STATE OF FLORIDA
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

SARAH H. LEE,

Petitioner,

vs.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT and WALDEN CHASE DEVELOPERS, LTD.,

Respondents.
_____/

DOAH CASE NO. 99-2215
SJRWMD F.O.R. NO. 99-1913

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, the Honorable Don W. Davis, held a formal administrative hearing in the above-styled case on July 26, 27, and 28, 1999, in St. Augustine, Florida.

A. APPEARANCES

For Petitioner, SARAH H. LEE:

Deborah Andrews, Esq.
11 N. Roscoe Blvd.
Ponte Vedra Beach, FL 32082

David J. White, Esq.
4804 S.W. 45th St., Ste. 100
Gainesvillle, FL 32608

For Respondent, WALDEN CHASE DEVELOPERS, LTD.:

Marcia Tjoflat, Esquire
1301 Riverplace Blvd.
Suite 1500
Jacksonville, FL 32207

John Metcalf, Esq.
200 West Forsyth Street, Ste. 1400
Jacksonville, FL 32202

For Respondent, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT:

Veronika Thiebach, Esquire
Mary Jane Angelo, Esquire
St. Johns River Water Management District
P. O. Box 1429
Palatka, Florida 32178-1429

On September 1, 1999, the Honorable Don. W. Davis ("Administrative Law Judge" or "Administrative Law Judge") 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." Petitioner Sarah H. Lee ("Petitioner") timely filed exceptions to the Recommended Order. Respondents, St. Johns River Water Management District ("District") and Walden Chase Developers, Ltd. ("Walden Chase") filed responses to Petitioner's exceptions. This matter then came before the Governing Board on September 22, 1999, for final agency action.

B. STATEMENT OF THE ISSUE

The issue in this case is whether Walden Chase Developers, Ltd.'s application for an individual environmental resource permit for a surface water management system should be approved pursuant to Chapter 373, Florida Statutes, and Chapters 40C-4 and 40C-42, Florida Administrative Code.

C. RULINGS ON EXCEPTIONS

Petitioner has filed numerous unnumbered exceptions to recommended findings of fact and three unnumbered exceptions to recommended conclusions of law. Therefore, in this Final Order the exceptions are referred to in sequential order as if petitioner had numbered her exceptions. Each paragraph beginning "Petitioner takes exception to recommended finding of fact #" is treated as a separate numbered exception. As a result, there are sixty exceptions related to recommended findings of fact. The three exceptions to recommended conclusions of law are treated as if numbered by petitioner as Exceptions 61, 62, and 63.

The Governing Board may not reject or modify an Administrative Law Judge's 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. Section 120.57(1)(1), Fla. Stat. (1998 Supp.) If an Administrative Law Judge's finding is supported by any competent substantial evidence from which the finding could reasonably be inferred, then it cannot be disturbed. Berry v. Dept. of Environmental Regulation, 530 So. 2d 1019 (Fla. 4th Dist. Ct. App. 1988) (construing similar language formerly with §120.57(1)(b)10., Fla. Stat.). The issue is not whether the record contains evidence contrary to the administrative law judge's finding, 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 Dist. Ct. App. 1991).

The Governing Board may reject or modify conclusions of law and interpretation of administrative rules over which it has substantive jurisdiction. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.). 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 Dist. Ct. App. 1982).

Hereinafter, references to testimony will be made by identifying the witness by surname followed by transcript page number (ex. Elledge: 27). References to exhibits received by the Administrative Law Judge will be designated "SHL" for Petitioner; "District" for Respondent District, and "WC" for Walden Chase Developers, Ltd., followed by the exhibit number, then page number, if appropriate (ex. WC 2: 32). Other references to the transcript will be indicated with a "T" followed by the page number (ex. T:60). References to the prehearing stipulation entered into by the parties will be designated by "PS" followed by the page number (ex. PS: 3).

EXCEPTION 1:

Petitioner takes exception to finding of fact No. 4 in which the Administrative Law Judge determined that the Walden Chase Homeowners Association, Inc. had the authority to exist in perpetuity. In this exception, Petitioner argues that the record reflects that the draft Articles of Incorporation submitted by Walden Chase lack the requisite language that the proposed operation and maintenance entity for the surface water management system ("system") exist in perpetuity. Petitioner admits that "draft amendments" were produced at trial, but that the record does not reflect evidence of the draft amendments having been executed and filed with the Secretary of State. A review of the record indicates that in the Articles of Incorporation, Article Ten contains the requisite language under paragraph 40C-42.027(3) 5., Fla. Admin. Code, that upon "termination, dissolution or final liquidation of the Association, that its assets shall be dedicated to a public body or conveyed to a nonprofit organization with similar purposes." These Articles, however, lack language stating that the system shall be transferred to and maintained by an entity acceptable to the District and effectuated prior to dissolution of the association, and that the association shall exist in perpetuity. (WC 38). However, the record further reflects that in the Draft Articles of Amendment to Articles of Incorporation of Walden Chase Homeowners Association, Inc. (WC 39), does contain the "shall exist in perpetuity" language in Article Twelve that is lacking in the Articles of Incorporation. Petitioner accurately states that there is no evidence in the record that the draft amendments have been executed or filed. Nonetheless, District rules require only

draft documents be submitted by the applicant with the requisite language, and that prior to initiating construction the applicant shall provide proof of existence of the proposed operation and maintenance entity. Subsection 40C42.027(6), Fla Admin. Code. The Administrative Law Judge's finding of fact No. 4 that the Association has the "authority' to exist in perpetuity is supported by the record (T:104-107; WC 39). "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., 24 Fla. L. Weekly D1399 (Fla. 4th Dist. Ct. App. June 16, 1999). Because finding 4 is supported by competent substantial evidence, it cannot be rejected or modified. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.). Petitioner's Exception 1 is, therefore, rejected.

EXCEPTION 2:

Petitioner takes exception to the last sentence of finding of fact No. 14 which provides that "[u]nder current conditions, the Quail Ridge pond does not discharge into the wetland systems" on the Walden Chase project site. Petitioner does not take exception to the remaining portion of finding of fact No. 14 which states that runoff from Quail Ridge discharges onto a ditch located on the Walden Chase property. As explained above, an agency may not reject or modify an administrative law judge's finding of fact that is supported by competent substantial evidence. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.). A review of the record indicates that Mr. Peacock provided testimony that subject drainage ditches "technically' are considered "other surface waters"--not wetlands (T:197)-- and that "other surface waters" . . . "are not truly wetlands. (T: 167). Mr. Miller testified before the Administrative Law Judge that the "Quail Ridge subdivision currently discharges . . . down a ditch down the power line. . .", and so does not "go into this wetland system." (T:45). Thus, the Administrative Law Judge's findings are supported by competent substantial evidence. An agency may reject an Administrative Law Judge's finding of fact only when there is no competent substantial evidence from which the finding could reasonably be inferred. Shumacher v. Dept. of Professional Regulation, 611 So. 2d 75 (Fla. 4th Dist. Ct. App. 1992). Since there is competent substantial evidence to support finding of fact No. 14, Petitioner's Exception 2 regarding finding of fact No. 14 is rejected.

Additionally, in Exception 2, Petitioner argues that surface water from Quail Ridge subdivision provides a water source for wetlands along the outfall and drainage ditch, and that if this water source is diverted, it will adversely affect Wetlands 7, 15, and 16. In the last part of Exception 2,

Petitioner argues that surface water from the Quail Ridge subdivision provides a water source for wetlands along the outfall and drainage ditch, and that if this water source is diverted, it will adversely affect Wetlands 7, 15, and 16. Petitioner further states that Walden Chase acknowledged by means of WC 43 that the diversion of water from Quail Ridge storm water system can potentially affect the hydroperiod of Wetland 15. It is unclear for what purposes Petitioner asserts this argument, as it does not relate to finding of fact No. 14, which addresses the pattern of discharge from Quail Ridge onto the Walden Chase property, rather than the possible effects of water diversion.

Because it is unclear as to which finding of fact Petitioner directs her statements, we will presume that Petitioner offers it as evidence-whether it be a restatement of evidence in the record (Petitioner cites to WC 43), or as additional evidence, or conflicting evidence to a finding of fact- that the proposed project will adversely affect the hydrology of the wetland system on the Walden Chase property contrary to District rules. These are evidentiary matters that lie within the Administrative Law Judge's province. As a result, we may not reweigh the evidence, resolve the conflicts therein, or judge the credibility of witnesses. If the record discloses any competent substantial evidence to support the findings of fact by the Administrative Law Judge, the agency is bound by such findings. Fla. Dept. of Corrections v. Bradley, 510 So. 2d 1122 (Fla. 1st Dist. Ct. App. 1987). West Coast Regional Water Supply Auth. v. Harris; 604 So. 2d 892 (Fla. 1st Dist. Ct. App.), cause dismissed, 613 So. 2d 4 (Fla. 1992). As discussed in Exception 3 below, there is competent substantial evidence to support the second part of finding of fact No. 14. Therefore, Petitioner's exception regarding finding of fact No. 14 is rejected.

EXCEPTION 3:

Petitioner takes exception to the last sentence of finding of fact No. 15 regarding Wetland 8 which states "[t]he surface water hydrology of the wetland system will also be maintained." The Governing Board may not reject or modify this finding of fact if it is supported by competent substantial evidence. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.). The Administrative Law Judge heard testimony from Mr. Miller that WC 30 is a report evaluating the surface water hydrology under pre-development conditions and post-development conditions. (Miller 45-48; WC 30). Mr. Miller testified that the report demonstrates that the "surface water hydrology going to the wetland system is approximately the same under both pre- and post-development conditions. (Miller: 46). The Administrative Law Judge also heard testimony from Mr. Frye regarding the maintenance of surface water hydrology. (Frye: 590-594). Mr. Frye testified

that the volume of surface water flowing into Wetland 8 would be maintained. (T:590). Mr. Frye concurred in the analysis and results contained in WC 30 supporting the conclusion that the surface water hydrology would be maintained. The last sentence of finding of fact No. 15 is supported by competent substantial evidence and cannot be rejected. Petitioner's Exception 3 is therefore rejected.

EXCEPTION 4:

Petitioner takes exception to a portion of the first sentence of finding of fact No. 16, which states that "[t]he diversion of the Quail Ridge discharge does not require modification of the Quail Ridge storm water system" and the second sentence of finding of fact No. 16 which states that the diversion will provide flood control benefits to Quail Ridge because the outfall from the Quail Ridge storm water treatment pond will be improved. Petitioner argues that both of these statements cannot be true, but states no basis for her exception. We will assume that the basis for her exception is either that these two findings are not supported by competent substantial evidence, or that the two statements are in some manner mutually exclusive. Again, the Governing Board may not reject or modify the findings of fact unless the agency first determines from a review of the entire record that the findings of fact were not based upon competent substantial evidence. Mr. Miller, Mr. Ma and Mr. Frye provided testimony supporting finding of fact No. 16 (Miller: 51-52; Ma: 141-142; Fry: 654-655). Because this finding of fact is supported by competent substantial evidence, it cannot be rejected or modified. Paragraph 120.5?(1)(1) (1998 Supp.).

With regard to whether the two statements are mutually exclusive, thus conflicting, it is not within our purview to determine whether the record contains evidence contrary to the Administrative Law Judge's finding of fact, but whether the finding of fact is supported by competent substantial evidence. Florida Sugar Cane League v. State Siting Bd., 580 So. 2d 846 (Fla. 1st Dist. Ct. App. 1991); Heifetz v. Dept of Business Regulation, 475 So. 2d 1277 (Fla. 1st Dist. Ct. App. 1985). For purposes of clarification to the Petitioner, the testimony provides that the Walden Chase project does not involve modification to the Quail Ridge storm water system, only the downstream conditions outside of the Quail Ridge property. This modification is designed to improve the condition of the Quail Ridge system by improving, off-site, the ability for water to flow. Since there is competent substantial evidence to support this portion of finding of fact No. 16 to which Petitioner takes exception, Petitioner's Exception 4 is rejected.

EXCEPTION 5:

Petitioner takes exception to the third sentence of finding of fact No. 16, in which the Administrative Law Judge finds that even if the diversion of Quail Ridge storm water did not take place, there will be no adverse impacts to the hydrology of Wetland 8. Petitioner argues that this finding conflicts with finding of fact No. 15, which provides that the surface water hydrology of Wetland 8 will be maintained. Again, it is not within our purview to determine whether the record contains evidence contrary to the Administrative Law Judge's findings of fact, but whether the finding of fact is supported by competent substantial evidence. Florida Sugar Cane League, 580 So. 2d 846; Heifetz, 475 So. 2d 1277. This finding is supported by competent substantial evidence as provided by testimony of Mr. Miller (T:75-76) and Mr. Frye (T:595). Therefore, we may not reject or modify the third sentence of finding of fact No. 16. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.). Petitioner's Exception 5 is rejected.

EXCEPTION 6:

Petitioner takes exception to the last sentence of finding of fact No. 16, which states that Walden Chase would monitor Wetland 8 to ensure that the hydrology was not adversely affected, and institute appropriate remedial measures if necessary to protect its function and values. The last sentence of finding of fact No. 16 is supported by competent substantial evidence consisting of the testimony of Mr. Miller. (T:48-49), Mr. Frye (T:597-601) and exhibit District 3. Therefore, we may not reject or modify the last sentence of finding of fact No. 16 and Petitioner's Exception 6 is rejected. Paragraph 120.57(1)(1), Fla Stat. (1998 Supp.).

EXCEPTION 7:

Petitioner takes exception to third sentence of finding of fact No. 17, in which the Administrative Law Judge states that the impacts from any diversion should be minimal because the wetlands are primarily hydrated through rainfall and groundwater. Petitioner argues that this statement conflicts with statements in finding of fact No. 16 that the wetlands are primarily hydrated by groundwater. We note that in finding of fact No. 16 the Administrative Law Judge specifically refers to Wetland 8, whereas he refers to "other wetlands" in finding of fact No. 17. To that end, the record does not reflect the conflict Petitioner suggests. Regardless, should a conflict in fact exist, the Governing Board may not resolve conflicts or determine whether the record contains evidence to the contrary of an administrative law judge's finding; those are evidentiary. matters within the

judge's province. Bradley, 510 So. 2d 1122; Florida Sugar Can_ League, 580 So. 2d 846; Heifetz, 475 So. 2d 1277. Mr. Miller (T:75-76) and Mr. Frye (T:595-597) provide testimony supporting the third sentence of finding of fact No. 17. Therefore, because this finding is supported by competent substantial evidence, it must be upheld. Petitioner's Exception 7 is consequently rejected. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.).

Petitioner argues in the paragraphs that follow Exception 7, yet prior to her Exception 8, that the hydrology of Wetland 8 will be impacted by the proposed development due to effects on surface water and groundwater flows, citing to the testimony of several experts. Because these statements speak to Wetland 8, this argument is directed to the Administrative Law Judge's findings of fact Nos. 15 and 16 concerning Wetland 8. Finding of fact No. 17 concerns "other wetlands" on Walden Chase. We have previously addressed Petitioner's exceptions to the Administrative Law Judge's findings concerning Wetland 8 in findings of fact Nos. 15 and 16 in Petitioner's Exceptions 3, 4, 5, and 6.

EXCEPTION 8:

Petitioner takes exception to the last sentence of finding of fact No. 17, which states that Walden Chase will monitor wetlands on site and if there is a significant adverse effect caused by the wetlands are primarily hydrated through rainfall and groundwater. Petitioner argues that this statement conflicts with statements in finding of fact No. 16 that the wetlands are primarily hydrated by groundwater. We note that in finding of fact No. 16 the Administrative Law Judge specifically refers to Wetland 8, whereas he refers to "other wetlands" in finding of fact No. 17. To that end, the record does not reflect the conflict Petitioner suggests. Regardless, should a conflict in fact exist, the Governing Board may not resolve conflicts or determine whether the record contains evidence to the contrary of an administrative law judge's finding; those are evidentiary matters within the judge's province. Bradley, 510 So. 2d 1122; Florida Sugar Can_ League, 580 So. 2d 846; Heifetz, 475 So. 2d 1277. Mr. Miller (T:75-76) and Mr. Frye (T:595-597) provide testimony supporting the third sentence of finding of fact No. 17. Therefore, because this finding is supported by competent substantial evidence, it must be upheld. Petitioner's Exception 7 is consequently rejected. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.).

Petitioner argues in the paragraphs that follow Exception 7, yet prior to her Exception 8, that the hydrology of Wetland 8 will be impacted by the proposed development due to effects on surface water and groundwater flows, citing to the testimony of

several experts. Because these statements speak to Wetland 8, this argument is directed to the Administrative Law Judge's findings of fact Nos. 15 and 16 concerning Wetland 8. Finding of fact No. 17 concerns "other wetlands" on Walden Chase. We have previously addressed Petitioner's exceptions to the Administrative Law Judge's findings concerning Wetland 8 in findings of fact Nos. 15 and 16 in Petitioner's Exceptions 3, 4, 5, and 6.

EXCEPTION 8:

Petitioner takes exception to the last sentence of finding of fact No. 17, which states that Walden Chase will monitor wetlands on site and if there is a significant adverse effect caused by 10 the diversion, then Walden Chase will take appropriate remedial action. Petitioner does not state the basis for her exception. We will presume that Petitioner takes exception to the last sentence of finding of fact No. 17 as not being supported by competent substantial evidence. However, this finding of fact is supported by competent substantial evidence, which consists of the testimony of Mr. Frye (T:598-599) and Mr. Miller (T:49) and exhibit District 3, whereby monitoring and any necessary remedial action is required. Since this finding of fact is supported by competent substantial evidence, Petitioner's Exception 8 is rejected. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.).

