

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH POLO HOLDINGS,)
INC.,)
)
Petitioner,)
) Case No. 02-0173GM
vs.)
)
THE VILLAGE OF WELLINGTON and)
DEPARTMENT OF COMMUNITY)
AFFAIRS,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Notice was given and on May 7 and 8, 2002, a final hearing was held in this case. Pursuant to the authority set forth in Sections 120.569, 120.57(1), and 163.3184(9)(b), Florida Statutes, the hearing was conducted by Charles A. Stampelos, Administrative Law Judge, in Palm Beach County, Florida.

APPEARANCES

For Petitioner, Palm Beach Polo Holdings, Inc.:

Lawrence M. Weisberg, Esquire
6877 Southwest 18th Street, Suite 141
Boca Raton, Florida 33433-7045

For Respondent, Department of Community Affairs:

Karen A. Brodeen, Esquire
Department of Community Affairs
2555 Shumard Oak Boulevard, Suite 315
Tallahassee, Florida 32399-2100

For Respondent, The Village of Wellington:

Thomas G. Pelham, Esquire
John H. Holley, Esquire
909 East Park Avenue
Tallahassee, Florida 32301-2646

STATEMENT OF THE ISSUES

Whether the Comprehensive Plan Amendment to the Village of Wellington Comprehensive Plan, adopted by Ordinance No. 2001-11, is "in compliance" as defined in and required by the "Local Government Planning and Land Development Regulation Act," Chapter 163, Part II, Florida Statutes, and whether the Plan Amendment is supported by adequate data and analysis as required by Chapter 163, Part II, Florida Statutes, and Rule 9J-5, Florida Administrative Code.

PRELIMINARY STATEMENT

On October 23, 2001, the Village of Wellington (Village) amended its Comprehensive Plan (Plan) through the adoption of Ordinance No. 2001-11, which approved an amendment to the Transportation and Capital Improvement Elements of the Village's Plan (Amendment).

On December 13, 2001, the Department of Community Affairs (Department) found the Amendment "in compliance" pursuant to Sections 163.3184 and 163.3189, Florida Statutes, and issued a Notice of Intent.

On January 7, 2002, Palm Beach Polo Holdings, Inc. (Polo), by and through counsel, filed a Petition for Formal Administrative Hearing (Petition) with the Department, and the Petition was forwarded to the Division of Administrative Hearings for the assignment of an administrative law judge. In a Joint Response to Initial Order, the parties advised that they were available for final hearing on March 18 and 19, 2002, and March 26 through 29, 2002. On January 28, 2002, the final hearing was scheduled for March 28 and 29, 2002, and an Order of Pre-Hearing Instructions was issued.

On or about January 28, 2002, the Village served expert witness interrogatories on Polo. Thereafter, counsel for Polo disclosed four experts, but indicated that no opinions had been formulated and no final list of experts had been determined.

On March 6, 2002, Polo filed a request to file an amended petition. The request was granted on April 19, 2002.

On March 11, 2002, the Village filed a Motion to preclude Polo's expert witnesses from testifying or, in the alternative, to compel Polo to respond to the expert interrogatories.

On March 14, 2002, counsel for Polo moved to withdraw without objection from the Village or the Department. The

Motion to Withdraw was considered during a telephone hearing held on March 14, 2002, and was granted.

During the March 14, 2002, telephone hearing, Polo's counsel moved ore tenus for a continuance of the final hearing. The continuance was granted without objection. Polo was given until March 28, 2002, to obtain new counsel and file a notice of appearance, and until April 4, 2002, for the new counsel or representative, to file responses to the pending motions. With the concurrence of all parties, the final hearing was re-scheduled for May 7 and 8, 2002, to give Polo adequate time to prepare for the final hearing.

The oral ruling was confirmed in the Order dated March 14, 2002. The Order further advised Polo and Respondents that "[a]ll pending motions will be considered after March 28, 2002," and that "[o]n or before April 4, 2002, Palm Beach [Polo], by its counsel or representative, shall advise, in writing, of Palm Beach's [Polo] position regarding all pending motions." Id. The motions pending at that time were Polo's request for leave to file an amended petition and the Village's Motion to preclude Polo from calling expert witnesses or to compel answers to discovery.

On April 6, 2002, the Law Offices of Lawrence M. Weisberg, P.A., served a Notice of Appearance on behalf of Polo. On April 8, 2002, Mr. Weisberg also served a Motion

requesting a continuance to prepare for the final hearing. Respondents opposed a continuance.

By Order dated April 19, 2002, Polo's Motion for Continuance was denied for failure to show good cause. Polo's pending request to amend its Petition was granted, and the Amended Petition previously filed on behalf of Polo was accepted as Polo's Amended Petition. The Village's Motion to preclude Polo's expert witnesses from testifying was denied. However, the Village's Motion to compel Polo to furnish additional information requested in the expert witness interrogatories was granted.

On April 24, 2002, Polo filed an Emergency Motion for Protective Order seeking to protect its witnesses from depositions unless the Village agreed to alternate the depositions of Polo's and the Village's experts, and the Village made its Council members available for depositions, in order to discover, in part, the "motivation and rationale for the Council members voting the way they did."

On April 25, 2002, the Village filed a Motion for Protective Order seeking to protect the Village Council members from Polo's deposition request. After hearing, by Order dated April 26, 2002, Polo's motion was denied, and the Village's motion was granted. Also, Polo's ore tenus motion

requesting the undersigned to view the local traffic situation was denied.

On May 2, 2002, Polo filed a Motion to Reconsider Taking the Depositions of Village Council Members and Striking Protective Order and Motion to Require a Special Master at the Deposition of Paul Schofield. The Village and the Department filed a Joint Motion in Limine seeking to exclude the introduction of evidence regarding the internal inconsistency of the existing Comprehensive Plan, other options or plan amendments which the Village might have but did not adopt, and the motive and intent of the Village Council members in adopting the Amendment. By Order dated May 3, 2002, Polo's motions were denied and ruling was deferred on the Village's motion until the day of the hearing.

