IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 3D21-2063

TROPICAL AUDUBON SOCIETY, and MICHELLE GARCIA, Appellants, v. MIAMI-DADE COUNTY, FLORIDA; and STATE OF FLORIDA, ADMINISTRATION COMMISSION, Appellees.	L.T. Case Nos.: DOAH Case No. 18-5696GM AC Case No. ACC-20-005 FINAL ORDER NO. AC-21-002
LIMONAR DEVELOPMENT, LLC, a Florida limited liability company; WONDERLY HOLDINGS, LLC, a Florida limited liability company; and MILLS FAMILY, LLC, a Florida limited liability company, Appellants, v. MIAMI-DADE COUNTY, a subdivision of the state of Florida; STATE OF FLORIDA, ADMINISTRATION COMMISSION, Appellees.	3D21-2077 (consolidated with 3D21-2063) L.T. Case Nos.: DOAH Case No. 18-5695GM AC Case No. ACC-20-005 FINAL ORDER NO. AC-21-002

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INTRODUCTION

The Final Order should be reversed because the Administration Commission ("Commission") erred in (1) ruling that the ALJ should have determined the facts under the "fairly debatable," and not the "preponderance of evidence" standard, and (2) in applying the "fairly debatable standard of review" to reject the Administrative Law Judge's ("ALJ") fact findings made after trial under the "preponderance of evidence" standard. Chapter 120, Fla. Stat., required the Commission to accept the ALJ's fact findings because they were supported by competent, substantial evidence and those facts, applied to the law under the fairly debatable standard, fully support the ALJ's Recommended Order. The Commission applied the wrong standard, exceeding its authority and improperly recast fact findings as legal conclusions that it claimed it was free to reject.

Even then, the Final Order's rejection of the ALJ's legal conclusions are erroneous. Miami-Dade County's (the "County") Comprehensive Development Master Plan ("CDMP") Plan Amendment to enable a six-lane highway (the "Tollway") outside the County's Urban Development Boundary ("UDB") and across the County's West

Wellfield, from which much of our drinking water is drawn, farmlands, wetlands, and lands critical to Everglades Restoration, is not consistent with the existing CDMP yet does nothing to resolve traffic congestion in West Kendall. The ALJ found the claimed congestion benefits of the proposed Tollway extension of State Road 836 would be "meager" or non-existent, even though the Tollway amendment was approved only "to the extent necessary to relieve … congestion … and to provide … faster connections to Downtown Miami." The ALJ's amply supported factual findings that the Tollway fails of its claimed purpose, but violates key components of Chapter 163 and the County's CDMP that protect County wellfields, the Everglades, agricultural and environmentally sensitive lands outside the UDB, and that promote shifting the County's modes of transportation away from automobiles, permit only a conclusion that the Amendment fails to comply with Chapter 163. The Court should reverse the Final Order.

STATEMENT OF THE CASE[1]

This is an appeal from a Final Order of the Commission under Ch. 163, Fla. Stat., approving a CDMP amendment adopted by Miami-Dade County to allow a six–lane, 13-mile extension of State Road 836 outside the County's Urban Development Boundary, across the County's West Wellfield, farmland, and Everglades wetlands, including wetlands acquired for Everglades restoration. R-01729 - 01787.

After an eight-day trial, a Division of Administrative Hearings Administrative Law Judge ("ALJ") issued a Recommended Order finding that the Tollway authorized by the amendment would result in "meager" traffic improvements, but would imperil a drinking water

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[1] References to the record appear as R-number, and, unless already stated in the text, a brief description of the record to which citation is made, the exhibit number, and page thereof. Citations to the transcript appear as Tr., witness name, V. number and page and line numbers. References to the Recommended Order will include the R number, the abbreviation "RO" and the page (p.) and paragraph (¶) number. References to the Final Order will include the R number, the abbreviation "FO" and the page (p.) number.

wellfield, and that the County had failed to analyze its impacts on Everglades wetlands and restoration, and thus the Amendment was "not in compliance" under Florida's *Community Planning Act*, Fla. Stat. Ch. 163.3161 *et seq.* (the "Act"). R-01731: FO, p. 3.

The Commission accepted every one of the County's exceptions to the Recommended Order, rewrote its material factual findings and, based on its own set of facts, reversed the ALJ's legal conclusions,[2] and found the Amendment in compliance. R-01729- 01787.

STATEMENT OF THE FACTS

I. The County Comprehensive Plan's Urban Development and Infrastructure Boundary (UDB)

A central feature of the County's Comprehensive Development Master Plan ("CDMP" or "Plan") is its "Urban Development Boundary" (UDB), which distinguishes "the area where urban development may occur … from areas where it should not occur." R-01279: RO, p. 16, ¶46. ***"[P]ublic expenditures for urban service and infrastructure***

[2] R-01730, 01732, 01783, 01785: FO, pp. 2-4, 55, 57.

improvements shall[3] ***be focused on the area within the UDB,*** and urban infrastructure *is discouraged* outside the UDB." (emphasis added). "***Critical in achieving the desired pattern of development is adherence to the 2020 UDB*** …." R-01279: RO, p. 16, ¶46. The UDB is "***an envelope within which public expenditures for urban infrastructure will be confined***." *Id.* (emphasis added)

II. The Plan Amendment Authorizes A 13-Mile Highway Outside the UDB

The Amendment allows the construction of the Kendall Parkway, a 13-mile, 4-6 lane extension of existing State Road 836, entirely outside of the UDB and across farmland, environmentally sensitive areas, and the County's West Wellfield. R-01731-01732: FO, pp. 3-4; R-01270: RO, p. 7, ¶13). Figure 1 depicts the Tollway on the CDMP's Land Use Map, identified as the solid black line beginning at the western end of NW 12th Street and following a

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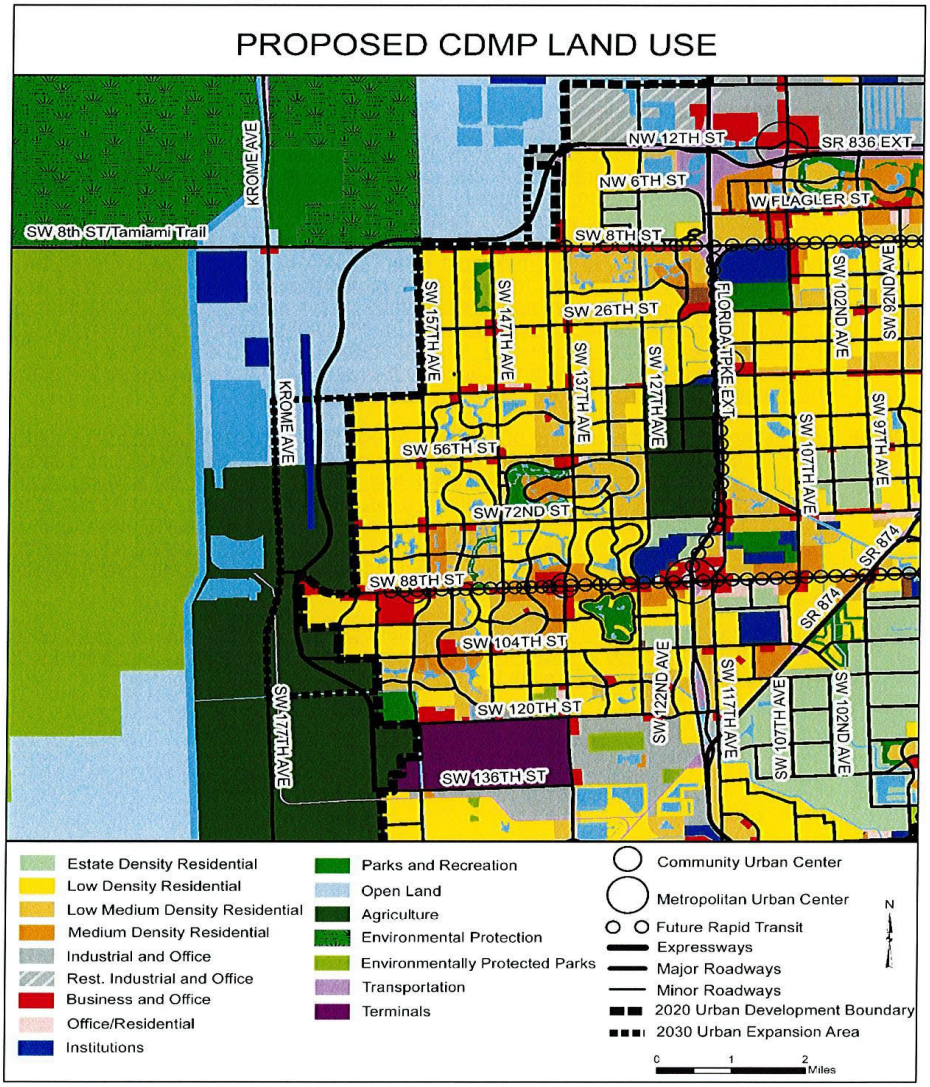
[3] The use of the term "shall" in a statute carries a mandatory connotation. *See Izaguirre v. Beach Walk Resort/Travelers Ins.*, 272 So. 3d 819, 820 (Fla. 1st DCA 2019) ("[t]he word 'shall' in a statute usually has a mandatory connotation.")

winding path west and southwest, through lands with development limitations, to its terminus at SW 136th Street.



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R-01272: RO, p.9, ¶20.

To reach the Tollway, commuters would be required to drive "outside of the UDB, through active agricultural lands, through environmentally sensitive lands, and through the West Wellfield…." R-01307: RO, p. 44, ¶161. The Tollway would traverse "the best agricultural land remaining in [the County]." R-01274: RO, p.11, ¶ 28. The CDMP makes protection of viable agriculture a priority. *Id.* RO, p.11, ¶ 29.

The ALJ found:

> The Plan Amendment proposes development of urban infrastructure outside the UDB, and thus, outside of the envelope within which the Plan dictates public expenditures for urban infrastructure "will be confined," in contravention of the Plan's direction that adherence with the UDB/UEA construct is "critical" to achieve the desired pattern of development for the County. R-01279: RO, p. 16, ¶49.

The ALJ found that the Amendment is inconsistent with the CDMP's UDB policies. R-01280: RO, p. 17, ¶50-51; R-01318: RO, p. 55, ¶207.

III. Impact on Everglades Wetlands and Restoration Projects

The Tollway would traverse the Pennsuco wetlands, high-quality swamps and wet prairies unsuited for agriculture or urban

development[4] and designated in the CDMP as Environmental *Protection* - those areas "most environmentally significant, most susceptible to environmental degradation … where such degradation would adversely affect the supply of potable fresh water or environmental systems of County, regional, State, or national importance." R-01274: RO, p.11, ¶27. The Pennsuco wetlands were publicly - acquired and restored to mitigate for harm to wetlands elsewhere. R-01274: RO, p.11, ¶25; Tr., Spinelli, V. 9 at 1303:16-1305:11.

The Tollway would traverse Everglades wetlands in the Tamiami-Bird Canal Basin, the North Trail Basin and the Bird Drive Basin, which recharge the County's West Wellfield and prevent flooding on private land. R-01273: RO, p.10, ¶¶22-23. Much of the Bird Drive Basin was acquired by the South Florida Water Management District ("District") and the U.S. Department of the Interior for the Comprehensive Everglades Restoration Plan ("CERP"). CERP, implemented by the District and the U.S. Army Corps of

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[4] R-01274: RO, p.11, ¶¶25, 27.

Engineers, is an extensive, multi-decade, restoration project to restore natural Everglades wetlands and re-establish healthy freshwater flows to parts of the Everglades which suffer from hydrologic alteration for urban development and agriculture. R-01275: RO, p. 12, ¶¶30-34.[5] The ALJ found that "[b]ecause of its location relative to several other CERP projects, the Bird Drive Basin plays a critical strategic role in the overall plan for restoration of the southern Everglades." R-01276-1277: RO, pp. 13-14, ¶38. Specifically:

> The water quality, conveyance, and storage objectives it is required to meet, along with its flood-attenuation objectives, are relied upon as part of the planning and operation of the other CERP projects in the region to restore the hydrology of the state-owned Water Conservation Areas, Everglades National Park and Florida Bay, and Biscayne Bay. The Bird Drive Basin project is a necessary flow way for restored water levels along the eastern edge of the Everglades, necessary to prevent the flow of too much water through the more central portions

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[5] *See also Teitelbaum, v. S. Fla. Water Mgmt. Dist.*, 176 So. 3d 998, 1001 (Fla. 3d DCA 2015) ("The Water District, as part of … CERP… approved by the United States Congress, began attempting to acquire all the property in the East Coast Buffer, including the Bird Drive Basin area, by purchasing the property from willing landowners").

> of the Everglades, which results in drowning out native plant and animal species.