EXCEPTION 9:

In her Exception 9, Petitioner takes exception to the last sentence of finding of fact No. 18 which states there will not be a significant adverse impact to the groundwater source for the wetlands. Petitioner maintains that a conflict exists between the second and third sentences of finding of fact No. 18, asserting that both sentences cannot be true. The second sentence states that the property is not an aquifer recharge area based on its soil types and, therefore, no adverse impacts to the aquifer are anticipated. The third sentence states that water will be able to percolate into the soil and into the groundwater. Both statements are supported by competent substantial evidence as provided by the testimony of Mr. Miller (T:48-51). For purposes of edification, we note that there is nothing inconsistent with an area not being characterized as an "aquifer recharge area" but still having soils of a type that allow water to percolate into the groundwater. Regardless, the Governing Board may not reweigh evidence and resolve any conflicts therein. We may only review the record to determine whether the findings of fact are supported by any competent substantial evidence. Bradley, 510 So. 2d 1122; Florida Sugar Cane League, 580 So. 2d 846; Heifetz, 475 So. 2d 1277. Mr. Miller's (T:48-51) testimony

provides the competent substantial evidence to support the Administrative Law Judge's finding of fact No. 18. Petitioner's ninth exception is rejected. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.).

EXCEPTION 10:

Petitioner takes exception to the second and last sentences of finding of fact No. 20. In the second sentence, the Administrative Law Judge finds that the source of seepage to Wetland 8 is primarily groundwater, not surface water. In the last sentence, he finds that the project will not significantly reduce the groundwater source because the percolation area is to be maintained. However, Petitioner fails to state the basis for her exception. Again, we will presume she is asserting that these sentences within finding of fact No. 20 are not supported by competent substantial evidence. Mr. Frye's testimony (T:595) provides the competent substantial evidence to support the Administrative Law Judge's second and last sentences of this finding of fact. Therefore, we must reject Petitioner's tenth exception. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.).

EXCEPTION 11:

Petitioner takes exception to a portion of finding of fact No. 27 in which the Administrative Law Judge finds that Wetlands 15 and 16 will be preserved or otherwise not disturbed by the proposed project. Petitioner states that the record does not support this finding. The record reflects that Walden Chase will install water and sewer pipes immediately adjacent to Wetland 15, causing a temporary impact to this wetland. (Esser: 526). With regard to Wetland 16, the record reflects that a 0.02 acre portion of Wetland 16 is to be filled. (WC 9; District 2:2). The remaining 0.69 acres of Wetland 16 are not to be disturbed (WC 10). The Governing Board 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. Paragraph 120.57(1)(1), (Supp. 1998). Therefore, there being no competent substantial evidence to support the part of the first sentence of finding of fact No. 27 that Wetlands 15 and 16 "will be preserved or otherwise not be disturbed", Petitioner's exception to that portion of finding of fact No. 27 is accepted. The first sentence of finding of fact No. 27 is modified so that Wetlands 15 and 16 are deleted from it.

However, we note that Petitioner does not request that any conclusion of law be changed as a result of the rejection of this portion of the first sentence of finding of fact No. 27. The

impact to Wetland 15 resulting from pipe installation adjacent to this wetland is considered temporary and the wetland would be returned to its native soil. (Esser: 526). Because of its temporary nature, this impact is considered de minimis to the value of Wetland 15. De minimis adverse impacts are not considered by the District to be adverse. Section 12.2.2, Applicant's Handbook, Management and Storage of Surface Waters (A.H.). Wetland 16 is an upland-cut drainage ditch. (T:197; WC 9; District 2:2). Unless upland-cut drainage ditches provide significant habitat for threatened and endangered species, alterations to such ditches must comply only with those rules relating to water quality in sections 12.2.4-12.2.4.5., A.H. and relating to water quantity impacts in 12.2.2.4, A.H. See, 12.2.2.2, A.H. The evidence established that none of the upland ditches to be impacted on the Walden Chase Development site, including Wetland 16, provide significant habitat to endangered or threatened species. (Peacock: 217-222, 227). Therefore, the deletion of Wetland 15 and 16 from the first sentence of finding of fact No. 27 is not material to the ultimate outcome of this proceeding.

Petitioner further argues that all wetlands will be impacted by secondary impacts, but provides no basis for this broad assertion and no citations to the record in support. Without an articulated basis, the Governing Board cannot reject the Administrative Law Judge's finding. There is competent substantial evidence that there will be no adverse secondary impacts to the water resources. (Stip 8; Miller: 40, 50, 53, 93-94; Frye: 604-608, 582, 586-589).

EXCEPTION 12:

Petitioner takes exception to the portion of finding of fact No. 27 in the last sentence, which states that 29.29 acres will be preserved. Testimony indicates that 29.39 acres of wetlands would be preserved. (WC 10; District 2:3). The Governing Board 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. Paragraph 120.57(1)(1), (Supp. 1998). There being no competent substantial evidence to support the portion of finding of fact No. 27 as it pertains to 29.29 acres of preservation by conservation easement, Petitioner's exception to that portion of finding of fact No. 27 is accepted. The last sentence of finding of fact No. 27 is modified to read 29.39 acres. We further note that Petitioner does not request that any conclusion of law be changed as a result this modification.

EXCEPTION 13:

Petitioner takes exception to the last sentence of finding of fact No. 29, which states that Wetland 6 is the only isolated wetland over one-half acre that is proposed to be impacted. The finding is supported by competent substantial evidence. (WC 10; WC 58; Miller: 67; Peacock: 194). Petitioner does not state a basis for this exception. Assuming that the basis is a lack of competent substantial evidence, this exception should be denied. This finding is supported by Walden Chase Exhibit 10, which shows that the only isolated wetland of more than 0.5 acres to be impacted is Wetland 6. (WC 10). Mr. Miller also testified that the diversion of the Quail Ridge storm water system will not require impacts to wetland 15. (Miller: 721). Thus, this exception is denied.

EXCEPTION 14:

Petitioner takes exception to the first sentence of finding of fact No. 31, which states that "[t]he following are not truly wetlands, but rather are upland cut drainage ditches: . . . ." However, Petitioner fails to state the basis for this exception. We will presume again that Petitioner is asserting that no competent substantial evidence supports this portion of finding of fact No. 31. This finding of fact is supported by competent substantial evidence, which consists of the testimony by Mr. Peacock that discusses the drainage ditches at issue, stating that those drainage ditches "technically" are considered "other surface waters" not wetlands (T:197) and that "other surface waters". . ."are not truly wetlands. (T:167). Applicant's Handbook, 2.0 (mm). Since this finding of fact is supported by competent substantial evidence, Petitioner's Exception 14 is rejected. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.).

EXCEPTION 15:

Petitioner takes exception to the last sentence of finding of feet No. 32 which finds that a series of alterations to wetlands were completed before the District rules requiring a permit prior to constructing a surface water management system became effective on December 7, 1983. Again, presuming Petitioner argues that no competent substantial evidence supports this finding, we determine from the record: (a) the borrow pit was constructed and the fill placed in late 1970 and early 1971; (b) Wetlands 6, 7, and 8A were altered by November, 1975, the area was clear-cut and a borrow pit was constructed in Wetland 8; (c) by March, 1980, the area had been heavily logged, a borrow pit had been constructed in Wetland 4, ditches had been constructed on Quail Ridge, and a trail road had been constructed along the area of the power line; (d) by March, 1983, the power

line area had been cleared and those wetlands "wiped out", the 3.9 acre borrow pit was under construction, and the borrow pit in Wetland 4 had been constructed. (WC 16-23; Peacock: 179-184; Esser: 504). There is competent substantial evidence to support this finding of fact. We, therefore, reject Petitioner's Exception 15. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.).

EXCEPTION 16:

Petitioner takes exception to the first sentence of finding of fact No. 33, in which the Administrative Law Judge states "[for isolated wetlands less than 0.05 acres in size which will be impacted (Wetlands 2, 5, 10, 11, 12, and 14), the following unrebutted testimony was provided: (i) the wetlands are not used by threatened or endangered species for more than an incidental use . . . ." Presuming Petitioner argues that no competent substantial evidence supports this finding, we determine from the record that Mr. Peacock's testimony (T:195) and Mr. Esser's testimony (T:502) state that any use of these small isolated wetlands by threatened or endangered species would only be incidental. Their testimony provides the competent substantial evidence necessary to support this finding of fact. The decision to accept the testimony of one witness over that of another and thereby weigh witness credibility is left to the discretion of the Administrative Law Judge and cannot be changed absent a complete lack of competent substantial evidence from which the finding of fact could be reasonably inferred. Perdue v. TJ Palm Associates, Ltd., 24 Fla. L. Weekly D1399 (Fla. 4th Dist. Ct. App. June 16, 1999). We must, therefore, reject Petitioner's Exception 16. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.).

EXCEPTION 17:

Petitioner takes exception to the second sentence of finding of fact No. 33 which states that Wetlands 2, 5, 10, 11, 12, and 14 are of minimal value to fish and wildlife when considered individually and cumulatively. Presuming Petitioner argues that no competent substantial evidence supports this finding, we determine from the record that testimony from Mr. Peacock (T:196) and Mr. Esser (T:503) provide competent substantial evidence necessary to support this finding of fact. Therefore, we reject Petitioner's Exception 17. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.).

EXCEPTION 18:

Petitioner takes exception to a portion of finding of fact No. 33, presumably asserting that no competent substantial evidence supports the finding that the impacts to wetlands 2, 5, 10, 11, 12 and 14 are de minimis. The record indicates that Mr.

Peacock did indeed provide such testimony in finding of fact No. 33. (T:173-187;196-197) Since there is competent substantial evidence to support this sentence in finding of fact No. 33, Petitioner's Exception 18 is rejected. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.).

EXCEPTION 19:

Petitioner takes exception to the last sentence of finding of fact No. 33, in which the Administrative Law Judge states that the mitigation plan compensates for whatever functional value these wetlands may provide. We again presume Petitioner argues that no competent substantial evidence supports this finding. The record indicates that evidence supports finding of fact No. 33. (District 2; Peacock: 173-187; 196-197; Esser: 495-498). Notwithstanding that there is competent substantial evidence to support this statement in finding of fact No. 33, the determination as to whether mitigation is sufficient under District rules is a matter of discretionary policy - i.e. a conclusion of law. The agency in its final order may reject or modify conclusions of law and interpretation of administrative rules over which it has substantive jurisdiction. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.). For that reason, provided the Administrative Law Judge has resolved factual disputes on mitigation, the sufficiency of mitigation lies within the exclusive jurisdiction of the agency. 1800 Atlantic Developers v. Dept. of Envtl. Regulation, 552 So. 2d 946 (Fla. 1st Dist. Ct. App. 1989), rev. denied, 562 So. 2d 345 (Fla. 1990); Florida Power Corp. v. Dept. of Envtl. Regulation, 638 So. 2d 545 (Fla. lst Dist. Ct. App.), rev. denied, 650 So. 2d 989 (Fla. 1994); Save Anna Maria, Inc. v. Dept. of Transportation, 700 So. 2d 113 (Fla. 1993); Collier County v. State. Dept. of Envtl. Regulation, 592 So. 2d 1107 (Fla. 2d Dist. Ct. App. 1991); Florida Sugar Cane League v. State, 580 So. 2d 846 (Fla. lst Dist. Ct. App. 1991). District staff have reviewed both the proposed wetlands impacts and the mitigation plan Walden Chase proposes to offset those wetland impacts, and have determined the mitigation to be sufficient (Esser: 515). The Governing Board concludes, based on our review of the record and the determination by District staff, that mitigation in this case is sufficient to offset the impacts to wetland functions. Petitioner's Exception 19 is rejected.

EXCEPTION 20:

Petitioner takes exception to a portion of the second sentence of finding of fact No. 34, which finds that Wetland 6 provides no value for the Florida black bear. We presume Petitioner bases her exception on an asserted lack of competent substantial evidence to support this finding or that the record contains evidence to the contrary. However, the issue is not

whether the record contains evidence contrary to the Administrative Law Judge's findings of fact, but whether the findings of fact are supported by competent substantial evidence. Florida Sugar Cane League v. State Siting Bd., 580 So. 2d 846 (Fla. lst Dist. Ct. App. 1991); Heifetz v. Dept. of Business Regulation, 475 So. 2d 1277 (Fla. 1st Dist. Ct. App. 1985)

Petitioner cites to Mr. Peacock's testimony that Florida black bear could use this site; that it is within the range of the Florida Black Bear (T:217); that the site provides forage for black bear and it is likely that bear use this site (MacDonald: 322-323); and that a black bear has been seen using this site (S.C. Lee: 291). Mr. Esser testified that he did "not believe it provides any kind of real values for bears." (T:481). Mr. Peacock testified that he did not see any evidence of black bears using the property. (Peacock: 213). The sufficiency of the facts required to form the opinion of an expert must normally reside with the expert himself. Any deficiencies in the facts required to form an opinion relate to the weight of the evidence. Gershanik v. Dept. of Professional Regulation, 458 So. 2d 302 (Fla. 3d Dist. Ct. App. 1984), rev. denied, 462 So. 2d 1106 (Fla. 1985); H.K. Corp. v. Estate of Miller, 405 So. 2d 218 (Fla. 3d Dist. Ct. App. 1981). The record reflects conflicting opinions regarding the value of Wetland 6 to the Florida black bear. The decision to believe one expert over another is left to the Administrative Law Judge 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 Dist. Ct. App. 1983). These are evidentiary matters within the province of the Administrative Law Judge. Bradley, supra. 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 Administrative Law Judge's findings. South Florida Water Management District v. Caluwe, 459 So. 2d 390 (Fla. 4th Dist. Ct. App. 1989). The portion of Administrative Law Judge's second sentence in finding of fact No. 34, as it relates to the Florida black bear, is supported by Mr. Esser's testimony. Since there is competent substantial evidence supporting this portion of finding of fact No. 34, we must reject Petitioner's Exception 20.

EXCEPTION 21:

Petitioner takes exception to a portion of finding of fact No. 34, which finds that Wetland 7 is a lower quality wetland and does not provide breeding habitat for gopher frogs. Again, we presume Petitioner bases her exception on an asserted lack of competent substantial evidence. This finding is supported by

competent substantial evidence (Esser: 481-482), and therefore Petitioner's Exception 21 is rejected.

EXCEPTION 22:

Petitioner takes exception to the last sentence of finding of fact No. 34, which finds that Wetland 8A is not a habitat typically suited for forage habitat for wood storks. Petitioner apparently bases her exception on the fact that the record contains evidence to the contrary, for she points to citations in the record indicating that wood storks have been seen on the Walden Chase site near Wetlands 7 and 8A. However, as previously stated, the Governing Board may not reweigh the evidence, resolve the conflicts therein, or judge the credibility of witnesses. We are bound by the findings of the Administrative Law Judge if the record discloses any competent substantial evidence to support those findings of fact. Bradley, 510 So. 2d 1122; West Coast Regional Water Supply Auth. v. Harris, 604 So. 2d 892, cause dismissed, 613 So. 2d 4 (Fla. 1992). Mr. Esser provided the testimony the Administrative Law Judge sets forth in the last sentence of finding of fact No. 34. (T:483). Because there is competent substantial evidence to support this portion of finding of fact No. 34, we must reject Petitioner's Exception 22.

EXCEPTION 23:

Petitioner takes exception to a portion of the finding of fact No. 35 finding that the 3.9 acre borrow pit does not appear to have suitable forage areas. Petitioner apparently bases her exception on the fact that the record contains contrary evidence for she indicates several places in the record where the Administrative Law Judge heard testimony that, among other things, wading birds may use this borrow pit for foraging (Esser: 505) or that little blue herons have been observed at this borrow pit. (Esser: 540; Peacock: 213; S.H. Lee:287). Notwithstanding that the record may contain evidence to the contrary, we are bound by these findings if the record discloses any competent substantial evidence in support. Bradley, 510 So. 2d 1122; West Coast Regional Water Supply Auth. v. Harris, 604 So. 2d 892, cause dismissed, 613 So. 2d 4 (Fla. 1992). Mr. Peacock (T:174, 222), Mr. Esser (T:504-50.5) and exhibit District 2 provide competent substantial evidence that supports this portion of finding of fact No. 35. Therefore, we must reject Petitioner's Exception 23.

EXCEPTION 24:

Petitioner takes exception to the portion of finding of fact No. 35 in which the Administrative Law Judge finds that the 3.9 acre borrow pit has minimal functional value and supports a

fish population. Petitioner argues that both of these statements cannot be true. The Administrative Law Judge heard testimony that this borrow pit provides only minimal functions for fish and wildlife even though it does contain fish. (Esser: 504-505; Peacock: 283). This portion of finding of fact No. 35 is supported by competent substantial evidence and, therefore, we cannot reject or modify it. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.) Petitioner's Exception 24 is rejected.