On May 3, 2002, the parties filed a Joint Prehearing Stipulation. On May 6, 2002, Polo filed a Notice of Filing Signature Page to Joint Pretrial Stipulation and Notice of Amending Petitioner's Portion of the Exhibit and Witness List of the Joint Prehearing Stipulation.

A final hearing was held on May 7 and 8, 2002, in the Village of Wellington. At the beginning of the final hearing, the undersigned ruled on the Respondents' Joint Motion in Limine. The Motion was granted as to evidence of the motive and intent of Village Council members and of the internal

inconsistency of the existing Comprehensive Plan, and was otherwise denied, allowing Polo to offer evidence of data and analysis, which was in existence when the Village Council approved the Amendment.

The Village's ore tenus motion seeking to quash two subpoenas for deposition served by Polo on the afternoon of May 6, 2002, was granted.

At the final hearing, Polo called as witnesses Michael H. Nelson; Robert F. Rennebaum, P.E. (an expert in traffic engineering); Robert E. Basehart, A.I.C.P. (an expert in land use planning and zoning); Daniel Carr; and Glenn F. Straub. Polo's twelve exhibits were admitted into evidence.

The Village called as witnesses Andrea M. Troutman, P.E. (an expert in traffic engineering and transportation planning), and Paul Schofield, A.I.C.P. (an expert in land use planning and comprehensive planning). The Village's five exhibits were admitted into evidence.

The Department did not call any witnesses or introduce any exhibits into evidence.

The parties introduced three joint exhibits which were admitted into evidence.

Pursuant to a request and Section 120.57(1)(b), Florida Statutes, public comment and one public exhibit were received during the final hearing on May 8, 2002.

At the conclusion of the final hearing, the parties stipulated that the proposed recommended orders would be filed within 45 days after the final hearing transcript was filed.

The transcript of the final hearing was filed on July 16, 2002, and the parties filed proposed recommended orders which have been considered in preparing this Recommended Order.

The Village has filed a motion seeking attorney's fees and costs from Polo, pursuant to Sections 120.569(2)(e), 120.595(1)(b) and (c), and 163.3184(12), Florida Statutes. In support of this Motion, the Village filed the depositions of Gary Clough; Andrea M. Troutman, P.E.; Paul Schofield, A.I.C.P.; Glenn F. Straub; Robert E. Basehart, A.I.C.P.; Michael H. Nelson; and Robert F. Rennebaum, P.E. No response was filed by Polo or the Department.

FINDINGS OF FACT

The Parties

1. Palm Beach Polo Holdings, Inc. Polo is a Florida corporation and the owner of real property within the Wellington Country Place Planned Unit Development (PUD), which is located within the Equestrian Preserve of the Village of Wellington, Florida. Polo is a developer of the Wellington Country Place PUD, significant portions of which remain undeveloped. Specifically, the Wellington Country Place PUD is about 30 to 35 percent built-out. Among Polo's real estate

holdings in the Village of Wellington is a 17.9-acre parcel of undeveloped, commercially designated land, which is located on South Shore Boulevard at or near the intersection with Green Shores Boulevard.

2. Glen F. Straub and Michael H. Nelson appeared at the final hearing as the corporate representatives of Polo. Mr. Nelson lives in Wellington and is employed by Effective Solutions, Inc., which provides a number of services to Polo, including management services, land use services, and lobbying services. In his lobbying capacity, Mr. Nelson has on numerous occasions advocated Polo's position before the Village.

3. Mr. Nelson and Mr. Straub spoke in opposition to the Amendment at the October 23, 2001, meeting of the Wellington Village Council. Mr. Nelson testified at the October 23, 2001, meeting, in support of the four-laning of the two roadway segments which will remain two-lane roads under the Amendment. Mr. Nelson's objections were made in his capacity as a resident of Wellington and "as an effected [sic] resident from Basin A." The minutes of the October 23, 2001, Wellington Village Council meeting, which were introduced into evidence by Polo to establish its standing, state that "Mr. Straub stated that he was concerned with limiting traffic on South Shore Boulevard. He felt that the Council should consider 4-

laning that road." Mr. Nelson also stated: ". . . the Council needed to consider ways to help circulate traffic for residents of Basin A. He felt that there would be a need in the future to 4-lane South Shore and Lake Worth Road."

4. Polo's Amended Petition alleges that "[r]ather than improving these road segments by four laning them - the road segments are currently two lane - the Village through the current amendment seeks to lower the LOS to E and add more trips."

5. Mr. Straub testified that a four-lane road might be an alternative. In part, he was concerned that the Village Council did not examine the effect of "build-out" in the area and the impact on traffic and resulting "gridlock" in the area. Mr. Straub views the Amendment (which he says is inconsistent with the Plan) as a "Band-Aid" to fix an ongoing traffic problem. Mr. Straub believes the traffic analysis supplied to the Village Council was performed hastily, incomplete, and inadequate.

6. The Village of Wellington. The Village is a municipality of the State of Florida, with the duty and responsibility under Chapter 163, Part II, Florida Statutes, to adopt a comprehensive plan and comprehensive plan amendments. The Village is located in the western portion of Palm Beach County and became incorporated in 1995 and

operational on March 28, 1996, with the seating of the first Village Council. Following incorporation, the Village adopted its first Comprehensive Plan in 1999.

7. Department of Community Affairs. The Department is the state land planning agency and has the authority to administer and enforce the Local Government Planning and Land Development Regulation Act (Act), Chapter 163, Part II, Florida Statutes. Among the responsibilities of the Department under the Act is the duty to review plan amendments and determine if the comprehensive plans and plan amendments are in compliance with the Act.