Id.

Pursuant to the Act's agency comment process,[6] the proposed Tollway Amendment was reviewed by the Florida Department of Environmental Protection ("DEP"), the District, and the South Florida Regional Planning Council, which reported that:

> Impacts to the Pennsuco Wetlands must be approached with the appropriate complexity. [They were] acquired for wetland loss elsewhere, and as such, any loss of this wetland is doubly impactful as it is the replacement for the historic loss of wetlands elsewhere.

Pet. Ex. 10, Staff Report p. 8-26.[7]

The District found that:

> *Sufficient* ***data and analysis to determine the final alignment of the expressway extension, potential impacts to natural resources, and potential impacts to restoration projects will be necessary***. [The County's supporting documents] … are missing environmental data

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[6] *See* § 163.3184 (3), Fla. Stat.

[7] Petitioner's Exhibit 10, the relevant County Staff Report, is identified in the record as R-01930-02037, consisting of 107 pages. All parties agree, however, that the exhibit contains 110 pages, and after conferring, have agreed to cite to the actual page number of the document in our briefs.

> and analysis. *** ***[S]upporting environmental data and analysis was not provided."***

R-03376: Resp. Ex. 7, District Comment Letter, p. 4 (emphasis added). See also R-01293-01294, RO, pp. 30-31, ¶104.

The District directed the County to:

> "• Provide[] relevant environmental information and studies.
>
> • Determine[] the final alignment of the expressway extension. [and]
>
> • ***Revise[] the ... plan amendment package***, as applicable, to reflect all completed studies and the final extension alignment." Id.

The DEP "***fully support[ed]***" the District's comments, finding it "***critical that" the County "address these issues prior to adopting the amendment***" and that "***this amendment ensures protection of the Everglades***":[8]

> "[t]he ***proposed amendment will need to demonstrate*** how impacts to the wetlands will be minimized and mitigated, and ensure that the alignment of the extension does not adversely impact CERP project areas and state lands."

R-03219: Resp. Ex. 5: DEP Comment letter, p. 2.

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[8] R-03218: Resp. Ex. 5: FDEP Comment letter, p. 1.

The County, however, "did not provide additional information to the District and did not receive any determination from the District regarding the Plan Amendment's consistency with CERP." R-01296: RO, p. 31, ¶ 105. The County adopted the Amendment anyway, ***after moving the proposed corridor farther west, encroaching further into the Everglades***. Tr., Spinelli, V. 9 at 1409:10 - 14, 1420:15-20; Woerner, V. 12 at 1790: 8-11 - 1792:15. The ALJ found:

> [T]he Plan Amendment is not supported by data and analysis on [Everglades wetlands and restoration]. ***Rather than providing the District with the additional information it requested to determine consistency with CERP, the County replied that it would continue to work with the District during the permitting process*** and "***may be able to include features*** … that provide benefits that are both ***compatible and consistent with the intent*** of the CERP.

R-01294: RO, p. 31, ¶107 (emphasis added)

> The ALJ also found that:
>
> [B]ecause the Plan Amendment was adopted *absent* a determination of consistency with CERP, [it] is not based upon adequate data or analysis. [….] ***The County did not react appropriately to the data and analysis available***—that the District needed more information in order to determine consistency—by adopting the Plan Amendment without such needed information.

R-01295: RO, p. 32 ¶111 (emphasis added)

IV. The Tollway also Traverses the County's West Wellfield Protection Area.

The Biscayne Aquifer is the County's sole source of drinking water. R-01273, RO, p. 10 ¶22. The County's West Wellfield supplies 15 million gallons of drinking water to residents daily. Tr., Mayorga, V. 10 at 1470: 7-8; Resp. Ex. 1: CDMP p. I-84.[9] The Tollway directly traverses the West Wellfield Protection Area, an area entitled to special protection under the CDMP. Much of the Tollway runs through the Wellfield's "30-day travel-time contour line" – an area of heightened sensitivity due to the reduced time in which contaminants can reach the wells. R-0454: Joint Pre-trial Stip. ¶10; Mayorga, V. 10 at 1464:23 – 1465:11; R-06158: Resp. Ex. 99]

Due to the wellfield's extreme transmissivity, the CDMP recognizes that activities in wellfields "directly impact the quality of

[9] The CDMP (Resp. Ex. 1) is identified in the Record at R-02700-03086, which is 386 pages. However, the entire adopted CDMP consists of 459 pages. The parties have conferred and agreed to cite to the CDMP as "CDMP at ___" using the CDMP pagination.

water ultimately withdrawn from the wells."[10] The CDMP mandates that:

> **[L]*and use and development*** within and upgradient from the full extent of their cones of influence must be **carefully controlled to limit land uses to those which will *pose no threat*** to water quality.

R-02700-3086: Resp. Ex. 1: CDMP p. I-78 (emphasis added).[11]

CDMP Policy CON-3B requires that water systems that "recharge regional wellfields shall be protected ***and*** enhanced." R-01285: RO, p. 22 ¶65. (emphasis added). The Tollway will destroy Bird Drive Basin wetlands that recharge the wellfield. R-00275, 00277-00278: RO, pp. 23, 25-26, ¶¶70, 81; Tr., Walsh, V. 4 at 548:25 – 549:6; McVoy, V. 3 at 440:12 -16, 450:21 – 451:10. The ALJ found the Tollway Amendment violated CDMP Policy CON-3B. R-01287: RO, p. 24 ¶76.

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[10] CDMP at I-88.

[11] County experts Mayorga and Woerner testified that, due to its "predominantly pristine" condition, the lack of surrounding development, and the fact that it cannot be easily replaced if degraded, the West Wellfield is protected more stringently than the County's other wellfields. Tr., Mayorga, V. 10, pp. 1469:10-1470:01, 1499:22 -1502:8; Woerner V. 12 at 1838:23 – 1840:22.

"Uses that could compromise groundwater quality ***shall not occur***" in this area. R-01273: RO, p. 10 ¶22. (emphasis added). The ALJ found that the Tollway Amendment was inconsistent with this policy. R-01318: RO, p. 55, ¶ 207, n. 19.

V. "Meager" Transportation Benefits

The Tollway Amendment was approved explicitly "***only to the extent necessary***" to relieve congestion in West Kendall and provide ***"faster" commute times to Downtown Miami and "major trip attractors***" in the County. R-01305: RO, p. 42, ¶152, fn. 14. (emphasis added). The ALJ found the evidence provided "no support" for the claim that the Tollway will "improv[e] the commute times to downtown and other employment centers." She found that "[t]he data is silent on whether the time to those destinations … will increase, decrease or stay the same." R-01306: RO, p. 43, ¶160. She found that the congestion improvement within West Kendall would be "meager." R-01307: RO, p. 44, ¶156.

The ALJ found that the Tollway only "minimally increased mobility in the study area"[12] and "the impact on daily traffic volumes is minor." R-01299: RO, p. 42, ¶153. She found only a 3% reduction in total vehicle hours travelled - from 323,600 to 314,900.[13] The average travel speeds would increase by 1.6 mph. R-01299: RO, p. 42, ¶153.[14] Total vehicle miles travelled would actually *increase* (commuters would have to drive further as they travel west to the new Tollway before making their way east).[15] The ALJ found that "less than half" of the roadways in the Study Area would see any level of service improvement. R-01299: RO, p. 42, ¶155.

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[12] The "Study Area" analyzed by the County to evaluate the impact of the Tollway was limited to an area "bounded on the north by NW 12th Street, on the east by SW 97th Avenue, on the south by SW 152 Street/Coral Reef Drive, and on the west by SW 177 Avenue/Krome Avenue." R-01301: RO, p. 38, ¶139. The study did not include downtown, the Airport or other employment centers. R-01306: RO, p. 43. ¶157. The ALJ found that "[t]he data is silent on whether the time to those destinations will increase, decrease or stay the same." *Id.* ¶160.

[13] R-01299: RO p. 42 ¶154. See R-04608: Resp. Ex. 15 p. 33 Table 9.

[14] See R-04608: Resp. Ex. 15 p. 33 Table 8.

[15] R-04312: Resp. Ex. 14 p. 45 Table 11; Tr., Iler, V. 5 at 702:18 - 23, 724:16-23.

If one assumed the "meager" benefits extended to commutes downtown, ***the total of congestion "relief"*** the Tollway will provide would be ***six minutes per two-hour round-trip commute***. Tr., Woerner, V.12 at 1878:12 -1882:3-8; R-04357: Resp. Ex. 14, p. 46 Table 12.

VI. The Final Order Reversed All of the ALJ's Material Findings of Fact, Rejected the Recommended Order and Approved the Amendment

Except for undisputed findings about the nature and location of the Tollway, the Final Order deleted or re-wrote all of the ALJ's findings of fact described above. It declared that findings of fact in Ch. 163 "compliance" proceedings are governed by the "fairly debatable"—not the "preponderance of evidence"—standard, and thus each factual dispute should have been decided by the ALJ in favor of any evidence the County presented. R-01762-1763: FO, pp. 34-35; R-01765-1766: FO, pp. 37 – 38; R-01771: FO, p. 43.; R 1774: FO, p. 46; R-01780-1781: FO, pp. 52 – 53, It also recharacterized material fact findings as conclusions of law the Commission was at liberty to reject. See e.g. R-01745-1747, 1771, 1774, 1779-1780: FO, pp. 17-19, 43, 46, 51, 52. The Commission ruled that the

Amendment was "in compliance" with the Act. R-01730, 01785: FO, pp. 2, 57.

VII. The Petitioners/Appellants

The ALJ found that Petitioner/Appellant, "Michelle Garcia, resides and owns property in the County near the area affected by the Plan Amendment." R-01268: RO, p. 5, ¶3. The ALJ adopted the parties' stipulation "that Ms. Garcia's substantial interests will be adversely affected by the Plan Amendment given that her property is located in the County near the area affected by the Plan Amendment".[16] R-01268: RO, p. 5 ¶6. She found that Petitioner/ Appellant Tropical Audubon Society ("Tropical"), "is an environmental organization in South Florida dedicated to conserving and restoring South Florida ecosystems, focusing on birds and other wildlife, as well as their habitats [and] Tropical owns property in the County.[17]

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[16] At trial, Garcia testified that she owned the home she lived in one mile from the proposed tollway. Tr., Garcia, V. 3 at 514:21 – 516:1; R-02096: Pet Ex. 24-A.

[17] Topical's President testified that, since 2004, the organization has concentrated efforts on preserving the County's UDB to protect natural habitat in Western Miami-Dade County, including in the Bird Drive Basin and Pennsuco, and that its members have observed

Id. ¶4. The ALJ found that the Limonar Petitioners are limited liability companies under the laws of the State of Florida and own property within the area affected by the Amendment. R-01268: RO, p. 5, ¶2.

SUMMARY OF ARGUMENT

The ALJ's factual findings, which the Commission was statutorily required to accept if supported in the record, compelled a ruling that there is no fair debate (no reasonable argument) that a 13-mile, 4 to 6 lane highway, with "meager" transportation benefits outside of the County's strict urban development and services boundary, through the West Wellfield and protected farmland and Everglades wetlands prioritized for restoration, violates the Community Planning Act and the County's own Comprehensive Plan policies concerning protection of Everglades wetlands and the wellfield, urban service limitations, shifting to mass transit. The Final Order misapplied the "fairly debatable" standard (which governs legal conclusions only) to the evidence, erroneously ruling

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endangered species in the area where the Tollway would be located. Tr., Barros, V. 1 at 217:13 – 219:23; Pet. Ex. 123 & 133.

that Ch. 163 required the ALJ to defer to the County's claims on disputed facts.

Chapter 120, however, is clear that an ALJ decides the facts under a "preponderance of evidence" standard after trial and the Commission must accept those findings where record evidence supports them. The Commission inappropriately rejected fact findings that were supported by competent, substantial evidence. The Final Order illegally rewrote the ALJ's findings of fact to adopt the Commission's, and the County's, view of the evidence regarding the Tollway's impact on natural resources, transportation planning and the Plan's direction that adherence with the UDB/UEA construct is "critical" to achieve a desired pattern of development for the County.

To enable this action, the Commission erroneously re-labeled disputed material facts as conclusions of law and deleted or re-wrote them. By doing so, the Commission improperly converted a Plan Amendment that clearly violated the statute to one the Commission claimed at least arguably complied with the law.

The Commission approved the Amendment even though the County refused to comply with §163.3177(1)(f)1, Fla. Stat., which requires that comprehensive plans be supported by "data and analysis." The County's failure to analyze the proposed Tollway's impact on Everglades wetlands and restoration supports no conclusion other than that it failed to comply with the statute. Allowing this fundamental planning requirement to be deferred to a subsequent permitting decision, under a different law governed by different standards, renders the statute a nullity.