EXCEPTION 25:

Petitioner takes exception to the portion of finding of fact No. 35 finding that the 0.18 acre borrow pit does not have suitable forage areas. Petitioner seems to base her exception on the fact that the record contains some evidence contrary, since she cites several places in the record where there was testimony from Mr. Peacock, Mr. Esser, Mr. Duever, Ms. Macdonald describing, among other things, the borrow pit and its possible value to wildlife and fish. Notwithstanding that the record may contain evidence contrary to the Administrative Law Judge's finding, we are bound by these findings if the record discloses any competent substantial evidence in support. Bradley, 510 So. 2d 1122; West Coast Regional Water Supply Auth. v. Harris, 604 So. 2d 892, cause dismissed, 613 So. 2d 4 (Fla. 1992). The record provides such evidence. (District 2; WC 31). Therefore, we must reject Petitioner's Exception 25.

EXCEPTION 26:

Petitioner takes exception to the portion of finding of fact No. 35 in which the Administrative Law Judge finds that the 0.18 acre borrow pit has minimal functional value and provides breeding habitat for gopher frogs, a listed species. Petitioner asserts that both of these statements cannot be true. This portion of finding of fact No. 35 is supported by WC 31 and the testimony of Mr. Esser (T:510). Because this portion of finding of fact No. 35 is supported by competent substantial evidence, we cannot reject or modify it. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.) Petitioner's Exception 26 is, therefore, rejected.

EXCEPTION 27:

Petitioner takes exception to the portion of recommended finding of fact No. 36 in which the Administrative Law Judge finds that the proposed project site is not used for nesting or denning. This portion of finding of fact No. 36 is supported by the record (Peacock: 195-196, 219-222; McDonald: 365-369; Esser: 488-489, 502). Because this portion of finding of fact No. 35 is supported by competent substantial evidence, we cannot reject or

modify it. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.). Petitioner's Exception 27 is, therefore, rejected.

EXCEPTION 28:

Petitioner takes exception to the portion of finding of fact No. 36 in which the Administrative Law Judge finds that any use of the wetland on-site by threatened or endangered species would be incidental because the habitat on-site is not the type typically used by such species. Petitioner asserts, among other things, that the Walden Chase property contains isolated wetlands of varying sizes that provide foraging areas for wood storks, an endangered species (Macdonald: 323), and the Florida black bear (Macdonald: 322-323). Although Petitioner points extensively to various testimony to support her exception, the Governing Board cannot reject a finding of fact simply because it may think the basis of the finding is inconclusive. Berry v. Dept. of Envtl. Regulation, 530 So. 2d 1019 (Fla. 5th Dist. Ct. App. 1988). Nor can it make additional findings of fact . Boulton v. Morgan, 643 So. 2d 1103 (Fla. 4th Dist. Ct. App. 1994); Friends of Children v. Fla. Dept. of Health and Rehabilitative Services, 504 So. 2d 1345 (Fla. 1st Dist. Ct. App. 1987); Cohn v. Dept of Professional Regulation, 477 So. 2d 1039 (Fla. 3d Dist. Ct. App. 1983). As explained above, an agency may not reject or modify an Administrative Law Judge's finding of fact that supported by competent substantial evidence. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.). A review of the record indicates that this portion of the Administrative Law Judge's finding of fact No. 36 supported by testimony (Peacock: 195; Esser: 220-222; 488489; 501-502). Because there is competent substantial evidence to support this portion of finding of fact No. 36, we must reject Petitioner's Exception 28.

EXCEPTION 29:

Petitioner takes exception to the last sentence of find of fact 36, which states that any impacts to threatened and endangered species would be offset by the mitigation plan. We presume Petitioner argues that no competent substantial evidence supports this finding. A review of the record indicates that this portion of finding of fact No. 36 is supported by competent substantial evidence. (T:220-222, 227;495-496; WC 7). However, as stated in our ruling on Petitioner's Exception 19, the determination as to whether mitigation is sufficient under District rules is a matter of discretionary policy. As such, the agency in its final order may reject or modify conclusions of law and interpretation of administrative rules over which it has substantive jurisdiction. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.). Provided the Administrative Law Judge has resolved factual disputes on mitigation, the sufficiency of mitigation

lies within the exclusive jurisdiction of the agency. 1800 Atlantic Developers v. Dept. Of Envtl. Regulation, 552 So. 2d 946 (Fla. lst Dist. Ct. App. 1989), rev. denied, 562 So. 2d 345 (Fla. 1990); Florida Power Corp. v. Dept. of Envtl. Regulation, 638 So. 2d 545 (Fla. 1st Dist. Ct. App.), rev. denied, 650 So. 2d 989 (Fla. 1994); Save Anna Maria, Inc. v. Dept. of Transportation, 700 So. 2d 113 (Fla. 1993); Collier County v. State, Dept. of Envtl. Regulation, 592 So. 2d 1107 (Fla. 2d Dist. Ct. App. 1991); Florida Sugar Cane League v. State, 580 So. 2d 846 (Fla. 1st Dist. Ct. App. 1991). District staff have reviewed the proposed wetlands impacts and the mitigation plan that Walden Chase proposes in order to offset those wetland impacts, and have determined the mitigation to be sufficient. (Esser T:515). The Governing Board concludes, based on its review of the record and the sufficiency determination by District staff, that mitigation in this case is sufficient to offset any impacts to these species. Therefore, Petitioner's Exception 29 is rejected. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.).

EXCEPTION 30:

Petitioner takes exception to the second sentence of finding of fact No. 37, which states that impacts to gopher frogs will be mitigated through relocation. Presumably Petitioner asserts that there is no competent substantial evidence in the record to support this finding. There is competent substantial evidence in the record to support a finding that the relocation will mitigate to impacts to the gopher frog. (Peacock: 215-216). To the extent this involves facts, the issue of "mitigation" under District rules is an area that is infused with policy considerations that are within the Board's discretion to decide. Under the District's rules, mitigation must offset the adverse impacts to wetland functions provided to fish and wildlife. We conclude that the relocation of gopher frogs is not mitigation of adverse impacts to wetland functions provided to fish and wildlife. Petitioner's exception is therefore accepted.

Petitioner does not request that any conclusion of law be changed as a result of the rejection of the second sentence of finding of fact No. 37. The Administrative Law Judge heard testimony from Mr. Esser (T:553) that once the project is completed, the habitat function provided to gopher frogs by the on-site wetlands will be maintained. (T:224,242)

EXCEPTION 31:

Petitioner takes exception to the third sentence of finding of fact No. 38, which states that the creation areas are currently typical pine plantation. Petitioner argues that the record reflects that the upland surrounding Wetland 4 is

sandhill. Yet, Petitioner fails to cite to the record where this evidence may be found. The Governing Board may not reject findings of fact that are based on competent substantial evidence. Paragraph 120.57(1)(I), Fla. Stat. (1998 Supp.). Testimony of Mr. Peacock (T:172) is that the "creation areas which show typical plantation which is an abundant land form you find in North Florida, bedded pine flatwood that have been planted with rows of pine." The third sentence of finding of fact No. 38 is therefore supported by competent substantial evidence consisting of the testimony of Mr. Peacock. Consequently, Exception 31 is rejected.

EXCEPTION 32:

Petitioner takes exception to the portion of finding of fact No. 38 that states that the mitigation ratios are consistent with the District's rules. We note that this portion of the finding of fact actually states "with District's rule guidelines". Petitioner again fails to state the basis for her exception. This portion of the finding of fact is supported by competent substantial evidence consisting of Mr. Peacoek's testimony. (T:203). Nonetheless, an agency's interpretation of its own rules is entitled to great deference. Reedy Creek Improvement Dist. v. State. Dept of Envtl. Regulation, 486 So. 2d 642 (Fla. lst Dist. Ct. App. 1986). Furthermore, where findings of fact are infused with discretionary policy, these findings are akin to conclusions of law and are within the exclusive jurisdiction of the agency. 1800 Atlantic Developers v. Dept. of Envtl. Regulation, 552 So. 2d 946; Save Anna Maria. Inc., 700 So. 2d 113; Collier County v. Dept. of Envtl. Regulation, 592 So. 2d 1107 (Fla. 2d Dist. Ct. App. 1991); Florida Sugar Cane League v. State, 580 So. 2d 846 (Fla. 1st Dist. Ct. App. 1991). The Governing Board may reject or modify such findings. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.). Upon review of the record, the Governing Board can find no cause to reject this portion of finding of fact No. 38. Petitioner's Exception 32 is therefore rejected.

EXCEPTION 33:

Petitioner takes exception to last sentence of finding of fact No. 38, which states that the mitigation is viable and sustainable. Petitioner argues that the District's chief engineer and supervisor for the project did not review the mitigation plan; nor did the staff engineer, and cites to their testimony. As explained in Exception 32, the Governing Board may reject or modify findings of fact concerning the sufficiency or viability of mitigation because it is infused with discretionary policy. See 1800 Atlantic Developers, supra. As the "supervising regulatory scientist" at the District's Jacksonville

Service Center, Mr. Esser testified that he conducts project reviews. (T:460). Mr. Esser reviewed the proposed Walden Chase project, which included reviewing the proposed impacts and the mitigation plan to determine whether it met District's rules. (T:475496). The record reflects that Mr. Esser determined that the mitigation plan adequately compensates for the wetland functions that will be impacted. (T:496; WC 7; WC 10). He further states that permit conditions ensure the success of the mitigation. (T:496; District 2).

The Administrative Law Judge's conclusion that the proposed mitigation will compensate for the project's adverse impacts is supported by competent substantial evidence that the mitigation will offset the project's adverse impacts to the functions of wetlands and surface waters (see, Section 12.3, A.H.). All of the adverse impacts of the Walden Chase Development upon wetlands can be offset by mitigation. (Esser: 496). Walden Chase has provided a mitigation plan that describes the proposed construction establishment and management, including monitoring, of the wetland creation areas. (WC 7). Under its mitigation plan, Walden Chase will create 3.8 acres of forested wetlands; and preserve 29.39 acres of the on-site wetlands and 4.65 acres of uplands, including buffers around preserved wetlands. (WC 10, D 2:3). All of the created and preserved wetlands and upland areas will be placed under a conservation easement. (WC 10, D 2:3, WC 12). The mitigation plan will more than offset the functions provided by the wetlands impacted by the project. (Peacock: 204). The creation areas will provide functional values similar to the wetlands impacted by the project because they will have a similar structure and hydroperiod and will provide viable and sustainable ecological functions. (Esser: 497, Peacock: 204). District rules do not require that mitigation creation areas have the exact same hydroperiod as the impacted wetlands (Esser: 552). The District's permit, as proposed includes conditions requiring monitoring of the wetland creation areas for a period of five years and establishing success criteria for these areas. (Esser T:496, District 2: 4, 7 (Special MSSW Condition 17)). A permit modification will be required if the mitigation success criteria are not met. (District. 2: 4, 7 (Special MSSW Condition 18)). The preserved wetlands include all of the relatively high quality wetlands on the project site and consist primarily of cypress/pine swamp. (Peacock T:166). Preservation of these areas will prevent them from being timbered and protect them in their existing condition. (Esser T:497). Even if consideration of the impact to isolated wetlands less than half an acre in size had been required, District staff determined that the mitigation plan would be sufficient to offset the project's impacts to all wetlands on the project site. (Esser: 515, Peacock: 196).

Competent substantial evidence was also presented that the mitigation ratios proposed for this project are consistent with the District's rule guidelines and that the mitigation is viable and sustainable. As the Administrative Law Judge recognized the mitigation ratios in the District's rules are guidelines only. (See, Section 12.3.2, Applicant's Handbook, Management and Storage of Surface Waters ("These [mitigation] ratios are provided as guidelines for preliminary planning purposes only. The actual ratio needed to offset adverse impacts may be higher or lower based on a consideration of factors listed in subsections 12.3.2.1 and 12.3.2.2"). Byron Peacock opined that based on the Applicant's Handbook's provisions and his experience with the District, the Walden Chase mitigation plan satisfies the District's rule guidelines with regard to mitigation ratios. (T:203). This testimony was unrebutted. Furthermore, no mitigation was required for the project's impacts on isolated wetlands less than 0.5 acres in size; 1/ however, expert testimony was presented that even if mitigation were required for these impacts, the mitigation plan would offset these impacts. (Peacock T:196, 204).

Based upon the review of the record and the District staff's determination that proposed mitigation meet District rules, the Governing Board can find no cause to reject this portion of finding of fact No. 38. Petitioner's Exception 33 is, therefore, rejected.

EXCEPTION 34:

Petitioner takes exception to that portion of finding of fact No. 39 where the Administrative Law Judge states that the allegation that the mitigation offered is "poor" because it does not preserve adjacent uplands is in error because the preserved wetlands remaining are surrounded by upland buffers, except for a road-crossing in Wetland 8A. Petitioner does not provide the basis of this exception. This finding is based on competent substantial evidence, consisting of Mr. Esser's testimony regarding the upland buffers. (T:492). Factual issues susceptible to ordinary methods of proof that are not infused with policy considerations are the prerogative of the Administrative Law Judge as finder of fact. The Administrative Law Judge may reasonably infer from the evidence a factual finding. Freeze v. Dept. of Business Regulation, 556 So. 2d 1204 (Fla. 5th Dist. Ct. App. 1990). Therefore, we may not reject or modify this finding of fact. Paragraph 120.57(1)(1), Fla. Stat. (1998 Supp.). Petitioner's Exception 34 is rejected.

EXCEPTION 35:

Petitioner takes exception to the first and second sentences of finding of fact No. 40, which find that the proposed mitigation will off-set the adverse impacts to wetland functions caused by the project and that the functional values lost by the proposed project will be replaced. Presumably, Petitioner is asserting that there is no competent substantial evidence to support this finding. Mr. Esser's testimony provides competent substantial evidence for this portion of finding of fact No. 40. (T:495-496t. This findings of fact also concerns the sufficiency of mitigation, which is infused with discretionary policy as explained in Exception 32. See 1800 Atlantic Developers, supra. Based upon the review of the record and the District staff's determination that the proposed mitigation meet District rules, the Governing Board can find no cause to reject this portion of finding of fact No. 38. Petitioner's Exception 35 is, therefore, rejected.

EXCEPTION 36:

Petitioner takes exception to the portion of finding of fact No. 40 that finds that permit conditions will ensure success of the mitigation creation areas. Presumably, Petitioner is asserting that no competent substantial evidence supports this finding. This finding is based on Mr. Esser's testimony (T:496). For the reasons stated in Exception 35, Petitioner's Exception 36 is rejected.

EXCEPTION 37:

Petitioner takes exception to the portion of finding of fact No. 42 that finds that the avoidance of impacts to Wetland 6 would cost approximately $326,800 and is not practicable. Petitioner asserts that Walden Chase did not provide the District with substantiation of the estimated value of the lots, citing Mr. Elledge's testimony (T:706). This portion of finding of fact No. 42 is supported by competent substantial evidence consisting of Mr. O'Steen testimony on lot values, WC 32, and Mr. Elledge's testimony that staff had reviewed the figures and found them to be reasonable (T:706). This evidence supports the factual underpinnings for this portion of finding of fact No. 42 can easily be inferred. Freeze v. Dept. of Business Regulation, 556 So. 2d 1204 (Fla. 5th Dist. Ct. App. 1990)(an administrative law judge may reasonably infer from the evidence a factual finding). District rules do not require that an applicant provide further substantiation of these values. For the above reasons, Petitioner's Exception 37 is rejected.

In addition, Petitioner argues that the value of the uplands to be used as wetland creation areas is $525,000-600,000 and that this value should have been used to offset the estimated cost of placing the ballfields and pond in alternative locations. No evidence was presented to support a finding that the layout of the property would allow lots or access roads to be placed in the wetland creation areas or how such lots would be valued. The applicant carried its burden of demonstrating that the design alternatives were not practicable. Petitioner did not present any evidence to rebut this evidence. Petitioner can not now attempt to introduce evidence that was not presented at hearing. Thus, this exception is rejected.

EXCEPTION 38:

Petitioner takes exception to the portion of finding of fact No. 43 that finds that the avoidance of impacts to Wetland 7 would cost approximately $675,000 and is not practicable. Presumably, Petitioner is asserting that no competent substantial evidence supports this finding. This portion of finding of fact No. 43 can reasonably be inferred from and is supported by competent substantial evidence. (WC 32; Esser: 478; Elledge: 674-675). Therefore, Petitioner's Exception 38 is rejected.

EXCEPTION 39:

Petitioner takes exception to the portion of the finding of fact No. 44 that states that the avoidance of impacts to Wetland 8A would cost approximately $1,600,000 or $450,000, depending on the alternative considered, and is not practicable. Presumably, Petitioner is asserting that no competent substantial evidence supports this finding. This portion of finding of fact No. 44 finding can reasonably be inferred from and is supported by competent substantial evidence. (WC 32; Esser: 478; Elledge: 673). Therefore, Petitioner's Exception 39 is rejected.

EXCEPTION 40:

Petitioner takes exception to the portion of finding of fact No. 44 that states that the avoidance of impacts to Wetland 8A by relocating Pond 3 is not a practical alternative because the pipes would be too large to install in the ground. Petitioners argues that the record does not contain evidence that a "larger pipe would be too large to install in the ground." The Administrative Law Judge heard testimony from Mr. Miller that a larger pipe would not be practicable. (Miller: 60-62). This portion of finding of fact No. 44 is supported by competent substantial evidence and cannot be rejected or modified. Therefore, Petitioner's Exception 40 is rejected.