Village Review and Adoption of the Amendment

8. The Village Equestrian Preserve Committee was created to review all decisions affecting the Equestrian Preserve prior to the full review by the Village Council. On April 11 and 26, 2001, the Village Equestrian Preserve Committee considered several options for the designated roadways, including the proposed Amendment. On May 9, 2001, the Village Equestrian Preserve Committee voted to recommend approval of the Amendment.

9. On June 7, 2001, the Village Planning, Zoning, and Adjustment Board, sitting as the Local Planning Agency, recommended approval of the Amendment.

10. The Village planning staff recommended approval of the Amendment. On October 23, 2001, the Village adopted the Amendment by Ordinance No. 2001-11.

Department Review of the Amendment

11. The Village submitted the adopted Ordinance No. 2001-11, the Staff Report, and other supporting documents to the Department for review on October 31, 2001.

12. After a review of the adopted Amendment, on December 13, 2001, the Department sent a letter to the Village, informing the Village that the Amendment was "in compliance" as that term is defined in Subsection 163.3184(1)(b), Florida Statutes. The Department issued its Notice of Intent to find the Amendment "in compliance" pursuant to Sections 163.3184 and 163.3189, Florida Statutes.

This notice was published in the Palm Beach Post on December 17, 2001.

The Existing Village Comprehensive Plan

13. The Village's Comprehensive Plan was adopted in 1999, by Ordinance No. 99-01. Subsequently, the existing Comprehensive Plan was reviewed by the Department and found to be "in compliance" with the Act.

14. The Transportation Element of the existing Village Plan contains the following Goal, Objective, and Policy:

Goal 1.0 Provide a transportation system that meets the needs of the Village of Wellington and the larger community of which the Village is a part while maintaining a high quality of life for Village residents and businesses.

Objective 1.1 Motorized and non-motorized transportation system: Achieve a safe, convenient, and efficient motorized and non-motorized transportation system consisting of arterial, collector and local street and roads; pedestrian ways; bicycle ways and equestrian trails which provide: 1) acceptable levels of service; 2) alternative routes of travel for major traffic flows; and 3) minimal vehicular intrusion into residential neighborhoods. This objective shall be made measurable by implementing policies. [9J-5.007(3)(b)(1)]

15. Policy 1.1.1. provides, in part, LOS standards for streets and roads in the Village. All Village arterial and collector streets and all Village local streets and roads have a Level of Service (LOS) D and all Village rural collector streets have a LOS E. By definition in the Plan, "Rural Collector" and "Rural Local Roads and Streets" shall be designed to maximize safety and minimize traffic speeds in the Equestrian Preserve Area. They shall be no more than two lanes, except for turn lanes, in the case of "Rural Collector" roads.

16. The Transportation Element includes the "Future Transportation Map." This map's legend identifies the various types of roadways within the Village, which are graphically

depicted on the map. Some of the roadways have different classifications for discrete roadway segments.

17. The Plan includes an optional section entitled "Equestrian Preservation Element," which is designed to preserve the Village's equestrian community. The data and analysis for this Plan Element provides: (1) a history, overview, and assessment of the Village's equestrian industry; (2) an assessment of the potential threats and opportunities affecting that industry; and (3) actions which may be taken to further the preservation and integration of the equestrian industry and rural lifestyle into the fabric of the growing community.

18. The Equestrian Preservation Element supplements other provisions of the Plan which relate to the Equestrian Preserve area. It is not the sole portion of the Plan which applies to that area.

19. The Equestrian Preservation Element was placed in the Plan to protect the unique character of the Equestrian Preserve area. It identifies the equestrian uses that are found there and seeks to preserve the rural lifestyle that is found in the equestrian area.

20. The Equestrian Preservation Element includes data and analysis, Goals, Objectives, and Policies (GOPs), and a Future Equestrian Circulation Map, which includes roads and

equestrian trails. Unlike this map and the GOPs, the data and analysis are not adopted portions of the Plan.

21. The Equestrian Preservation Element of the existing Plan contains the following Goal, Objective, and Policies:

Goal 1.0 The goal of this element is to ensure the preservation and protection of the neighborhoods which comprise this area, the equestrian industry and the rural lifestyles which exist in the Equestrian Preserve.

Objective 1.3 The Village shall control traffic volume, speed and type within the Equestrian Preserve to limit the negative impacts of high volume, high speed and through traffic on the Equestrian Preserve. This objective shall be made measurable by its implementing policies and by limiting vehicular speed on rural roads, installation of signage, road design features, implementation of capital improvement projects and other actions of the Village Council.

Policy 1.3.1 Within one year of the effective date of this plan, the Village will develop a traffic-calming plan for all roadways in the Equestrian Preserve. This plan shall:

- a) Minimize traffic through the area by considering alternative routes around the area;
- b) Provide for safe equestrian crossings at all identified points of vehicular and equestrian conflict. Particular attention shall be paid to the intersection of South Shore and Pierson Road and Lake Worth Road and South Shore Boulevard and generally along Pierson Road;

c) Provide for a reduction in speed through the installation of traffic circles, speed humps, four-way stop signs or other traffic calming measures as deemed appropriate by the Village Engineer.

Policy 1.3.3 Roadways within the Equestrian Preserve shall be maintained as two-lane facilities. Adopted levels of service for these roadways shall be Level of Service E.

22. As noted, the Equestrian Preservation Element gives special planning treatment to the Village's equestrian preserve area to protect its equestrian nature and rural lifestyle. The Element protects the Equestrian Preserve by controlling the impacts of traffic. It treats traffic and roadways inside the Equestrian Preserve differently from that outside the Preserve. It seeks to limit through-traffic in the Equestrian Preserve by reducing speeds and level of service, and requiring traffic signage and calming measures in the Preserve. The Element also establishes an Equestrian Committee to review and make recommendations regarding development proposals in the Preserve.

The Amendment

23. On October 23, 2001, the Village Council adopted Ordinance No. 2001-11, which approves certain amendments to the Plan. The Ordinance adopted various changes to the Transportation and Capital Improvements Elements related to

the creation and implementation of a new roadway classification, "Rural Arterial."