The Final Order also violates the "internal consistency" requirement of §163.3177 (1) and (2), Fla. Stat., because it approved a transportation map Plan Amendment that fails to reflect and is inconsistent with the County CDMP's wellfield and wetland protections, and transportation planning priorities. The ALJ properly interpreted the CDMP and found that the claimed traffic benefits were so "meager" that they did not support the County's claims that the Tollway's substantial harms were outweighed by chimerical, traffic benefits. The Final Order's ruling otherwise sprang from the application of the wrong standard of review, ubiquitous violations of

the "competent substantial evidence" rule, unreasonable interpretations of law, and rejection of the statutory process for deciding comprehensive plan disputes.

This Court must overturn the Commission's ruling that the ALJ was required to accept the County's "debatable" factual positions without regard to the evidence, and that her factual findings were instead policy recommendations it was free to reverse. The Court should overturn the Final Order, which is dramatically at odds with the statutory scheme of Chapters 120 and 163, and rule that the Tollway Amendment is not in compliance under § 163.3184(1)(b), Fla. Stat.

ARGUMENT

I. Argument One: Erroneously ruling that the ALJ should have applied the "fairly debatable" and not the "preponderance of evidence" standard to determine the facts, the Commission impermissibly rewrote multiple dispositive findings of fact.

A. Standard of Review

Appellate courts review statutory interpretations *de novo*. *Bosem v. Musa Holdings, Inc.*, 46 So.3d 42, 44 (Fla. 2010). Art. V, § 21, Fla. Const. prohibits judicial deference to an agency's statutory

interpretations. *Kantor Real Estate LLC v. DEP, et al,* 267 So. 3d 483, 487 (Fla. 1st DCA 2019), *rev. dismissed*, 2019 WL 2428577 (Fla. 2019).

B. The Commission Erred in Applying the Fairly Debatable Standard to Fact Findings

The Commission rewrote every disputed material finding of fact made by the ALJ, on the legal theory that factual determinations in a Ch. 163 "compliance" proceeding are governed by the "fairly debatable", not the "preponderance of evidence" standard. R-01762-1763: FO, pp. 34-35; R-01765-1766: FO, pp. 37 – 38; R-01771: FO p. 43.; R-01774: FO, p. 46; R-01780-01781: FO, pp. 52 – 53.

Section 163.3184 (5), Fla. Stat., however, dictates that "compliance" disputes under the Act be litigated under § 120.57(1)(j). Section 120.57(1)(j) unambiguously requires that an ALJ render findings of fact based on the preponderance of the evidence standard.[18]

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[18] *See Sierra Club v. Miami Dade County,* (Dept. of Comm. Affrs' Final Order No. DCA 06-GM 219 (Sept. 12, 2006). (Ruling that, in comprehensive plan amendment compliance cases, the "fairly debatable" standard applies only to the ultimate legal determination

The finishing blow to the Commission's theory is *Miami-Dade County v. Department of Community Affairs*, 54 So.3d 633 (Fla. 3d DCA 2011), where, in a comprehensive plan amendment case, this Court held:

> "The **scope of the Administration Commission's review of the ALJ's recommended order is limited by ... [§] 120.57(1)(l**), [Fla. Stat.]." *Id* at 634.(emphasis added).

The Court ruled the Commission:

> "may not reject or modify the findings of fact unless … the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law." *Id.*[19]

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of "compliance", but the underlying facts are determined by a preponderance of the evidence).

[19] The 2011 Commission Final Order this Court upheld had rejected Miami-Dade County's claim that the ALJ's was required to credit the County's view of the evidence in a "compliance" case, ruling that "[T]he ALJ [as] the finder of fact is often presented with two widely different methodologies and analysis with widely different results that are professionally acceptable. It is appropriate for the finder of fact 'to simply give less weight to the evidence that is less persuasive *regarding the appropriateness of data and analysis.*'". *Dep't of Community Aff. v. Miami-Dade County*, 2009 Fla. ENV Lexis 139; 2010 ER FALR 2 (2009) (Final Order ACC-09-005 p. 22).

No agency order[20] or appellate decision has ever suggested otherwise. Until now.

As correctly observed by the ALJ in this case:

> "The mere existence of contravening evidence is not sufficient to establish that a land planning decision is 'fairly debatable.' It is firmly established that:
>
> '[**E]ven though there was expert testimony adduced in support of the City's case, that in and of itself does not mean the issue is fairly debatable**. If it did, every zoning case would be fairly debatable and the City would prevail simply by submitting an expert who testified favorably to the City's position. **Of course that is not the case. The trial judge still must determine the weight and credibility factors to be attributed to the experts**. Here the final judgment shows that the judge did not assign much weight or credibility to the City's witnesses.' *Boca Raton v. Boca Villas Corp.*, 371 So. 2d 154, 159 (Fla. 4th DCA 1979)." (emphasis added)[21]

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[20] The Commission's application of the "fairly debatable" standard to factual determination in this case is also inconsistent with prior agency orders. *See, e.g., Sierra Club v. Miami Dade County* (Dept. of Comm. Affrs' Final Order No. DCA 06-GM 219, at 4 (Sept. 12, 2006) (holding ALJ is to resolve factual issues using a preponderance standard); *Ferrell v. Orange County* (Admin. Comm. Case No. ACC-17-002, at 4 (April 2, 2018) (explaining ALJ is to determine the weight to give conflicting evidence, judge credibility of witnesses, draw permissible inferences from the record, and reach ultimate findings of fact based on competent substantial evidence); *Mattino v. City of Marathon et al.* (Fla. Dept. of Economic Opportunity Final Order DEO 20-032, at 7 (Dec. 23, 2020).

[21] R-01316: RO, p. 53, ¶199.

The Commission, however, refused to follow *Boca Raton*, claiming its rulings were overly-broad dicta [22] inapplicable to cases under Chapter 163,[23] under which, it ruled erroneously, "the role of the ALJ is not to choose which expert is more convincing, but rather to assess whether conflicting expert testimony renders a disputed legal issue 'fairly debatable.'" R-01774: FO, p. 46.

The ruling that the "fairly debatable" standard required the ALJ to yield to the County on disputed facts flouts the very purpose of a formal administrative hearing. Evidentiary-related matters are within the sole province of the ALJ as the "fact-finder." *Tedder v. Fla. Parole Comm'n*, 842 So. 2d 1022, 1025 (Fla. 1st DCA 2003). The facts are determined by the ALJ applying a preponderance of the evidence standard after hearing from witnesses subject to cross-examination. §120.57(1)(j), Fla. Stat. It is the province of the ALJ to consider the

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[22] R-01774: FO, p. 46. (stating "In the over forty years since *Boca Villas Corp*. was decided, no court appears to have read the decision as broadly as the ALJ did here."). It provided no citation or discussion of any other judicial decision.

[23] R-01774-01775: FO, pp. 46-47.

evidence, resolve conflicts, judge witness credibility, draw inferences from the evidence, and make ultimate findings of fact. *Padron v. Dep't of Envtl. Prot.*, 143 So. 3d 1037, 1041 (Fla. 3d DCA 2014); *accord, Boca Raton*, 371 So. 2d at 159.

The decisions upon which the Final Order relied do not support the novel legal ruling that the "fairly debatable" legal standard governs an ALJ's factual findings in a comprehensive plan case. *Martin County v. Section 28 Partnership Ltd.,* 772 So. 2d 616 (Fla. 4th DCA 2000) did not address a challenge to a comprehensive plan amendment under the Administrative Procedures Act and did not rule that the facts in such a case are determined by the fairly debatable standard.[24] That case reversed a property rights damage award against a local government, ruling that, in a constitutional challenge to a legislative decision to deny a request to amend a comprehensive plan, the action will be upheld if it is fairly debatable standard. *Id.* at 619. The Court upheld the County's denial of a land

[24] R-01774-1775: FO, pp. 46-47.

use change ***because that decision was supported by competent substantial evidence***. *Id* at 620 - 621.

The administrative order in *1000 Friends of Florida, Inc. v. Martin County,* No. 10-10007GM, 2011 WL 1782280, *10 (Fla. DOAH May 5, 2011) also is inapposite. The case stands only for the unremarkable proposition that when the facts found by an ALJ make the legal conclusion of whether a comprehensive plan amendment is "fairly debatable", that decision may not be overturned. Consistent with the clear statutory directive and caselaw described above, it refutes the Final Order's claim that the "fairly debatable" standard governs the factual findings.

Having erroneously concluded that the ALJ should have deferred to the County on all debatable facts and evidence, the Commission then deleted or re-wrote ***every*** disputed material fact found by the ALJ, converting a comprehensive plan amendment that clearly violated multiple independent statutory requirements into one the Commission claimed at least debatably complied with the law because of the County's *ipse dixit*. The Court should reverse the Final

Order for having applied the wrong standard of review to the Recommended Order's findings of fact.

II. The Commission violated §120.57(1)(l), Fla. Stat. by improperly rewriting or deleting every disputed material finding of fact made by the ALJ, all of which were supported by competent, substantial evidence.

The Final Order's ruling that determinations about disputed fact are policy decisions by the County to which the ALJ was required to defer is a blatant violation of the statutory process for deciding comprehensive plan disputes and reversible error.

A. The Governing Law

Under § 163.3184 (5), Fla. Stat., comprehensive plan amendment compliance disputes are litigated under §120.57, Fla. Stat. Section 120.57(1)(l), Fla. Stat. states:

> "The agency may not reject or modify the findings of fact unless [it] first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law."

A statement that derives from testimony or evidence is a finding of fact. Stander, *Administrative Decision Writing*, 10 Journal of the Nat'l Ass'n of Admin. Law Judiciary 149, 160-161 (1990). In contrast,

"[c]onclusions of law are the result of [the] application of relevant statutes, rules, and case law to the findings of facts." Shoop, *Administrative Law: The "Finality" of Recommended Orders*, 81 Fla. Bar 41, 42 (2007).

An ALJ reaches factual conclusions after hearing testimony or seeing exhibits, but reaches legal conclusions after reading the law. *Guzman v. State*, 721 So. 2d 1155, 1159 (Fla. 1998).

Agencies are bound by an ALJ's findings of fact and may not reweigh the evidence or the credibility of witnesses if any competent substantial evidence[25] exists to support them. *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009); *Walker v. Bd. of Prof'l Eng'rs*, 946 So. 2d 604 (Fla. 1st DCA 2006); *Packer v. Orange Cty. Sch. Bd.*, 881 So. 2d 1204 (Fla. 5th DCA 2004). Any competent, admissible evidence that could reasonably support a factual finding is "competent substantial evidence." *Scholastic Book*

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[25] Competent substantial evidence is "evidence that will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957).

Fairs, Inc. v. Unemployment Appeals Comm'n, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996).

Where there is competent substantial evidence to support a factual finding, it is irrelevant that there was also evidence supporting a contrary finding. *Arand Constr. Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991). "The [ALJ] is entitled to rely on the testimony of a single witness even if that testimony contradicts the testimony of a number of other witnesses." *Hamilton Downs Horsetrack, LLC v. State Dep't of Bus. & Prof'l Regulation,* 226 So. 3d 1046, 1050 (Fla. 1st DCA 2017).

An agency ***may not recast*** an ultimate factual determination as a conclusion of law in order to modify or overturn a finding of fact. *Stokes v. Bd. of Prof. Eng'rs*, 952 So. 2d 1224 (Fla. 1st DCA 2007). In *Goin v. Commission on Ethics*, 658 So. 2d 1131 (Fla. 1st DCA 1995), the Commission charged Goin with violating the Florida Ethics Code. The hearing officer rendered factual findings that Goin's conduct did not knowingly violate the statute. Id., at 1137-1138. Nevertheless, the Final Order found that Goin violated the rules and levied penalties against him. The Court reversed the

Final Order, which it found had mis-characterized a finding of fact as a legal conclusion and because the ALJ's factual findings negated a violation of Ch. 112. Ruling that "an agency cannot circumvent the requirements of the statute by characterizing finding of fact as legal conclusions",[26] the Court ruled the Commission erred by substituting its determination as to Goin's intent for that of the hearing officer. *Id.* at 1139; *see also McGann v. Fla. Elections Comm'n*, 803 So. 2d 763, 764 (Fla. 1st DCA 2001) (reversing final order of Elections Commission where Commission recast ALJ finding that elections violations were not "willful" as legal conclusions: "one's 'willfulness' relative to violation of campaign laws is a question of fact").

ALJ Garret Chisenhall explained the principle of unbiased fairness that is the fundamental tenant of formal administrative litigation in Florida, that the binding nature of an ALJ's factual findings is central to the integrity of that process and emphasized the

[26] Id. at 1138.