EXCEPTION 41:

Petitioner takes exception to finding of fact No. 45 on the basis that it is a conclusion of law rather than a~ finding of fact. Finding of fact No. 45 states that a reduction and elimination analysis would not be required for the isolated wetlands less than 0.5 acres in size. Because the reduction and elimination analysis of wetland impacts under 12.2.2.1, A.H. is a factual determination infused with policy considerations, it is akin to a conclusion of law. However the factual underpinnings to support this conclusion must be determined by the fact finder. Consequently, this conclusion is a matter within the exclusive jurisdiction of the agency. See 1800 Atlantic Developers v. Dept of Envtl. Regulation, 552 So. 2d 946 (Fla. 1st Dist. Ct. App. 1989), rev. denied, 562 So. 2d 345 (Fla. 1990); Florida Power Corp. v. Dept of Envtl. Regulation, 638 So. 2d 545 (Fla. lst Dist. Ct. App.), rev. denied, 650 So. 2d 989 (Fla. 1994); Save Anna Maria. Inc. v. Dept. of Transp., 700 So. 2d 113 (Fla. 1993); Collier Countv v. State, Dept. of Envtl. Regulation, 592 So. 2d 1107 (Fla. 2d Dist. Ct. App. 1991); Florida Sugar Cane League v. State, 580 So. 2d 846 (Fla. lst Dist. Ct. App. 1991). To the extent that "finding of fact No. 45" is not purely a factual determination, Exception 41 is accepted. However, this exception raises a clarification, and Petitioner asserts no error that would change the outcome of this proceeding.

To the extent Petitioner is arguing that the Administrative Law Judge improperly interpreted District rules to find that a reduction and elimination analysis is not required for isolated wetlands less than 0.5 acres in size, Petitioner is incorrect. Pursuant to sections 12.2.2.1 and 12.2.1.1, A.H., an applicant is not required to implement practicable design alternatives to eliminate or reduce adverse impacts to isolated wetlands less than 0.5 acres in size. Section 12.2.1.1., A.H., only requires a reduction and elimination analysis when "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 sections 12.2.2 through 12.2.3.7." Section 12.2.2.1, A.H. does not require compliance with these sections (i.e., 12.2.2-12.2.3.7) except in limited circumstances which the Administrative Law Judge found were not applicable in the instant case. Since section 12.2.2.1, A.H. does not require compliance with the very subsections that determine whether a reduction and elimination analysis is even necessary, such an analysis is not required for isolated wetlands less than 0.5 acres in size that are not covered by the exceptions contained in subsections 12.2.2.1(a)-(d), A.H.. To the extent that Petitioner is arguing that the isolated wetlands less than 0.5 acres in size on the Walden Chase site required a reduction and elimination analysis,

there is competent substantial evidence in the record to support a finding that they did not. (Elledge: 676-677).

EXCEPTION 42:

Petitioner takes exception to the portion of finding of fact No. 47 that concludes that minimum upland buffers of 15 feet are provided for all wetlands except Wetland 1 and 8A. Petitioner asserts that Wetland 8 also does not have minimum 15 foot buffers. However, Petitioner does not state a basis for this exception. If the basis for the exception is that no competent substantial evidence was presented to support a finding that minimum upland buffers of 15 feet are provided for all wetlands except Wetland 1 and Wetland 8A, such evidence exists in the record, which indicates that minimum upland buffers of 15 feet will be provided around all of the preserved wetlands except a portion of Wetland 8 and Wetland 1. (T:83, 490-491, 505). As part of this project, Wetland 8A is proposed to be filled in its entirety and therefore no upland buffers will be provided. (WC 10). To the extent that the first sentence of finding of fact No. 47 relates to Wetland 8A, it is hereby corrected to refer to a portion of Wetland 8.

EXCEPTION 43:

Petitioner's Exception 43 takes exception to the portion of finding of fact No. 47 that states that the mitigation plan offsets any wetland functions and values lost through those impacts. Petitioner fails to state any basis for this exception. This exception is rejected. See ruling on Exception 29 above.

EXCEPTION 44:

Petitioner takes exception to the portion of finding of fact No. 49 that states there are no significant archeological or historical resources on the site. Petitioner argues the record does not demonstrate that an "archeological survey" was conducted. Although there may not be evidence of an "archeological survey," there is competent substantial evidence in the record to support a finding that there are no significant archeological or historical resources on the site. Mr. Peacock testified that he contacted the Florida Department of Historical Resources to determine if there were any record sites on the property or in the vicinity and, the response he got back was that there was none. (Peacock: 228-229). He also testified that he discussed the issue with other experts. (Peacock: 228). Mr. Esser testified that there were no significant archeological or historical resources on the site. (Esser: 494). Because this portion of finding of fact No. 44 is supported by competent

substantial evidence, Governing Board may not reject it. Accordingly, this exception is denied.

EXCEPTION 45:

Petitioner takes exception to the portion of finding of fact No. 52 in which the Administrative Law Judge concludes that the rule criteria are presumably met. Petitioner does not state the basis for this exception. Competent substantial evidence exists in the record that: 1) the post-development peak rate of discharge from the Walden Chase Development will be slightly less than the pre-development peak rate of discharge from the site for the 25-year, 24-hour storm event (Frye: 576, Ma: 133; WC 34); 2) no calculations are required regarding volume of discharge because the system does not discharge to a land-locked lake (Fry: 575-576); 3) the Walden Chase Development is not located on a watercourse or stream downstream of a drainage area that is five square miles (3200 acres) because the area drained by the Walden Chase Development is 280 acres and is essentially self-contained (Frye: 580-581); and 4) flows of adjacent streams, impoundments or other water courses will not be decreased so as to cause impacts. (Miller: 55-56). Pursuant to section 10.2.1(a), A.H., Walden Chase Development's surface water management system is presumed to have complied with subsections 40C-4.301(1)(a)-(b) since uncontroverted evidence was presented that the post-development peak rate of discharge would be slightly lower than the pre-development peak rate of discharge for a 24-hour, 25-year storm event. Sections 40C-4.301(1)(c) and sections 10.2.1 (b)-(d), A.H., are not applicable to Walden Chase Development since its system will not be discharging to a landlocked lake; is not located downstream on a point or watercourse where the drainage area is five square miles; and is not located-adjacent to a stream, impoundment or other water course. Thus, this exception is denied.

EXCEPTION 46:

Petitioner takes exception to the portion of finding of fact No. 53 that concludes that there will be no adverse secondary impacts to aquatic and wetland dependent species. Petitioner has not stated the basis for this exception. The only reference to "aquatic and wetland dependent species" in this finding of fact is the sentence: "No aquatic and wetland dependent species use the uplands on the site for nesting and denning and therefore it is presumed that no adverse secondary impacts to those species will occur." It was not proven that no wetland and aquatic dependent species use the uplands on the site for nesting and denning. However, the District's expert testified that no aquatic and wetland dependent species that is listed uses the uplands on the site for nesting or denning. (Esser:493-494). In

addition, Section 12.2.7(b), A.H., the second part of the secondary impact test to which this sentence pertains, does not create any presumptions. Thus, this finding is modified as follows to reflect accurately the testimony in the record and the District's existing requirements: "No aquatic or wetland dependent listed species uses the uplands on the site for nesting and denning and no adverse secondary impacts to those species will occur."

In Exception 46, Petitioner also takes exception to the portion of the finding of fact that "There will be no adverse impact to significant archeological and historic resources and therefore it is presumed that no adverse secondary impact to those species will occur." Presumably, the basis for this exception is a lack of competent substantial evidence. However, such evidence exists where the record indicates that adverse secondary impacts to historical and archeological resources will not occur. (Peacock: 229-230, Esser: 494). However, no competent substantial evidence supports a finding that archeological and historical resources are "species," a finding which, in light of the first sentence's first clause, appears to be a clerical error. In addition, Section 12.2.7(c), A.H., the third part of the secondary impact test to which this sentence pertains, does not create any presumptions. Accordingly, this finding of fact is modified so that the second clause states ". . . and no adverse secondary impacts to historical and archeological resources will occur." Finally, the four-part secondary impact test in section 12.2.7, A.H., is used to determine compliance with 40C-4.301(L)(f) and not 40C-4.301(1)(d) as presented in finding of fact No. 53. See, Section 12.2.7, A.H. (This section refers to Section 12.11.(f), A.H., which restates section 40C4.301(1)(f), Fla. Admin. Code).

EXCEPTION 47:

Petitioner takes exception to the portion of finding of fact No. 53 that finds there is a presumption that there are no adverse secondary impacts associated with the future phases of the CR 210 PUD. Competent substantial evidence exists in the record to support a finding that no secondary impacts will occur as a result of the future phase of the CR 210 PUD. (Elledge: 680-684, WC 8). However, Petitioner is correct that Section 12.2.7(d), A.H., does not create any presumptions. This portion of the finding of fact is actually a conclusion of law. Thus, the fourth sentence from the end of finding of fact No. 53 is corrected to comport with the law by deleting the words "it is presumed that."

EXCEPTION 48:

Petitioner takes exception to a portion of finding of fact No. 53 where, she contends, the Administrative Law Judge finds that "the secondary impacts to Wetland 8A is [sic] off-set by the mitigation plan." This statement does not accurately state the Administrative Law Judge's finding. Since Wetland 8A is proposed to be fi led as part of the proposed project, only direct and no secondary impacts "to Wetland 8A" will occur. Therefore, this portion of Petitioner's exception is denied.

Petitioner's Exception 48 also takes exception to the conclusion that the criterion in Rule 40C-4.301(1)(d) has been met. Petitioner's basis for the exception is that this statement is a conclusion of law. Competent substantial evidence has been submitted to support this conclusion in that the project will not change the hydroperiod of wetlands so as to adversely affect wetland functions to fish and wildlife (Frye: 586, 595,597) and, as discussed in Exceptions 32 and 33, the mitigation is sufficient to offset any adverse impacts to the functions provided by wetlands for fish and wildlife. As discussed in Exception 41, the sufficiency of mitigation is a factual determination infused with policy considerations, and is therefore, akin to a conclusion of law. Consequently, this conclusion is a matter within the exclusive jurisdiction of the agency. To this extent that "finding of fact No. 45" is not purely a factual determination, this portion of Exception 48 is correct and is, therefore, accepted.

EXCEPTIONS 49-52:

In Exceptions 49-52, Petitioner takes exception to portions of the findings of fact finding that certain rule criteria have been satisfied. Petitioner asserts that these are conclusions of law rather than findings of fact. The Governing Board concurs that these portions of the challenged findings of fact are conclusions of law, and to this extent, the exceptions are granted. However, for the reasons set forth in the discussion of Exceptions 61, 62 and 63, the rule criteria cited in Petitioner's Exceptions 49-52 have been satisfied.

EXCEPTION 53:

Petitioner takes exception to the portion of finding of fact No. 59 finding that water quality standards will not be violated. In addition, Petitioner takes exception to the portion of that recommended finding that the criterion in "Rule 40C-4.301(1)(I) [sic]" has been satisfied as this is a conclusion of law, not a finding of fact. As to the first part of the exception, there is competent substantial evidence in the record to support a finding

that water quality standards will not be violated. (Ma: 139-140, Frye: 603-610, Elledge: 694-695, WC 33). As to the second part of the exception, finding of fact No. 59 does not refer to Rule 40C-4.301(1)(1). Instead, it refers to Rule 40C-4.301(2). Presumably, Petitioner's citation contains a typographical error. The Governing Board accepts, however, that this part of the finding is a conclusion of law rather than a finding of fact. Because the Administrative Law Judge finds that reasonable assurances have been given regarding water quality, it cannot be rejected if supported by competent substantial evidence. Reedy Creek Improvement Dist. v. State. Dept. of Envtl. Regulation, 486 So. 2d 642 (Fla. 1986)(the determination that reasonable assurances has been given regarding water quality maintenance is a matter resolved to agency expertise and interpretation that will not be disturbed if otherwise supported by competent substantial evidence). This portion of Petitioner's Exception 53 is, therefore, rejected.

EXCEPTION 54:

In the first part of Petitioner's Exception 54, Petitioner takes exception to the portion of finding of fact No. 60 which concludes that the criterion in Rule 40C-4.302(1)(a) has been satisfied on the ground that this is a conclusion of law, not a finding of fact. The Governing Board concurs that this part of the finding is actually a conclusion of law.

In this exception Petitioner also disputes that the public health, safety and welfare factor is neutral. There is competent substantial evidence in the record to support a finding that this factor is neutral. (Frye: 618-619). Petitioner argues that the proposed project will adversely affect the public health, safety and welfare or property of others because of the adverse effects to Wetland 8 that Petitioner alleges will occur. In making this argument, Petitioner is asking the Governing Board to reweigh the evidence, which, as discussed earlier, the Governing Board is not at liberty to do. There is competent substantial evidence in the record to support a finding that adverse effects to Wetland 8 will not occur. (Miller: 76, Frye: 595).

In addition, Petitioner contends the applicant did not provide any information about wetlands on Quail Ridge within 200 feet of pond 5, and thus, the applicant has not provided reasonable assurance that the project will not impact the property of others. This is not accurate. There is competent substantial evidence in the record to support a finding that there are no wetlands on the Quail Ridge property near Pond 5. (Peacock: 275-276). Thus, this exception is denied.

EXCEPTION 55:

Petitioner takes exception to the portion of finding of fact No. 60 which finds that the public interest factor relating to the conservation of fish and wildlife, including endangered or threatened species and their habitat in 40C-4.302(1)(a)2 is neutral. Petitioner has not stated the basis for this exception. Presumably, the basis of the exception is a lack of competent substantial evidence. However, competent substantial evidence was presented to support this finding. The District's expert testified that because the mitigation adequately offsets all adverse impacts, the project will not adversely affect the conservation of fish and wildlife. (Esser: 499). To the extent that this determination requires a finding that the mitigation is sufficient, competent and substantial evidence was presented to allow such a conclusion to be made. (See Exceptions 32, 33, and 48 above) Therefore, this exception is denied.

EXCEPTION 56:

Petitioner takes exception to the portion of finding of fact No. 60 that finds that the factor related to the flow of water is neutral. Petitioner argues that because of the alleged proposed alterations to the flow of surface water to Wetland 8, the project will adversely affect the flow of water. There is competent substantial evidence in the record to support a finding that the flow of water will not be adversely affected. (Frye: 622). Moreover, with regard to Wetland 8, in finding of fact No. 16, the Administrative Law Judge made factual findings that there will be no adverse impacts to the hydrology of Wetland 8 because that wetland is primarily hydrated through groundwater sources. This finding is supported by competent substantial evidence. (Miller: 76, Frye: S95). Thus, this exception is denied.

EXCEPTION 57:

Petitioner takes exception to the portion of finding of fact No. 60 that finds that the public interest factor relating to recreational values in 40C-4.302(1)(a)4 is neutral. Petitioner has not stated the basis for this exception. Presumably, the basis for the exception is lack of competent substantial evidence. However, competent substantial evidence was presented to support this finding. The District's expert testified that this factor would be considered neutral because the mitigation would offset the project's adverse impacts. (Esser: 500). (See Exceptions 32, 33, and 48 above). Therefore, this exception is denied.

EXCEPTION 58:

Petitioner takes exception to the portion of finding of fact No. 60 finding that the public interest factor relating to the current condition and relative value of functions in 40C.-4.302((1)(a)7 is neutral. Petitioner has not stated the basis for this exception. Presumably, the basis for the exception is lack of competent substantial evidence. The District's expert testified that District staff considered this factor neutral since the project is designed such that the current condition and relative condition of functions being performed by wetlands is maintained. (Esser: 501). Therefore, there was competent substantial evidence presented to support this finding and this exception is denied.

EXCEPTION 59:

In Petitioner's Exception 59, Petitioner takes exception to the portion of finding of fact No. 60 that finds that any adverse impacts are offset by mitigation. To the extent that this evaluation requires a conclusion that the mitigation would be adequate, the record contains competent substantial evidence that the proposed mitigation will offset the project's adverse impacts. (See Exceptions 32, 33, and 48). Therefore, this exception is denied.

EXCEPTION 60:

Petitioner takes exception to the portion of finding of fact No. 61 which concludes that there will be no unacceptable impacts. Petitioner does not state a basis for this exception. Presumably, the basis for the exception is a lack of competent substantial evidence. Competent substantial evidence was presented to support this finding. (Esser: 495, Peacock: 236-37). The District's expert testified that, because the proposed mitigation would offset the project's adverse impacts and would occur on-site, and thus, within the same drainage basin as the project, further cumulative impact analysis was not required under the District's rules. To the extent that this evaluation requires a conclusion that the mitigation would be adequate, the record contains competent substantial evidence that the proposed mitigation will offset the project's adverse impacts. (See Exceptions 32, 33, and 48) Therefore, this exception is denied.

EXCEPTIONS 61. 62 and 63:

Petitioner takes exception to the Administrative Law Judge's ultimate conclusion that all applicable permit criteria have been meet and, therefore, the applicant is entitled to the ERP. Petitioner does not provide any bases for these exceptions. As

set forth above in the discussion of Petitioner's finding of fact exceptions, there is competent substantial evidence to support a conclusion that Walden Chase has met the conditions for issuance of an individual environmental resource permit. Moreover, the Administrative Law Judge's conclusions of law are correct.

Pursuant to section 10.2.1(a), A.H., Walden Chase Development's surface water management system is presumed to have complied with subsections 40C-4.301(1)(a)-(b) since uncontroverted evidence was presented that the post-development peak rate of discharge would be slightly lower than the pre-development peak rate of discharge for a 24-hour, 25-year storm event. Sections 40C-4.301(1)(c) and sections 10.2.1 (b)-(d), A.H., are not applicable to Walden Chase Development since its system will not be discharging to a landlocked lake; is not located downstream on a point or watercourse where the drainage area is five square miles; and is not located adjacent to a stream, impoundment or other water course.