24. The Transportation Element Policy 1.1.1 establishes LOS standards for roadways depicted on the Future Transportation Map, identifies corresponding criteria for each roadway, and defines roadway classifications and qualifying criteria. Prior to the Amendment, "[a]ll Village arterial and collector streets" and "[a]ll Village rural collector streets," had an LOS of D and E, respectively. (The Future Transportation Map shows the types of roadways and the segment classifications for each of the various roadways within the Village.)

25. The Amendment amends the Transportation Element Policy 1.1.1 of the Plan to create the new Village roadway classification of "Rural Arterial" and to adopt an LOS standard of "E" for all Village Rural Arterial roads and describes these roads as follows:

These roads shall be designed to maximize safety and minimize traffic speeds in the Equestrian Preserve Area. They shall be no more than two lanes, except for turn lanes.

Rural Arterial Roads shall be paved and shall be designed and marked in a manner to limit vehicular speeds.

26. Transportation Element Policy 1.5.2 is amended and adopts right-of-way widths for roadways based on their classification in Policy 1.1.1. Under Policy 1.5.2, all

public roads, except local streets, must have right-of-way widths of 120 feet. The Amendment provides a right-of-way width of 120 feet for Rural Arterial roads "to allow comfortable separation between vehicles and horses."

27. The Amendment also amends the Transportation Element to designate two roadway segments within the Village as Rural Arterial on the Future Transportation Map. These re-designated roadway segments are South Shore Boulevard from Pierson Road to Lake Worth Road, and Lake Worth Road from 120th Street West to South Shore Boulevard (the roadway segments). The roadway segments are located in the Wellington Country Place PUD and the Equestrian Preserve.

28. The Capital Improvements Element (CIE) Policy 1.2.1 mirrors Transportation Policy 1.1.1 to a large extent by reiterating the same LOS standards. CIE Policy 1.2.1 identifies criteria for various roadways, as does Transportation Policy 1.1.1. With respect to arterial and collector streets, pre-Amendment CIE Policy 1.2.1 described the qualifying criteria as "[u]ntil such time and at such locations as signalized intersections exceed 2.49 per mile." The Amendment deletes this description.

29. CIE Policy 1.2.1 also was amended to delete the description of Village Rural Arterial roads as having "2.49 or fewer intersections per mile." Under the Amendment, this

Policy refers to all Village Rural Arterial roads as having an LOS standard of E with no mention of signalization or intersections or other qualifying criteria.

30. The Amendment also amends the CIE to include funding for the improvement of the two re-designated roadway segments in the five-year capital improvements schedule in the CIE. The two roadway segments are to be reconstructed as two-lane roadways with a median and turn lanes.

31. The term "rural" in the context of the Village's roadway classifications refers to a roadway lying within the Equestrian Preserve. It is not used to describe the nature of the roadway's surroundings. See endnote 2.

Polo's Amended Petition

32. Polo alleges that the Amendment is not "in compliance" because it is internally inconsistent with Transportation Element Goal 1.0 and Objective 1.1, and Equestrian Element Objective 1.3 of the Village Comprehensive Plan.

33. Polo also alleges that the Amendment is inconsistent with the Wellington Country Place Planned Unit Development (Wellington PUD), which is, according to Polo, incorporated into the Village Comprehensive Plan and contemplates that the two road segments in question will be four-laned.

34. Further, Polo alleges that the Amendment is not supported by adequate data and analysis as required by Section 163.3177(6),(8), and (10), Florida Statutes, and Rule 9J-5.005(2), Florida Administrative Code.

35. In the Joint Prehearing Stipulation, Polo clarified and stated with particularity that its claim of inadequate data and analysis relates to three deficiencies in the Pinder-Troutman traffic analysis relied upon by the Village. Specifically, Polo contended that the Pinder-Troutman traffic analysis is deficient because it (1) used only a one-day traffic count as opposed to three days; (2) failed to properly account for future growth; and (3) did not include a safety analysis. See Findings of Fact 60-74.

The Affected Roadways

36. The two roadway segments directly affected by the Amendment are (1) South Shore Boulevard from Pierson Road to Lake Worth Road; and (2) Lake Worth Road from 120th Street to South Shore Boulevard. The two roadway segments are located in the Equestrian Preserve of the Village.

37. Currently, the two roadway segments are two-lane undivided roads. They are designated on the Future Transportation Map of the existing Village Comprehensive Plan as two-lane collector roads with an LOS D.

Internal Consistency

38. Polo contends that the Amendment is inconsistent with the following Plan provisions: (1) Transportation Element Goal 1.0; (2) Transportation Element Objective 1.1; and (3) Equestrian Preserve Element Objective 1.3.

39. The existing Village Comprehensive Plan was adopted in 1999, and subsequently reviewed and determined to be "in compliance" by the Department.

40. The Department's final determination of compliance included a determination that the provisions of the Village's original Comprehensive Plan were internally consistent and supported by adequate data and analysis.

41. In determining the internal consistency of the Amendment with existing provisions of the Comprehensive Plan, each Comprehensive Plan Goal and its umbrella Objectives and Policies must be read and considered together. It is not appropriate to read and interpret an individual Policy in isolation.

42. Maintaining the high quality of the equestrian lifestyle for the Equestrian Preserve Area is a major goal for the Village. Transportation Policy 1.1.19 recognizes the unique character of the Equestrian Preserve Area, and the need to preserve it, by requiring the Village to "implement its system of streets and roads in coordination with the system of

equestrian trials and other equestrian facilities set forth in the Goals, Objectives and Policies of the Equestrian Element."

43. Limiting the speed for through-traffic and discouraging cut-through traffic is consistent with Goal 1.0 and Objective 1.1 of the Transportation Element. The Amendment accomplishes this by limiting the Rural Arterial roads to two lanes, and adding medians and turn lanes to those roadways.

