STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

1000 FRIENDS OF FLORIDA, INC. and AUDUBON SOCIETY OF THE EVERGLADES, INC.,	)	
Petitioners,	)	
vs.	)	Case No. 01-0781GM
DEPARTMENT OF COMMUNITY AFFAIRS and THE VILLAGE OF WELLINGTON,	)	
Respondents,	)	
and	)	
PALM BEACH POLO HOLDINGS, INC.,	)	
Intervenor.	)	

RECOMMENDED ORDER

On June 12-15, 2001, an administrative hearing was held in this case in Wellington, Florida, before J. Lawrence Johnston, Administrative Law Judge (ALJ), Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether the Future Land Use Map (FLUM) Amendment, LUPA1-2000/04, adopted by the Village of Wellington (Village) on December 12, 2000, by ordinance numbers 2000-27, 2000-30, 2000-31, is "in compliance" as defined in and required by the "Local Government Comprehensive Planning and Land Development Regulation Act," Chapter 163, Part II, Florida Statutes (the Act).

PRELIMINARY STATEMENT

After review by the Department of Community Affairs (DCA), the Village's FLUM Amendment was determined to be "in compliance." DCA published a Notice of Intent to find the amendment in compliance on February 7, 2001.

On February 12, 2001, 1000 Friends of Florida (Friends) and Audubon Society of the Everglades, Inc. (Audubon) filed a Petition for Formal Administrative Hearing (Petition) under Section 163.3184(9). (All citations to sections are to the 2000 codification of the Florida Statutes; all rule citations are to the current Florida Administrative Code.) DCA referred

the Petition to DOAH under Section 120.57(1). At DOAH, it was given Case No. 01-0781GM and assigned to the undersigned ALJ; an Initial Order was entered on February 27, 2001.

On March 5, 2001, the Village filed a Motion to Dismiss Petition for Formal Administrative Proceedings for Lack of Standing (Motion to Dismiss). The Village and DCA also responded to the Initial Order, and Petitioners filed a Demand for Expeditious Resolution under Section 163.3189(3).

With the consent of all parties, a hearing was scheduled on the Motion to Dismiss for March 13, 2001. On March 13, 2001, Petitioners also filed a Motion for Protective Order (not to be required to disclose the identity of their members), and the parties consented to consideration of Petitioners' Motion for Protective Order at the hearing.

After oral argument, the parties requested and were given the opportunity to file additional authorities and argument, which were filed by DCA and the Village. After consideration of all written and oral argument, the Motion to Dismiss was granted with leave to amend. It was ruled: (1) the Petition did not allege that either Friends or Audubon, as individual entities, met the definition of "affected person" in Section 163.3184(1)(a); and (2) if an association itself does not meet the definition of "affected person" in Section 163.3184(1)(a), it must prove that a substantial number of its members do, as

suggested by Florida Home Builders Ass'n v. Dept. of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982), in order to prove "associational standing." Petitioners' Motion for Protective Order was granted under National Rifle Association of America, Inc. v. City of South Miami, 774 So. 2d 815 (Fla. 3d DCA 2000), with National Rifle's caveat that Petitioners might not be able to prove "associational" standing if they refused to disclose at least enough information both to prove essential standing allegations and to allow their adversaries to test the truthfulness of those allegations.

Scheduling of final hearing also was discussed at the hearing on March 13, 2001. Petitioners withdrew their Demand for Expeditious Resolution, and the parties agreed to final hearing in Wellington, Florida, on May 8-11, 2001. Separate Notice of Hearing and Order of Pre-hearing Instructions were issued on March 20, 2001.

On April 5, 2001, Palm Beach Polo Holdings, Inc. (Polo) filed a Petition for Leave to Intervene, which was granted.

On April 12, 2001, the Village filed an Unopposed Motion for Continuance, and Petitioners filed their First Amended Petition on April 16, 2001. Final hearing was rescheduled for June 12-14, 2001.

On May 24, 2001, the Village filed a Motion to Dismiss or Motion for Summary Final Order Based on Lack of Standing, and

DCA filed a response in support. The Motion to Dismiss or Motion for Summary Final Order for Lack of Standing argued that Petitioners' claims to "associational" standing should be dismissed because they still refused to disclose the identity of their members and that Petitioners' claims to individual standing should be dismissed because Petitioners could not establish ownership or operation of a business within the Village (or the other requirements under Section 163.3184(1)(a) of "owning property" or "residing" in the Village). Petitioners filed a response in opposition.

The Village, DCA, and Polo also filed a Joint Motion in Limine on May 31, 2001. The Joint Motion in Limine requested exclusion of evidence or testimony relating to consistency or compliance with the environmental permitting standards and criteria of the South Florida Water Management District (SFWMD). Petitioners filed a response in opposition, citing Section 163.3177(6)(d) (stating that the land uses identified on the land use map or map series contained in the future land use element "shall be consistent with applicable state law and rules.")

The Motion to Dismiss or Motion for Summary Final Order for Lack of Standing was heard on June 1, 2001, and taken under advisement. The Village then scheduled a hearing on the Joint Motion in Limine and a pre-hearing conference for

June 7, 2001. In addition, the Village and Polo filed a Motion in Limine Regarding Petitioners' Associational Standing or Alternative Motion for Continuance, Motion to Compel Discovery and/or Motion to Dismiss as to Associational Standing on June 6, 2001, and requested that it also be heard on June 7, 2001. Petitioners filed a response in opposition to this last motion at the hearing and pre-hearing conference on June 7, 2001; in part, the response offered as a compromise to provide redacted lists showing mailing addresses with zip codes corresponding to the Village but not disclosing street numbers or otherwise identifying the addresses.

At the hearing and pre-hearing conference on June 7, 2001, ruling on the Motion to Dismiss or Motion for Summary Final Order for Lack of Standing was announced. The motion was granted as to "associational" standing for two reasons: (1) the undisputed evidence was that no member of either Friends or Audubon "submitted oral or written comments, recommendations, or objections" so as to be "affected persons" under Section 163.3184(1)(a); and (2) notwithstanding their offer to provide redacted mailing lists, Petitioners still refused to identify their members. (Petitioners were given the opportunity to proffer their redacted lists as exhibits at final hearing.) As a result of this ruling, the Motion in Limine Regarding Petitioners' Associational Standing or

Alternative Motion for Continuance, Motion to Compel Discovery and/or Motion to Dismiss as to Associational Standing became moot. The motion was denied as to individual standing because summary disposition was not appropriate as to that issue.

After argument at the hearing on June 7, 2001, the Joint Motion in Limine was denied but it was ruled that Section 163.3177(6)(d) did not require consistency of the FLUM Amendment with SFWMD standards, criteria, and permits. (It also was ruled that Section 163.3177(6)(d) might have application if, for example, a state law or rule prohibited a residential land use designation for land containing wetlands or if a comprehensive plan amendment defined wetlands or a wetland value contrary to state law or rule; but no such issues were raised in this case.)

At the pre-hearing conference on June 7, 2001, it was indicated that an additional day of hearing may be necessary, and June 15, 2001, was added to the final hearing calendar. The parties' Pre-hearing Stipulation was filed later on June 7, 2001.

