STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JIM DURHAM and CITIZENS FOR PROPER PLANNING, INC.,	)	
Petitioners,	)	
vs.	)	Case Nos. 03-0593GM
	)	03-0933GM
POLK COUNTY,	)	
Respondent,	)	
and	)	
JACK M. BERRY, INC.,	)	
Intervenor.	)	

RECOMMENDED ORDER

Pursuant to notice, these matters were heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on December 18 and 19, 2003, in Bartow, Florida.

APPEARANCES

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For Intervenor: Jack P. Brandon, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Polk County's small scale development amendment (CPA2003S-02) adopted by Ordinance No. 03-03 on January 22, 2003, as later amended by Ordinance No. 03-19 on March 15, 2003, is in compliance.

PRELIMINARY STATEMENT

This matter began on January 22, 2003, when Respondent, Polk County (County), adopted Ordinance CPA2003S-02, a small scale amendment, which changed the future land use designation on the County's Future Land Use Map (FLUM) on a 9.99-acre parcel of property owned by Intervenor, Jack M. Berry, Inc. (Berry), from Residential Low-1 (RL-1) to Convenience Center (CC) and Business Park Center (BPC-1). This change was formalized by the adoption of Ordinance No. 03-03 the same date.

On February 21, 2003, Petitioners, Jim Durham (Durham) and Citizens for Proper Planning, Inc. (CPPI), filed their Petition for Formal Administrative Proceedings (Petition) with the Division of Administrative Hearings. The Petition alleges that the amendment was not in compliance for numerous reasons.

This Petition was assigned DOAH Case No. 03-0593GM.

On March 6, 2003, the County adopted Ordinance No. 03-19, which amended Ordinance No. 03-03 by correcting certain "scrivener's errors in describing the property subject to the comprehensive plan amendments."

On March 19, 2003, Petitioners filed a second Petition for Formal Administrative Proceedings challenging the amendment adopted by Ordinance No. 03-19. Except for one additional ground, the second Petition contained essentially the same allegations raised in Case No. 03-0593GM and was given Case No. 03-0933GM. Both cases were assigned to Administrative Law Judge J. Lawrence Johnston. By Order dated March 20, 2003, the cases were consolidated for hearing.

On March 19, 2003, Intervenor filed its Motion to Intervene in support of the challenged amendment. An Order granting intervention was entered on March 19, 2003, subject to the filing of an objection by another party. On March 24, 2003, Petitioners filed a Response to Motion to Intervene in which they raised certain minor objections. Those objections are hereby overruled and the Order granting intervention is reaffirmed.

By Notice of Hearing dated March 25, 2003, a final hearing was scheduled on June 23 and 24, 2003, in Bartow, Florida. On May 29, 2003, the cases were transferred to

Administrative Law Judge Richard P. Hixon. On June 20, 2003, Petitioners filed an unopposed Motion for Continuance (Motion) on the ground that their expert witness was unavailable to testify. By Order dated June 20, 2003, the Motion was granted, and the cases were temporarily abated pending the parties' filing of new hearing dates. By Notice of Hearing dated August 6, 2003, the matters were rescheduled to December 18 and 19, 2003, at the same location. On December 9, 2003, the cases were transferred to the undersigned.

At the final hearing, Petitioners presented the testimony of Dr. Earl J. Starnes, a planner and accepted as an expert; Jean S. Reed, who resides near the project and is chairperson of the Board of Directors of CPPI; Jim Durham, a realtor and local property owner; and Reverend Arnold Brown, director of missions for Ridge Baptist Association, which owns property across the street from Berry's property. Also, they offered Petitioners' Exhibits 14A, 26A-F, 27A-D, 36, 37, 40A and B, and 43, which were received in evidence. The County presented the testimony of Merle H. Bishop, County Planning Director and interim Growth Management Department Director and accepted as an expert, and offered County Exhibit 1, which was received in evidence. Intervenor presented the testimony of Warren K. Heath, II, a former Berry employee; David Carter, a professional engineer and accepted as an expert; and G.

Michael Joachim, a planning consultant (and former County Planning Director) and accepted as an expert. Also, it offered Intervenor's Exhibit 9, which was received in evidence. Finally, the parties offered Joint Exhibits A-C, consisting of three volumes of documents (Exhibit A) and two maps (Exhibits B and C), which were received in evidence.