44. Such traffic limitations are required by the Equestrian Preservation Element. In that Element's data and analysis section, it is stated that the Village will adopt an LOS of E for roads within the Equestrian Preserve Area in order to protect that area from increasing speeds by widening the rural collector roads to four lanes.

45. Policy 1.3.3 of the Equestrian Preservation Element addresses this concern and provides that roadways within the Equestrian Preserve shall be maintained as two-lane facilities with adopted LOS E. This Policy was found to be internally consistent with Transportation Goal 1.0 and Objective 1.1 and Equestrian Preservation Element Objective 1.3 when the existing Village Plan was found to be "in compliance."

46. Policy 1.3.1 of the Equestrian Preservation Element does not distinguish between classifications of roadways. The Village interprets Policy 1.3.3 to apply to all classes of

roadways within the Equestrian Preserve regardless of classifications. The Village's planning expert, Mr. Schofield, testified that, in his opinion, this interpretation is reasonable.

47. Mr. Basehart, Polo's planning expert, testified that Policy 1.3.3 of the Equestrian Preservation Element was intended to address only local roads and collectors because the original Plan did not provide for rural arterials, and that the Village had always intended that the two roadway segments be four-laned. However, the Transportation Element's Future Transportation Map of the existing Village Plan depicts the two roadway segments as two-lane facilities consistent with Policy 1.3.3 of the Equestrian Element.

48. Adopting an LOS standard of E for the newly created Rural Arterial roads and limiting those roadways to two lanes is consistent with Transportation Element Goal 1.0 and Objective 1.0.

49. By continuing to require Equestrian Policy 1.3.3's two-lane requirement and LOS of E for future roads within the Equestrian Preserve Area, the Amendment is consistent with that Policy.

Data and Analysis: The Pinder-Troutman Traffic Analysis

50. As noted herein, Polo raised three issues related to the Amendment's data and analysis. Each of those issues

relates to the sufficiency of a report prepared by traffic consultants and relied on by the Village as data and analysis to support the Amendment. The March 2001 report is referred to herein as the "Pinder-Troutman Report."

51. The validity of the data, as collected, is not in dispute. Polo's traffic engineer, Mr. Rennebaum, accepted the accuracy of the count data in reaching his conclusions.

52. Prior to the adoption of the Amendment, the Village was experiencing traffic capacity problems with the two roadway segments. The Village asked Pinder-Troutman whether the traffic volume and growth in the area justified a Plan change. To address the problems, in January 2001, the Village retained Pinder-Troutman Consulting, Inc. (Pinder-Troutman) to do a traffic analysis of the two roadway segments and to make recommendations for solving the problem.

53. Pinder-Troutman performed the analysis and submitted an initial report on February 6, 2001, and a final report on March 1, 2001, i.e., the Pinder-Troutman Report.

54. In the February 6, 2001, report, Ms. Troutman, the author of this report, noted that the roadways for the Equestrian area are limited to two lanes with a LOS of E and that in accordance with the Village's adopted Transportation Element, this roadway cross section and LOS correlate to an adopted peak hour directional service volume of 900. (This

service volume was derived from the Florida Department of Transportation (FDOT) 1995 LOS Manual, Table 5-1, for Urbanized Area arterials.) Directional volumes were derived from count data and annual average conditions examined. Because of the limited count data available for the roadway links in question, peak season factors and historic growth rates were developed, based on available count data for area roadways. An historic growth rate of 4.73 percent was applied. One conclusion reached was that the adopted two-lane LOS E service volume of 900 was projected to be exceeded in one year for Lake Worth Road.

55. In the February 6, 2001, report, Pinder-Troutman concluded that "in order to ensure operation at adopted LOS D standards, in the near future the inclusion of a four-lane cross-section in the equestrian area is recommended." The February report discussed one option for creating additional capacity on the roadway segments.

56. Thereafter, the Village requested Pinder-Troutman to consider, in part, whether the Plan's classification of the road segments was appropriate. The February and later March studies followed the same methodology, examining growth and the traffic along the corridor. (The February study was attached to the March study.)

57. The March 1, 2001, Pinder-Troutman Report considered various alternatives for improving service volumes to the South Shore Boulevard and Lake Worth Road segments. Turn lanes and medians were specifically evaluated, both of which are design features which increase safety. Traffic data was collected along the corridor, and morning and afternoon intersection turning movement counts were conducted at four locations. Twenty-four hour count data collected by the Village and Palm Beach County were also utilized. The FDOT 1998 LOS Handbook was also utilized to examine the potential for creating additional capacity with the construction of auxiliary turn lanes. A two-tier analysis was performed which included consideration of the appropriateness of utilizing "the category" for "unsignalized uninterrupted flow" for the roadway segments.

58. Based upon observations of the roadway segments, Ms. Troutman testified that there was a minimal amount of traffic entering and exiting the driveways on the roadway segments and that the fixed traffic signals only existed at the ends of the roadway segments. In her judgment, this meant that the flow of traffic was uninterrupted, notwithstanding the placement of a flashing signal at the intersection of South Shore Boulevard and Lake Worth Road (which Ms. Troutman treated as "a fully functional signal"), which is a mile from

the traffic signal at the intersection of South Shore Boulevard and Pierson Road, and a traffic signal (flashing yellow signal) at the fire station, which flashes only during emergencies, and is not considered "as a fully-operational signal." See Findings of Fact 70-74.

59. Based on its traffic study and analysis, Pinder-Troutman concluded that LOS D could be maintained on the two roadway segments for at least five years without widening to four lanes¹ if the new roadway category of "Rural Arterial" and service volumes for these segments are adopted and a median with turn lanes is provided.²

60. In the Joint Prehearing Stipulation, Polo alleged that there are three specific deficiencies in the Pinder-Troutman Report's data and analysis. Specifically, Polo alleged that the Report was inadequate because it: (1) utilized one day of data instead of three; (2) did not properly account for future growth; and (3) did not include a safety analysis.