At final hearing, the rulings announced on June 7, 2001, were confirmed and clarified. After opening statements, Joint Exhibits 1-3 were admitted in evidence, and Petitioners presented the testimony of: Terri Bates, who testified as an expert in environmental resource permitting, surface water

management permitting, dredge and fill permitting, and wetlands ecology; Helge Swanson, who testified as an expert in comprehensive planning, environmental planning and permitting, and environmental permitting; Charles Pattison, AICP, Executive Director of Friends, who testified as an expert in comprehensive planning and testified about the standing of Friends; and Rosa Durando, who testified as a lay person about the history of the subject of the FLUM Amendment and about Audubon's standing. Petitioners also had the following Petitioners' Exhibits admitted in evidence: 7-12; 14; 17-18; 20-26; 28-32; 34-45; 47-49; 52; 54-58; 64-65; 69; 74(A-B)-75; 86B; and 94(A-B)-95. (Objections to Petitioners' Exhibits 53, 76, 85, 86A, and 87-89 were sustained; ruling was reserved on objections to Petitioners' Exhibits 79-84 pending post-hearing written argument.) The Village called: Russell Scott, who testified as an expert in land use planning and regulation; Jay Foy, P.E., who testified as an expert in civil engineering; Jim Hudgens, who testified as an expert in environmental assessment, natural resource documentation and analysis, and environmental resource permitting; Robert Higgins, P.E., who testified as an expert in water resources engineering, hydrology, and hydraulic water quality; and James R. Kuzdas, the Village's Planning, Zoning, and Building Director from July 1997 to February 2001. The Village also

had Village Exhibits 5, 15, 17-23, and 31-33 admitted in evidence. DCA called Roger Wilburn, who testified as an expert in comprehensive planning and compliance review under the Act.

After presentation of evidence, the parties ordered a transcript of final hearing and requested 30 days from the filing of the transcript to file proposed recommended orders (PROs). The Transcript was filed on July 25, 2001, making PROs due August 24, 2001, but DCA moved without objection for an extension until August 31, 2001, which was granted. All parties filed PROs, and all PROs have been considered.

In addition, consideration has been given to the post-hearing written arguments on the objections to admissibility of Petitioners' Exhibits 79-84, and it is now ruled that those objections are sustained.

Finally, the Village and Polo made an ore tenus motion at final hearing to strike certain testimony by Rosa Durando as not having been disclosed in Audubon's answers to interrogatories and in her deposition. Some of the testimony is stricken and will not result in findings; but, as reflected in the Findings of Fact, the motion to strike is denied as to other testimony falling within the general categories "monitoring planning and development activities within the Village" and "monitoring environmental permitting before

[SFWMD] that involve development in Wellington," and not narrowed during Durando's deposition.

FINDINGS OF FACT

The Parties

1. DCA is the agency of the State of Florida charged with responsibility to review local government comprehensive plans and amendments under Part II, Chapter 163, Florida Statutes.

2. The Village is a municipal corporation located within Palm Beach County. It was not incorporated on December 31, 1995. However, its Village Council sits as the governing board of the ACME Improvement (Drainage) District, which has essentially the same geographic boundaries as the Village and has been in existence since the mid-1970's. It adopted the FLUM Amendment that is the subject of these proceedings. The Village is bordered on the south by the Arthur R. Marshall Loxahatchee National Wildlife Refuge (Refuge), which is part of the Florida Everglades.

3. Polo has a deed to the property subject to the FLUM Amendment.

4. Friends is a Florida not-for-profit corporation. The corporate purpose of Friends includes monitoring and ensuring the proper implementation of the State's growth management

laws. In Palm Beach County in particular, that would include protection of the Refuge and the Everglades.

5. Audubon is a Florida not-for-profit corporation. It is legally distinct from but affiliated with the statewide Audubon of Florida and the National Audubon Society. The corporate purpose of Audubon is to promote the understanding of and interest in wildlife and the environment that supports it and to further the cause of conservation of all natural resources. In particular, like Friends, that also would include protection of the Refuge and the Everglades.

Friends' Standing--"Business" in the Village

6. In 1995, Friends established the Loxahatchee Greenways Initiative, which was a planning effort to show how greenways and habitat protection were compatible with growth. The Initiative produced a publication called the Loxahatchee Greenway Project. While the Village of Wellington was incorporated after the date of the publication, the study area for the Greenways Project included lands adjacent to and within the current Village boundaries. While land now within the Village was not a "major component" of the Project, the Project contained a recommendation to link conservation lands located to the north of the Village with the Refuge, which is located on its southern border.

7. In 1999, Friends opened an office in West Palm Beach and hired a community planner, Joanne Davis, to further another planning initiative called the Palm Beach County Green Initiative. The primary focus of this Initiative was to look at the impacts of development on the Everglades and to promote education and advocacy on these issues in Palm Beach County, including the Village.

8. To further the purposes of the Green Initiative, Friends prepared and distributed several publications throughout Palm Beach County, including the Village. These publications included a pamphlet called "The Citizens Guide to Smarter Growth in Palm Beach County." This document was intended to educate people throughout Palm Beach County, including the Village, on the values of better planning for growth to protect the environment. It listed the Village as one of the cities in Palm Beach County and was made available throughout the County's library system.

9. Another educational publication of the Initiative was a newspaper insert in the Sunday edition of the Palm Beach Post entitled "Smart Growth Building Better Communities and Protecting the Environment in Palm Beach County," which was distributed throughout the County, including in the Village. Both of these publications were intended to educate people in Palm Beach County, including in the Village, about development

and its impacts on the Everglades and to promote appropriate planning, which issues are central to the issues in this proceeding.

10. Friends' Palm Beach County Green Initiative and local office are funded in part by private foundation grants. The purpose of these grants includes education and advocacy on issues related to development in Palm Beach County and the Everglades. The goal of these grants is to encourage better development in the area, which includes the Village, so as to better protect the Everglades. Friends must report to these foundations on the progress toward achieving the goals of the grants. Friends could lose financial support if it fails to meet the goals of these grants. However, there was no evidence of any fund-raising activities with the Village. (No more than 7 of Friends' 3,631 members have mailing addresses in the Village.)

11. Friends' employees have participated to a limited extent in planning and development activities other than the FLUM Amendment at issue in this case. The evidence was that employees of Friends monitored and participated in at least one meeting and one site visit relating to Big Blue Trace, another tract of land designated Conservation on the Village's FLUM. Friend's participation was in response to concerns about a change to the FLUM designation of Big Blue Trace.

Friends ascertained from its participation that no change was being considered by the Village. Friends also participated to a limited extent in monitoring efforts by various governments in collaboration to purchase Section 34, which is within the Village, as part of a plan to resolve the Village's drainage problem--a problem involved in FLUM Amendment in this case. It is not clear from the evidence whether employees of Friends attended the public auction on Section 34 held in the Village.

12. Friends' local community planner, Joanne Davis, also monitors and attends meetings regarding the Comprehensive Everglades Restoration Plan (CERP), which is a joint state and federal process to restore the Everglades. While these meetings are not held in the Village, CERP specifically addresses, among other things, the activities of the Village's drainage district, ACME, and calls for the use of Section 34 as an attenuation area for a storm water treatment area (STA) for storm water leaving the Village before it gets into the Refuge.

13. Friends was very involved in the FLUM Amendment at issue in this case. Besides submitting oral and written comments to the Village during the time between the transmittal hearing and the adoption hearing, three employees of Friends met with the Village's City Manager before the amendment was adopted. Friends' Executive Director, Charles

Pattison, wrote two letters to the Village regarding the Amendment before it was adopted, one to the City Manager and the other to the Mayor. Both of these persons responded in writing to Pattison before the Amendment was adopted.