"heavy monetary price" agencies would pay[27] "for rejecting proper factual findings." Chisenhall, *"DOAH: Bringing Impartiality and Fairness to Administrative Litigation Since 1975"*, The Florida Bar Journal 41, at 43. (Dec. 2017). The Final Order in this case blatantly violates this basic administrative law principle.

B. The Commission's Final Order

The Court should overturn the Final Order which applied the incorrect standard of review, usurping the ALJ's exclusive fact-finding role, and showing contempt for the formal administrative hearing process, which is designed to subject disputed evidence to cross-examination and credibility determinations by an ALJ. Arguments three and four will demonstrate that the Final Order's finding that the Tollway Amendment was "in compliance" resulted from its erroneous rejection of the disputed material factual findings made by the ALJ (based on her rejection of the County's claims and crediting of the Appellants' evidence), coupled with unreasonable interpretations of law.

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[27] In the form of an attorneys' fee award under §120.595 (5), Fla. Stat.

III. The amendments violate the Comprehensive Plan "Internal Consistency" requirement in §§163.3177 (1) and (2), Fla. Stat. The Commission's finding otherwise resulted from the erroneous rejection of factual findings that were supported by competent, substantial evidence, and by unreasonable interpretations of law.

A. Standard of Review

An appellate court may set aside agency action if the fairness of the proceedings or the correctness of the action may have been impaired by a failure to follow prescribed procedure, the agency erroneously interpreted the law and a correct interpretation compels reversal, or the agency's exercise of discretion was otherwise in violation of a statute. §§120.68 (7)(c), (d) and (e), Fla. Stat.

The interpretation of a local government comprehensive plan is a question of law, subject to *de novo* review. *Rinker Materials Corp. v. North Miami Beach*, 286 So. 2d 552, 553 (Fla. 1973).

B. Argument

The ALJ found the Amendment violated the "internal consistency" mandate in §163.3177(1) and (2), Fla. Stat. To approve the Amendment anyway, the Commission improperly rewrote the ALJ's findings to adopt the County's view of the evidence, improperly rejected her legal interpretations in favor of those that are not as or

more reasonable, and ruled that the Tollway amendment was internally consistent with the CDMP. R-01781-01782: FO, p. 53-54.

Section 163.3177(1) requires comprehensive plans to "guide future decisions in a consistent manner …." Section 163.3177(2) mandates "[t]he several elements of the comprehensive plan shall be consistent." The Act emphasizes the particular importance of a plan's adopted maps, such as the Future Transportation Map amended in this case:

> Each map depicting future conditions … **must *reflect* the principles, guidelines, and standards within all elements….**" Id. (emphasis added)

A 1989 Commission Final Order explained that a plan's adopted maps are "a critical component of the Plan" …] "an essential visual representation of the … goals, objectives, and policies …." *Austin v. City of Cocoa and DCA*, 1989 WL 645182, ER FALR 89:0128 (Admin. Comm. 1989).

The "internal consistency" requirement is one of the fundamental mandates governing comprehensive plans. Its violation is dispositive of a plan amendment's compliance with the Act. *See Payne v. City of Miami*, 52 So. 3d 707 (Fla. 3d DCA 2010) (invalidating

land use amendments for inconsistency with plan provisions concerning the Miami River). *Accord, SCAID v. DCA and Sumter County,* 730 So. 2d 370 (Fla. 5th DCA 1999) (finding a land use change violated the internal consistency requirement because it violated comprehensive plan policies.). A substantial body of administrative law exists finding plans and amendments out of compliance when map amendments conflict with plan policies. *See, e.g.*, *Dep't of Comm. Affairs v. Miami Dade County*, 2009 Fla. ENV Lexis 139, 2010 ER FALR 2 (2009), *aff'd Miami Dade County v. DCA*, 54 So.3d 633 (Fla. 3d DCA 2011) (land use change inconsistent with the plan's urban development boundary policy)*; DCA v. St. Lucie County*, 1993 WL 943708, 15 FALR 4744 (Admin. Comm. 1993) (Map amendment failed to reflect policies discouraging urban sprawl, and promoting agricultural protection, land use compatibility and other objectives); *Kelly v. City of Cocoa Beach*, 1990 WL 749217, 12 FALR 4758 (1990) (increased density failed to reflect objective to direct population away from the coastal hazard area).

1. The Tollway violates the CDMP's wellfield protection policies. The Final Order improperly re-wrote the findings of fact proving the

violations, and adopted unreasonable interpretations of those policies.

The Final Order violates §120.57(1) (l), Fla. Stat., which prohibited the Commission from rejecting or modifying the ALJ's findings of fact, and from rejecting conclusions of law, as its substituted legal interpretations were not "as or more reasonable than that which was rejected or modified." The Commission's claim that the CDMP is subject to more than one interpretation,[28] and its substituted interpretation – that the CDMP allows this highway to be built over the West Wellfield is refuted by the CDMP's plain terms.

The ALJ found the Tollway Amendment violated CDMP Policy CON-3B, that "water management systems that recharge regional wellfields shall be protected and enhanced." R-01287: RO, p. 24 ¶76.[29] She also found it violated the CDMP policy that:

> "Uses that could compromise groundwater quality ***shall not occur in this area***...." R-01287: RO, p. 24 ¶76 n. 7.

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[28] R-01745 - 01746: FO, p. 17-18.

[29] This includes the Bird Drive Basin wetlands through which the Tollway would run. Tr., Walsh, V. 4 at 548:25 – 549:6; McVoy, V. 3 at 440:12 – 441:11, 451:7-10.

The ALJ found that County wellfield expert "Mayorga's[30] testimony that 'any roadway carries an inherent risk of contamination' conceded the point that the Plan Amendment creates a risk of contamination to the wellfields." R-01287: RO, p. 24 ¶76 (fn. 7). She also credited the testimony of Dr. McVoy:

> "Dr. McVoy testified that building ***the tollway certainly increases risk of contamination*** …. Mr. Mayorga … ***opined that any roadway carries an inherent risk of contamination*** …. As [he] explained, "The closer you are to the production wells, the [fewer] alternatives you have in how you manage stormwater." R-01286: RO, p. 23, ¶73.[31]
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> ***
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> […] Respondent's expert witness confirmed that building the new corridor will neither protect nor enhance the water management systems that recharge the West Wellfield." R-01287: RO, p. 24, ¶75.[32]

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[30] Mayorga, responsible for the County's wellfield protection, testified that the Biscayne Aquifer, which supplies the West Wellfield, is "sensitive to pollution." V. 10 at 1458:18-23. He conceded an "inherent risk" with Tollway traffic across the Wellfield and that "clearly there is a risk of an impact from [an] accident." *Id.* at 1474:11-15.

[31] The CDMP also states the County must "limit land uses to those which will pose no threat to water quality". R-02700-3086: Resp. Ex. 1: CDMP p. I-78.

[32] Dr. McVoy, an expert in water resources, testified that the Tollway "***absolutely***" increases the risk of contamination to the Wellfield. Tr., McVoy, V. 3 at 451:11- 452:1. He testified that water supply to the

Nevertheless, reasoning that "protect" did not mean "zero risk," the Commission rejected the ALJs fact findings, and found, incredibly, that the Amendment did "protect and enhance" the Wellfield by building a Tollway over it. R-01745-01747, 01779 - 01780: FO, pp. 17-19, 51, 52. The Commission re-wrote the findings - substituting the County's desired inferences from the witnesses' testimony,[33] claiming the ALJ "mischaracterized" the evidence when she found the Tollway would increase the risk of contamination to, and not "protect", the Wellfield. R-01746 - 01747. The re-written findings referenced and re-interpreted the County witness' testimony,[34] and impermissibly rejected the testimony of Appellants' witness, which the ALJ had credited. R-01747: FO, p. 19.

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wellfield "can't be increase[d] by putting a highway on it." *Id.* at 450:19-23. He testified that routing the Tollway within the Wellfield's 30-day travel-time contour line does not "protect and enhance" these systems that recharge the Wellfield; it imperils wellfield protection and recharge. Id. at 451:11- 452:1.

[33] R-01747: FO, p. 19.

[34] Mr. Mayorga, responsible for wellfield protection in the County, was never consulted to assess the Tollways' risks to the West Wellfield. Neither was anyone who worked for him. V. 10 at 1514:17-22, 1518:13 - 17. The ALJ was "puzzled" by his "unhelpful"

These revisions of fact findings are remarkable in their audacity. The ALJ's finding were fully supported by the evidence, which permitted only one finding–the Tollway does not "preserve and enhance" systems that recharge the Wellfield as required by the CDMP. The Court should reverse the Commission's re-write of findings of fact and rule that the Tollway Amendment violates Policy CON-3B, as it fails to protect and enhance all systems recharging the West Wellfield, including the Bird Drive Basin.

Next, the Commission re-wrote footnote 7 to ¶76[35] and footnote 19 to ¶207[36] to conclude that the Tollway complied with the policy that "[u]ses that could compromise groundwater quality ***shall not occur in this area*** …" because, according to the Commission, "[u]nder the CDMP, roads are not … 'uses'…." R-01750, 01779: FO, pp. 22, 51.

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testimony, that he was "not familiar" with whether the plan amendment "threat[ened] water management systems." R-01286: RO, p. 23, ¶72.; See Mayorga, V. 10 p. 1494:4-7.

[35] R-01287: RO, p. 24 ¶76 n. 7.

[36] R-01318: RO, p. 55, ¶207, fn. 19.

This interpretation ignores the Policy's context and the use of the conjunctive "and" between "land uses" and "development." Because the Tollway admittedly poses a threat to the Wellfield, it violates this restriction. The claim that the Tollway is not a "use" of land, but is "infrastructure," a "facility" or "feature" is legal sophistry that defies the plain and ordinary meaning of the word "use," which would treat the replacement of wetlands and farmland with a Tollway as a "use" of land. It violates the CDMP's clear policy, because the affected area is largely outside the County's UDB and "largely undeveloped", the CDMP seeks "***to maintain pristine water quality***." R-02700-3086: Resp. Ex. 1: CDMP at p. I-88. Precisely because roads exist over ***other*** wellfields, the West Wellfield's pristine nature is especially protected in the Plan because, as the CDMP states, "if these become contaminated there are no alternative sites for … comparable high-capacity wellfields." *Id.* Land uses ***and*** development in the West Wellfield area thus "must be carefully controlled to limit land uses to those which will pose ***no threat*** to water quality." Id. (emphasis added). Due to its "predominantly pristine" condition, the lack of surrounding development, and the

fact that it cannot be easily replaced if degraded, this wellfield is protected more stringently than the County's other wellfields. Tr., Mayorga, V. 10, pp. 1469:10-1470:01, 1499:22 -1502:8; Woerner V. 12 at 1838:23 – 1840:22.

The Court should rule that the Final Order violates §120.57(1)(l), Fla. Stat., overturn Commission's re-writing of the ALJ's wellfield impact findings, and reinstate the ALJ's finding that the Tollway Amendment is inconsistent with those policies.

2. The Tollway violates the CDMP's wetland protection policies. The Commission improperly rewrote the ALJ's findings of fact and conclusions of law about the Tollway's impact on wetlands.

a. The Tollway does not "protect and preserve" wetlands

The ALJ found that the Amendment is inconsistent with CDMP Objective CON 7, that:

> "[the] County ***shall*** protect and preserve the biological and hydrological functions of … Wetlands …. Future impacts to the biological functions of publicly and privately-owned wetlands shall be mitigated. […] Publicly acquired wetlands ***shall be restored and managed for their natural resource, habitat and hydrologic values***."

R-01318: RO p. 55, ¶208.

The Final Order reversed this finding, claiming it was inconsistent with the ALJ's findings in Paragraphs 87 and 98, and thus the issue was "at least fairly debatable." R-01780: FO, p. 52. But the ALJ never found the Tollway consistent with Objective CON-7. Finding 87 simply observed that:

> "Petitioners' allegations of inconsistency with Objective CON-4, Policy CON-4A, and Objective CON-7, all relate to the impact of the new corridor on aquifer recharge and storage capacity of wetlands …." R-01289, RO, p. 26.

Finding of Fact ¶ 98 was that:

> Petitioners did not prove … the … Amendment violates … the cited Conservation Element *policies*, with the exception of CON-7A …."

R-01292, RO, p. 29.

This finding refers to *policies,* not, as the Final Order claimed, to Objective CON-7.