61. Regarding the traffic counts, using a one-day traffic count does not invalidate the traffic analysis. For traffic studies like the Pinder-Troutman Report, a one-day traffic count is the standard procedure approved by Palm Beach County and the FDOT. The FDOT requires three days of counts only when variables or characteristics of a roadway are being

changed, and no variables are being changed in the Pinder-Troutman report. Polo's expert, Mr. Rennebaum, stated that the Pinder-Troutman Report did not change any variables. Further, Mr. Rennebaum testified that he also typically uses a one-day traffic count, and that a one-day traffic count is professionally acceptable. Mr. Rennebaum did not collect any new data on or perform an independent analysis of the roadway segments. However, although Mr. Rennebaum accepted the count data as accurate, he was critical of the use of a one-day count versus a three-day count because, according to Mr. Rennebaum, FDOT "typically requires three day counts."

62. Pinder-Troutman took traffic counts in the middle of the week at peak hours. It is professionally accepted standard practice to conduct traffic studies during the middle of the week rather than on weekends.

63. Pinder-Troutman used the best available data in its traffic analysis.

64. In its traffic analysis, Pinder-Troutman used a future annual growth rate of 4.73 percent. This rate was based on the historical growth rate of the areas adjacent to the South Shore Boulevard and Lake Worth Road segments. This rate was conservative because there has actually been negative growth in the area. The growth rate Ms. Troutman used was professionally acceptable.

65. The historic growth rate was based on information provided by Palm Beach County. There was no historic data available for the two roadway segments. Only recently have Palm Beach County and the Village begun to collect data for the two roadway segments in dispute.

66. The growth rate took into consideration future development that had been approved by development orders, including the Village of Wellington Mall and the Mento property. As the growth rate utilized in the study already projected future growth and it did not appear that those developments would add to those anticipated impacts, the Mall and Mento developments were not specifically added to the projected 4.73 percent growth rate.

67. The methodology used in developing the historic growth rate is professionally acceptable.

68. Polo did not offer persuasive evidence that the growth rate used in the Pinder-Troutman Report was inaccurate or inadequate. Polo's traffic expert, Mr. Rennebaum, had not conducted a growth rate analysis to determine if Pinder-Troutman's growth rate was correct, and had not formed an opinion on the growth rate.

69. Regarding safety issues, the Pinder-Troutman Report did not expressly discuss safety because the report was a capacity analysis. Experts for both the Village and Polo

testified that safety is primarily a design feature, more appropriately considered and addressed at the design stage of a roadway. However, the Pinder-Troutman Report does include safety as a consideration; it considered and evaluated turn lanes and medians, in conjunction with two-lane roads, which are safety features. Mr. Rennebaum agreed that turn lanes and medians are relevant safety considerations.

70. Although Polo did not identify it as an issue in the Joint Prehearing Stipulation, Mr. Rennebaum opined that the un-signalized uninterrupted flow analysis used by Pinder-Troutman for the two road segments was inappropriate. The issue is at least the subject of fair debate.

71. According to Mr. Rennebaum, Pinder-Troutman inappropriately treated the two road segments as a freeway because the uninterrupted flow analysis only applies to freeways and un-signalized sections of rural highways and because the roadway segments are not un-signalized segments. However, Ms. Troutman testified that the FDOT manual provides that both arterials and freeways may be analyzed under the un-signalized uninterrupted flow category. Pinder-Troutman treated the two roadway segments as an arterial for purposes of the uninterrupted flow analysis which is provided for in the FDOT manual. See Finding of Fact 58.

72. The rural arterial classification of the two roadway segments is appropriate. The term "rural" is used to indicate that the roads are located in the Equestrian Preserve which is the "rural" area of the Village. The arterial classification is appropriate because the two roadways currently function as arterials and will continue to do so after implementation of the Amendment. See endnote 2.

73. The weight of the evidence indicated that the two roadway segments currently function as arterials and will continue to operate as arterials if the Amendment is implemented. As noted by Ms. Troutman: "The change in classification does not change how the roadway operates. It's already operating as an arterial today. It's already operating at an uninterrupted. All we're doing is changing the classification to make it consistent with how it operates. It will not change how the road operates."

74. It is professionally acceptable to use the uninterrupted flow analysis on the two roadway segments.

Litigation Costs and Attorney's Fees Should Not Be Assessed Against Polo

75. Polo raised a reasonable dispute regarding the traffic analyses prepared by Pinder-Troutman. For the most part, experts supported Polo's positions, but their testimony and other evidence were not sufficient to overcome the

statutory burden. Polo did not prove that the Amendment is not "in compliance." Nevertheless, on this record, it can not be concluded that Polo participated in this proceeding for an improper purpose.

CONCLUSIONS OF LAW

Jurisdiction

76. The Division of Administrative Hearings has jurisdiction to conduct a hearing on the subject matter of this proceeding. Sections 120.569, 120.57(1), and 163.3184(9), Florida Statutes.

Standing

77. Polo is an "affected person" with standing to participate as a party in this proceeding pursuant to Section 163.3184(1)(a), Florida Statutes. The evidence established that Polo owns real property within the boundaries of the Village of Wellington, and that Polo, through its representatives, timely commented to the Village regarding the Amendment.

Burden of Proof

78. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue of the proceeding. Young v. Department of Community Affairs, 625 So. 2d 831 (Fla. 1993).

79. Section 163.3184(9)(a), Florida Statutes, imposes the burden of proof on the person challenging a plan amendment that has been determined by the Department to be "in compliance."

80. "In compliance" means consistent with the requirements of Sections 163.3177, 163.3178, 163.3180, 163.3191, and 163.3245, Florida Statutes, the State Comprehensive Plan, the Regional Policy Plan, and Rule 9J-5, Florida Administrative Code. See Section 163.3184(1)(b), Florida Statutes.