The Transcipt of the hearing (two volumes) was filed on January 7, 2004. By agreement of the parties, the time for filing proposed findings of fact and conclusions of law was extended to February 9, 2004. The same were filed jointly by Respondent and Intervenor on February 6, 2004, and by Petitioners on February 9, 2004, and they have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

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

a. Background

1. Berry is the owner of a tract of land located on the southwest corner of the intersection of Eagle Lake Loop Road (County Road 540-A) and Pollard Road in Section 16, Township 29, Range 26 in the eastern part of unincorporated Polk County, Florida. The property lies south of the City of Winter Haven, east-southeast of the City of Eagle Lake, less

than a mile south of Lake Eloise (on which Cypress Gardens is located), and west of U.S. Highway 27. Because Berry owns property within the County, and submitted oral and written comments to the County prior to the adoption of the challenged amendment, it has standing to participate in this action.

2. On July 19, 2002, Berry filed an application with the County Planning Department seeking to change the land use on 9.99 acres (or just below the threshold of 10.0 acres for a small scale amendment) from RL-1 to Neighborhood Activity Center (NAC) to include approximately 4.95 acres of various neighborhood specialty shops such as a grocery store, drug store, convenience store, and dry cleaners, with the remaining acreage used as a mini-warehouse self-storage facility. In September 2002, Berry amended its application by seeking to change 3.93 acres from RL-1 to CC and 6.06 acres from RL-1 to BPC-1. The application was assigned Case File No. CPA2003S-02.

3. Under the County's review process, the application is first reviewed by the County Development Review Committee (Committee), then by the County Planning Commission (CPC), which either accepts or rejects the Committee's recommendation, and finally by the Board of County Commissioners (Board), which either adopts the amendment, adopts the amendment as amended by the Board, or rejects the

amendment.

4. After conducting a preliminary review of the application, on September 16, 2002, the Committee conducted a public hearing and voted to recommend approval. The matter was then transmitted to the CPC, which conducted a meeting on October 9, 2002, and recommended that the Board approve the amendment.

5. On January 22, 2003, by a 3-2 vote, the Board adopted CPA2003S-02 changing the designation on the FLUM of the County Comprehensive Plan (Plan) as proposed by Berry. This was confirmed by the County's adoption of Ordinance No. 03-03.

6. On February 21, 2003, Petitioners filed their Petition challenging the Berry amendment.

7. The matter was again placed on the Board's agenda on March 19, 2003, after the County discovered that Ordinance No. 03-03 had inadvertently changed the land use on the entire parcel to CC rather a mix of CC and BPC-1. In addition, there were minor errors in the legal description of both the 3.93 and 6.06-acre parcels. Accordingly, Ordinance No. 03-19 was enacted to correct those errors.

8. A second Petition for Formal Administrative Proceedings (with essentially the same allegations, but also adding an allegation that the same property had been improperly subject to two small scale amendments within a 12-

month period) was filed by Petitioners on March 19, 2003, challenging the action taken in Ordinance No. 03-19.

9. At the outset of the final hearing, Petitioners voluntarily dismissed two allegations contained in their Petition. In their Proposed Recommended Order, Petitioners have further narrowed the issues by addressing only the following allegations: that the property which is the subject of this proceeding exceeds 10.0 acres in size and therefore cannot qualify as a small scale amendment; and that the amendment violates Future Land Use Element (FLUE) Policies 2.102-A1, 2.113-B-3, 2.113-B-4, 2.110-C3, and 2.113-B-1 and is thus internally inconsistent with the Plan. These issues will be discussed separately below. All other allegations contained in the second Petition and the parties' Pre-Hearing Stipulation are deemed to have been withdrawn or abandoned.

10. Because the change in the FLUM was filed and approved as a small scale plan amendment under Section 163.3187(1)(c), Florida Statutes (2003),[1] a compliance review of the amendment was not made by the Department of Community Affairs (DCA). See § 163.3187(3)(a), Fla. Stat.

b. Standing of Petitioners

11. Durham is a realtor/developer who owns property within 250 feet of Berry's property and resides at 10 Lake Eloise Lane, Southeast, Winter Haven, Florida. He made oral

and written comments to the County prior to the adoption of the amendment. As such, he qualifies as an affected person under Section 163.3184(1)(a), Florida Statutes, and has standing to bring this action.