The ALJ's finding that the Tollway fails to "restore[] and manage[]" the publicly acquired Pennsuco wetlands "*for their natural resource, habitat and hydrologic values"*[37] is amply supported by the

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[37] R-01318: RO, p. 55, ¶208

record. Her finding that paving a highway through the publicly acquired Pennsuco wetlands does not "restore[] and manage[]" them "*for their natural resource, habitat and hydrologic values"* or "protect and preserve the biological and hydrological functions of the … wetlands" is supported by extensive competent substantial evidence. Tr., McVoy V. 3 at 422:13 – 434:22, 440:7 – 441:11, 444:12 – 446:1; Spinelli, V. 9 at 1358:24 -1359:6, 1360:12 – 14, 1389:7 - 14, 1396:25 – 1398:23, 1404:7-18, 1409:10-14, 1414:5-23, 1416:7 – 1417:5, 1418:8 – 1419:21, 1420:8 -23, 1423:22 – 1424:4,1426:25-1427:2, 1432:21-1433:5.

b. The Final Order's reversal of the ALJ's findings and conclusions about the inadequacy of the Amendment's wetland mitigation policies was improper.

The Commission erroneously rejected the ALJ's conclusion of law about an unadopted mitigation policy. The Final Order improperly reversed the ALJ's finding that:

> The County maintains that it has addressed [the issue][38] through an interlocal agreement with MDX,[39] which

[38] R-01289: RO, p. 26, ¶83.
[39] The Miami-Dade County Expressway Authority.

> requires that the entire span of the new corridor traversing the Pennsuco wetlands be elevated. However, the interlocal agreement is not incorporated into or adopted by reference in the Plan Amendment; thus, is not enforceable through the Plan. To the contrary, the interlocal agreement may be modified or amended upon mutual agreement of the parties. R-01289: RO, p. 26, ¶84.
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> The ALJ also found:
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> Even if the interlocal agreement were incorporated into the Plan Amendment, this inconsistency would not be completely resolved because [it] allows pilings or other support structures for the elevated section to be located in the Pennsuco wetlands.

Id.

The Final Order deleted this finding about the inadequacy of anything less than full bridging over the Pennsuco wetlands,[40] even though it was supported by the testimony of Garcia's Everglades expert, Dr. McVoy[41] and the County's wetland expert.[42] In fact, even a fully bridged Tollway would harm wildlife in these wetlands through shading of sunlight, noise and light impacts. Tr., McVoy, V. 3 at

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[40] R-01750: FO, p. 22.
[41] V. 3 at 422:4 – 424:25, 428:14-24, 434:1-22.
[42] Tr., Spinelli, V. 9 at 1416:7- 1417:5.

428:6-9, 429:14 – 430:18; Spinelli, V. 9 at 1364:1-18, 1423:22, 1424:4.

The second part of the improperly stricken finding was that the document the County claimed provided adequate protection – an "interlocal agreement" between it and MDX – "is not incorporated into or adopted by reference in the Plan Amendment; thus, is not enforceable through the Plan." R-01289: RO, p. 26.

That is the law. Comprehensive plans are comprised of only their adopted language and any documents formally incorporated by reference. *DCA, et al. v. Monroe County*, *1995 Fla. ENV LEXIS 129; 95 ER FALR 148* (Admin. Comm., Dec. 12, 1996); *Department of Community Affairs v. Escambia County*, ER FALR 92:138 (Final Order July 22, 1992) (P. 39; ¶¶ 265 - 266).

Here, the interlocal agreement is not "adopted" by the Amendment. It can be cancelled by mutual agreement of the parties; no third party may enforce it. The Final Order did not find otherwise. It simply struck the ALJ's finding without addressing the issue.

The Final Order also points to a mitigation policy in the Amendment,[43] but the County's wetlands expert's admitted that the mitigation is unavailable to meet what would be needed. Tr., Spinelli, V. 9 at 1317:18- 1319:1, 1339:7-18, 1344:2-6, 1352:9-17, 1420:8-23. The agency comment letters and expert testimony agree that full mitigation for these wetlands will not be available given their uniqueness, scarcity, strategic location, and already protected status. Tr., McVoy, V. 3 at 425:17 - 427:15. Because the Pennsuco wetlands were publicly - acquired and restored to mitigate for harm to wetlands elsewhere,[44] the South Florida Regional Planning Council explained that "any loss of this wetland is doubly impactful as it is the replacement for the historic loss of wetlands elsewhere" and thus "[i]mpacts to the Pennsuco Wetlands must be approached with the appropriate complexity". Pet. Ex. 10, Staff Report at p. 8-26.[45]

In *Austin v. City of Cocoa and DCA*, ER FALR 89:0128 (Admin. Comm. Case No. 89-31, DOAH Case No. 88-6338GM (Admin. Comm.

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[43] R-01748, 01750: FO, p. 20, 22.
[44] R-01274: RO, p.11, ¶25.
[45] See n.6.

Sept. 29, 1989) the Commission held there must be data to support any assurances articulated in comprehensive plan policies. It ruled that a plan objective of protecting natural resources provided only vague and inadequate assurances and was unsupported by data and analysis demonstrating their adequacy to counteract the impacts of the new land use designations. *Id. Austin* Rec. Order p. 106, ¶62.

The claim that the mitigation policy saves the Amendment also fails under *Moehle v. City of Cocoa Beach,* 1997 WL 1052873, DOAH 96-5832GM (Oct. 20, 1997), which found a plan amendment supported only by conclusory claims of a lack of environmental impacts was found to violate the Act's "data and analysis" requirement. *Moehle*, p. 5, ¶9.

The Commission's unjustifiable rejection of the ALJ's findings about the inadequacy of the Amendment's wetland mitigation provisions is reversible error.

C. The Commission erred in finding the Tollway Amendment consistent with the CDMP, impermissibly substituting its view of the credibility of a witness's testimony for that of the ALJ, and erroneously interpreting the CDMP as applied to the facts.

The ALJ's ruling that the Tollway Amendment was inconsistent with the CDMP's over-arching urban development and infrastructure containment strategy was correct beyond a fair debate. The Final Order's ruling otherwise was not as or more reasonable.

The Commission improperly reversed the ALJ's factual and legal findings that the Amendment violated the CDMP. The ALJ was correct, however, that there is no fair debate – no reasonable argument - that the CDMP as a whole does not contemplate this highway in this location. The Commission's focus on whether a highway is correctly deemed a land "use", "development,"[46]

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[46] The Final Order's reversal of the ALJ's ruling that the Tollway was development for purposes of some CDMP policies illustrates the legal error. R-01742: FO, p. 14 (See R-01279, 317: RO, p. 16, ¶50, p. 54, ¶201, fn. 17.) The Commission claimed authority to reverse that ruling in the case of *Sierra Club v. Fla. Dep't Cmty. Affairs*, 2006 WL 1674277; DOAH Case No. 03-0150GM, Final Order No. DCA06-GM-219 (FDCA Sept. 13, 2006), but infrastructure projects are exempt from the statutory definition of "development" only if they are constructed within an "existing right of way". §§334.03(21) and 380.04(3) (a), Fla. Stat.; *Miami-Dade County v. Florida Power & Light Company*, 208 So. 3d 111, 117-18 (Fla. 3rd DCA 2016). This highway is not. The County and Expressway Authority own neither fee nor easement to the land, much of it Everglades wetlands owned by state or federal agencies. R-01318: RO, p. 55 ¶206; Prehearing Stip. ¶¶11-

"infrastructure," a "facility" or a "service" is irrelevant to the Amendment's consistency with the CDMP.[47]

The ALJ found the testimony of the County's expert planner, who struggled to opine that the Tollway Amendment complied with the CDMP, non-responsive and "conclusory." R-01279: RO, p. 16, ¶48. The Final Order deleted that finding. R-01745: FO, p. 17. But an agency may not alter the trier of fact's view of the credibility or weight of a witness's testimony. *Padron*, infra, 143 So. 3d at 1041.

The ALJ found that the Amendment:

> [P]roposes … urban infrastructure outside the UDB, and thus, outside of the envelope within which the Plan dictates public expenditures for urban infrastructure 'will be confined,' in contravention of the Plan's direction that adherence with the UDB/UEA construct is "critical" to achieve the desired pattern of development for the County." R-01279: RO, p. 16, ¶46.[48]

16; Tr., Hawkins, V. 1 p. 98; McVoy, V. 3 at 509; R-03219: Resp. Ex. 5: DEP Letter p. 2.

[47] The County acknowledged below this issue is a "red herring." R-01460: County Exceptions to Rec. Order, p. 85.

[48] Thus, she found that the Amendment inconsistent with the CDMP policies on pages I-60, I-61, and I-74, identified in ¶46. R-01279, 01280, 1318: RO, pp. 16-17, ¶¶49 -51; p. 55, ¶207.

The Final Order impermissibly re-wrote this and other related findings,[49] deeming the Amendment consistent with the CDMP because it does "not prohibit infrastructure that serves areas within the UDB from being located outside the UDB".[50] The Final Order, however, identifies none of the policies that it claims support building the Tollway outside of the UDB, and completely ignores the Tollway's conflict with the CDMP's wellfield, Everglades, farmland and transit policies. Despite the hypothetical situation where the CDMP might, under another set of facts, allow infrastructure outside the UDB, this does not support rejecting the ALJ's findings that this Tollway is inconsistent with the CDMP as a whole. "[T]he comprehensive plan as a whole, including the future land use map and all of the other policies of the plan, consists of legislative policies that must be applied to determine what uses can be made of a specific tract of

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[49] The Final Order rewrote findings 46, 48- 51, 201, 206 and 207, and rejected and deleted finding 205. R-01776, 01777: FO, pp. 48-49.

[50] R-01743, 01744: FO, pp. 15-16. 48-50.

land." *Coastal Development of North Fla., Inc. et al. v. City of Jacksonville*, 788 So. 2d 204, 209 (Fla. 2001).

Ultimately, the question of internal consistency asks, in this case, does the CDMP intend for this highway to be placed in this location? It does not - there is no fair debate. The CDMP's interpretive text explains what its various provisions ultimately mean:

> Given the fundamental influences of infrastructure and service availability on land markets and development activities, the CDMP has since its inception provided that the UDB serve **as an envelope within which public expenditures for urban infrastructure**[51] **will be confined**. In this regard, the UDB serves as an urban services boundary in addition to a land use boundary.

Id. at I-74. (emphasis added).

The *Sierra Club* order[52] cited by the Commission makes clear that the Act:

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[51] The highway is urban infrastructure, as the County admits and witnesses testified. See R-01370: County Exceptions to RO, p. 39; Tr., Mullerat, V. 2 at 318:18-19; Iler, V. 5 at 723:5-11, 739:14-21, 751:23 - 752:6; Hawkins, V. 1 at 114:16-20, 115:10-12.

[52] *Sierra Club v. Miami Dade County,* (Dept. of Comm. Affairs' Final Order No. DCA 06-GM 219 (Sept. 12, 2006)

> **"[*E]stablishes an important link between planned road infrastructure and future land use decisions.*** The future transportation map … plays a critical role in the future land use pattern of a local government, particularly with regard to roadways." *Sierra Club,* R.O. ¶104 (emphasis added)
>
> Thus:
>
> **"*Growth management laws*, *therefore*, *generally discourage the provision of roadway capacity in areas where a local comprehensive plan discourages development*."**

Sierra Club, Rec. Order ¶105 (emphasis added)

Sierra Club reveals the dramatic difference between a roadway siting decision that complies with the law and the CDMP, and the one in this case, which does not. The plan amendment there widened an existing segment of the Florida Intrastate Highway System,[53] a designated evacuation route[54] with a significant adverse "life-or-death" crash and fatality history[55] that was not in the Everglades.[56]

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[53] *Sierra Club,* Rec. Order, ¶5-6.
[54] *Sierra Club,* Rec. Order, ¶33-39.
[55] *Sierra Club,* Rec. Order, ¶7-11, 16-17, 19, 22, 24 -28, 32, 43, 79-80.
[56] *Sierra Club,* Rec. Order, ¶122.

Here, there are no "life-or-death" safety problems, and no demonstrable hurricane evacuation benefits to support building a completely new 13-mile Tollway across the Wellfield and sensitive lands. Here, the positive planning impact, if any, is limited to a "meager," six-minute improvement to a two-hour daily commute. *Sierra Club* supports the ALJ's conclusion that the Amendment is inconsistent with the CDMP and the Act.

The Final Order incorrectly deferred to the County's unreasonable theory that the CDMP contemplates a 13-mile highway through farms, wetlands, and Everglades Restoration project footprints outside of the UDB. But beyond any fair debate, regardless of whether it is deemed "development" or a "use" of land, the Tollway is "urban infrastructure" and "public expenditure[] for … infrastructure improvements" outside of the UDB "envelope within which public expenditures for urban infrastructure will be confined" into the area "where urban development … should not occur…." The Plan Amendment unquestionably contravenes the CDMP's direction that adherence with the UDB/UEA construct is "critical" to achieve the desired pattern of development for the County. The amendment

to the CDMP's Future Transportation Map, and Transportation and Future Land Use Elements is a comprehensive plan amendment that violates the Act's "internal consistency" requirement.