81. Because the Department initially issued a Notice of Intent to find the Amendment adopted by Ordinance Number 2001-011 "in compliance," this Amendment shall be determined to be "in compliance" if the local government's determination of compliance is "fairly debatable" as set forth in Section 163.3184(9)(a), Florida Statutes. Polo has the burden of demonstrating beyond fair debate that the Amendment is not "in compliance."

82. The term "fairly debatable" is not defined in Chapter 163, Florida Statutes, or Rule 9J-5, Florida Administrative Code. The Supreme Court of Florida has opined, however, that the fairly debatable standard under Chapter 163, Florida Statutes, is the same as the common law "fairly debatable" standard applicable to decisions of local governments acting in a legislative capacity. In Martin County v. Yusem, 690 So.

2d 1288, 1295 (Fla. 1997), the Court opined: "The fairly debatable standard of review is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety." (citation omitted). Quoting from City of Miami Beach v. Lachman, 71 So. 2d 148, 152 (Fla. 1953), the Court stated further: "[A]n 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." Martin County v. Yusem, 690 So. 2d at 1295. Nevertheless, "local government action still must be in accord with the procedures required by Chapter 163, Part II, Florida Statutes, and local ordinances." Id. (citation omitted).

Data and Analysis: The Pinder-Troutman Traffic Analysis

83. Polo contends that the Amendment is not based upon relevant and appropriate data and analysis as required by Section 163.3177(6), (8) and (10), Florida Statutes, and Rule 9J-5.005(2)(a), Florida Administrative Code. Specifically, as set forth in the Joint Prehearing Stipulation, Polo alleges that the Pinder-Troutman Report is deficient because it: (1) utilized only one day of data rather than three days; (2) did not properly account for future growth; and (3) did not include a safety analysis.

84. Any amendment to a comprehensive plan must be based upon appropriate data. Although such data need not be original data, local governments are permitted to utilize original data as long as appropriate methodologies are used for data collection. Section 163.3177(8) and (10)(e), Florida Statutes.

85. Rule 9J-5.005(2), Florida Administrative Code, requires that, in order for a plan provision to be "based" upon relevant and appropriate "data," the local government must "react to it 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 data must also be the "best available existing data" "collected and applied in a professionally acceptable manner." Rule 9J-5.005(2)(a)-(c), Florida Administrative Code; Section 163.3177(10)(e), Florida Statutes.

86. However, the data and analysis which may support a plan amendment are not limited to those identified or actually relied upon by a local government. All data available to a local government in existence at the time of the adoption of the plan amendment may be relied upon to support an amendment in a de novo proceeding. Zemel v. Lee County, et al., 15 F.A.L.R 2735 (DCA June 22, 1993), aff'd 642 So. 2d 1367 (Fla. 1st DCA 1994). See also The Sierra Club, et al. v. St. Johns

County, et al., Case Nos. 01-1851GM and 01-1852GM (DCA Final Order July 30, 2002)("The ALJ need not determine whether the [local government] or the Department were aware of the data, or performed the analysis, at any prior point in time." (citation omitted.)) Analysis which may support a plan amendment, however, need not be in existence at the time of the adoption of a plan amendment. See Zemel, supra. Data which existed at the time of the adoption of a plan amendment may be subject to new or even first-time analysis at the time of an administrative hearing challenging a plan amendment.

Id.

87. The Pinder-Troutman Report, in analyzing the capacity of the two roadway segments, evaluated several factors, including: LOS standards; maintaining the two roadways as two-lane facilities; turn lanes and medians; and the reclassification of the two roadways to Rural Arterial. These factors are relevant and appropriate to the Amendment adopted by the Village.

88. The Pinder-Troutman Report utilized the best available data in the form of the best traffic counts available from Palm Beach County and the Village which consisted of the one-day count taken by Pinder-Troutman. Polo's expert traffic engineer accepted the accuracy of the

one-day count and did not identify or provide any better data sources.

89. The Pinder-Troutman Report employed professionally acceptable methodologies. The use of one day's worth of traffic counts was professionally acceptable because there were no variables changed in the study to trigger FDOT's requirements for three days of counts. Polo's expert testified that a one-day count did not invalidate the Pinder-Troutman traffic analysis, confirmed that Pinder-Troutman did not change any variables, and further that he typically uses a one-day traffic count which is professionally acceptable. The calculation and use of the historic growth rate in the Pinder-Troutman Report are professionally acceptable. Polo presented no persuasive evidence to show that the growth rate was not calculated in a professionally acceptable manner. Finally, Pinder-Troutman's use of un-signalized uninterrupted flow analysis on the two roadway segments, as provided in the FDOT's manual, was professionally acceptable.

90. Polo did not establish that safety was an appropriate issue in this proceeding because of the scope of the Amendment. Polo's expert admitted that safety is customarily addressed at the design phase of roadways. However, safety was considered in the Pinder-Troutman Report because of its evaluation of safety features such as turn lanes and medians.

Polo's expert agreed that turn lanes at intersections and medians are relevant safety considerations. Therefore, safety was considered to the extent that it is relevant to the Amendment.

91. The persuasive evidence establishes that the "rural arterial" classification proposed by the Amendment for the two roadway segments is appropriate. The term "rural" connotes that the two roadways are in the Equestrian Preserve. The roadway segments currently operate as arterials and will continue to operate as arterials after they are reconstructed as divided roads with a median and turn lanes.

92. Polo did not prove beyond fair debate that the Amendment is not supported by appropriate data and analysis. This record contains appropriate data and analysis to support the Amendment at issue in this proceeding. This includes, but is not limited to, the data and analysis supporting the existing Village Comprehensive Plan, Ordinance No. 2001-11, and supporting documentation, and the Pinder-Troutman traffic analysis. Based on the data and analysis presented by the Village, it is at least subject to fair debate that the Amendment is based upon adequate data and analysis.