There is competent substantial evidence to support a conclusion that Walden Chase Development will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters, as required by subsection 40C-4.301(d). To determine whether this subsection has been met, Walden Chase was required to demonstrate compliance with sections 12.2.2. and 12.2.2.4 of the Applicant's Handbook. Section 12.2.2 of the Applicant's Handbook requires consideration of whether the Walden Chase Development will impact the values of wetlands and surface waters on the site so as to cause adverse impacts to the abundance, diversity, and habitat of fish, wildlife, and listed species. Compliance with sections 12.2.2 and 12.2.2.4, A.H., however, is not required for those parts of the Walden Chase Development which will be located in isolated wetlands less than one half acre in size, 2/ since none of the exceptions in section 12.2.2.1(a)-(d), A.H., were demonstrated to apply in this case. 3/

First, there is no competent substantial evidence to support a finding that any threatened or endangered species actually utilizes, on a more than incidental basis, any of the isolated wetlands less than 0.5 acres located on the project site. The evidence showed only that certain species might or may potentially use some these wetlands on an incidental basis and these observations are insufficient to rise to the level of "use" contemplated by section 12.2.2.1(a), A.H.

Second, none of the isolated wetlands less than 0.5 acres in size are located in an area of critical state concern or are connected by standing or flowing surface water at seasonal high water level to one or more wetlands. Finally, the evidence did

not establish that any of the isolated wetlands less than 0.5 acres in size proposed to be impacted singly or cumulatively are of more than minimal value to fish and wildlife. The conclusion that gopher frogs may breed in some of these wetlands is -- without more information such as in which wetlands they have actually been found -- not sufficient to establish that these wetlands individually or cumulatively provide more than minimal value to fish and wildlife.

Walden Chase proposes to dredge and/or fill wetlands 6, 7 and 8A. Since their destruction will eliminate these wetlands' ability to provide functions to fish and wildlife, these impacts are initially considered adverse. Section 12.2.1.1, A.H., provides that in this instance Walden Chase must have implemented practicable design alternatives to reduce or eliminate these adverse impacts. Walden Chase has implemented all practicable design alternatives in that it evaluated alternative locations in uplands for each of the facilities to be located in the wetlands: the ballfields in wetland 7, storm water pond 3 in wetland 8A, and storm water pond 5 in wetland 6. The analysis demonstrated that relocation of these facilities was not practicable because the cost of the relocation more than outweighed the environmental benefit of avoiding the impacts to wetlands 6, 7, and 8A.

There is also competent substantial evidence to support a conclusion that Walden Chase Development will not change the hydroperiod of wetlands or surface waters so as to adversely affect wetland functions or surface water functions, and that the project, therefore, complies with subsection 12.2.2.4, A.H., the other prong of the test to determine whether subsection 40C-4.301(d) has been met. Since the surface water and groundwater contributions to wetlands will not be significantly different after the Walden Chase Development is completed, the project is not reasonably expected to alter the water levels in wetlands remaining on the site after the project has been built. As a precaution, the Administrative Law Judge is recommending the special vegetative monitoring condition proposed by the District staff.

Unless upland-cut drainage ditches provide significant habitat for threatened and endangered species, alterations to such ditches must comply only with those rules relating to water quality in sections 12.2.4-12.2.4.5., A.H. and relating to water quantity impacts in 12.2.2.4, A.H.. See, section 12.2.2.2, A.H. Since the evidence established that none of the upland ditches to be impacted on the Walden Chase Development site (labeled as wetland numbers 16, 17, 18, 19, 20 and 21) provide significant habitat to endangered or threatened species, Walden Chase was required only to demonstrate that the filling or dredging of these ditches would not result in violations of water quality

standards or change the hydroperiod of wetlands or surface waters so as to adversely affect the functions they provide to fish and wildlife. All of the regulated activities proposed on the Walden Chase Development, including the alterations to drainage ditches, comply with these requirements.

Since Walden Chase has implemented all practicable design alternatives to eliminate and reduce adverse impacts to wetlands 6, 7 and 8A, the District staff, pursuant to section 12.3, A.H., was able to consider mitigation proposed for the Walden Chase Development. There is competent substantial evidence to support a finding that the higher quality wetlands will be preserved and protected with upland buffers, and that the proposed wetland creation areas are onsite and will mimic the impacted areas in their physical characteristics, including size, and in the types of functions they will provide to fish and wildlife. The Governing Board concurs with the Administrative Law Judge's conclusion that Walden Chase's mitigation will offset the adverse impacts the project will have on the value of functions provided to fish and wildlife by wetlands 6, 7, and 8A, and that subsection 40C-4.301(1)(d 1 is, therefore, met.

The mitigation proposed by Walden Chase will be on-site and thus within the same drainage basin as the Walden Chase Development. District staff determined that the proposed mitigation will offset the project's adverse impacts. Therefore, pursuant to section 40C-4.302(1)(b), the cumulative impacts criterion is met.

Walden Chase Development will not cause adverse secondary impacts to the water resources as required by subsection 40C-4.30l(l)(f). Compliance with this subsection is determined by applying the four-part test in section 12.2.7, A.H. The evidence showed that, under the first part of the test, the following potential impacts were evaluated: (i) the effect on wildlife utilization of wetland 8 adjacent to the small portion of the entrance road located in wetlands; (ii) the effect of human activity adjacent to the wetlands to be preserved; and (iii) the effect of surface water run-off from lots bordering wetlands on water quality in the wetlands. Pursuant to subsection 12.2.7(a) and, with the exception of a small area in Wetland 1 and a small portion of wetland 8 near the road crossing wetland 8A, the secondary impacts of human activity adjacent to the wetlands to be preserved are not considered adverse, since the evidence showed that Walden Chase has proposed buffers with an average width of 25 feet and a minimum width of 15 feet around each of these wetlands. Because runoff from lots bordering wetlands will be treated to meet applicable state water quality by the buffers, this effect is also not considered an adverse secondary impact.

No secondary impacts will occur under the second part of the test, since there was no evidence that any aquatic or wetland dependent listed animal species use uplands for existing nesting or denning on the Walden Chase site. (A list of such species is provided in Table 12.2.7-1, A.H.). No adverse secondary impacts will occur under the third part of the test, since the evidence showed that Walden Chase Development will not cause impacts to significant historical or archeological resources. Finally, under the fourth part of the test, the evidence was uncontroverted that additional development phases of the County Road 210 Planned Unit Development, which includes the Walden Chase Development, can be constructed in a way that is permittable under the District's rules and will not result in water quality violations or adverse impacts to the functions of wetlands or surface waters.

Pursuant to section 12.2.7, A.H., a permit applicant has the option of proposing measures to prevent adverse secondary impacts or proposing mitigation measures to offset such impacts. See also, section 12.3 ("Mitigation . . . is required only to offset the adverse impacts to the functions identified in 12.2-12.2.8.2 [which includes 12.2.7, A.H.] caused by regulated activities."). In the instant case, there is competent substantial evidence to support a conclusion that the mitigation proposed by Walden Chase -- in the form of wetland creation and upland and wetland preservation -- will offset all of the project's adverse impacts to wetlands, including its limited adverse secondary impacts, and therefore, subsection 40C-4.301(1)(f) is met.

The Administrative Law Judge is correct that Walden Chase has provided reasonable assurance that Walden Chase Development will not affect the quality of receiving waters such that state water quality standards will be violated, assurance required by 40C-4.301(1)(e), Fla. Admin. Code. Pursuant to section 10.7.2, A.H. and 40C-42.023(1)(a), it is presumed that the Walden Chase Development will not violate water quality standards because the wet detention portion of its surface water management system is designed in accordance with subsection 40C-42.026(4), the design criteria for wet detention systems, and the vegetated buffers providing storm water treatment for rear lots are also designed in accordance with the District's regulations. No evidence was presented that would rebut this presumption.

Since no minimum surface or ground water levels or surface water flows have been established for water bodies affected by the Walden Chase Development pursuant to Chapter 40C-8, Fla. Admin. Code, subsection 40C-4.301(1)(g) is not applicable to this project.

Since no works of the District are in the project area or will be affected by the project, subsection 40C4.301(1)(h) is not applicable to this project.

The Governing Board concurs with the Administrative Law Judge's conclusion that since the evidence demonstrated that Walden Chase Development's surface water management system is typical for a residential development, Walden Chase has provided reasonable assurance that its system, based on generally accepted engineering and scientific principles, will be capable of being performed and of functioning as proposed, and subsection 40C-4.301(1)(i) is, therefore, met.

Since the evidence established that Walden Chase's storm water management system will be constructed by a capitalized limited partnership and will be operated and maintained by a homeowner's association with sufficient powers to provide for the long term operation and routine custodial maintenance of the system, the Governing Board concurs with the Administrative Law Judge that Walden Chase has provided reasonable assurance that the Development will be undertaken in accordance with the terms and conditions of its permit as required by 40C-4.301(1)(j).

Since no special basin or geographic area criteria apply in the project area, subsection 40C-4.301(1)(k) is not applicable to this project.

Public Interest Criteria

Pursuant to 40C-4.302(a), Walden Chase 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. See also, section 12.2.3, A.H.

The Governing Board concurs with the Administrative Law Judge's conclusion that Walden Chase has provided reasonable assurance that the Walden Chase Development is not contrary to the public interest, since the evidence established that all of the public interest factors to be balanced were determined to be neutral or not applicable to the project. Because the mitigation proposed for Walden Chase Development will offset the project's adverse impacts to wetlands, no adverse effects to the conservation of fish and wildlife or due to the project's permanent nature will occur. There is also competent substantial evidence to support a conclusion that best management practices and the outfall channel's design will ensure that the project will not result in harmful erosion or shoaling. Further, there is competent substantial evidence to support a conclusion that Walden Chase Development will not adversely affect the flow of water, significant historical or archeological resources, or the

public health, safety, or welfare or property of others. Based upon our the review of the record, the Administrative Law Judge correctly concluded that the project's design, including mitigation, is such that the current condition and relative value of functions performed by wetlands will be maintained.

TYPOGRAPHICAL CORRECTIONS:

In addition to its rulings on exceptions submitted by Petitioner, the Governing Board makes the following rule clarifications and corrections to typographical errors:

1. In paragraph 9 of the Recommended Order, first sentence, the following correction should be made: "62-302.400, "~~61-400~~, Fla. Admin. Code."

2. In paragraph 53 of the Recommended Order, the second sentence should read "A four-part test for satisfying any secondary impacts for the system ~~affecting this criterion~~ is described in Section 12.2.7 ~~12.2.1~~ of the Applicants Handbook."

3. In paragraph 55 of the Recommended Order, the last sentence, the following corrections should be made: Rule 40C-4.301(1)(fl) ~~40C-4.301(i)(f)~~, Fla. Admin. Code.

ACCORDINGLY, IT IS HEREBY ORDERED:

The Recommended Order dated September 1, 1999, 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 the rulings on Petitioner's Exceptions 11, 12, 30, 41, 42, 46, 47, 48, 49-52 and 53. Walden Chase Developers Ltd.'s application number 4-109-0211A-ERP for an individual environmental resource permit is hereby granted under the terms and conditions contained in the District's proposed agency action as set forth in the Technical Staff Report dated July 25, 1999, attached hereto, exhibit District 3, with the addition of the following condition:

Permittee shall not divert the discharge from the Quail Ridge subdivision's storm water management system until the Quail Ridge storm water treatment system is repaired and in compliance with District permits for that system. Alternatively, permittee may divert the Quail Ridge discharge into wetland number 8 upon receiving prior written approval from the District that the discharge complies with all applicable state water quality standards based on water quality sampling data submitted to the District. If permittee is not able to construct this diversion prior to the construction of pond 3, then the permittee must implement monitoring of wetland 8 equivalent to the monitoring

required in the special condition for vegetative monitoring. Once the Quail Ridge system is in compliance, the diversion of discharges to wetland number 8 may be implemented and any monitoring of wetland 8 may be discontinued. (Frye: 603-605; Elledge: 694-695).

DONE AND ORDERED this 24th day of September 1999, in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

BY:_____
J. DANIEL ROACH
CHAIRMAN

RENDERED this 27th day of September 1999.

BY:_____
SANDRA BERTRAM
DISTRICT CLERK

ENDNOTES

1/ Section 12.2.2.1, A.H. provides:

Compliance with sections 12.2.2-12.2.3.7, 12.2.5-12.3.8 will not be required for isolated wetlands less than one half acre in size unless:

(a) the wetland is used by threatened or endangered species,

(b) the wetland is located in an area of critical state concern designated pursuant to chapter 380, F.S.

(c) the wetland is connected by standing or flowing surface water at seasonal high water level to one or more wetlands, and the combined acreage so connected is greater than one half acre, or

(d) the District establishes that the wetland to be impacted is, or several such isolated wetlands to be impacted are

cumulatively, of more than minimal value to fish and wildlife.

Sections 12.2.5-12.3.8, A.H., include the sections requiring and governing mitigation.

2/ The relevant wetlands are wetlands 2, 5, 10, 11, 12, and 14.

3/ Section 12.2.2.1, A.H. provides:

Compliance with sections 12.2.2 -12.2.3.7, 12.2.5-12.3.8 will not be required for isolated wetlands less than one half acre in size unless:

(e) the wetland is used by threatened or endangered species,

(f) the wetland is located in an area of critical state concern designated pursuant to chapter 380, F.S.

(9) the wetland is connected by standing or flowing surface water at seasonal high water level to one or more wetlands, and the combined acreage so connected is greater than one half acre, or

(h) the District establishes that the wetland to be impacted is, or several such isolated wetlands to be impacted are cumulatively, of more than minimal value to fish and wildlife.

Copies to:

Deborah J. Andrews, Esquire
11 N. Roscoe Blvd.
Ponte Vedra Beach, FL 32082

David J. White, Esquire
4804 Southwest 45 Street
Suite 100
Gainesville, FL 32608

Marsha P. Tjoflat, Esquire
Rogers, Towers, Bailey,
Jones & Gay, P.A.
1301 Riverplace Blvd.
Suite 1500
Jacksonville, FL 32207

John G. Metcalf, Esquire
Pappas, Metcalf, Jenks, Miller
& Reisch
200 W. Forsyth Street
Suite 1400
Jacksonville, FL 32202

Veronika Thiebach, Esquire
Mary Jane Angelo, Esquire
St. Johns River Water Management
District
P. O. Box 1429
Palatka, FL 32178-1429

INDIVIDUAL ENVIRONMENTAL RESOURCE PERMIT
TECHNICAL STAFF REPORT
07/25/99

Applicant:	Raymond O'Steen Walden Chase Developers, Ltd. 2999 Hartley Rd., Suite 102 Jacksonville, FL 32257
Agent:	K.T. Peter Ma, P.E. 3131 St. Johns Bluff Rd. Jacksonville, FL 32246
Consultant:	See Agent

County: St. Johns	Project Name: Walden Chase
Sections: 1, 2,11	Township: 5-S Range: 28-E
Acres Owned: 280	Project Acreage: 280

General Project Description FOR APPLICATION NO.: 4-109-0211A-ERP

This application is for the construction of a surface water management system to serve Walden Chase, a 280 acre, single family residential development.

Authority: Chapter 373, F.S.; 40C-4.041 (2)(b)2.,8., F.A.C.

Existing Land Use: Undeveloped - Woods

Hydrologic Basin(s): 3G

Receiving Water Body(ies): Twelve Mile Swamp/Durbin Creek (Class III)

Easements/Restrictions: Yes

Operation and Maintenance Entity: Joint Property Owners Association

Staff Comments:

Walden Chase is a proposed 258 acre residential community, on the south side of County Road 210, east of U.S. Highway 1, immediately east of Old Dixie Highway, in northeastern St. Johns County. The applicant proposes to construct a surface water management system to serve the development pursuant to the criteria of Chapters 40C-4 and 40C-42, F.A.C.

The proposed surface water management system consists of graded homesites, curb and gutter roadway, storm inlets, concrete pipes, vegetated natural buffers and four, inter-connected wet detention storm water ponds. The ponds are designed to provide 25 year, 24 hour peak discharge rate attenuation and water quality treatment according to the District's design criteria. The permanent pool volume of the wet detention ponds are based on a 21 day residence time so that no littoral shelf is required. The single off-site discharge structure is located in the pond named pond 5 on the approved plans, and outfalls to the east into a ditch connecting to off-site wetlands associated with Twelve Mile Swamp.

A commercial outparcel located within the drainage area served by this system, and accounted for in the design, will require a general permit prior to construction there. Staff is recommending a special condition to address the future permitting requirements of this parcel.

Environmental Comments

The proposed project includes pine flatwoods, scrubby flatwoods, sandhill, pine plantation, cypress swamp, wet pine flatwoods, two borrow pits, and several drainage ditches.

The pine flatwoods and pine plantation are similarly vegetated with slash pine, gallberry, saw palmetto,

scattered red maple, and bracken fern. The scrubby flatwoods are at a slightly higher elevation than the pine flatwoods and trend slightly to a more xeric character. These areas are vegetated with, slash pine, water oak, saw palmetto, wiregrass, and bracken fern.