14. Counsel for the Village elicited testimony from Pattison that Friends did not feel constrained, inhibited, or prevented from conducting its business by the Village's comprehensive plan. But it potentially could be. For example, the comprehensive plan potentially could be written to limit public participation, which is essential to conduct of Friends' business. It also potentially could be written so as to plan poorly and damage the environment, which could have an adverse effect on Friends' membership and financial support.

Audubon's Standing--"Business" in the Village

15. Audubon was incorporated in 1966. As its name suggests, its focus is the Everglades; in particular, it focuses on the nearby Refuge. National Audubon has designated the local chapter as official "Refuge Keeper" of the Refuge. The group's mascot is the Everglades Kite, an endangered species known to use the Refuge and, for at least a time in the 1980's, the land subject to the FLUM Amendment.

16. Audubon does not have an office or mailing address in the Village. It receives mail at a post office box in West Palm Beach.

17. Due to the focus of its concern, the group has always been concerned about drainage of wetlands west of State Road (SR) 7 into the Refuge and the discharge of water east to tide, which is a loss of both estuarine and wetland habitat. The Village is located in this area of concern.

18. In her capacity as Chairman of the Conservation Committee since 1980, Rosa Durando has attended hundreds of meetings on permitting activities at the South Florida Water Management District (SFWMD) and on land use issues before local governments over the years to promote concern for wetlands and the Everglades. Some of these involved activities in the area now within the boundaries of the Village.

19. In her capacity as Chairman of Audubon's Conservation Committee, Durando was involved in the original adoption of the Palm Beach County comprehensive plan, which governed the lands within the Village until its incorporation. She questioned the extension of Forest Hill Boulevard west of SR 7. (After the extension took effect, SR 7 became the main road access into the Village from the east. After development

in what is now the Village, Durando was on a panel that discussed whether the Village should incorporate.

20. Durando also reviewed and commented on Palm Beach County's plans to widen SR 7, which is a major north-south road through the east side of the Village. In the SR 7 Corridor Study which has been conducted in the last two or three years, Durando represented Audubon and made presentations to the Village and other agencies.

21. Other land use issues Durando monitored for Audubon included the Northlake Corridor study, which was proposed to relieve traffic on SR 7. She opposed the creation of a Constrained Roadway At Lower Level of Service (CRALLS) designation--a type of traffic concurrency exemption--for Forest Hill Boulevard.

22. When the Village adopted its initial comprehensive plan in 2000, Durando testified on behalf of Audubon in support of the Village's placing a conservation designation the land subject to the FLUM Amendment in this case. She also reviewed and commented on proposals to adopt best management practices for treating storm water in the Village.

23. On behalf of Audubon, Durando reviewed and made comments on the Western C-51 basin study by SFWMD related to wetlands and drainage issues. The C-51 is a major canal that borders the Village to the north. The canal runs from Lake

Okeechobee to the Lake Worth Lagoon. The northern part of the Village, called Basin A, drains into the C-51. While the Village did not exist at time, its drainage district, ACME, existed and was involved in this study.

24. Durando also attended meetings and made presentations to SFWMD on the Lower East Coast Water Supply Authority and proposals for the Water Preserve Areas designed to buffer the Refuge and the Everglades. Durando's presentations raised concerns over the Village's drainage problems in Basin B, which drains the southern half of the Village into the Refuge.

25. In 1979, Audubon challenged a permit issued by SFWMD to ACME to drain 900 acres of land in what is now Basin B of the Village for a development called the Wellington Country Place PUD. SFWMD, ACME, and Audubon settled the administrative challenge by agreeing to enlarge the proposed storm water detention area of the proposed water management system from 49 to 79 acres to increase protection of the Refuge from storm water runoff leaving the PUD. These 79 acres constitute virtually all of the very land that is subject to the FLUM Amendment in this case.

26. In the early 1980's, Dr. and Mrs. Peacock, who were members of Audubon and residents of what is now the Village, discovered endangered Everglades (a/k/a Snail) Kites using the

Wellington Country Place detention area. Subsequently, Audubon organized field trips to Peacock Pond during the 1980s to do bird watching. The detention area came to be known locally and among Audubon members as Peacock Pond. Durando personally visited Peacock Pond for bird-watching on several occasions in those years. She was there when environmental specialists for the US Fish and Wildlife Service and SFWMD visited the site and noted its importance as habitat for the Snail Kite. (As will be seen, events since approximately 1989 have led to dewatering of the area and degradation of its usefulness as habitat for Snail Kite and other wildlife, and bird-watching no longer takes place there. See Findings of Fact 49 and 66-67, infra. Nonetheless, the land still is often referred to as Peacock Pond.)

27. About two years ago, Audubon was asked to make a presentation to the Boys and Girls Club, which is located in the Village adjacent to Peacock Pond. Durando responded and specifically discussed Peacock Pond. She also showed photographs of the area and discussed the value of wetlands.

28. Audubon is supported with donations, grants, and membership dues to further the organization's work on behalf of the Everglades and on land development issues in the Village. Some of this money comes from people in the Village. There is a financial connection between the organization and

the land use decisions of the Village. While there was no direct evidence of fund-raising activities with the Village, there was evidence that Audubon could lose financial support if it fails to meet its goals to protect the Refuge.

29. Durando attended the Village's transmittal and adoption hearings on the FLUM Amendment on behalf of Audubon and spoke against the Amendment. At those hearings, she told the Village about the SFWMD permitting history of Peacock Pond and discussed its use and importance to Snail Kites.

30. Counsel for the Village also elicited testimony from Durando that Audubon did not feel constrained, inhibited or prevented from conducting its business by the Village's comprehensive plan. But, as with Friends' business, it potentially could be--e.g., by limiting public participation, damaging the environment, or otherwise planning poorly. See Finding of Fact 14, supra.

The Planning and Zoning History

31. The FLUM Amendment applies to 80 acres, essentially Peacock Pond, which is centrally located in the 960-acre Wellington Country Place PUD. The PUD was created in 1976 when Palm Beach County rezoned the PUD to RE-Residential Estate District. This zoning classification has remained in effect on the entire PUD through final hearing in this case.

32. In 1977, Palm Beach County approved the Wellington

Country Place PUD Master Plan. The approved Master Plan includes 440 dwelling units with a gross density of 0.44 units per acre, plus equestrian recreation, civic, and commercial uses. It also designated Peacock Pond as a "Natural Reserve," which was included in the "open space" calculations for the PUD.

33. Now, almost 25 years later, the PUD is about half built-out, with about 200 units left to be built. Within the PUD, Mallot Hill subdivision, a residential estate development, is located north of Peacock Pond. To the north and northeast of the Pond is a park, the Boys and Girls Club, and a fire station. Equestrian Club Estates is located to the west of the Pond. Undeveloped portions of the PUD are located to the east and south of Peacock Pond.

34. Under the 1980 Palm Beach County Comprehensive Plan, the entire Wellington Country Place PUD was designated very low to low residential. In 1989, the County adopted a revised Comprehensive Plan, as required by the Act. The 1989 County Comprehensive Plan applied a future land use classification of Low Residential-1 (a maximum 1 unit per acre) to the entire PUD site.

35. In 1999, the Village adopted its Comprehensive Plan, as required by the Act. The Village Plan designated the Peacock Pond site as Conservation and the remainder of the

Country Place PUD as Residential. Under the Conservation future land use classification, parks and ball fields are permitted uses, and building coverage of 5 percent is allowed. The Peacock Pond property was not required to be operated as a storm water facility. The entire PUD, including the Peacock Pond property, is within the urban service area designated in the Village's Comprehensive Plan.