The ALJ did not misread the plan; the Commission did. Under §120.68(7)(d), the Court should reverse and set aside the Final Order and find the Amendment not in compliance with **§163.3177(1) and (2), Fla. Stat. because it is inconsistent with the** CDMP's goals, objectives and policies as a whole.

IV. The Tollway Amendment Violates the Data and Analysis Requirement in §163.3177(1) (f), Fla. Stat.[57]

A. The Data and Analysis Requirement

The ALJ's factual findings that (1) the County refused to analyze the Tollway's impact on Everglades wetlands and the CERP, and (2) the transportation data and analysis did not support the claimed

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[57] The Final Order erroneously proclaimed that Everglades' restoration impacts were "only relevant because of the need to maintain internal consistency with [CDMP] Policy CON-7J." R-01739, 01755: FO, pp. 11, 27. It ignored the Everglades impacts relative to the primary statutory requirement that governs comprehensive plans – the data and analysis requirements in §§163.3177(1) (f), and (6) (a) (2) and (8), Fla. Stat.

purpose of the Tollway, allow no fair debate and are fatal to the Tollway Amendment's compliance. The Amendment violates §163.3177(1) (f), Fla. Stat., which requires that plan amendments:

> "***shall be based upon relevant and appropriate data and an analysis*** …." (emphasis added)
>
> "To be based on data means:
>
> to ***react to it in an appropriate way and to the extent necessary*** indicated by the data …." Id. (emphasis added)

Naked assertions made in comprehensive plan policies are not data and analysis. In *Payne v. City of Miami*, 52 So. 3d 707 (Fla. 3d DCA 2010), this Court overturned the state's determination that comprehensive plan amendments were based upon data and analysis, rejecting the claim that any supporting expert opinion was sufficient to comply with the Act:

> "there is no competent evidence … to support her conclusory statement. [T]he only record evidence … is a one-page "analysis" …. This … document, however, performs no analysis … the conclusions reached were, instead, based on "assumptions." *Id*, p. 732.[58]

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[58] "Competent substantial evidence may not be based upon mere surmise, conjecture or speculation." *Tropical Park, Inc. v. Ratliff*, 97 So.2d 169, 177 (Fla. 1957) (Hobson, J. concurring).

"The conclusions reached," wrote this Court, "are not supported by *any* data, and the Department lists no sources for the data it allegedly relied on." *Id*, at 732.

B. The Final Order improperly reversed the ALJ's factual findings regarding the Everglades wetlands and restoration data and analysis. The County's refusal to analyze the Tollway's impact on Everglades wetlands and the CERP violates §163.3177(1) (f), Fla. Stat and the CDMP.

The ALJ found the Tollway amendment did not react appropriately to the environmental agencies' findings that the County' failed to analyze the Tollway's impact on the Everglades. R-01319: RO, p. 56, ¶212. She ruled, correctly, that the County violated the "data and analysis" mandate by deferring to subsequent environmental permitting processes. *Id.* ¶214.

The Final Order's ruling otherwise[59] violates and renders the statutory requirement a nullity.[60]

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[59] R-01752-01753: FO, pp. 24-25.

[60] "[C]ourts should avoid readings that would render part of a statute meaningless." *Unruh v. State,* 669 So.2d 242, 245 (Fla.1996).

1. The Commission improperly rejected the ALJ's findings of fact and that the County failed to analyze the Tollway's Everglades wetlands and CERP impact, as well as her conclusion of law that this violated §163.3177(1) (f), Fla. Stat.

The ALJ found that that the County refused to analyze the Tollway's impact on the Everglades[61] and adopted the Amendment anyway, explicitly deferring such analysis to subsequent environmental permitting processes and speculating that the Tollway "may" be able to be compatible with Everglades restoration.[62] She found that the Amendment violated the statute because it "did not react appropriately to the data and analysis"[63] and because it had not been shown to be consistent with CDMP Policy CON-7J, which requires the denial of applications that are "inconsistent with CERP objectives, projects or features." R-01293: RO, p. 30, ¶101.[64]

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[61] R-01294: RO, p. 31, ¶105.
[62] R-01294: RO, p. 31, ¶107.
[63] R-01295: RO, p. 32, ¶111 (emphasis added)
[64] The ALJ found the County witness's testimony on this issue "hedging at best" and contrary to the plain language of the Policy. R-01295: RO, p. 32, ¶¶109-110. The Final Order reversed both findings, replacing the ALJ's view of the witness' credibility with a finding that his unintelligible testimony "comports with the plain language of the policy…." R-01757: FO, p. 29.

The Final Order reversed these findings. It re-characterized them as a finding that "certain evidence did not exist, but the record shows that the evidence did exist, the Commission finds this finding is not supported by competent, substantial evidence." R-01749, 01750, 01753: FO, pp. 23-25.

Despite the evidence supporting the ALJ's finding, the Commission ruled that the County did support the Amendment with data and analysis about the Tollway's environmental impact[65] - the County staff report.[66] But the substance of the County's response - refusing to analyze the Tollway's environmental impact and approving the Amendment anyway - violated the statutory requirement to "***react to" the data and analysis "in an appropriate way and to the extent necessary*** indicated by the data …." §163.3177(1) (f), Fla. Stat. (emphasis added)

The substance of the County's responses to the multiple agency comments raising environmental issues was that:

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[65] R-01755: FO, p. 27.
[66] Pet. Ex. 10, pp. 8-26 through 8-30. See fn.6.

- **analysis of the anticipated impacts to wetlands and surface waters will be evaluated and documented as part of the … wetland permitting processes**. Pet. Ex. 10, Staff Report at pp. 25 – 28, 30. (emphasis added).

- Efforts to avoid and minimize wetland impacts will be made during that process. Pet. Ex. 10, Staff Report at pp. 8-26, 27, 30.

- The "feasib[ility]" of design features the project **"may be able to include"** to make it "compatible and consistent with the intent of the CERP" has not yet been determined. Pet. Ex. 10, Staff Report at pp. 25-26, 30.

- **Unavoidable wetland impacts are expected**, for which mitigation plans will be prepared in the future. Pet. Ex. 10, Staff Report pp. 8-26, 27, 30. (emphasis added).

- On-site mitigation will be pursued "to the maximum extent feasible." Pet. Ex. 10, Staff Report at p. 8-27.[67]

Not only did the County provide *no* additional analysis about the Tollway's Everglades impacts after the initial proposal of the Amendment to the state, it also worsened that impact by shifting the Tollway deeper into the Everglades. Tr., Spinelli, V. 9 at 1409:10-14, 1420:15-20; Woerner, V. 12 at 1790:8-11 -- 1792:15.

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[67] *See* n.6.

The Final Order's claim that the ALJ's finding is a conclusion of law the Commission could reject "because it determines one element of the statutory 'in compliance' standard"[68] makes a mockery of Chapter 120. Ultimate facts - mixtures of fact and law - are "conclusions of fact", within the sole province of the ALJ to make.[69]

The Commission's theory that the ALJ's findings are not supported by substantial competent evidence because of the existence of the County's "we'll get back to you later" response to the agencies is absurd and renders the data and analysis requirement meaningless.

The Final Order also sought to justify re-writing the ALJ's correct findings on this point by claiming:

> [T]he face of the District letter, which described the CERP project the amendment was being measured against, was all the data and analysis necessary to determine consistency with Policy CON-7J, particularly when coupled with the County's response to those comments and the District's lack of response.... R-01739: FO, p. 11.

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[68] R-01756: FO, p. 28.
[69] *Padron*, supra, 143 So. 3d at 1041.

This revised finding is refuted by the District's letter, which stated that the County had not provided enough information to allow it to evaluate the Tollway's compatibility with either the Bird Drive Basin or Pennsuco CERP projects,[70] explaining:

> Sufficient data and analysis to determine the final alignment of the expressway extension, potential impacts to natural resources, and potential impacts to restoration projects will be necessary. [….] The District ***cannot make recommendations to address these items until the County***:
>
> • Provides relevant environmental information and studies.
>
> • Determines the final alignment of the expressway extension.
>
> • ***Revises the remainder of the plan amendment package***, as applicable, to reflect all completed studies and the final extension alignment.

R-03376: Resp. Ex. 7, District Comment Letter, p. 4. (emphasis added).

The District and DEP comment letters were explicit that that the data and analysis did not demonstrate the Tollway would be

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[70] R-03378.

consistent with CERP, and consistency could not be determined unless the County submitted the required analysis. R-03218 - 03219: Resp. Ex. 5: DEP Comment letter, pp. 1 -2. It did not.

Based on the DEP and District comments, and the testimony of a Everglades restoration expert Dr. Chris McVoy, the ALJ found the Amendment was not based upon the relevant data and analysis about the Tollway's potential to compromise the Bird Drive Basin CERP project. R-01294 -- 01295: RO, p. 31 - 32, ¶¶107 & 111. The ALJ found that portions of the Bird Drive Basin through which the Tollway would run were the site of a planned CERP project, called "Component U", needed to serve a variety of functions for the Everglades and the County, including drinking water supply by recharging the West Wellfield, and protecting landowners in developed parts of the County from flooding from the higher restored water levels into Everglades National Park. R-01276: RO, p. 13, ¶¶37 - 41. "Because of its location relative to several other CERP projects, the Bird Drive Basin plays a critical strategic role in the overall plan for restoration of the southern Everglades" and is "relied upon as part

of the planning and operation of the other CERP projects ….” R-01276: RO, p. 13, ¶38.[71]

The Final Order however, substituted the County’s view of the evidence for that of the ALJ, making its own factual findings, based on testimony of a County witness,[72] that the District has made a final decision to use only a fraction of the Bird Drive Basin for this CERP Project. R-01740--1741: FO, pp. 12-13.

But the Final Order ignored the competent, substantial evidence that the smaller CERP Project footprint the County hopes for is merely one possible scenario currently under study, that no final formal decision under the federal – state CERP planning partnership has been made to reduce the scope of the project, and that meeting the full objectives of the original “Component U” project

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[71] The ALJ noted that the County introduced hearsay evidence “to seek to prove that the District has determined Component U to be infeasible and has instead moved toward a conveyance concept … which, ostensibly requires less property”, but “[n]o matter the size or scale of the CERP project, the District remains the agency with authority to determine whether the Plan Amendment interferes with the project. R-01293: RO, p. 30, ¶102, fn. 9.

[72] R-0739: FO, p 11.

remains the state's priority. CERP expert Dr. Chris McVoy described the project's status exactly as found by the ALJ. Tr., McVoy, V. 3 at 434:23 -- 439:20, 468:24 - 470:16, 472:22 – 473:23, 499:14 – 501:4, 501:24 – 502:20, 503:6 – 20, 506:3 – 509:21, 512:16-22.

Regardless, however, of the exact scope and size of the CERP Project the District will require of these lands, the District and DEP letters were clear that the **County had not shown the Tollway to be compatible with the even a scaled-down version of the Bird Drive Basin CERP Project.** R-01293, 1294, RO pp. 30-31 ¶104. R-03377-78: Resp. Ex. 7, District Comment Letter, pp. 5-6; R-03218: Resp. Ex. 5: FDEP Comment letter, p. 1. The District found that:

> *Sufficient* ***data and analysis to determine*** *the final alignment of the expressway extension,* ***potential impacts to natural resources, and potential impacts to restoration projects will be necessary****.* [***] ***[S]upporting environmental data and analysis was not provided."***

R-03376: Resp. Ex. 7, District Comment Letter, p. 4

Finally, the District letter, and the testimony of both party's wetland experts, make clear that **the wetlands through which the Tollway would run are important for their function as**

Everglades' wetlands, whether or not they become part of a CERP engineering project. R-03376: Resp. Ex. 7, District Comment Letter, p. 4. (addressing wetland impacts separate and apart from CERP project impacts); Tr., McVoy, V. 3 at pp. 386:8 – 387:20, 419:4 – 420:6, 438:20-439:20 (testifying that "it might make those wetlands even more important to preserve"), 442:24- 443:5; Spinelli, V.9 at 1396:25-1397:25, 1398:13-23, 1401:23-1402:18, 1433:12-22; Walsh, V. 4, pp. 549:20—550:5, 558:2-5.

The Final Order renders a nullity the statutory comprehensive plan amendment review process prescribed in §163.3177(1) (f), Fla. Stat. Under the statute, the DEP and District provide formal comments on flood protection and management, wetlands and other surface waters, regional water supply, water pollution, federal and state-owned lands and interest in lands, and Everglades restoration. §163.3184 (3) (b) (3) and (4), Fla. Stat. A plan amendment ultimately adopted without resolving the state comments is subject to being found not in compliance. §163.3184 (3), Fla. Stat. The Final Order's ruling that the County can simply ignore those agencies' findings that the County analysis did not show the Tollway to be

consistent with CERP and the protection of wetlands[73] renders their statutory role in the plan amendment process pointless.