12. CPPI began as an association in November 2002 and was later incorporated in February 2003. Presently, it has around 100 members, all of whom reside in the County. According to its chairperson, its purpose is to "help educate and inform residents of Polk County . . . towards growth matters that may affect their daily lives." The organization "encourages donations" from its members; it was scheduled to have conducted its first annual meeting on January 10, 2004; and members prepared and circulated petitions opposing the amendment to residents of the area in December 2002 and January 2003. At least one member of CPPI made written and oral comments on its behalf to the County prior to the adoption of the amendment in March 2003. There is no evidence, however, that CPPI (as opposed to its individual members) owns property or owns or operates a business within the County. Therefore, it lacks standing to file a petition.

c. <u>The land and surrounding uses</u>

13. Berry owns a triangle-shaped parcel of land (the parent parcel) totaling around 14 acres which fronts on Eagle Lake Loop Road (a 24-foot wide urban collector road) to the

north, Pollard Road (a local road) to the east, and a CSX railroad track, with right-of-way, on its western side. (Pollard Road dead ends at Eagle Lake Loop Road, and another collector road, Eloise Loop Road, continues to the north from the intersection). Pollard Road provides access to eight nearby single-family homes, which lie south of the Berry property and front on Pollard Road, and eventually terminates at the City of Winter Haven's Sewage Treatment Plant (an institutional use), which lies slightly more than a mile south of the site.

14. To the west of the site directly across the railroad tracks and fronting on Eagle Lake Loop Road is additional property owned by Berry and on which were once located the original Berry corporate offices. The Berry office buildings are now used, at least partially, by other tenants. Although the land across the railroad tracks is classified as Residential Suburban (RS), the property can be used for offices since the buildings were constructed, and office use began, prior to the adoption of the Plan. Directly across Pollard Road to the east is a vacant 10-acre tract of land owned by the Baptist Ridge Association, which intends to construct a church on the property.

15. Berry's property is now classified as RL-1, a land use classification which "is characterized by single-family

dwelling units, duplex units, and small-scale multi-family units." Since at least the 1950s, however, or long before the County adopted its Plan, the property has been used primarily for agriculture purposes (citrus groves); therefore, Berry is grandfathered to continue this non-conforming use on its property. Presently, the entire tract of land is undeveloped and largely covered by an orange grove, which Berry describes as "past maturation and is declining." Citrus trucks and trailers have been parked on the extreme northwestern corner of the parent parcel and are used in conjunction with the citrus operation.

16. Except for the former Berry offices, a nearby beauty salon operating out of a house, and a convenience store about three-quarters of a mile away, which all began operation before the Plan was adopted and are grandfathered as non-conforming uses, and the City of Winter Haven's large tract of institutional land to the south, all of the property within slightly less than a one-mile radius of the Berry property is classified in various residential land use categories with only residential uses.

d. <u>The Amendment</u>

17. As noted above, Berry has owned the subject property for many years. In 1987, Berry (then under the name of Jack M. Berry, Sr.) made application with the County for a zoning

change on the property from Rural Conservation (RC) to Commercial (C-3) to allow typical commercial uses. The application was ultimately denied by the County on the ground, among others, that the zoning district being proposed was inconsistent with the Plan, "given the residential development pattern in the area." At least partly on the theory that the area has changed substantially in the last 15 years, Berry has filed (and the County has approved) an application seeking to change the land use on the property to commercial uses.

18. Berry has carved out of the parent parcel two smaller parcels totaling 9.99 acres in size and seeks to change the land use on the northern parcel (3.93 acres) to CC and the land use on the southern parcel (6.06 acres) to BPC-1. The remaining land in the parent parcel, which consists of a 0.43-acre triangle-shaped parcel on the northwestern corner of the parent parcel and now used by citrus trucks, and a vacant 2.74-acre triangle-shaped parcel on the southern end, will remain R-1. (However, all parties agree that if the amendment is approved, these remaining parcels will be unsuitable for residential development.) In addition, strips of land ranging from 22 to 28 feet in width which front on Eagle Lake Loop Road and Pollard Road will be dedicated to the County for right-of-way and have not been included in the 9.99-acre amendment. Presumably, the proposed change is being done in

this manner so that the total acreage is less than 10.0 acres, which qualifies the application to be processed as a small scale development amendment rather than a regular plan amendment and subject to DCA review and approval.