36. Data and analysis in the Land Use Element of the Village's 1999 plan referred to Peacock Pond as one of the "two primary sites designated conservation in the Village." Data and analysis also referenced the phosphorus reduction goals of the Everglades Forever Act and discussed the need for "a plan for handling water quality and water quantity concerns in Basin B."

37. Data and analysis in the Recreation and Open Space Element of the 1999 plan stated that Peacock Pond "continues to boast habitat for listed species and . . . could be a great resource if restored."

38. Data and analysis in the Conservation Element of the Village's 1999 comprehensive plan recognized Peacock Pond's importance for wildlife and storm water treatment. Data and analysis referred to Peacock Pond as a "Significant Wellington Wetland and Preserve Area". Data and analysis at page CON 6 noted that Peacock Pond was established primarily for water

quality treatment, and concluded by stating: "The Village is concerned with finding a long term solution to the problems at Peacock Pond so that it may be restored as a viable wetland reserve and become an integral part of Wellington’s natural areas."

39. On the Conservation Map and Natural Resource Map in the Conservation Element, the site was labeled "Peacock Pond Natural Reserve." However, the map legend identified site as "Wetlands/Possible Wetlands" on the Conservation Map and as "Emergent Wetlands" on the Natural Resource Map. In addition, neither the data and analysis nor the Goals, Objectives, and Policies (GOP's) define "natural reserve."

40. On the Future Equestrian Circulation Map in the Equestrian Preservation Element of the Village's 1999 plan, Peacock Pond is labeled "Natural Preserve," and the map legend identifies it as "Parks natural preserves." Neither the data and analysis nor the GOP's define either of these terms.

41. On December 12, 2000, the Village adopted Ordinance No. 2000-27 which amended the Future Land Use Map of the Village Comprehensive Plan to designate the Peacock Pond site as "Residential B," which allows a maximum density of 1 unit per acre. Surface water management facilities are allowed in the residential future land use classifications of the Village's Comprehensive Plan and would be allowed on the

Peacock Pond site if the Amendment becomes effective. In addition, under the Village's zoning regulations, storm water management facilities are allowed and even required in residential zoning districts.

42. The 2000 FLUM Amendment also deleted the data and analysis referred to in Findings of Fact 36-38, supra, and replaced them with updated data and analysis. The FLUM Amendment did not, however, amend the maps identified in Findings of Fact 39-40, supra.

Permitting and Operation of Peacock Pond Facility

43. The evidence was that, at one time, Peacock Pond was part of one of the many headwaters of the Everglades. Having been both topographically and hydrologically connected to the Everglades, its soils are hydric--largely Okeelanta muck (approximately 75%), Tequesta muck, and Sanibel muck soils. Aerial photography suggests that, at some point, horticulture may have been attempted at Peacock Pond, as it was elsewhere in the vicinity. There are possible faint signs past perimeter and ditching on the site. However, if horticulture was attempted at the site, it was discontinued and abandoned well before 1965, quite possibly failing due to the muck soils.

44. There was more persistent horticultural use north, east, and south of Peacock Pond, with attendant perimeter and

infield ditching; in addition, ACME dug a drainage canal along the western boundary of the site by 1965. The Peacock Pond site was altered from natural conditions by these activities.

45. Notwithstanding the agricultural history in the vicinity, the evidence indicates that Peacock Pond continued to function as a wet prairie through 1979, and aerial photography suggests that the site may have been used for open pasture during that timeframe. In 1979, the site was the major part of a large area of contiguous wet prairie within the PUD that was relatively undisturbed by agricultural activity.

46. After approval of the Wellington Country Place PUD, ACME applied to the SFWMD for a surface water management permit for the PUD. The application proposed a 49-acre detention facility in part of Peacock Pond. Following review of the application, SFWMD's staff recommended approval of the application with a 49-acre detention facility. But, as mentioned previously, Audubon (and Florida Audubon) challenged SFWMD's intent to grant the application, and the challenge was settled by ACME's agreement to increase the size of the detention facility to 79 acres. In 1979, by Order No. 79-3, SFWMD issued the agreed permit for the system, which also included a 12-acre lake, canals, and collector swales.

47. SFWMD's 1979 permit contemplated use of the Peacock Pond site as a "detention-type" surface water management facility. Generally, such a facility detains the water, allows the pollutants to settle, then pumps the water out. Characteristic of the time period, there was no vegetative requirement for the system and no mention of the detention area being a "filter marsh," as Petitioners contend, although that is essentially how it functioned. The permit simply required that an above-ground impoundment be constructed by placing a berm or dike around the detention area, which was larger than normal for a PUD the size of Wellington Country Place; no excavation was required. Pumps were required to be installed at the northwest corner of Peacock Pond to pump water into the site from the ACME canal to the west. The berm was to detain water on the site until it reached a certain level and then return it to the ACME canal through an outfall structure at the southwest corner of the site. From there, the water reentered ACME's system of Basin B canals. SFWMD calculated that Peacock Pond treated approximately 200,000,000 gallons of water a year in this way.

48. After issuance of the 1979 permit, an above-ground impoundment was constructed, and the pumps were installed. The detention area was operated under the permit for approximately ten years--until approximately 1989. During

that time, the pumps at the northwest corner of the property kept Peacock Pond hydrated, even in dry conditions. As a result, there was standing water in Peacock Pond virtually continuously, particularly in areas of isolated depressions, and Peacock Pond remained wetter, longer compared to surrounding areas. As a result, apple snails thrived there, and Everglades Kites began using Peacock Pond as habitat, especially in dry conditions when other habitat dried out. That is what resulted in siting of unusually large numbers of Everglades Kites in Peacock Pond in the mid-1980's. See Finding of Fact 26, supra.

49. It appears that ACME stopped operating the water quality detention facility in accordance with the 1979 permit in about 1989. For reasons not explained by the evidence, no action was taken to enforce the permit conditions for the next five to six years. In about 1995, a local Audubon member reported the condition of Peacock Pond (including apparent illegal excavation and bull-dozing of cypress trees) to Rosa Durando, who complained to SFWMD. SFWMD inspected Peacock Pond in 1995, confirmed that ACME was not operating the facility in accordance with the 1979 permit, and found several violations. It was not established by the evidence in this case whether SFWMD performed an ecological assessment of the property at the time. Subsequently, on April 2, 1996, SFWMD

issued notices of violation against ACME--by this time, a dependent district of the Village--and the Village. Polo also was cited for illegal unpermitted excavation in wetlands.

50. During SFWMD enforcement proceedings, it was estimated that it would cost approximately $2.5 million to restore the drainage facility for operation in accordance with the 1979 SFWMD permit. However, SFWMD's 1979 permit unfortunately did not require ACME to acquire legal control over Peacock Pond, as applicants are now required to do. As a result, ACME and the Village were unable to take over and operate the surface water management facility because neither had ownership interest in the Peacock Pond property or the pumps and outfall structures, and neither had or could not get an access easement to the property from Polo.

51. To settle SFWMD's enforcement action against ACME, the parties entered into a Consent Agreement on December 11, 1997. The Consent Agreement required ACME and the Village to undertake various actions, including obtaining from the landowner immediate temporary access to the property; filing an eminent domain or other actions to effectuate perpetual access to the property; and either filing an application to modify the permit, so as to eliminate the necessity of utilizing Peacock Pond for water quality treatment, or restoring the Peacock Pond facility.