More importantly, by approving of the County's refusal to provide the required environmental analysis, the Final Order violates §163.3177(1) (f), Fla. Stat. by allowing the County to avoid complying with its own policies simply by not analyzing available data. The Commission's ruling that the County's written refusal to consider the Tollway's impact on CERP constitutes data and analysis to support the Amendment mocks the statute.[74] That response - that it would only comply with that requirement later – and in separate permitting processes - proves the ALJ's factual and legal findings and conclusions are accurate. This "shoot first, ask questions later" approach was as if the §163.3177(1)(f), Fla. Stat. requirement that

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[73] R-01752, 01753: FO, pp. 24-25.

[74] The Final Order manufactured an illusory basis to justify its unauthorized reversal of the ALJ's findings, claiming that the County's responses to the District were adequate because the District provided no further response to the County. But follow-up state agency comments are not authorized by Chapter 163, which provides for only a single letter by commenting agencies on the proposed plan amendment. Reviewing agencies do not comment on the final adopted amendment. §163.3184 (3), Fla. Stat.

comprehensive plan amendments make the most appropriate use[75] of all land, as determined by the data and analysis - did not exist.

The Act's intent that comprehensive plans "encourage the most appropriate use of land, water, and resources, consistent with the public interest"[76] is implemented by the mandate that all plan amendment be based upon and "react appropriately" to relevant data and analysis. §163.3177(1) (f), Fla. Stat. The evidence, including the District comment – that the Amendment lacked "[a]n analysis to demonstrate the suitability of the proposed use considering the character of the undeveloped land, soils, topography, and natural resources"[77] – unresolved by the adopted Amendment – is fatal to the Final Order's ruling to the contrary.

C. The Commission improperly rejected the ALJ's factual

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[75] "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land, but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 191 (2001) (Stevens J, dissenting).
[76] §163.3161(4), Fla. Stat.
[77] R-03376: Resp. Ex. 7, District Comment Letter, p. 4.

findings that the data and analysis showing meager or non-existent traffic improvements did not support the claimed purpose of the Tollway.

The ALJ made a series of factual findings, all amply supported by the evidence including the County's own analysis, rejecting the County's claims of substantial transportation benefits from the Tollway. Blatantly disregarding the basic tenants of Chapter 120, the Commission re-wrote these findings, converting factual findings that discredited the County's justification for the Tollway into policy decisions the County is free to make regardless of the facts and law. The Final Order violated the Ch. 120 by (1) applying the "fairly debatable" standard to the factual issue of whether the County's transportation claims were accurate, (2) reversing each of the ALJ's findings.

The ALJ found:

> The purpose of the Plan Amendment is … to improve mobility in West Kendall; and to decrease the commute times to downtown and other employment centers. R-01305: RO, p. 42 ¶152.

She found "no support" in the evidence for the County's claim that the Tollway will "improv[e] the commute times to downtown and other employment centers", finding instead that the congestion

improvement in West Kendall would be "meager." R-01306: RO, at 43, ¶156. She found that the Amendment violated § 163.3177(1)(f), Fla. Stat. because it:

> is **not an appropriate reaction to ...** the **data demonstrating that the new corridor will make "meager" improvements to mobility** in the West Kendall area, and **no overall improvement in commutes from West Kendall** to downtown, the airport, or other employment and urban centers to the east and north. Likewise, the Plan Amendment is **not based on data and analysis to support use of the mass transit option** that the Plan Amendment mandates to be co-located within the new corridor. R-01319: RO, p. 56 ¶213. (emphasis added).

The ALJ found the Tollway **would result in only "minimally increased mobility in the study area"** – and **"the impact on daily traffic volumes is minor."** R-01305: RO, p. 42, ¶153. She found that the "total reduction in vehicle hours traveled ("VHT") for morning rush hour is four percent, and for evening rush hour is five percent. The average annual daily reduction in VHT is just over three percent (from 226,033 to 218,803), and an average daily increase in travel speed from 27.72 mph to 29.34 mph." She found "the greatest reduction in vehicle miles travelled ("VMT") is six percent Id., ¶154.

The ALJ found that, because the Study Area was narrowly drawn to West Kendall, the "data is silent" on whether the commute

time to downtown, the Airport or the major vehicular trip attractors "will increase, decrease or stay the same." R-01306: RO, p 43, ¶ 160. The ALJ credited testimony of transportation expert Kulash that "it was not an acceptable planning practice to have ignored origin and destination trips." R-01306: RO, p. 43 ¶159. See also, Tr., Mullerat, V. 2 at 277:09 – 280:21.

"Notably," she wrote, the Tollway "would result in an improvement … for less than half of the roadways within the study area." R-01305, 01306: RO at 42-43, ¶155.

The Commission rewrote all of these findings, substituting for them the claims of the County's witnesses, which the ALJ had rejected, and deleted the ALJ's description of the evidence showing the Tollway's meager transportation benefits. R-01761: FO, p. 33. The Final Order claimed "the ALJ overlooked the County's expert opinions, which analyzed the traffic data … and opined that the expressway 'would significantly improve traffic conditions'", reversing ¶53, claiming it was legally erroneous, and "infused with policy considerations." It rejected finding 156 for the same reason, claiming both the facts and the legal interpretations interpretation favored by

the County were "fairly debatable". R-01765, 1766: FO, pp. 37 - 38. It overturned Rec. Order ¶¶ 213-214. R-01782-1783: FO, pp. 54-55.

The error in applying the incorrect evidentiary standard was express:

> "The Commission finds that the **ALJ did not apply the 'fairly debatable standard' in assessing the evidence** regarding traffic improvement." R-01762: FO, p. 34.
>
> "[I]nstead of making a 'fairly debatable' determination, **the ALJ improperly chose the opinions of Petitioners' experts."** *Id.* (emphasis added)

The violation of the competent substantial evidence rule is also apparent from the extensive evidentiary record supporting the ALJ's findings. What the Commission characterized as the ALJ's failure to defer to the County's policy choices about whether the Tollway would provide enough traffic benefit to support its approval, was instead the ALJ making amply – supported factual findings about the lack of meaningful traffic benefits.

1. The inadequate study area that proved nothing about the commutes to Downtown Miami or other trip attractors the County claimed would be improved.

The Amendment was adopted "***only to the extent necessary*** to relieve existing traffic congestion in the southwestern parts of the

County and to provide a reliable, robust, and faster connection to Downtown Miami and other major trip attractors across the County." R-01305: RO, p. 42, ¶152 n. 14. Its stated "purpose … is … to improve mobility in West Kendall; and to decrease the commute times to downtown and other employment centers." *Id.* The ALJ's finding that the data provides "no support for finding that the Plan Amendment will accomplish its … objective [of] improving the commute times to downtown and other employment centers,"[78] was supported by extensive evidence, including the admission that **the "Traffic Study Area" excluded all of the existing** Tollway east of 97th Ave. to Downtown Miami, Miami International Airport, the Hospital District (roughly NW 14th Ave. and 12th St.), Broward County and all other **major vehicular trip attractors.**[79]

This was particularly crucial given the County transportation planner's admission that the destination for the majority of West Kendall commuters is the central business district east of 97 Avenue

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[78] R-01306: RO, p. 43 ¶ 156.
[79] Tr., Sandanasamy, V. 8 at 1238:11 – 1240:21; See also, Mullerat, V. 2 at 277:24 – 280:3; Kulash, V. 4 at 594:12- 595:5.

in Downtown Miami – the location of the bulk of their employment. Tr., Sandanasamy, V. 3 at 1239:8-12; *See also,* Sosa, V. 4 at 979:19 -23, and Kulash, V. 4 at 593:24-594:25. Since all of the major trip attracters were outside the "Traffic Study Area" County transportation planner Vinod Sandanasamy admitted the data provided no information to support a claim of improved commute times from West Kendall to the major trip attractors, all of which are outside of the Traffic Study Area. V. 8 at 1240:5- 1242:8, 1243:19 - 24.

Both party's experts agreed an "origin to destination" travel time study—analyzing travel times trip start to finish, which the County did not undertake—is a "standard practice" and it is poor transportation planning practice not to consider "origin and destination" of trips. The ALJ credited testimony from Appellants' transportation expert Juan Mullerat that "it was not an acceptable planning practice to have ignored origin and destination trips." R-01306: RO, p. 43 ¶159; Tr., Mullerat, V. 2 at 277:9 – 280:21. The County's expert concurred that destination studies are important and that without such information "we don't know … what the impact

on [commuters to downtown] will be of adding this extension to 836." Tr., Sandanasamy, V. 8 at 1240:18-1241:22. Garcia's expert Waler Kulash concurred. Tr., V. 4 at 593:24- 595:5.

Despite the evidence supporting the ALJ's findings, the Final Order reversed them, claiming they were contradicted by record evidence. R-01766: FO, p. 38. The Final Order identified no such testimony. Even if it had, the existence of competing evidence or testimony supportive of a contrary finding cannot support the reversal of an ALJ's findings of fact.

2. The Meager Transportation Benefit

The Commission's rejection and rewriting of the ALJ's findings of fact - central to the ruling that the Amendment is "not in compliance" with Ch. 163 - to reflect the County's "views'" as to the Tollway's transportation benefits,[80] violates the very fundamentals of administrative hearing law.

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[80] R-01764: FO, p. 36 (overturning RO ¶¶156, 159-160)

The ALJ's factual determination that the commuter travel time improvements would be "meager" within the West Kendall Study Area and, outside of West Kendall, unknown[81] is amply supported by competent, substantial evidence:

- Because of the artificially cabined "Traffic Study Area," the data and analysis did not demonstrate the Tollway would reduce commuting times from West Kendall to and from any major traffic destination ***at all***. Tr., Sandanasamy, V. 8 at 1238:11 – 1241:22; Mullerat, V. 2 at 277:24 – 280:3; Kulash, V. 4 at 594:12- 595:5.
- Expert traffic engineer Walter Kulash testified that the Tollway's congestion benefits within the Study Area would be "meager" – less than a single-digit percentage time savings. Tr., Kulash, V. 4 at 588:16.
- This testimony was corroborated by the County's own witnesses and exhibits - that showed ***at best*** a 6% increase in travel speed overall within the Study Area. R-04312: Resp. Ex. 14, p. 46,

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[81] R-01406: RO, p. 43 ¶156.

Table 12; Tr., Woerner, V. 12 at 1880:4-8. *See also,* Iler, V. 5 at 702:10 -703:10, 742:7.

- Even giving the County the benefit of the doubt and applying this commute time reduction all the way into Downtown Miami, the County's expert acknowledged that the sum total time savings to commuters would be ***six minutes on a two-hour round trip*** commute. Tr., Woerner, V.12 at 1878:12 -1882:3-8; R-04357: Resp. Ex. 14, p. 46 Table 12.
- Although the County claimed the Tollway was needed to remedy what it claimed was a current commute time of 3 hours, no data was introduced in support of this claim. Kulash, V. 4 at 569:2-10, 593:18-20; Woerner, V. 12 at 1872:18 -1873:5.
- Due to "induced" demand", the Tollway will likely become congested quickly with existing drivers and new drivers who are now incentivized to drive the Tollway. Tr., Hawkins, V. 1 at 54-55; Kulash, V. 4 at 603:25 – 606:17.

3. Traffic Will get Worse

The ALJ found that:

> [C]ommuters will drive 13 miles, outside of the UDB … only to connect with the existing expressway operating at

> [a level of service] lower than it operates at today." R-0307: RO, p. 44 ¶161.

The Commission deleted this finding, even though it was squarely based on the testimony of the County's own transportation planner, who admitted the Tollway would cause traffic on the existing segment of 836 between 137th Avenue and 97th Avenue to ***more than double and reduce the level of service from C to D***.[82] Tr., Sandanasamy, V. 8 at 1237:4-12. Other evidence supports this finding. Tr., Sosa, V. 7 at 1143:6-19; Woerner, V. 12 at 1885:13-1886:11, 1889:17-25; R-02248: Pet. Ex. 59 at Table 10. The County's expert explained that the Tollway "could be an inducement to some commuters to select vehicles as opposed to selecting transit." Tr., Sandanasamy, V. 8 at 1247:11-14. Thus, the Tollway would actually cause commuters on existing SR-836 to "find their travel times ***increased***." Tr., Kulash, V. 4 at 595:11-17. (emphasis added).

Yet, the Final Order sought to justify its deletions and revisions of ¶161 and n. 15 by claiming that, since the ALJ did not find that

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[82] The traffic doubling on existing SR836 might extend to Downtown, however, the Study Area did not include impacts beyond 97th Ave. *Id.*

the increases congestion on existing sections of SR 836 would violate the CDMP's minimum level of service requirement – her findings were irrelevant to any compliance issue and thus did not comply with the essential requirements of law. R-01767, 01768: FO, p. 41-42.