The well drained sandhill areas are vegetated with longleaf pine, sand live oak, running oak, Chapman oak, turkey oak, bluejack oak, saw palmetto, bracken fern, and wiregrass.

The wetlands on-site total 34.57acres and the surface waters total 5.35 acres. The wetlands include 4.63 acres of wet pine flatwoods, 28.77 acres of cypress/pine swamp, and 1.17 acres of isolated herbaceous wetlands. The surface waters include 1.27 acres of upland-cut drainage ditches, a 3.9 acre permitted borrow pit, (permit number 04-109-0140, issued 07 December 1993), and a 0.18 acre trail-side borrow pit.

The wet pine flatwoods include nine areas identified on the permit drawings as wetlands 1 (portion), 2, 5 (portion), 6, 7, 8A, 10, 11, and 12. These areas range in size from 0.01 acres up to 1.81 acres. Wetland 1 is a 1.52 acre area located along the-northern property line, near the powerline easement. Approximately 0.62 acres of this have been disturbed by silviculture and is primarily vegetated by new growth that includes slash pine, scattered cypress, wax myrtle, red maple, bitter gallberry, and cinnamon fern. The remaining 0.90 acres are relatively undisturbed and is included in the cypress/pine swamp descriptions. Wetland 2 is a recently timbered 0.02 acre isolated depression that is vegetated with red root, beakrush, and wax myrtle. Wetland 5 is located along the south property line, just north of Quaii Ridge subdivision. This 0.19 acre isolated wetland connects into a 0.18 acre borrow pit. This wetland is vegetated with slash pine, bitter gallberry, red maple, swamp bay, and cinnamon fern. Wetland 6 is a 0.50 acre wetland depression that pops off into a drainage ditch along the powerlines. This wetland is vegetated with slash pine, bitter gallberry, cinnamon fern, red maple, sweetgum, and red root. Wetland 7 is a 1.04 acre isolated depression that is vegetated with slash pine, bitter gallberry, myrtle-leaf holly, black-stem chain fern, red root, and broomsedge. Wetland 8A is a 1.81 acre wetland that has been disturbed by silviculture. A portion of this wetland is vegetated with pine, bays, and dense shrubs, while other portions are vegetated with pines, grasses, ferns, and sphagnum.

The cypress/pine swamp wetlands includes five areas identified on the permit drawings as wetland areas 1

(portion), 3, 4, 8, & 9. The wetlands range in size from 1.06 acres up to 13.78 acres and all but wetland 1 extend off-site. The five areas are similarly vegetated with species that include cypress, wax myrtle, black-stemmed chain fern, and bog button.

The herbaceous wetlands include wetland areas 13, 14, and 15. Area 13 is a 0.01 acre depression located within the powerline easement. This small area is dominated by broomsedge. Area 14 is a 0.04 linear feature adjacent to a drainage ditch. This area is vegetated with a few ferns. Area 15 is a 1.12 acre linear strip within the powerline easement. This area is vegetated with species that include sedges, ferns, panic grasses, marsh fleabane, and scattered wax myrtle.

The largest of the surface waters is a recently constructed 3.90 acre borrow pit that was authorized by permit number 4-109-0140, issued 07 December 1993. The steep-sided borrow pit consists primarily of open water with a very narrow vegetated littoral area. The vegetation is primarily panic grasses. The second borrow pit is 0.18 acres and was excavated for fill to construct an adjacent trail road. This area has scattered areas of rooted vegetation that includes red root and duck potato.

The on-site ditches are all upland-cut and man-made. The ditches range in width from approximately 3-9 feet and in depth from approximately 1-2 feet. The ditches have a mixture of herbaceous species that include soft rush, red root, beak rush, and sedge.

PROPOSED WETLAND IMPACTS

The applicant proposes to dredge/fill 4.02 acres of the wet pine flatwoods, 0.04 acres of the herbaceous wetlands, 0.46 acres of the man-made upland-cut ditches, and the two borrow pits (4.08 acres). The impacts are proposed to construct the storm water treatment facility, a single road crossing to access developable uplands, and for lot development. The impacts include 0.70 acres of isolated wetlands that are each less than 0.50 acres. No other impacts to wetlands or surface waters are proposed. The applicant has avoided the higher quality wetlands and limited the impacts to the smaller, more disturbed isolated wetlands and has proposed to construct the road crossing through the narrowest portion of the wetlands.

To determine whether adverse impacts to listed species would occur as a result of the proposed project, staff applied the

review criteria of sections 12.2.2.1, 12.2.2.2, and 12.2.7, A.H. Staff determined that the hydroperiod of the wetlands proposed to be impacted is not sufficient to support permanent fish populations, the primary if not almost exclusive forage of woodstork. The isolated wetlands also have a relatively thick vegetative cover that would limit catch success even if fish were available. The larger borrow pit supports a fish population but does not have sufficient shallow water areas for forage or the ability to drawdown to concentrate the fish. The small borrow pit does not have a fish population and does not appear to have suitable forage areas.

To offset the proposed wetland impacts, the applicant has proposed a mitigation plan that includes wetland creation, wetland preservation, and upland preservation. The applicant has proposed to create 3.80 acres of forested wetlands adjacent to wetlands 4 and 8. Creation areas A and B will be located along the eastern and southern edge of wetland 8 and creation areas C and D will be located at the north and south ends of wetland 4. The creation areas are pine flatwoods that will be scraped down to elevations consistent with the impact areas and planted with wetland tree species that include pond pine and at least three of the following species, sweet bay, tupelo, swamp bay, and myrtle leaf holly. The applicant has also proposed to preserve 29.39 acres of the on-site wetlands and 5.64 acres of uplands. The upland preservation includes 4.65 acres that will be used to prevent secondary impacts and are otherwise consistent with criteria in section 12.2.7, A.H. All of the creation and preservation areas will be encumbered with a conservation easement pursuant to section 704.06, F.S. Cumulative impacts are not expected because the mitigation will replace the lost wetland functions and will be located on-site.

In addition, staff was concerned that the proposed normal water level in the storm water treatment ponds would adversely alter the hydrology in adjacent wetlands. In these areas the ponds will be fully lined to maintain wetland hydrology. Other condition 3 is added to ensure the proper installation of the liner.

This proposed project meets all applicable conditions for permit issuance pursuant to sections 40C-4.301 and 40C-4.302, F.A.C.

Wetland Inventory (acres)

Total Wetlands on Project Site:	39.92
Total Wetlands Preserved:	29.39
Total Wetlands Disturbed:	0.00
Total Wetlands Lost:	8.59
Total Wetlands Created as Mitigation:	3.80
Total Wetlands Enhanced or Restored as Mitigation:	0.00
Other Compensation: Upland preservation including 25' Buffer	5.64

Recommendation: Approval

Conditions for Application Number 4-109-0211A-ERP:

General ERP CONDITIONS (See Condition Sheet): 1-19

Special MSSW CONDITIONS (See Condition Sheet): 1, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 28

Tables: N/A

Other Conditions:

1. The surface water management system must be constructed as per plans received by the District on January 27, 1999, and as amended by plan sheets 20, 50 & 51, received March 12,1999.

2. Prior to construction on the commercial parcel along County Road 210, the applicant must submit for, and obtain, a General permit from the District. The applicant must demonstrate consistency with the master design. If the commercial development is not consistent with the design assumptions of this application, a modification of this permit is required.

3. A Florida registered Professional Engineer must certify to the District that each pond liner that is proposed in the permitted construction plans has been observed to be installed as designed, or received written staff approval of any deviation from the permitted construction plans prior to installation of the pond liners.

4. The mitigation plan received by the District 06 July and as amended by the special and other conditions is incorporated as a condition of this permit.

Reviewers: FRYE/ESSER

NOTICE OF RIGHTS

1. Any substantially affected person who claims that final action of the District constitutes an unconstitutional taking of property without just compensation may seek review of the action in circuit court pursuant to Section 373.617, Florida Statutes, and the Florida Rules of Civil Procedures, by filing an action within 90 days of rendering of the final District action.

2. Pursuant to Section 120.68, Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal pursuant to Fla.R.App. 9.110 within 30 days of the rendering of the final District action.

3. A party to the proceeding who claims that a District order is inconsistent with the provisions and purposes of Chapter 373, Florida Statutes, may seek review of the order pursuant to Section 373.114, Florida Statutes, by the Land and Water Adjudicatory Commission (Commission) by filing a request for review with the Commission and serving a copy on the Department of Environmental Protection and any person named in the order within 20 days of adoption of a rule or the rendering of the District order.

4. A District action or order is considered "rendered" after it is signed by the Chairman of the Governing Board on behalf of the District and is filed by the District Clerk.

5. Failure to observe the relevant time frames for filing a petition for judicial review as described in paragraphs #1 or #2 or for Commission review as described in paragraph #3 will result in waiver of that right to review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing NOTICE OF RIGHTS has been furnished by United States Mail to:

Deborah J. Andrews, Esquire
11 North Roscoe Blvd
Ponte Vedra Beach, FL 32082

At 4:00 P.M. this 27th day of SEPTEMBER, 1999.

SANDRA L. BERTRAM
DISTRICT CLERK
St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32178-1429

CERTIFIED MAIL #Z 135 395 582

NOTICE OF RIGHTS

1. Any substantially affected person who claims that final action of the District constitutes an unconstitutional taking of property without just compensation may seek review of the action in circuit court pursuant to Section 373.617, Florida Statutes, and the Florida Rules of Civil Procedures, by filing an action within 90 days of rendering of the final District action.

2. Pursuant to Section 120.68, Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal pursuant to Fla.R.App. 9.110 within 30 days of the rendering of the final District action.

3. A party to the proceeding who claims that a District order is inconsistent with the provisions and purposes of Chapter 373, Florida Statutes, may seek review of the order pursuant to Section 373.114, Florida Statutes, by the Land and Water Adjudicatory Commission (Commission) by filing a request for review with the Commission and serving a copy on the Department of Environmental Protection and any person named in the order within 20 days of adoption of a rule or the rendering of the District order.

4. A District action or order is considered "rendered" after it is signed by the Chairman of the Governing Board on behalf of the District and is filed by the District Clerk.

5. Failure to observe the relevant time frames for filing a petition for judicial review as described in paragraphs #1 or #2 or for Commission review as described in paragraph #3 will result in waiver of that right to review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing NOTICE OF RIGHTS has been furnished by United States Mail to:

David J. White, Esquire
4804 Southwest 45th Street
Suite 100
Gainesville, FL 32608

At 4:00 P.M. this 27th day of SEPTEMBER, 1999.

_____
SANDRA L. BERTRAM
DISTRICT CLERK
St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32178-1429

CERTIFIED MAIL #Z 135 395 583

NOTICE OF RIGHTS

1. Any substantially affected person who claims that final action of the District constitutes an unconstitutional taking of property without just compensation may seek review of the action in circuit court pursuant to Section 373.617, Florida Statutes, and the Florida Rules of Civil Procedures, by filing an action within 90 days of rendering of the final District action.

2. Pursuant to Section 120.68, Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal pursuant to Fla.R.App. 9.110 within 30 days of the rendering of the final District action.

3. A party to the proceeding who claims that a District order is inconsistent with the provisions and purposes of Chapter 373, Florida Statutes, may seek review of the order pursuant to Section 373.114, Florida Statutes, by the Land and Water Adjudicatory Commission (Commission) by filing a request for review with the Commission and serving a copy on the Department of Environmental Protection and any person named in the order within 20 days of adoption of a rule or the rendering of the District order.

4. A District action or order is considered "rendered" after it is signed by the Chairman of the Governing Board on behalf of the District and is filed by the District Clerk.

5. Failure to observe the relevant time frames for filing a petition for judicial review as described in paragraphs #1 or #2 or for Commission review as described in paragraph #3 will result in waiver of that right to review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing NOTICE OF RIGHTS has been furnished by United States Mail to:

Marsh P. Tjoflat, Esquire
Rogers, Towers, Bailey, Jones & Gay, P.A.
1301 Riverplace Blvd
Suite 1500
Jacksonville, FL 32207

At 4:00 P.M. this 27th day of SEPTEMBER, 1999.

_____
SANDRA L. BERTRAM
DISTRICT CLERK
St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32178-1429

CERTIFIED MAIL #Z 135 395 584

NOTICE OF RIGHTS

1. Any substantially affected person who claims that final action of the District constitutes an unconstitutional taking of property without just compensation may seek review of the action in circuit court pursuant to Section 373.617, Florida Statutes, and the Florida Rules of Civil Procedures, by filing an action within 90 days of rendering of the final District action.

2. Pursuant to Section 120.68, Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal pursuant to Fla.R.App. 9.110 within 30 days of the rendering of the final District action.

3. A party to the proceeding who claims that a District order is inconsistent with the provisions and purposes of Chapter 373, Florida Statutes, may seek review of the order pursuant to Section 373.114, Florida Statutes, by the Land and Water Adjudicatory Commission (Commission) by filing a request for review with the Commission and serving a copy on the Department of Environmental Protection and any person named in the order

within 20 days of adoption of a rule or the rendering of the District order.

4. A District action or order is considered "rendered. after it is signed by the Chairman of the Governing Board on behalf of the District and is filed by the District Clerk.

5. Failure to observe the relevant time frames for filing a petition for judicial review as described in paragraphs #1 or #2 or for Commission review as described in paragraph #3 will result in waiver of that right to review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing NOTICE OF RIGHTS has been furnished by United States Mail to:

John G. Metcalf, Esquire
Pappas, Metcalf, Jenks, Miller & Reisch
200 W. Forsyth Street
Suite 1400
Jacksonville, FL 32202

At 4:00 P.M. this 27th day of SEPTEMBER, 1999.

_____
SANDRA L. BERTRAM
DISTRICT CLERK
St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32178-1429

CERTIFIED MAIL #Z 135 395 585

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SARAH H. LEE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 99-2215
	)	
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT and WALDEN CHASE DEVELOPERS, LTD.,	)	
	)	
Respondents.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, the above matter was heard before the Division of Administrative Hearings by its duly-designated Administrative Law Judge, Don W. Davis, on July 26-28, 1999, in St. Augustine, Florida.

APPEARANCES

For Petitioner, Sarah H. Lee:

Deborah Andrews, Esquire
11 North Roscoe Boulevard
Ponte Vedra Beach, Florida 32082

David J. White, Esquire
Suite 100
4804 Southwest 45th Street
Gainesville, Florida 32068

For Respondent, Walden Chase Developers, Ltd.:

Marsha Parker Tjoflat, Esquire
Rogers, Towers, Bailey,
Jones & Gay, P.A.
1301 Riverplace Boulevard
Suite 1500
Jacksonville, Florida 32207

John G. Metcalf, Esquire
Pappas, Metcalf, Jenks, Miller
& Reisch
200 West Forsyth Street, Suite 1400
Jacksonville, Florida 32202

For Respondent, St. Johns River Water Management District:

Veronika Thiebach, Esquire
Mary Jane Angelo, Esquire
St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32178-1429

STATEMENT OF THE ISSUE

Whether the proposed Walden Chase development (the "Project"), is consistent with the standards and criteria for issuance of an Environmental Resource Permit ("ERP") as set forth in Rules 40C-4.301 and 40C-4.302, Florida Administrative Code.

PRELIMINARY STATEMENT

On January 22, 1999, Walden Chase Developers, Ltd. ("Walden Chase") applied to the St. Johns River Water Management District ("District") for a permit to construct and operate a surface water management system to serve 279 acres in St. Johns County (the "Permit"). Issuance of the Permit is subject to the ERP rules contained in Chapter 40C-4.301 (Conditions for Issuance of Permits) and 40C-4.302 (Other Conditions for Issuance of Permits), Florida Administrative Code (collectively, the "ERP Criteria").

On March 23, 1999, the District notified Petitioner of its intent to issue the Permit. On April 13, the District Governing Board held a public hearing to determine whether to issue the

Permit. After presentations by Petitioner, Applicant and District staff, the Board determined that the Project satisfied the ERP Criteria and affirmed its intent to grant.

On April 19, Petitioner filed a Petition for Administrative Hearing objecting to issuance of the Permit. On May 14, the District forwarded the case to the Division of Administrative Hearings, and the matter was subsequently set for final hearing on July 26-28, 1999.

In the Prehearing Stipulation, Petitioner alleges that Walden Chase has not provided reasonable assurance that the ERP Criteria have been met, and that therefore Walden Chase is not entitled to issuance of the ERP. Walden Chase and the District allege that the ERP Criteria have been met and that Walden Chase is entitled to issuance of the ERP, subject to certain general, special, and other conditions specified in the technical staff report.

At the final hearing Petitioner presented the testimony of three fact witnesses: Sarah H. Lee, Sarah Claire Lee, Helen Cortopassi, and two expert witnesses: Laurie MacDonald, an expert in wildlife zoology and conservation biology; and Linda Conway Duever, an expert in upland and wetland ecology, natural area evaluation and management, and conservation planning. Petitioner also presented testimony of two witness by deposition: Mark Brown, an expert in wetland ecology, wetland systems, ecological economics, site planning and environmental design, and

environmental impact assessment; and Paul Moler, an expert in wildlife biology, specifically reptiles and amphibians. In addition to the deposition, Petitioner presented an additional six exhibits. All exhibits were admitted without objection.

At the final hearing Walden Chase presented the testimony of one fact witness, Raymond O'Steen, and three expert witnesses: Doug Miller, an expert in civil engineering, including site layout, and in the permitting of surface water management systems; Ka Tai Peter Ma, an expert in civil engineering; and Byron Peacock, an expert in wetlands, wildlife ecology, and environmental permitting. Additionally, Walden Chase presented 42 exhibits.