52. Pursuant to the Consent Agreement, the Village first instituted a court proceeding to obtain an easement over the Peacock Pond property so that it could be operated in accordance with the 1979 SFWMD permit. For reasons unclear from the evidence, this court action was unsuccessful. Next, the Village instituted an eminent domain action against Polo to obtain title to Peacock Pond property so that it could access and operate the storm water management facility. This eminent domain action resulted in a jury verdict of $5.2 million against the Village. (In addition, the Village had to pay attorney's fees in the amount of $1.5 million.)

53. On November 8, 1999, following the eminent domain proceedings, Polo filed a claim against the Village under the Bert J. Harris Act, Section 70.001, Florida Statutes. The basis of the claim was that the Conservation designation applied to the Peacock Pond property by the Village inordinately burdened the property within the meaning of the Harris Act. The property owner claimed that the value of the property with the residential designation was $5.2 million, while the value of the property with the Conservation designation was only $200,000. On April 27, 2000, the Village offered to settle the claim by changing the future land use designation of the property from Conservation to "Residential B."

54. At the final hearing in this case, SFWMD, Petitioners, and the Village agreed that $5.2 million was not a reasonable price to pay for the opportunity to spend another $2.5 million or more to restore Peacock Pond's ability to improve water equality, particularly given the larger Basin B drainage problems.

55. The purpose of ACME was to drain and reclaim for development the acreage under its jurisdiction, including what later became the Village of Wellington. ACME, through manmade alterations, divided the land into two drainage basins: Basin A and Basin B. In relation to the Village's current boundaries, Basin A is to the north and discharges into the C-51 canal which ultimately takes water to the east. Basin B is to the south. In total, Basin B drains an area of approximately 9,000 acres, which are more rural in nature. Drainage from Basin B is discharged through a set of pumps into the Loxahatchee Wildlife Preserve, an Outstanding Florida Water which basically forms the edge of the Everglades in this region, at an annual volume of about 40,000 acre feet per year.

56. Section 373.4592, the Everglades Forever Act, regulates all discharge that flows into what is called the Everglades Protection Area, which includes the Refuge. SFWMD has studied sources of urban storm water entering the

Everglades, and the Village is the highest source of phosphorus pollution of all areas in the Everglades Storm Water Program and the main source of pollution in Basin B. The Village contributes an average total phosphorus load to the Refuge of 164 ppb.

57. The Everglades Forever Act requires the Village to meet established water quality standards by 2006. The default standard for phosphorus is an average total phosphorus load of 10 ppb. It is anticipated that the phosphorus standard to be adopted will be higher, but it cannot be ascertained at this time.

58. The size of the jury verdict in the eminent domain case caused the Village great concern because one proposed solution to the greater Basin B drainage problems would require purchase of approximately 800 acres for use as a modern storm water treatment area (STA). Consequently, the Village hired a consulting team to evaluate the Peacock Pond facility and develop alternatives for addressing Basin B problems. (The consulting team included James Hudgens, Jay Foy, and Robert Higgins, all of whom testified for the Village as experts at the final hearing.)

59. Following the eminent domain verdict, SFWMD also concluded that there were other solutions to the Basin B drainage problems which would be more cost effective than

requiring the Village to purchase the Property for $5.2 million. Accordingly, on May 23, 2000, the Village and SFWMD entered into a Joint Cooperation Agreement which outlined a strategy for addressing Peacock Pond and for implementing a water quality improvement plan for drainage of Basin B. Among other things, this Agreement required the Village to submit an application to the SFWMD to modify the Peacock Pond permit and a Consent Agreement to either eliminate or substantially reduce the size of Peacock Pond. In addition, the Agreement required the Village's proposed modification to provide reasonable assurances and demonstrate that the water quality treatment, water quantity, and environmental benefits associated with the Peacock Pond permit are maintained through the facility or by other equivalent measures. Further, the Agreement provided that until the application to modify the Peacock Pond permit was approved by SFWMD, the conditions of the existing SFWMD permit would remain in full force and effect, but that SFWMD would stay any enforcement action concerning Peacock Pond until December 31, 2001, so long as the parties to the Agreement were carrying out the other provisions of the Agreement.

60. The Village has since identified several other alternative possible solutions to Basin B drainage problems. One alternative is to acquire land outside the Village,

construct an STA, and divert Basin B drainage to the STA. A second plan is to divert Basin B water away from the Loxahatchee preserve and the Everglades. A third alternative would be for the Village to utilize Aquifer Storage and Recovery (ASR) Wells. Finally, the Village has considered the utilization of a rock pit north of the Village in conjunction with an STA; the pit would hold the water, and the STA would treat the water.

61. Additionally, other techniques could be used to reduce phosphorus discharge, such as: best management practices, which can be and to some extent have been instituted in the Village: chemical treatment of water to remove phosphorus; and controlling fertilizer. The FLUM Amendment does not prevent the Village from pursuing any of these alternatives.

62. The Joint Cooperation Agreement is the last and most recent action taken by SFWMD regarding the property. At the time of the final hearing, the Village was in compliance with the Joint Cooperation Agreement and had filed an application to modify the permit for Peacock Pond. The modification would double the water treatment ability, not the size, of the Pond. By the time of final hearing, SFWMD had not yet acted on the application.

63. Meanwhile, the existing surface water management facility on the Peacock Pond property cannot be changed or eliminated without a permit from SFWMD. Even if the FLUM Amendment takes effect, a SFWMD permit would be required before any development could take place on the property. Also, in order to develop the property, an amendment to the PUD Master Plan would have to go through the Village's development review process and be approved by the Village.

64. The Amendment does not repeal, revise, or exempt Peacock Pond from the Village's Comprehensive Plan. The Village Comprehensive Plan has a drainage element which requires the Village to provide adequate drainage facilities which are subject to concurrency and level of service standards. Development of the Peacock Pond property would have to comply with these drainage facilities. Because the property is in the Village's urban service area, it is reasonable to assume that the Village or the developer will provide any necessary drainage facilities.

Environmental and Natural Resource Characteristics

65. When Peacock Pond was operated as required by the 1979 SFWMD permit, it was a high-quality wetland. Based on environmental assessments of the property performed by SFWMD in the 1986-1988 time period, it is clear that Peacock Pond had wetland characteristics in the 1980s. In 1986, SFWMD

employees noted that Peacock Pond "supports diverse areas of wetland vegetation, including saw grass, cypress, carolina willow, pickerel weed, water lettuce, primrose willow and cat tails [sic]." In 1989, SFWMD staff wrote that Peacock Pond was "the only functional marsh habitat left in the Wellington area" and was "heavily used by both breeding and migrant birds and supports a large population of apples snails, used by the threatened limpkins and the endangered Everglades kite." Peacock Pond had substantial wetland vegetation, and wildlife associated with wetlands. As found previously, substantial numbers of the Everglades Kite were observed on the Property at times in the mid-1980's.

66. When Peacock Pond failed to be operated in accordance with the 1979 SFWMD permit, its wetlands features and functions declined. With no water on the property, exotic plant species invaded. In addition, there was illegal unpermitted excavation, and cypress trees were bulldozed. Over time, improper operation of the facility had resulted in severe degradation of the wetlands on the property and the invasion of undesirable exotic vegetation, such as maleleuca and Brazilian Pepper.