But that is not the point. **The County approved the Tollway "only to the extent necessary to relieve existing traffic congestion ... and to provide a ... faster connection to Downtown Miami and other major trip attractors...."** The ALJ's factual findings are that the data and analysis does not support this claim – the County's sole justification for building the tollway to the detriment of the statutory and CDMP land use, environmental and transit goals and objectives. That the Tollway won't make traffic so bad as to violate a development Level of Service Standard is irrelevant. The point is that is claimed justification is not supported by the data and analysis.

4. The Failure of the Tollway to Shift Transportation Trends to Transit

The ALJ found that the Tollway inconsistent with Plan Policy TC-4F, that:

> "The County **shall** consistently improve strategies to **facilitate a Countywide shift in travel modes** from personal automobiles, automobile use, to pedestrian, bicycle and transit modes." [83]

She found that:

> "all experts agreed that the Plan Amendment does not 'shift the travel mode' in this part of the County 'from single occupancy vehicle to mass transit.'" R-01315: RO, p. 52 ¶190.

The ALJ's finding that the Tollway Amendment – a major transportation planning decision of the type which directly and significantly implicates this policy[84] - failed to do this, is supported by competent substantial evidence,[85] including the County expert's admission that it "does not reduce dependence on the use of personal automobiles." Tr., Woerner, V. 12 at 1897:2-8.

The Final Order nevertheless reversed this finding, deeming it "fairly debatable" that the Tollway was consistent with TC-4F. R-01781: FO, p. 53. The Commission reasoned that the Tollway

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[83] R-01315, 01318: RO, p. 52 ¶190; p. 55 ¶ 208.
[84] Tr., Hawkins, V. 1 at 101:11-102:13, 107:6-8, 166:4-18; V. 2 at 244:8-13.
[85] Tr., Hawkins, V. 1 at 166:1-18; Iler, V. 5 at 744:3-8.

amendment *improved strategies* to facilitate a Countywide shift in travel modes from personal automobiles to transit modes.[86] But it did not. The ALJ also found that:

> "There is no data to determine whether the County's directive to another agency to fund and build 13 miles of mass transit service along the expressway route, will actually "**promote mass transit use,"** as required by the Plan." R-01315: RO p. 52 ¶189. (emphasis added).

She found the County witnesses' testimony to the contrary "not credible", and that the analysis he referred to "was never made." Id.

The Commission impermissibly re-wrote this finding, claiming it was inconsistent with another finding by the ALJ, which the Final Order misrepresented. The Commission claimed the "ALJ recognized that the evidence showed that the Plan Amendment is consistent with CDMP policies to 'promote mass transit'".[87] The ALJ, however, actually found:

> "the Plan Amendment is not supported by data and analysis to determine whether it is internally consistent with the cited goals and policies." R-01322: RO p. 59 ¶191.

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[86] R-01772-1773: FO, p. 44-45.
[87] R-01771: FO, p. 43. (referring to RO ¶191)

The ALJ found the County produced no data and analysis to demonstrate consistency with the mass transit policies. The Commission's unsupported rewrite of the ALJ's ruling that the Amendment violates the statutory data and analysis requirement into a finding of compliance with the mass transit policies fails. Its claims that the existence of any admitted evidence supporting the County's version of the facts means the issue is fairly debatable and requires a ruling in favor of the County, and that the finding is really a conclusion of law,[88] fail for the reasons explained above.

The Commission's rewriting of the ALJ's finding that the evidence failed to prove the Amendment promoted mass transit – amply supported by competent substantial evidence – to find that it did[89] cannot withstand the existence of the following competent substantial record evidence:

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[88] *Id.*
[89] R-01772: FO, p. 44.

- No data or analysis exists to show the Tollway will have any value as a transit corridor. Tr., Kulash, V. 4 at 617:9-618:22; Mullerat, V. 2 at 293:3-9.
- Given the location outside the UDB, in wetlands and farmland, far from transit users from homes or commercial centers, it is "farcical" to expect a bus route or any other transit mode on a six-lane toll road meant primarily to support single-vehicle travel, to be meaningful. Tr., Hawkins, V. 1 at 118:3-10, 160:9-161:5 – 162:7, 170:21 – 171:7, 203:15-21, 205:18-22; Kulash, V. 4 at 618:2-18; Mullerat, V. 2 at 246:6 - 19, 351:9-19.
- The Tollway's location and design negate it as a functional transit corridor; commuters would have to first drive west, outside the UDB, use a Park and Ride facility, then take a bus north and then ultimately back east to any actual functional stops. Tr., Hawkins, V. 1 at 160:9 – 162:7.
- The data and analysis of a transit alternative to meet the County's mobility needs was so meager as to be an "afterthought." Tr., Hawkins, V. 1 at 108:8-18, 164:13-16.

- The Amendment's references to an "intermodal path" and dedicated bus lanes along the Tollway are supported by no ridership, use or viability analysis. Tr., Mullerat, V. 2 at 293:3-9; Tr., Hawkins, V. 1 at 210:2-211:11.
- No data and analysis projects any amount of vehicular trips that would be converted to transit or explains how the purported dedicated bus lanes would connect to mass transit on existing segments of SR 836. Tr., Hawkins, V. 1 at 210:2-211:11.
- The data and analysis was overwhelmingly and narrowly focused on determining the specific alignment for a connection for the existing Tollway; It was not about how best to meet the County's mobility needs consistent with the CDMP's priority of transit. Tr., Hawkins. V. 1 at 108:10-21; Mullerat, V. 2 at 244:4-22; Kulash, Vol. 4 at 617:9-13.
- The Tollway's engineering and environmental study stated its primary purpose was to analyze a corridor for a new extension of the existing SR 836. Tr., Sosa, V. 7 at 1099:20-1100:13; R-04964: Resp. Ex. 38: (Draft, Prelim. Engineering Report)

- The Tollway will be a facility for personal vehicles by an expressway authority whose funding source is vehicular tolls. Tr., Woerner, V. 8 at 1898:2-16 Kulash, V. 4 at 606:18 - 607:5, 608:15-18.

The ALJ read and applied the policy to the evidence correctly. There was no basis for the Commission to rule that a contrary interpretation is as or more reasonable, and the ALJ's underlying factual finding is based on competent substantial evidence.

5. The Evacuation Improvement Claim

The Commission made its own finding of fact – devoid of any evidentiary support - that the Tollway would improve hurricane evacuation times. R-01759: FO, p. 31. The ALJ's determination otherwise, however, was supported by the following testimony of the County's expert planning witness:

a. He could only speculate the Tollway might one day serve as a "potential" evacuation route. Tr., Woerner, V. 12 at 1904:20-23; Pet. Ex 10, at p. 2.[90]

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[90] See fn. 3.

b. Anyone evacuating to West Kendall would drive from the east, not the west where the Tollway extension would lie. Any coastal evacuees would drive north on I-95 or the Turnpike (not this Tollway, which would lie to the west of those facilities). Evacuees from the west would use Krome Avenue which connects directly to US-27 which funnels traffic north to avoid high density areas. Tr., Woerner, V. 12 at 1905:4 – 1907:12; *see also*, Tr., Mullerat V. 2 at 260:1-23.

c. The data and analysis documents not a single minute of evacuation time improvement. Tr., Woerner, V. 12 at 1907:13 – 1908:15.

The Final Order's manufactured finding that the Tollway will improve hurricane evacuation is invalid.

6. Transportation Final Analysis

In clear contravention of unambiguous statutory and caselaw, the Commission sought to justify its reversal of the ALJ's findings

about the Tollway's "meager" transportation benefits[91] by citing to testimony presented by the County but rejected by the ALJ:[92]

> "The County presented evidence that commute times would improve and thus the 'fairly debatable' standard required the ALJ to assess whether the evidence regarding commute times was fairly debatable. But instead of making a 'fairly debatable' finding, the ALJ simply agreed with [Appellants] expert opinions. The Commission therefor finds that the ALJ did not apply the 'fairly debatable' standard in assessing the evidence regarding commute times. Consequently, the ALJ's findings regarding commute times were not based on proceedings that complied with the essential requirements of law. R-01766: FO, p. 38.

Without legal citation, the Commission ruled that "the ALJ improperly rendered her own policy opinion about the traffic improvements rather than subject the data and analysis to the 'fairly debatable' standard." R-01763: FO, p. 35. "By overlooking the evidence entirely, without affirmatively finding that it was inadmissible or lacked credibility, the ALJ overlooked admitted

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[91] Findings 156, 159 and 160.

[92] R-01767 - 01768: FO, pp. 39-40. The egregious nature of the Final Order's substitution of its view of the evidence and credibility of the witnesses is evident in the deletion of the word "credibly" from the ALJ's finding of fact 159 - describing the testimony of Garcia's expert witness Juan Mullerat. R-01768: FO, p. 40.

evidence that directly addresses the 'fairly debatable' standard." *Id.* The Final Order sought to bolster its rejection of the ALJ's findings by claiming that "the ALJ did not find any of th[e County's] evidence to be inadmissible or to lack credibility." R-01762: FO, p. 34.

These rulings - supported by no authority - are frivolous, contrary to the legal axiom that the mere admission of evidence into the record does not require a judge to agree with the proponent's view of what facts flow from that evidence, as the judge may reject that testimony on favor of contrary admitted testimony she deems more weighty or credible. *Gross v. Department of Health*, 819 So.2d 997 (Fla. 5th DCA 2002)(reversing agency rejection of an ALJ's factual findings that credited the testimony of one testifying expert over that of a contrary expert). That evidence is admitted into the record obviously does not mean it must be credited by the trier of fact.

Second, as explained above, Chapter 120 unambiguously allocates the authority to the decide the facts to an ALJ under the preponderance of the evidence standard and makes those findings mandatory on the Agency issuing the Final Order.

The Final Order claimed that the ALJ's findings about the meager transportation benefits of the Tollway were policy decisions by the County to which the ALJ was required to defer. R-01763: FO, p. 35. It also claimed the ALJ's findings regarding the Tollway's actual impact on commute time were conclusions of law because they "determine one element of the statutory 'in compliance' standard." R-01766: FO, p. 38. See also R-01767 - 01768: FO, pp. 39-40.

They were, however, unmistakably findings of fact.

On the strength of these egregious violations of Chapter 120, despite the ALJ's express findings of fact to the contrary, the Final Order decided the facts were that (1) there was a fair debate as to the extent of the transportation improvements the Tollway would bring,[93] (2) the positive impacts were "significant" and the negative impacts "insignificant",[94] and (3) the County analysis demonstrated improved commute times from West Kendall to employment centers.[95]

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[93] R-01786: FO, p. 40 (re-writing finding of fact 156).
[94] *Id.* (re-writing finding of fact 159).
[95] R-01769: FO, p. 41 (re-writing finding of fact 160).

But the ALJ found the testimony of the Garcia's experts more credible, reliable and true than that of the County's witnesses. Such is the classic, exclusive role of the trier of fact in a formal administrative hearing. What the Commission characterized as the ALJ' inappropriately making policy was instead fact finding that the data and analysis did not support the County's claims that the Tollway would ease congestion and provide faster commutes into Miami. The County failed to prove at trial what it convinced the Commission to say was proven.

7. Data and Analysis Conclusion

Once submitted to the scrutiny of a formal administrative hearing, the County's claims about the purpose and benefit of the Tollway and its compatibility with environmental and drinking water protection were found by the ALJ to lack support in the preponderance of evidence, which instead supported contrary findings. The Final Order's rejection of the Recommended Order was a material error in procedure, inconsistent with prior agency practice, and inconsistent with the comprehensive plan data and analysis requirement in §163.3177(1)(f) (1), Fla. Stat. Under §120.68 (7) (c),

(d) and (e) 4, Fla. Stat., the Court should set aside the Final Order and find the Tollway Amendment not in compliance.

CONCLUSION

There is no fair debate – no reasonable argument – that Ch. 163 and the County's own Plan (the CDMP) contemplate the construction of this 13-mile long highway, with this meager benefit on mobility, outside of the County's strict Urban Development (and services) Boundary through the West Wellfield, an urban expansion area, protected farmland and the very Everglades wetlands Florida has prioritized for restoration. Because the Recommended Order's findings of fact were supported by competent substantial evidence, and proved that the Amendment violated the Act's "internal consistency" and "data and analysis" requirements, under § 120.68(7) (c), (d) and (e), Fla. Stat., the Court should reverse the Final Order, and rule that the Plan Amendments are "not in compliance".

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellants' Brief has been furnished by the Florida Courts e-filing Portal pursuant to Fla. R. Jud. Admin. 2.516(b)(1), this 28th day of March, 2022, upon the following:

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I HEREBY CERTIFY that this brief was prepared in Old Bookman Style, 14-point font, and contains 16,505 words, in compliance with the Florida Rules of Appellate Procedure.

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