of Subsection 40C-4.301(2).

c. Rule 40C-4.302 - Public Interest Test

39. Under Rule 40C-4.302(1)(a)1.-7., an applicant must provide reasonable assurance that the parts of its surface water management system located in, on, or over wetlands are not contrary to the public interest. Similar requirements are found in Section 12.2.3.

40. The Applicant has provided reasonable assurance that the parts of the project that are located in, on, or over wetlands (mainly the detention pond and fill) are not contrary to the public interest, because the evidence showed that all seven of the public interest factors to be balanced are neutral. Because the proposed permanent mitigation will offset the project's adverse impacts to wetlands, no adverse effects to the conservation of fish and wildlife due to the project's permanent nature will occur. The evidence also showed that best management practices and erosion control measures will ensure that the project will not result in

harmful erosion or shoaling. Further, it was demonstrated that the project will not adversely affect the flow of water, navigation, significant historical or archaeological resources, recreational or fishing values, marine productivity, or the public health, safety, welfare or property of others. Finally, the evidence showed that the project's design, including permanent mitigation, will maintain the current condition and relative value of functions performed by parts of the wetland proposed to be impacted. Therefore, the project meets the public interest criteria found in Rule 40C-4.302(1)(a).

d. Rule 40C-4.302(1)(b) - Cumulative Impacts

41. Rule 40C-4.302(1)(b) and Section 12.2.8 require that an applicant demonstrate that its project will not cause unacceptable cumulative impacts upon wetlands and other surface waters within the same drainage basin as the regulated activity for which the permit is being sought. Under this requirement, if an applicant proposes to mitigate the adverse impacts to wetlands within the same drainage basin as the impacts, and if the mitigation fully offsets these impacts, the District will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface waters.

42. The Applicant has chosen to mitigate for the impacts to 0.99 acres of wetlands by preserving 17.8 acres of wetlands and 1.2 acres of uplands on-site. Since this mitigation will occur in the same drainage basin as the impacts and the mitigation fully offsets those impacts, the Applicant satisfies the requirements of the Rule.

e. Rule 40C-4.302 - Other Requirements

43. The parties have stipulated that the requirements of Paragraphs (c) and (d) of Rule 40C-4.302(1) do not apply.

44. There is no evidence that the Applicant has violated any District rules or that it has been the subject of prior disciplinary action. Therefore, the requirements of Subsection (2) of the Rule have been met.

C. Miscellaneous Matters

a. County Pond Site

45. The Seminole County pond site located on the east side of Lake Ann Lane and across the street from the project is not a jurisdictional wetland and does not have any wetland indicators. It is classified as an upland cut surface water.

46. The Applicant is not proposing to impact any wetlands at the pond site, and the site is not part of the proposed mitigation plan for the project.

47. The permit in issue here is not dependent on the pond site, and nothing in the application ties the project

with that site. Indeed, the transfer of density rights from the County property is not relevant to the District permitting criteria.

b. Review of Application

48. When the decision to issue the permit was made, the District had received all necessary information from the Applicant to make a determination that the project met the District's permitting criteria. While certain information may have been omitted from the original application, these items were either immaterial or were not essential to the permitting decision.

49. The application complies with all District permitting criteria. Contrary to Petitioners' contention, the Applicant does not have to be the contract purchaser for property in order to submit an application for that property. Rather, the District may review a permit application upon receipt of information that the applicant has received authorization from the current owners of the property to apply for a permit. In this case, the Applicant has the permission of the current owners (the Harold Kasik Living Trust).

CONCLUSIONS OF LAW

50. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

51. As the applicant in this cause, KGB Lake Howell, LLC, bears the burden of showing by a preponderance of the evidence that it is entitled to the requested permit. See, e.g., Cordes v. State, Dep't of Envir. Reg., 582 So. 2d 652, 654 (Fla. 1st DCA 1991). The applicant's burden is one of "reasonble assurances, not absolute guarantees." Manasota-88, Inc. v. Agrico Chemical Co., 12 F.A.L.R. 1319, 1325 (Dep't of Envir. Reg. 1990), aff'd 576 So. 2d 781 (Fla. 2d DCA 1991). This means that the applicant must establish "a substantial likelihood that the project will be successfully implemented," Metro Dade County v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). This standard does not require an absolute guarantee that a violation of a rule is a scientific impossibility, only that its non-occurrence is reasonably assured by accounting for reasonably forseen scientific contingencies. Ginnie Springs, Inc. v. Watson, 21 F.A.L.R. 4072, 4080 (Dep't of Envir. Prot. 1999).

52. By a preponderance of the evidence, the Applicant has provided reasonable assurance that the applicable requirements of the District's rules have been met and that a standard Environmental Resource Permit should be issued to the Applicant with the conditions proposed by the District in the draft permit dated October 8, 2001, with the modification to Condition 26 referred to above.

RECOMMENDATION

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

RECOMMENDED that the St. Johns River Water Management District enter a final order granting the requested permit as described above.

DONE AND ENTERED this 29th day of March, 2002, in Tallahassee, Leon County, Florida.

_____
DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of March, 2002.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.