At the final hearing the District presented three expert witnesses: Walter Esser, an expert in wetland and wildlife ecology, mitigation planning, wetland delineation, and ERP permitting and regulation; Everette Frye, an expert in water resource engineering and water management permitting; and Jeffrey Elledge, an expert in the permitting requirements and procedures at the Water Management District, water resource engineering, civil engineering, hydrology, water quality, and storm water management. The District also offered five exhibits; four exhibits were admitted without objection, and the fifth was not admitted pursuant to objection by Petitioner.

The Transcript of the final hearing was filed on August 6, 1999, and the parties were allowed ten days in which to submit

proposed recommended orders. Each party timely filed a Proposed Recommended Order.

FINDINGS OF FACT

The Project

1. The Project will allow construction and operation of a proposed surface water management system ("System") designed to serve a 258-acre residential community and an adjacent 21-acre commercial out parcel (the "Project"). The Project is part of a larger proposed development, the "County Road 210 PUD," that contains additional areas that are not owned by Walden Chase and are not part of the Project.

2. The Project is located east of U.S. 1, a federal highway with average daily traffic of 16,500 cars per day; along the western boundary is light residential development. The northern boundary of the property is County Road 210, with daily traffic of about 8,500 cars per day. To the south is Nease High School, and to the east is Quail Ridge Farm subdivision ("Quail Ridge"), a major development, and Christ Episcopal Church. The Project property is bifurcated by a major overhead power line, including an associated fill road which runs through the middle of the property.

3. The Project consists of approximately 565 homes, a recreation area (including ball fields) located in the center of the Project, and the System. The Project is being developed by Walden Chase Developers, Ltd., a limited partnership formed in

1999 for the purpose of developing the Project. The budget for the Project is $16,000,000, which is being financed through investors, equity, and an acquisition and development loan. Raymond O'Steen, president of Walden Chase's Managing Partner, Florida First Coast Development Corporation, testified that he is responsible for ensuring that the Project is constructed in compliance with the Permit conditions. To ensure such compliance, he will supervise construction, hire professional engineers to make monthly inspections, and cooperate with agency staff inspecting the Project. During construction, all construction equipment will be maintained to ensure that no oils and greases will be discharged into wetlands.

4. The long-term maintenance entity will be the Walden Chase Homeowners Association, Inc. (the "HOA"). The HOA has authority to: (i) operate and perform routine custodial maintenance of the surface water management system; (ii) establish rules and regulations; (iii) assess the cost of operation and maintenance, and enforce the collection of such assessment; and (iv) exist in perpetuity. If the HOA is dissolved, then operating responsibility will be transferred to a suitable entity acceptable to the District.

5. Walden Chase has entered into an agreement with the owner of the 21-acre commercial out parcel (which is to be served by the System), whereby the owner of that outparcel will pay a

pro-rata share of the operation and maintenance costs. Cross-easements have been recorded to that effect.

6. The outfall from the storm water management system is through a ditch to the east of the Project. Walden Chase has legal authority to use that ditch. The ditch will be maintained by HOA.

7. No septic tanks are planned for the Project.

The Surface Water Management System

8. The System is primarily a wet detention type of storm water treatment system, composed of a series of interconnected lakes that discharge at the southeastern portion of the property. Wet detention systems contain ponds with permanent pools of water with structures limiting discharge from the System so that pollutants from the storm water gradually settle out. The System was designed to capture 2.5 inches of runoff from the impervious area.

9. The receiving bodies of water for the System are Twelve Mile Swamp and Durbin Creek, which are classified as Class III waters, pursuant to Rule 61-400, Florida Administrative Code. Neither Durbin Creek nor Twelve Mile Swamp are classified as Outstanding Florida Waters, pursuant to Rule 62-4.242(2), Florida Administrative Code. The System does not discharge to a land-locked lake.

10. The System is designed to accommodate a 25-year/24-hour storm. The System is designed to provide replacement storage

within 14 days following a storm event. The System is not located within a 10-year flood plain, nor within a flood way. The System has been designed so that it will not cause a reduction in the 10-year flood plain, nor will it cause a net reduction in flood conveyance capabilities within a flood way.

11. To ensure that the System will not cause sediment transport, the outfall ditch is lined with concrete, and a sediment pond will be constructed at the end of the ditch to collect any type of sand or silt. Additionally, the banks of the System will be stabilized and will be seeded and mulched to prevent erosion. A detailed erosion and sediment control plan has been incorporated in the design, including the use of silt fencing and hay bales during construction.

12. The parties stipulated that:

> excluding backyard swales and the diversion of storm water from Quail Ridge subdivision . . . the system is designed in accordance with Rule 40C-42.026(4), Fla. Admin. Code, the design criteria for wet detention systems.

13. In addition to the wet detention component of the System, water quality treatment is provided by draining storm water run-off from the backyards, across vegetative natural buffers, and then into wetlands. The width of vegetative natural buffers needed to provide the required water quality treatment was calculated using the District's required methodology. Based on these calculations, vegetative natural buffers of a minimum of 15 feet and an average of 25 feet are provided around all

wetlands which will remain on site. On two wetlands, larger buffers of 25.65 feet will be provided to ensure adequate water quality treatment. These buffers are consistent with the calculated requirements for vegetative natural buffers.

Diversion of Surface Waters

14. The run-off from approximately 47 acres currently discharges onto the Walden Chase property from Quail Ridge, the subdivision located to the east of the Project. Currently, the water discharges from the Quail Ridge storm water treatment pond into a ditch located in the power line easement which bifurcates the Walden Chase property. Under current conditions, the Quail Ridge pond does not discharge into the wetland systems on-site.

15. After development, the Quail Ridge discharge will be diverted into a large wetland system on-site which extends over and onto Petitioner’s property ("Wetland 8"). This diversion will replace surface water from 42 acres that currently discharge into Wetland 8, but after development, will be re-routed through the Project's System. The run-off volume directed to Wetland 8 will be approximately the same after development as pre-development conditions. The surface water hydrology of the wetland system will also be maintained.

16. The diversion of the Quail Ridge discharge does not require modification of the Quail Ridge storm water system, but rather, only modification of the drainage patterns on the Project site. The diversion will provide flood control benefits to Quail

Ridge because the outfall from the Quail Ridge storm water treatment pond will be improved. Even if the diversion were not to take place, there will be no adverse impacts to the hydrology of Wetland 8 because that wetland is primarily hydrated through groundwater sources. If the diversion were not to take place, Walden Chase would monitor Wetland 8 to ensure that the hydrology was not adversely affected, and institute appropriate remedial measures if necessary to protect its functions and values.

17. The System will also divert some surface waters that currently drain into other wetlands located on the Project site. The diversion will redirect the flow of water into treatment ponds to meet the ERP Criteria for water quality treatment. The run-off from portions of the houses and the back yards will continue to drain into the wetlands. The impacts from any diversion should be minimal because the wetlands are primarily hydrated through rainfall and the presence of groundwater under the wetlands. To ensure that the diversion will not significantly adversely affect the wetlands, Walden Chase will monitor the wetlands on-site; if there is significant adverse effect experienced, then Walden Chase will undertake appropriate remedial action.

Diversion of Groundwater

18. The wetlands which will remain after development are primarily hydrated by on-site groundwater, which is part of the area-wide surficial aquifer groundwater system. The soil types

on the property indicate that it is not an aquifer recharge area, so no adverse impacts to aquifer recharge are anticipated. Additionally, due to the characteristics of the proposed residential development, water will be able to percolate into the soil, and thence into the groundwater. For these reasons, there will not be a significant adverse impact to the groundwater source for the wetlands.

19. Walden Chase is undertaking additional measures to ensure the System will not adversely draw down groundwater. Two of the storm water facilities near wetlands were lined with clay materials to ensure they would not lower the groundwater elevations below the wetlands. Groundwater will not be lowered more than an average of three feet across the site nor more than five feet at any one location.

20. Of particular concern to Petitioner were possible effects to the hydrology of Wetland 8, a large wetland system that extends onto her property. However, the source of seepage to Wetland 8 is primarily a groundwater source, not surface water. Rainwater percolates through the ground and then travels laterally through the soil to the seepage slope. The Project will not significantly reduce the groundwater source because the percolation area is to be maintained.

Water Quantity

21. In permitting wet detention-type systems, the maximum flow of water discharged (the "peak rate of discharge") from the

system is analyzed to ensure that the natural drainage conveying water off-site is not overtaxed. Under pre-development conditions, the peak rate of discharge from the Project site is 52 cubic feet per second. After development, the peak rate of discharge will be 49 cubic feet per second. The post-development peak rate of discharge will not exceed the pre-development peak rate of discharge.

22. The Project roads have been designed to be flood-free, pursuant to the requirements of the applicable St. Johns County regulations. The first floor elevations of buildings will be located above the 100-year flood elevation, as is required by St. Johns County.

23. The Project is not located on a water course. The upstream drainage area for the Project is significantly less than five square miles.

Water Quality

24. Before discharge, storm water from the Project is treated by the wet detention system and the vegetative natural buffers. The wet detention system slows water to allow time for pollutants to settle out. Also, treatment processes are provided through "nutrient uptake" by resident algae that live in the ponds, and by adsorption and oxidation of pollutants on the pond slopes and bottom. The proposed vegetative natural buffers treat the run-off from the back yards prior to discharge into wetlands.

25. The District has determined that the storm water treatment system for Quail Ridge is not currently in compliance with the District's design criteria, but no evidence was presented that the quality of discharge from Quail Ridge is out of compliance with water quality standards. To ensure that the water diverted from Quail Ridge into Wetland 8 complies with state water quality standards, Walden Chase will undertake a three-step analysis. First, if the Quail Ridge storm water system is brought into compliance with its design, then the water quality being discharged from the system will presumptively meet water quality standards and the diversion can take place. Second, if the Quail Ridge system is not brought into compliance with the design criteria, then Walden Chase will sample the water quality of water discharging from Quail Ridge: if that water meets water quality standards, then the diversion can take place. Third, if the Quail Ridge system is not in compliance and the water quality discharging from that system does not meet water quality standards, then the diversion will not take place. In that instance, the currently existing discharge will be maintained until water quality standards are met, and Wetland 8 will be monitored to ensure that the surface water diversions caused by the Project will not adversely affect that wetland.

Environmental Considerations

26. The Project site includes pine flatwoods, scrubby flatwoods, sandhills, pine plantations, cypress swamp, wet pine

flatwoods, two borrow pits, and several drainage ditches. The wetlands on site total 34.57 acres. There are also 1.27 acres of upland-cut drainage ditches, a 3.9 acre borrow pit, and a 0.18-acre borrow pit adjacent to Wetland 5.

27. The following wetlands and drainage ditches will be preserved or otherwise not be disturbed by the Project: 1, 3, 4, 8, 9, 13, 15, 16, and 17. A total of 29.29 acres of wetlands will be preserved through imposition of a conservation easement, and 1.94 acres of wetlands will remain undisturbed.

28. None of the wetlands on site are high quality. The following wetlands and other surface waters are of low or marginal quality or do not otherwise require mitigation of impacts: 10, 14, 18, 20, and 21. With the exception of three areas (the 3.9-acre borrow pit, the 0.18-acre borrow pit adjacent to Wetland 5, and a small borrow pit within Wetland 8), the wetlands on site are all "ephemeral," meaning that they dry-up periodically during the year.

Wetland Impacts

29. Certain of the wetlands are considered "isolated," which means that they are completely surrounded by uplands. In considering impacts to isolated wetlands, the District rules distinguish between isolated wetlands of less than 0.5 acres and those 0.5 acres or larger. Isolated wetlands of less than 0.5 acres are: Wetlands 2 (0.02 acres); 5 (0.37 acres); 10 (0.01 acres); 11 (0.3 acres); 12 (0.14 acres); and 14 (0.04 acres).

All of these isolated wetlands are proposed to be impacted by the Project (D Ex 10). Isolated wetlands of 0.5 acres or larger are: Wetlands 1 (1.52 acres); 3 (1.06 acres); 4 (7.51 acres); 6 (0.5 acres); 9 (5.52 acres); and 15 (1.12 acres). Of those wetlands, only isolated Wetland 6 (0.5 acres) is proposed to be impacted.

30. The other wetlands on-site are considered contiguous. These are: Wetlands 7 (1.04 acres); 8A (1.81 acres); 8 (13.7 acres on site); and 13 (0.01 acres). Of these, Wetlands 7 and 8A will be impacted for a total of 2.85 acres.

31. The following are not truly wetlands, but rather are upland cut drainage ditches: 16 (0.02 acres); 17 (0.12 acres); 18 (0.07 acres); 19 (0.25 acres); 20 (0.06 acres); and 21 (0.06 acres). Of these, the following will be impacted by the Project: 16, 18, 19, 20, and 21. Alterations in upland cut drainage ditches are not required to comply with the criteria related to fish, wildlife, or listed species and their habitats unless they provide significant habitat for threatened or endangered species.

Wetlands Functions

32. All of the wetlands and uplands have been impacted in part by land management activities on the site and adjacent sites. For example, the site has been extensively logged, borrow pits have been constructed, and the Quail Ridge subdivision severed Wetlands 5, 6, 7, and 8A from a formerly large wetland area that extended into the Quail Ridge site. The power line and its associated road and the construction of the Quail Ridge

subdivision altered the hydrology of Wetlands 5, 6, 7, and 8A. All of these alterations were completed prior to existing District rules requiring a permit prior to construction of a surface water management permit became effective on December 7, 1983.

33. For the isolated wetlands less than 0.5 acres in size which will be impacted (Wetlands 2, 5, 10, 11, 12, and 14), the following unrebutted testimony was provided: (i) the wetlands are not used by threatened or endangered species for more than an incidental use; (ii) the wetlands are not located in an area of critical state concern; and (iii) the wetlands are not connected by standing or flowing surface waters at seasonal high water levels to one or more wetlands. These isolated wetlands less than 0.5 acres in size are of minimal value to fish and wildlife, when considered individually and cumulatively. The impact to these isolated wetlands are considered de minimus, based upon the disturbed condition of these wetlands and their use by limited members of animal species. Petitioner's expert MacDonald opined that Wetlands 2, 5, 11, and 12 were of more than minimal value, although she admitted Wetlands 2 and 11 were not as important as other wetlands on the site. However, the mitigation plan compensates for whatever functional value these wetlands may provide.

34. The major wetland impacts are to Wetlands 6, 7, and 8A. Wetland 6 is a lower quality wetland which provides some forage

habitat for wading birds and mammals that may stray through, and some breeding habitat for amphibians. Wetland 6 may provide some minimal value or less-than-minimal value to wood storks that may incidentally use the wetland, and no value for the Florida Black Bear. Wetland 7 is a lower quality wetland due to the adjacent ditch, roadway, trail road, and power line easement. Wetland 7 may provide breeding habitat for some frogs, but not for gopher frogs. It may provide for foraging, cover, breeding, nesting and perching for other animal species. Wetland 8A may provide breeding habitat for gopher frogs and foraging, cover, breeding, nesting, and perching areas for other animals. It is not a habitat typically suited for forage habitat for wood storks.

35. Upland cut drainage ditches to be impacted are 16, 18, 19, 20, and 21. These are considered to be low quality. The 3.9-acre borrow pit and the 0.18-acre borrow pit provide minimal functional value. Gopher frogs (a Species of Special Concern) may breed in the 0.18-acre borrow pit. The larger borrow pit supports a fish population but does not have sufficient shallow water areas for forage or draw down ability to concentrate fish. The smaller borrow pit does not have a fish population and does not appear to have suitable forage areas.

36. Petitioner testified that on one occasion she saw wood storks (an endangered species) on the Walden Chase property in the power line easement near Wetlands 7 and 8A. She also saw Little Blue Herons (a Species of Special Concern) use the 3.9

acre borrow pit more than once. She also saw a Sherman's Fox Squirrel (a Species of Special Concern), Snowy Egret (a Species of Special Concern), and Bald Eagle (a Threatened Species), but she did not specify where or when she saw those animals or how frequently. Petitioner's daughter saw a Florida Black Bear (a Threatened Species) one time near the power line on the Walden Chase property about four years ago. However, there was no evidence that these animals use the wetlands for nesting or denning or that the wetlands on the Walden Chase property provide critical habitat for these animals. Petitioner's expert MacDonald testified that the site is not used for nesting or denning of these and other species. Any use of the wetlands on-site by threatened or endangered species would be incidental because the habitat on-site is not the type typically used by such species. Any impacts to these species would be offset by the mitigation plan.

37. All parties agreed that gopher frogs may be present on-site and may use some of the wetlands on-site for breeding habitat. However, impacts to gopher frogs will be mitigated through Walden Chase’s plan to relocate all gopher frogs to an approved site. The relocation plan has been approved by the Florida Fish and Wildlife Conservation Commission. Any gopher frogs which escape this relocation effort will still be able to use the wetlands remaining on the site for breeding purposes.

Wetland Mitigation

38. To mitigate for anticipated impacts to wetland functions, Walden Chase will create 3.8 acres of new wetlands, preserve 29.39 acres of wetlands, and preserve 5.64 acres of uplands. Wetlands will be created adjacent to Wetlands 8 and 4. The creation areas are currently typical pine plantation, an abundant land form in the area. The wetland and upland preservation areas will be encumbered by a conservation easement subject to the provisions of Section 704.06, Florida Statutes. The mitigation ratios offered are consistent with the District's past practice and within the District's rule guidelines. The mitigation is to be conducted on-site. The mitigation is viable and sustainable.