Internal Consistency

93. Polo contends that the Amendment is not consistent with other provisions of the Plan. Section 163.3177(2),

Florida Statutes, and Rule 9J-5.005(5)(a), Florida Administrative Code, require the elements of a comprehensive plan to be internally consistent. To be "internally consistent," comprehensive plan elements must not conflict. If the objectives do not conflict, then they are coordinated, related, and consistent. See generally Schember v. Department of Community Affairs, Case No. 00-2066GM (DCA Final Order Oct. 24, 2001).

94. Polo alleges that the Amendment is internally inconsistent with Transportation Element Goal 1 and Objective 1.1, and Equestrian Preservation Element Objective 1.3. The Amendment is not internally inconsistent with these provisions of the Plan. The existing Plan, including Transportation Element Goal 1 and Objective 1.1, and Equestrian Preservation Element Objective 1.3 and Policy 1.3.3, have been previously determined to be internally consistent.

95. Policy 1.3.3 of the Equestrian Preservation Element provides that all roadways in the Equestrian Preserve shall be two-lane facilities with adopted LOS E. The Village interprets Policy 1.3.3, which does not distinguish between classifications of roadways, to require all roads in the Equestrian Preserve to be two-lane roads with LOS E. The Village's interpretation is reasonable and is consistent with the plain language of Policy 1.3.3. Capers v. State, 678 So.

2d 330, 333 (Fla. 1996) ("The plain meaning of statutory language is the first consideration of statutory construction.")

96. The Amendment, which maintains the two roadway segments as two-lane facilities with adopted LOS E, does not conflict with and is not inconsistent with the above-cited provisions of the Plan. Thus, it is at least subject to fair debate that the Amendment is internally consistent with the Plan.

Ultimate Conclusion

97. For all of the foregoing reasons, Polo did not prove beyond fair debate that the Amendment is not "in compliance."

Litigation Costs and Attorney's Fees Should Not Be Assessed Against Polo

98. Pursuant to Section 120.595(1)(b) and (c), Florida Statutes, an award of litigation costs, including reasonable attorney's fees, may be awarded in a Section 120.57(1) proceeding if the administrative law judge finds the nonprevailing party participated for an "improper purpose" within the meaning of Section 120.569(2)(e), Florida Statutes.

(Likewise, sanctions, including the imposition of reasonable expenses including a reasonable attorney's fee, may be imposed against a person for filing a motion, pleading, or other paper in an administrative proceeding for an improper purpose.

Sections 120.569(2)(e) and 163.3184(12), Florida Statutes. A separate Final Order has been entered denying the Village's Motion for attorney's fees and costs pursuant to these subsections.)

99. The definition of "improper purpose" in Section 120.569(2)(e), Florida Statutes, includes a "frivolous purpose or needless increase in the cost of litigation." See also Section 120.595(1)(e)1., Florida Statutes. A frivolous purpose has been judicially defined as "one which is of little significance or importance in the context of the goal of administrative proceedings." Mercedes Lighting and Electrical Supply, Inc. v. State, Department of General Services, 560 So. 2d 272, 278 (Fla. 1st DCA 1990).

100. Whether an improper purpose exists is a question of fact determined by the administrative law judge's review of the record presented by the parties. Burke v. Harbor Estates Associates, Inc., 591 So. 2d 1034, 1037 (Fla. 1st DCA 1991). See also Mercedes Lighting, 560 So. 2d at 278. (The determination of improper purpose is based on the record, not a party's subjective intent.) In the absence of "direct evidence of the party's and counsel's state of mind, we must examine the circumstantial evidence at hand and ask, objectively, whether an ordinary person standing in the

party's or counsel's shoes would have prosecuted the claim." Procacci Commercial Realty, Inc. v. Department of Health and Rehabilitative Services, 690 So. 2d 603, 608 (Fla. 1st DCA 1997)(citation omitted.)

101. Polo raised a reasonable dispute regarding the traffic analyses prepared by Pinder-Troutman. For the most part, experts supported Polo's positions, but their testimony and other evidence were not sufficient to overcome the statutory burden. Polo did not prove that the Amendment is not "in compliance." Nevertheless, on this record, it can not be concluded that Polo participated in this proceeding for an improper purpose.

RECOMMENDATION

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

RECOMMENDED that a final order be issued concluding that the Amendment adopted by the Village of Wellington in Ordinance No. 2001-011 is "in compliance" as defined in Chapter 163, Part II, Florida Statutes, and the rules promulgated thereunder, and further, that the Department not award attorney's fees and costs against Polo.

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

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

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of October, 2002.

ENDNOTES

^{1/} Ms. Troutman opined that four-laning the roadway segments would lead to more traffic into the Equestrian Preserve from outside the Preserve and traffic at a higher speed.

^{2/} Ms. Troutman explained that the term "rural" was used to identify the road segments which are within the Equestrian community and that "arterial" was recommended because the roadway segments function as arterials. Ms. Troutman confirmed that she was using "the arterial category, not the freeway category." According to Ms. Troutman, there is not likely to be a change in operation of the roadway segments if the Amendment is implemented, except for "turn lanes to provide a more safe and efficient access coming into [the] driveways."

COPIES FURNISHED:

Karen A. Brodeen, Esquire
Department of Community Affairs
2555 Shumard Oak Boulevard, Suite 315
Tallahassee, Florida 32399-2100

Thomas G. Pelham, Esquire
John H. Holley, Esquire
909 East Park Avenue
Tallahassee, Florida 32301-2646

Christine P. Tatum, Esquire
Village of Wellington
14000 Greenbriar Boulevard
Wellington, Florida 33414-7615

Lawrence M. Weisberg, Esquire
6877 Southwest 18th Street, Suite 141
Boca Raton, Florida 33433-7045

Steven M. Siebert, Secretary
Department of Community Affairs
2555 Shumard Oak Boulevard, Suite 100
Tallahassee, Florida 32399-2100

Cari L. Roth, General Counsel
Department of Community Affairs
2555 Shumard Oak Boulevard, Suite 325
Tallahassee, Florida 32399-2100

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.