67. Unfortunately, the evidence establishes that Peacock Pond currently has no or very low natural resource and environmental values in terms of wetlands or wildlife. The

site is devoid of any significant wetland functions or wildlife values. It is mostly dry and covered by exotic species, at least in part because it and the surrounding area have been drained. There are no Everglades Kites on the site; apparently, there have not been any for about 10 years. Any remaining wetlands on the site were variously described as "remnant," "isolated," and of "poor quality."

68. It would not be impossible to restore Peacock Pond to some semblance of its condition in the mid-1980's. Restoration would require operation of the drainage facility in accordance with the 1979 SFWMD permit and eradication of exotic vegetation. If restored, wetland wildlife such as the apple snail and Everglades Kite probably would return. Indeed, in 1996, the Village submitted an application to the Florida Communities Trust to buy Peacock Pond. The FCT grant application mentioned the potential of Peacock Pond "to provide important habitat for listed and threatened species" and for "improving water quality." But the FCT has not purchased the property, and it now appears that it would cost the Village over $5 million to purchase the property, another $2.5 million to comply with the conditions of the 1979 SFWMD permit, plus the cost of eradicating exotic plants.

Soil Suitability

69. The testimony regarding soils and septic tank use in this area was not in substantial dispute. It was undisputed that Peacock Pond consists of "hydric" soils, mostly Okeelanta muck, Tequesta muck, and Sanibel muck. Hydric and muck soils are relatively unsuited for residential development. Nonetheless, residential development of land characterized by hydric or muck soils is common throughout Florida, including Palm Beach County, and the coastal plane of the United States. It was undisputed that approximately 89 percent of the soils in the Village are "hydric" soils. In these areas, it is standard residential construction practice to remove muck soils and replace them with other soils on which construction can take place. Substantial portions of the Village having hydric soils have been developed for residential uses in this manner. Also, the extensive dewatering through ditching and canal systems in the area has made the land more available and suitable for development. For these reasons, it cannot be said that Peacock Pond's soils are absolutely unsuitable for residential development.

70. While there was evidence that Okeelanta soils in their natural state are not suitable for septic tanks, it is undisputed that the Okeelanta soils in the Wellington Country Place PUD are not in their natural state. Moreover, septic

tanks can be used on such property by use of enough appropriate fill dirt. Septic tanks are used extensively in Wellington Country Place PUD; the entire PUD is on septic tanks except for the Equestrian Club Estates, a portion of the PUD on the west side. Further, much of the Village south of Pierson Road, where the Country Place PUD is located, is on septic tanks.

71. There was some evidence of failure of septic tanks in the Village when inundated from heavy rains. But despite widespread use of septic tanks on land that contains hydric soils, including the Okeelanta muck, there was no evidence of substantial health problems.

72. It is common for land that contains some wetlands to be designated residential. This is especially true in western Palm Beach County, including the Village, where much of the soils are hydric and contain wetland features. For example, there are other wetlands in the Wellington Country Place PUD that are designated residential, and there are other wetlands in the Village, outside of Country Place PUD, that have non-conservation land use designations. Conversely, it is relatively uncommon to have private land, such as Peacock Pond, designated Conservation without any density.

73. The Village's Comprehensive Plan contains provisions that protect the wetlands and other natural resources. The

Amendment does not exempt the Peacock Pond property from these provisions. Therefore, any development of the Property would have to be consistent with these Plan provisions.

Functioning and Efficiency of Peacock Pond Facility

74. Even if restored, Peacock Pond could not begin to solve the larger Basin B drainage problems and indeed may not even be effective enough to serve the Country Place PUD. Whether Peacock Pond is restored or not, the Village must seek alternatives to comply with the Everglades Forever Act.

75. The Peacock Pond facility, as designed, was not very effective as a storm water quantity attenuation area. As designed, the facility can only hold about 1/2 inch of runoff from the Wellington Country Place PUD. Due to this limited capacity, the facility is barely adequate to serve the PUD and is of no use at all to the rest of the Village as a storm water attenuation area.

76. In terms of water quality treatment, the Peacock Pond facility is also not very effective or efficient. If operated as permitted, without consideration of any vegetative uptake of nutrients, the facility would have only limited ability to remove phosphorus, about 32 kilograms per year. (Considering vegetative uptake of nutrients, the percentage of phosphorus removal would be higher but no estimate was calculated.) Also, the facility cannot provide adequate storm

water quality treatment because of its inadequate design capacity. Without adequate storm water quantity attenuation capacity, the facility cannot treat for water quality effectively.

77. Storm water treatment technology has advanced greatly since the permitting of the Peacock Pond facility in 1979. Both passive and active/harvested STA's are examples. A passive STA is designed to include vegetation utilized to remove nutrients from storm water but leaves the vegetation on site. An active/harvested STA is an emerging technology which goes one step further by actively cutting and removing the aquatic vegetation to an off-site location, thereby removing the nutrients from the system. As permitted, the Peacock Pond facility is neither a passive nor an active/harvested STA. It is only a detention area which holds the water and allows the nutrients to settle to the bottom, with limited, incidental uptake of nutrients by whatever vegetation happens to be onsite. A 1.5-acre active/harvested STA could perform the same water quality treatment function that Peacock Pond would perform if operated in accordance with the 1979 permit, assuming no vegetative uptake of nutrients. Moreover, the 1.5-acre STA could be located anywhere in Basin B.

78. Another alternative to Peacock Pond is also available for addressing drainage in the Country Place PUD.

The storm water management system permitted in 1979 included a 12-acre lake in addition to the 79-acre Peacock Pond facility. However, the development of the PUD thus far has actually generated 54 acres of lakes. Based on current development patterns, it is reasonable to assume another 37 acres of lakes will be generated by the build out of the Country Place PUD. Thus, the original 91 acres of storm water management areas planned for the PUD (a 12-acre lake plus the 79-acre Peacock Pond) is likely to be satisfied by development of the remainder of the PUD, even without retaining Peacock Pond as a drainage facility.

79. It was indicated at final hearing that Polo would acquiesce in the future development of an additional 37 acres of lakes. However, Polo had not made any binding commitment to do so at the time of final hearing, and the requirement for Polo to add 37 acres of lakes in the future, as a condition to future development, has not yet been incorporated in a binding SFWMD permit.

DCA Review and Approval of the FLUM Amendment

80. The FLUM Amendment was transmitted to the DCA on June 20, 2000. Roger Wilburn supervised DCA's review of the Amendment. On September 8, 2000, the DCA issued its ORC report, which objected to the Amendment because the FLUM Amendment, which is essentially all that was included in the

transmittal package to DCA, conflicted starkly with data and analysis in the existing Village Plan. Data and analysis in the existing plan of just one year prior justified designation of Peacock Pond as Conservation by its potential for restoration of important wetlands, wildlife habitat, water quantity treatment, and water quantity functions. A year later, and without adequate explanation, the Village was proposing to change the FLUM designation to "Residential B."

81. Following the issuance of DCA's ORC report to the Village, Wilburn traveled to the Village for a meeting with Village officials and consultants to discuss DCA's objections. During these discussions and his visit to the site, Wilburn learned of the degradation of Peacock Pond, the development around the Pond, the Village's legal problems in gaining access to the site, and the Village's desire to pursue alternatives other than Peacock Pond to address its drainage issues. Based on this information, Wilburn advised the Village that it needed to update its data and analysis to reflect current conditions to support the proposed Amendment.