39. Allegations that the mitigation offered is "poor" because it does not preserve adjacent uplands is in error because the preserved wetlands remaining are surrounded by upland buffers, except for a road-crossing in Wetland 8A. The road-crossing is considered a secondary impact, off-set by additional mitigation.

40. The proposed mitigation will off-set the adverse impacts to wetland functions caused by the Project. The functional values lost by the Project will be replaced. The conservation easement will preserve portions of the property, keeping those portions in their existing condition in perpetuity. Permit conditions have been imposed to ensure success of the

creation areas. A monitoring and maintenance program will be undertaken to assure success.

Mitigation Costs

41. The mitigation, including monitoring and maintenance, is expected to cost between $81,287 and $112,800. Walden Chase will ensure that the funds to complete the mitigation are available by funding an escrow account for that purpose. The escrow account will be established at 110 percent of the contracted amount for such work.

Reduction and Elimination

42. Walden Chase considered alternative designs which would reduce or eliminate the impacts to Wetlands 6, 7, and 8A. Wetland 6, as a 0.5 acre isolated wetland, will be impacted for the construction of Lake 5 (part of the storm water management system). Reconfiguration of Lake 5 to avoid impact to Wetland 6 would result in a loss of seven residential lots (at a cost of approximately $280,000) and increased construction costs (of $46,800), for a total increase of $326,000. The alternative is not practicable because the benefits to be achieved by preservation of Wetland 6 do not warrant the cost of avoidance.

43. Wetland 7 is being impacted to construct ballfields which are part of the recreation park located in the center of the Project. Moving the ballfields to an alternative location would result in a loss of approximately 15 residential lots (at a cost of $525,000) and would require construction of additional

supporting facilities (at a cost of $150,00), for a total cost of $675,000. Wetland 7 is a medium quality wetland that has been previously drained, and is not a pristine wetland. The alternative is not practicable because the environmental benefits would be very small compared to the costs of relocating the facilities.

44. Wetland 8A is being impacted by construction of a road-crossing and a storm water pond (Pond 3). The road-crossing is required to connect the various areas in the Project and the various land uses in the CR 210 PUD. The road-crossing is unavoidable, and crosses the wetland at the narrowest location. There is no practical alternative to relocating Pond 3 because that relocation would require use of pipes that would be too large to install in the ground. Two other alternatives were considered: (i) relocating the pond and discharge through Wetland 8 (at a cost of $1,600,000); and (ii) moving the pond immediately south of Pond 3 and losing 13 lots (at a cost of $450,000). Wetland 8A is a medium quality wetland. The alternative is not practicable because the environmental benefits to be achieved compared to the cost were not reasonable.

45. The District provided unrebutted testimony that a reduction and elimination analysis would not be required for the isolated wetlands less than 0.5 acre in size.

46. Further reduction of Wetland impacts will be achieved by lining storm water Ponds 3 and 4, which are adjacent to wetlands.

Wildlife Utilization

47. The potential exists for secondary impacts to wildlife utilization in wetlands crossings located adjacent to Wetland 1 and into Wetland 8A. However, except for those areas, upland buffers of a minimum width of 15 feet and an average width of 25 feet are provided abutting the Wetlands that will remain on-site. The wetland mitigation plan offsets any wetland functions and values lost through those impacts.

48. With regard to whether the Project will adversely impact adjacent uplands which are used by aquatic and wetland-dependent animal species that are listed in Table 12.2.7-1 of the Applicant's Handbook, the uplands are not used for nesting or denning by any of the species listed.

Historical and Archaeological Resources

49. There will be no adverse impact to significant historical or archaeological resources. There are no such resources on the site. Additionally, the Permit conditions require that if any such resources are discovered during construction that work be halted, and the District be notified.

Future Phases

50. Potential secondary impacts of the Project are wetland impacts which could potentially result from future phases of the

Project. Walden Chase and the District presented an unrebutted analysis of a future phase of the CR 210 PUD that could potentially impact a portion of Wetland 8, which is located off the Walden Chase property. The potential wetland impact would be a 0.6-acre road-crossing required by the local government in order to connect portions of the CR 210 PUD. Conceptually, the 0.6-acre impact could be mitigated by preservation of wetlands and uplands on the tract of land served by the road-crossing. However, the additional phase could be constructed in a way consistent with the District rules that would not result in secondary impacts to wetlands or water quality.

ERP Criteria

51. In order for an applicant to obtain an ERP from the District, an applicant must provide reasonable assurances that construction and operation of the proposed surface water management system comply with the criteria enunciated in Rules 40C-4.301 and 40C-4.302, Florida Administrative Code. The Applicant's Handbook adopted in Rule 40C-4.091, Florida Administrative Code, provides clarification of these rules.

52. Section 10.2.1 of the Applicant's Handbook establishes a presumption that construction and operation of a surface water management system will meet certain rule criteria if certain conditions are met. These conditions are met because: (i) the post-development peak rate of discharge (49 cubic feet per second) does not exceed the pre-development rate of discharge (52

cubic feet per second); (ii) no calculations are required regarding volume of discharge because the system does not discharge to a land-locked lake, nor are any special basin criteria adopted for the area; and (iii) flows of adjacent streams, impoundments or other water courses will not be decreased so as to cause adverse impacts. Having satisfied these four conditions, the following rule criteria are presumably met:

(1) Construction and operation of the System will not cause adverse water quantity impacts to receiving waters and adjacent lands. § 40C-4.301(1)(a), Florida Administrative Code;

(2) Construction and operation of the System will not cause adverse flooding to on-site or off-site property. § 40C-4.301(1)(b), Florida Administrative Code; and

(3) Construction and operation of the System will not cause adverse impacts to existing surface water storage and conveyance capabilities. § 40C-4.301(1)(c), Florida Administrative Code.

53. Rule 40C-4.301(1)(d), Florida Administrative Code, requires that construction and operation of the System will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters. A four-part test for satisfying any secondary impacts for the System affecting this criterion is described in Section 12.2.1 of the Applicant's Handbook. A potential adverse secondary impact exists for the disturbance of the wetlands by use of adjacent uplands (e.g., horses, dogs, cats, etc.). However, pursuant to

Section 12.2.7 of the Applicant's Handbook, these impacts are not considered adverse if upland buffers of a minimum of 15 feet, an average of 25 feet, are provided. No aquatic and wetland-dependent species use the uplands on the site for nesting and denning and therefore it is presumed that no adverse secondary impact to those species will occur. There will be no adverse impact to significant archeological and historical resources and therefore it is presumed that no adverse secondary impact to those species will occur. The future phase of the CR 210 PUD is not part of the Project nor is it being developed by Walden Chase. However, for purposes of permitting, wetland impacts on that phase could be considered potential secondary impacts of the Project. Walden Chase and the District presented unrebutted testimony that the future phase of the CR 210 PUD could be constructed so as not to adversely impact wetlands or water quality, and therefore it is presumed that no adverse secondary impacts will occur as a result of that phase. The potential secondary impact for the road-crossing in Wetland 8A would not result in adverse impacts to wetlands or water quality. The potential secondary impact for the road-crossing in Wetland 8A was considered as part of the other impacts to that wetland, and as part of the wetlands impact onsite are offset by the mitigation plan. Additionally, the values and functions of the wetland impacts are off-set by the mitigation plan.

Consequently, the criterion contained in Rule 40C-4.301(1)(d) has been satisfied.

54. Rule 40C-4.301(1)(e), Florida Administrative Code, requires that construction and operation of the System will not adversely affect the quality of receiving waters so as to violate state water quality standards. This criterion is presumed met if the System is designed and constructed in accordance with Chapter 40C-42, Florida Administrative Code; and Section 10.7.2, Applicant's Handbook. The parties have stipulated that this condition has been met for all portions of the System except: (i) the diversion from Quail Ridge into Wetland 8; and (ii) the discharge of storm water from back yards through vegetative natural buffers. With regard to the diversion from Quail Ridge, Walden Chase has agreed to refrain from diverting that discharge until water quality standards are met, assuring that the diversion will not violate these standards. With regard to the vegetative natural buffers, those buffers have been calculated to be large enough to provide the required level of storm water treatment. Consequently, the criterion contained in Rule 40C-4.301(1)(e) has been satisfied.

55. Rule 40C-4.301(1)(f), Florida Administrative Code, requires that construction and operation of the System will not cause adverse secondary impacts to the water resources. Water quality discharging from the System will presumptively meet water quality standards because the System is designed in accordance

with the provisions of Chapter 40C-42, Florida Administrative Code. No diversion of water from Quail Ridge to Wetland 8 will be allowed if water quality standards are not met. The vegetative natural buffers provide water quality treatment for water discharging into the wetlands. Therefore, there will be no adverse secondary impacts to the water quality of the water resource. Additionally, Walden Chase has provided reasonable assurance that there will be no adverse impact to groundwater resources by lining those storm water ponds necessary to prevent draw-down of wetlands, and by ensuring that water will continue to percolate into groundwater sources. There will be no adverse impact to aquifer recharge. Consequently, the criterion contained in Rule 40C-4.301(i)(f), Florida Administrative Code, is satisfied.

56. Compliance with Rules 40C-4.301(1)(g), (h), and (k), Florida Administrative Code, has been stipulated to by the parties.

57. Rule 40C-4.301(1)(i), Florida Administrative Code, requires that construction and operation of the System will be capable of being performed and of functioning properly. The System is a very simple, low-maintenance system that is expected to perform well. Consequently, the criterion contained in Rule 40C-4.301(1)(i) has been satisfied.

58. Rule 40C-4.301(1)(j), Florida Administrative Code, requires that construction and operation of the System will be

performed by an entity with the financial, legal, and administrative capability of ensuring that the activity will be undertaken in accordance with the terms of the permit. Walden Chase has designated the HOA as the operation and maintenance entity. In conformance with Section 7.1.2 of the Applicant's Handbook, Walden Chase has submitted Articles of Incorporation, draft revisions to those Articles of Incorporation, and Covenants and Restrictions which provide sufficient powers to the HOA to operate the System, establish rules and regulations, assess members for associated costs, contract for services, and exist in perpetuity. Walden Chase will also establish an escrow account in the amount of 110 percent of the cost of mitigation for the purpose of establishing the financial responsibility for the mitigation, monitoring, and corrective action for wetland mitigation work. Consequently, the criterion contained in Rule 40C-4.301(1)(j), Florida Administrative Code, is satisfied.

59. Rule 40C-4.301(2), Florida Administrative Code, and Section 12.2.4.5 of the Applicant's Handbook set forth special requirements that are to be applied if an applicant is unable to meet water quality standards because the ambient conditions in the receiving body of water are below water quality standards. As set forth above, Walden Chase has provided reasonable assurances that water quality standards will not be violated. Consequently, the criterion contained in Rule 40C-4.301(2), Florida Administrative Code, is satisfied.

60. Rule 40C-4.302(1)(a), Florida Administrative Code, requires that the District balance seven factors to determine whether construction and operation of the System will be contrary to the public interest. The public health, safety, and welfare factor is considered neutral because: (i) the System will not impact off-site properties; (ii) flood levels are controlled; and (iii) water flows are maintained. The factor related to conservation of fish and wildlife, including endangered or threatened species or their habitats is considered neutral because adverse impacts to those functions are offset by the mitigation plan. The factor related to erosion, navigation, the flow of water, and shoaling is considered neutral because an effective erosion control plan is in place, and no harmful effects are anticipated to navigation or the flow of water or as a result of shoaling. The factor related to fishing or recreational values and marine productivity in the vicinity of the activity is considered neutral because the mitigation would off-set any adverse impact. The factor related to significant historical and archaeological resources is considered neutral because none are anticipated to be on-site. The factor related to the current condition and relative functions being performed by areas affected by the proposed activity is considered neutral because the current condition and relative values of wetlands will be maintained. The System will be permanent, a condition which is considered neutral in balancing the public interest

because any adverse impacts are off-set by the mitigation plan. On balance, the Project is not contrary to the public interest. Consequently, the criterion contained in Rule 40C-4.302(1)(a), Florida Administrative Code is satisfied.

61. Rule 40C-4.302(1)(b), Florida Administrative Code, requires that construction and operation of the System will not cause unacceptable cumulative impacts. Such an analysis asks the question whether the proposed system, considered in conjunction with past, present and future activities in the drainage basin, would be the "straw that breaks the camel's back" with regard to water quality, wetland, and other surface water functions. The mitigation for wetlands impacts is being conducted on-site and adequately off-sets any adverse impacts. If all projects in the same drainage basin undertook similar mitigation for the same type of wetland impacts, there would be no adverse cumulative effect. As attested by Petitioner's expert, there will be no cumulative loss occurring on site. Consequently, the criterion contained in Rule 40C-4.302(1)(b), Florida Administrative Code, is satisfied.

62. Rule 40C-4.302(1)(c), Florida Administrative Code, establishes additional criteria for Projects located in adjacent or in close proximity to certain classified waters. The parties have stipulated that the Project is not so located. Consequently, this criterion has been satisfied.

63. Rule 40C-4.302(1)(d), Florida Administrative Code, requires certain conditions for projects which constitute vertical sea walls. The parties have stipulated that the Project does not contain vertical sea walls. Consequently, this criterion has been satisfied.

CONCLUSIONS OF LAW

64. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties hereto pursuant to Section 120.57, Florida Statutes (1998).

65. This is a de novo proceeding intended to formulate final agency action. Dept of Transp. v. J.W.C., Inc., 396 So. 2d 778, 786-87 (Fla. 1st DCA 1981). The burden of proof in a permitting hearing initially falls upon the applicant to prove entitlement by a preponderance of the evidence. J.W.C., 396 So. 2d at 788 (citing Balino v. Dept of Health & Rehabilitative Servs., 348 So. 2d 349 (Fla. 1st DCA 1977)). To carry the initial burden, the applicant must provide reasonable assurances through presentation of credited and credible evidence of entitlement to the permit. Id. at 789. The applicant's burden is one of reasonable assurances, not absolute guarantees. City of Sunrise v. Indian Trace Community Dev. Dist., 14 F.A.L.R. 866, 869 (South Florida Water Management Dist., January 16, 1992). The applicant's evidence will be accepted by the trier of fact when it is accepted by the agency and properly identified and authenticated by the agency as being accurate and reliable.

J.W.C., 396 So. 2d at 789. Likewise, even for contested issues, an applicant's unrebutted testimony will not be rejected unless it is shown to be inaccurate or unreliable. Id.; Merrill Stevens Dry Dock Co. v. G. & J. Inv., 506 So. 2d 30 (Fla. 3d DCA 1987).

66. Once the applicant has carried this burden through a preliminary showing of entitlement, the burden of presenting contrary evidence shifts to the Petitioner. J.W.C., 396 So. 2d at 789; Hoffert v. St. Joe Paper Co., 12 F.A.L.R. 4972, 4987 (Dept of Envtl. Regulation, December 6, 1990). The Petitioner is required to present evidence of equivalent quality and prove the truth of the facts alleged in the petition. J.W.C., 396 So. 2d at 789, Hoffert, 12 F.A.L.R. at 4987. For applicants who have provided prima facie evidence of entitlement to the permit, the permit cannot be denied unless the Petitioner presents contrary evidence of equivalent value. J.W.C., 396 So. 2d at 789; Ward v. Okaloosa County, 11 F.A.L.R. 4217, 4236 (Dept of Envtl. Regulation, June 29, 1989). The Petitioner's burden cannot be met by way of presentation of mere speculation of what "might" occur. Chipola Basin Protective Group, Inc. v. Florida Chapter Sierra Club, 11 F.A.L.R. 467, 480-81 (Dept of Envtl. Regulation, December 29, 1988).

67. Walden Chase provided credible and credited evidence demonstrating entitlement to the environmental resource permit. The burden then shifted to Lee to present evidence of equivalent quality to that evidence. Lee has not carried this burden.

68. By a preponderance of the credible and accepted evidence, Walden Chase has given reasonable assurances that the criteria set forth in Rules 40C-4.301 and 40C-4.302, Florida Administrative Code, as well as relevant provisions of the Applicant's Handbook, have been complied with, and the permit should accordingly be issued.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is:

RECOMMENDED that a final order be entered granting the requested permit in accordance with the agency's proposed agency action.

DONE AND ENTERED this 1st day of September, 1999, in Tallahassee, Leon County, Florida.

DON W. DAVIS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of September, 1999.

COPIES FURNISHED:

Deborah Andrews, Esquire
11 North Roscoe Boulevard
Ponte Vedra Beach, Florida 32082

David J. White, Esquire
Suite 100
4804 Southwest 45th Street
Gainesville, Florida 32068

Veronika Thiebach, Esquire
Mary Jane Angelo, Esquire
St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32178-1429

John G. Metcalf, Esquire
Pappas, Metcalf, Jenks,
Miller & Reisch
Suite 1400
200 West Forsyth Street
Jacksonville, Florida 32202

Marsha Parker Tjoflat, Esquire
Rogers, Towers, Bailey,
Jones and Gay, P.A.
Suite 1500
1301 Riverplace Boulevard
Jacksonville, Florida 32207

Henry Dean, Executive Director
St. Johns River Water
Management District
Highway 100, West
Palatka, Florida 32177

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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