82. After responding to DCA's ORC, the Village adopted the Amendment on December 12, 2000, and transmitted it to DCA along with the new supporting data and analysis. The supporting data and analysis included, among other things, the Joint Cooperation Agreement with SFWMD and the reports

prepared by Village consultants Hudgens and Foy regarding the environmental assessment of Peacock Pond and its efficiency as a surface water management facility. In addition, the Village submitted revisions to the data and analysis in the Conservation Element of its Plan to reflect the new data and analysis and the changed circumstances regarding Peacock Pond.

83. DCA also received comments on the Amendment from SFWMD. SFWMD did not object to the Amendment and, in its comments, informed DCA of its Joint Cooperation Agreement with the Village.

84. DCA also received comments on the Amendment from the Treasure Coast Regional Planning Council. The Council found that the Amendment was consistent with its Strategic Regional Policy Plan.

85. Based on the adoption transmittal package, Wilburn and his staff recommended that the DCA find the Amendment in compliance. DCA concurred with that recommendation and issued its Notice of Intent to find the Amendment in compliance on February 7, 2001.

CONCLUSIONS OF LAW

Standing

86. Any "affected person" may participate in proceedings challenging proposed plans and plan Amendments under the Act. Section 163.3184(9).

87. Affected persons are defined in Section 163.3184(1)(a):

> "Affected person" includes the affected local government; persons owning property, residing, or owning or operating a business within the boundaries of the local government whose plan is the subject of the review. . . . Each person, other than an adjoining local government, in order to qualify under this definition, shall also have submitted oral or written comments, recommendations, or objections to the local government during the period of time beginning with the transmittal hearing for the plan or plan amendment and ending with the adoption of the plan or plan amendment.

In St. Joe Paper Co., et al. v. Dept. of Community Affairs, et al., 657 So. 2d 27, 28 (Fla. 1st DCA 1995), the court characterized Section 613.3184(1)(a) as providing "a more expansive definition of an affected person who may participate in the section 120.57 proceeding held pursuant to section 163.3184(10)(a)." However, the court also held:

> Section 163.3184(10)(a) specifies that a person must be an "affected person" in order to participate in the section 120.57 proceeding.

Id. Section 163.3184(9)(a) also specifies that a person must be an "affected person" in order to participate in the section 120.57 proceeding.

88. As described in the Preliminary Statement, it was ruled prehearing that Friends and Audubon cannot establish "associational" standing in this case under Florida Home

Builders Ass'n v. Dept. of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982). In addition, the record in this case is clear that neither Friends nor Audubon, as individual legal entities, reside in or own property in the Village. The disputed standing issue of fact litigated in this case was whether Friends and Audubon owned or operated a business within the boundaries of the Village.

89. In St. Joe Paper, there was no evidence that Friends had any connection to Walton County beyond submittal of oral or written comments, recommendations, or objections to the County between the transmittal hearing and adoption hearing for the comprehensive plan at issue in that case. The court characterized Friends' level of participation in that case as an "incidental and transient presence" that "does not suffice under section 163.3184(1)(a)." St. Joe Paper, at 29. The court continued: "Rather, the statute contemplates a more substantial local nexus, of a type which might make the business potentially subject to the constraints of the local comprehensive plan." Id.

90. Clearly, the evidence was that both Friends and, especially, Audubon have a "more substantial local nexus" than it appeared from the evidence that Friends had in Walton County in St. Joe. On the other hand, their local presence or nexus in the Village clearly is much less than that of any

number of other businesses operating in the Village. It would appear that their local presence or nexus is less than that of RGMC in Dept. of Community Affairs v. Lee County, ER FALR 96:118 (Admin. Comm'n 1996)(Recommended Order, 1996 WL 1059844 (Fla.Div.Admin.Hrgs.)).

91. In this case, there was persuasive evidence that both Friends and, especially, Audubon operated a business in the Village (as well as elsewhere). The nature of both their businesses is different from that of a more "classic" commercial enterprise, but so long as the threshold local presence or nexus exists, Section 163.3184(1)(a) does not discriminate based on the kind of business operated. In addition, as found, although neither Friends nor Audubon felt "constrained" by the Village's comprehensive plan from conducting business in the Village, operation of both businesses in the Village potentially could be "constrained" by the Village's comprehensive plan. It is concluded that, in this case, there was evidence of a local presence or nexus as to both Friends and, especially, as to Audubon so as to "suffice under section 163.3184(1)(a)."

Burden and Standard of Proof

92. Section 163.3184(9) imposes the burden of proof in this case on Petitioners and states:

> [T]he local plan or plan amendment shall be determined to be in compliance if the local

> government's determination of compliance is fairly debatable.

93. The terms "fairly debatable" are not defined in the statutes or rules, but the Supreme Court of Florida held in Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997), that this "fairly debatable" standard is the same as the common law "fairly debatable" standard applicable to decisions of local governments acting in a legislative capacity. The Court elaborated:

> An ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity.

The ultimate issue in this case is whether Petitioners proved beyond fair debate that the FLUM Amendment is not "in compliance."

94. Section 163.3184(1)(b) states:

> "In compliance" means consistent with the requirements of ss. 163.3177, 163.3178, 163.3180, 163.3191, and 163.3245, with the state comprehensive plan, with the appropriate strategic regional policy plan, and with chapter 9J-5, Florida Administrative Code, where such rule is not inconsistent with this part and with the principles for guiding development in designated areas of critical state concern.

Petitioners argue that the FLUM Amendment is not "in compliance" primarily because of: inadequate data and analysis; internal inconsistency; failure to promote

conservation and preserve natural resources; site unsuitability; and inconsistency with the regional and state policy plans.

Data and analysis

95. Subsection 163.3177(6)(a), (8), and (10)(e) require that plan amendments be supported by "appropriate" data and analysis that is collected in a "professionally accepted" way. Rule 9J-5.005(2) mirrors the statute and requires that plan amendments be "based upon relevant and appropriate data and analyses." Under this Rule, "based upon" means "to react to [data and analysis] in an appropriate way and to the extent necessary indicated by the data available on that particular subject at the time of adoption of the plan or plan amendment at issue." The Rule also requires that data be "collected and applied in a professionally acceptable manner" and requires that, when data is being updated, the methodologies "shall meet professionally accepted standards for such methodologies."

96. There can be no real dispute that professional acceptable data and analysis was collected and utilized to support the FLUM Amendment. The real issue raised by Petitioners is whether the FLUM Amendment reacts to the data and analysis in an appropriate way and to the extent necessary. Petitioners would prefer for Peacock Pond to

remain Conservation at least until the Village implements a feasible plan to resolve its Basin B drainage problems. Instead, Petitioners accuse the Village of adopting the FLUM Amendment essentially under duress and solely to avoid the threat of Polo's Bert Harris claim. But the evidence was that there was much more to the Village's motivation. As found, Petitioners did not prove beyond fair debate that the Village did not react to the data and analysis, taken as a whole, in an appropriate way and to the extent necessary.

97. Petitioners also argue that the data and analysis compelled maintenance of the Conservation designation for Peacock Pond because of the serious need to protect the Refuge from the Village's Basin B runoff. But the evidence was clear that redesignating Peacock Pond as Residential B does absolutely nothing to prevent the Village from using Peacock Pond as needed to help resolve those problems-up to and including purchase of the entire parcel for $5.2 million or more, and re-implementing the 1979 permit conditions at a cost of $2.5 million or more. Meanwhile, the data and analysis were clear that future residential development on Peacock Pond could accommodate drainage requirements of Wellington Country Place PUD itself if an additional 37 acres of lakes are required as part of any such development.

98. Petitioners also argue that the Village relied on future "data" to support the FLUM Amendment--namely, modification of the 1979 SFWMD permit for Wellington County Place PUD, future drainage areas, or construction of an STA somewhere else. But those are only some of the options for resolving the Village's Basin B drainage problems. The FLUM Amendment neither relies on nor compromises any of those options.

99. Petitioners also argue that, when the Village updated its data and analysis after DCA's ORC, it did not do so in a way meeting "professionally acceptable standards" because it simply deleted previous data and analysis contained without clearly explaining why the data and analysis is no longer relevant. To the contrary, the evidence was that the updated data and analysis not only deleting some previous data and analysis but also added data and analysis that adequately explained the deletions. In addition, since the explanation for the deletions was analysis, this analysis included the evidence at final hearing. See Zemel v. Lee County, DOAH Case No. 90-7793GM, 1992 WL 880139, 15 FALR 2735, 2773-2775 (DCA 1993), aff'd, 642 So. 2d 1367 (Fla. 1st DCA 1994).

100. Finally, Petitioners argue that it was not "appropriate" or "professional" to cite the impacted condition of wetlands on Peacock Pond as data, when it was known that

those impacts resulted directly from the illegal acts of ACME (which serves and is now governed by the Village's Council) and Polo during the period of time approximately between 1989 and 1995. But Petitioners cite no authority requiring the Village, under these circumstances, to plan based on facts as they used to exist. To the contrary, the statutes and rules generally require a local government to plan for the future based on actual conditions. In particular, Section 163.3177(6)(a) requires: "The future land use plan shall be based upon . . . the character of undeveloped land." Rule 9J-5.006(2)(b) requires that the future land use element be based on "analysis of the character and magnitude of existing vacant undeveloped land . . . ." Section 163.3177(6)(d) requires: "A conservation element for the conservation, use, and protection of natural resources in the area . . .." Rule 9J-5.013(1)(a) requires the conservation element to identify and analyze "natural resources, where present within the local government's boundaries . . . ." (Whether it is appropriate for SFWMD to consider the impacts of illegal activities in characterizing the wetland functions of Peacock Pond for purposes of permitting and enforcement is another matter.)

Internal inconsistency

101. Section 163.3177(2) requires: "The several elements of the comprehensive plan shall be consistent

. . . ." Rule 9J-5.005(5) repeats this admonition in subparagraph (a), and subparagraph (b) adds: "Each map depicting future conditions must reflect goals, objectives, and policies within all elements and each such map must be contained within the comprehensive plan."

102. In contrast to determinations under Section 163.3177(10(a) as to whether a local comprehensive plan is consistent with a state or regional policy plan, there is no reason to insist that all objectives and policies of a plan "take action in the direction of realizing" the other objectives and policies of the same plan. The meaningful question is whether objectives are in conflict with each other; if not, they are coordinated, related, and consistent.

103. Petitioners argue that the FLUM Amendment is internally inconsistent with the Conservation Map and Natural Resource Map in the Conservation Element and with the Future Equestrian Circulation Map in the Equestrian Preservation Element of the Village's plan. See Findings of Fact 39-40, supra. On its face, the FLUM Amendment may appear to be some conflict with those other maps. But the Conservation Map and Natural Resources Map merely label the site "Peacock Pond Natural Reserve"; the map legends identify the site as "Wetlands/Possible Wetlands" on the Conservation Map and as "Emergent Wetlands" on the Natural Resources Map. In

addition, the Village's plan does not define either "natural reserve" as used in the Conservation Map and Natural Resources Map or "natural preserve" as used in the Equestrian Circulation Map, and the significance of the use of those terms, as they relate to the FLUM, is not clear. For those reasons, a determination that the maps are not in conflict is not beyond fair debate.

104. Petitioners also argue that the FLUM Amendment is inconsistent with various GOP's in the Infrastructure Element (drainage) and in the Conservation Element (natural resources element) of the Village's comprehensive plan. But Petitioners failed to prove any such inconsistencies.

Natural Resources

105. Petitioners argue that the FLUM Amendment is inconsistent with Section 163. 3177(6)(d), Rule 9J-5.006(3), and Rule 9J-5.013. But, as with the similar data and analysis argument, the Village was not required to plan to protect natural resources based on facts as they used to exist. See Conclusion of Law 100, supra.

Site Suitability

106. Rule 9J-5.006(2) requires that land be suitable for designated land uses, and Rule requires that land uses be coordinated with appropriate topography, soil conditions, and the availability of facilities and services for drainage and

storm water treatment. But Petitioners did not prove inconsistency with those rules.

107. Peacock Pond contains wetlands and has soils which are "constrained" for development and the use of septic tanks. It is low and in its natural state was flooded and hydrologically connected to the Florida Everglades. But existing conditions are quite different now, and Petitioners did not prove beyond fair debate that Peacock Pond is unsuitable for designation as Residential B on the Village's FLUM.

State and Regional Policy Plans

108. Petitioners argue that the FLUM Amendment is inconsistent with the State Comprehensive Plan for various reasons but primarily because the State plan requires local governments to ensure that growth does not adversely affect public health, to protect and conserve wetlands, and to prohibit the destruction of habitat for endangered species. Section 187.201(6), (10), and (16).

109. Petitioners also argue that the FLUM Amendment is inconsistent with the Treasure Coast Strategic Regional Policy Plan for various reasons but primarily because the regional plan requires local governments to protect wetlands unless they cannot be restored.

110. Section 163.3177(10) provides that a local government's comprehensive plan is "consistent" with the state and regional policy plan if the local plan is "compatible with" and "furthers" such plans. It also defines the phrase "compatible with" as meaning "not in conflict" and defines the term "furthers" to mean "take action in the direction of realizing goals or policies of the state or regional plan." In addition, in making these determinations, the state and regional plans "shall be construed as a whole and no specific goal and policy shall be construed or applied in isolation from the other goals and policies in the plan. . . ."

111. As compared to Chapter 9J-5, the state plan sets out general planning goals and policies. Unlike Chapter 9J-5, they do not establish "minimum criteria"; rather, if a plan would appear to violate a provision of the state plan, a balanced consideration must be given to all other provisions of both the state and local plan to determine whether a local comprehensive plan is consistent with the state plan. In addition, many of the provisions of the state plan apply to the State of Florida and its agencies in planning on the state level, as opposed to local governments. Rarely will a local plan violate the state plan if it does not also violate the applicable Chapter 9J-5 "minimum criteria." See Heartland

Environmental Council v. DCA, DOAH Case No. 94-2095GM, 1996 WL 1059751 (Fla.Div.Admin.Hrgs.)

112. Regional planning council policy plans are similar to the state comprehensive plan. They set out general planning goals and policies for the region. They do not establish "minimum criteria."

113. Using these legal standards, Petitioners did not prove any inconsistency with either the State or regional plans.

RECOMMENDATION

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

RECOMMENDED that the Department of Community Affairs enter a final order finding the Village's FLUM Amendment LUPA1-2000/04, adopted on December 12, 2000, by ordinance numbers 2000-27, 2000-30, 2000-31, "in compliance."

DONE AND ENTERED this 2nd day of October, 2001, in Tallahassee, Leon County, Florida.

_____
J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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