19. If the change is approved, the northern part of the parcel (3.93 acres) will be changed to CC to develop convenience commercial uses. Under the Plan, the most typical tenant in this category is a convenience store, while other typical tenants include laundry, dry cleaning, barber, restaurant, gas station, and office uses. The southern (and larger) portion of the tract will be changed to BPC-1. The most typical tenant in this category is "[o]ne or more light-assembly plants, or warehouse facilities," which include a mini-warehouse storage facility. Other typical tenants described in the Plan are offices, distribution centers, research and development firms, and high-density residential, with proper buffering. (Berry says it intends to build a mini-warehouse facility on the southern parcel; however, any of the above described uses could be placed on the property if the change is approved.)

e. Petitioners' Objections

20. In broad terms, Petitioners have contended that the small scale amendment actually involves a use of more than 10 acres since the strips of land being dedicated as right-of-way

to the County must be counted as a part of the land being amended. They also contend that the plan amendment violates five FLUE policies and is therefore internally inconsistent with the Plan.

21. A small scale development amendment can only be adopted if "[t]he proposed amendment involves a use of 10 acres or fewer." See § 163.3187(1)(c)1., Fla. Stat. The parties have agreed that the legal description of the parcel subject to the change includes only 9.99 acres, or less than the 10-acre threshold. However, prior to the development of the site, Berry intends to dedicate to the County two strips of land, one fronting on Eagle Lake Loop Road (28 feet wide), and the other on Pollard Road (22 feet wide), for future right-of-way for some public purpose. Petitioners contend that the right-of-way constitutes essential infrastructure for the development and must be included as a part of the amendment. If this land is added to the amendment, the total acreage would obviously exceed 10.0 acres.

22. The dedicated land is not "essential infrastructure" needed for the development activities on the land, since two roadways (Eagle Lake Loop Road and Pollard Road) already exist on the northern and eastern boundaries of the property, and they are sufficient in size to provide ingress to, and egress from, the property. Instead, the County will "bank" the land

in the event some form of right-of-way activity is needed in the future. It is noted that Eagle Lake Loop Road was recently widened to 24 feet, and it is not anticipated that a further widening will occur for a number of years.

23. There is nothing in the Plan which requires an applicant for an amendment to include all of its property in a proposed amendment, or prevents an applicant from leaving a residual piece of property out of the application. Therefore, Berry was not required to include in the amendment the right-of-way or the two smaller residual pieces of property that will remain R-1.

24. Finally, assuming arguendo that Petitioners' contention is correct, that is, that an applicant must include right-of-way land dedicated to the local government in the total acreage calculation, Berry could still lawfully comply with the 10-acre threshold by simply reducing the other acreage being changed to CC or BPC by the amount of land being dedicated to the local government for right-of-way.

25. Therefore, it is found that Berry has not improperly excluded from the amendment land necessary for essential infrastructure so as to violate Section 163.3187(1)(c)1., Florida Statutes, as alleged by Petitioners.

26. Policy 2.102-A1 requires compatibility between adjacent uses. More specifically, it provides that:

> Land shall be developed so that adjacent uses are compatible with each other, pursuant to the requirements of other Policies in this Future Land Use Element, so that one or more of the following provisions are accomplished:
> a. there have been provisions made which buffer incompatible uses from dissimilar uses;
> b. incompatible uses are made to be more compatible to each other through limiting the intensity and scale of the more intense use;
> c. uses are transitioned through a gradual scaling of different land use activities through the use of innovative development techniques such as a Planned Unit Development.

Therefore, as the Plan is now written, so long as Berry develops the land in a manner which accomplishes at least one of the three "provisions" in paragraphs a - c of the policy, so as to make the adjacent uses compatible, the proposed land use change is permissible.

27. As noted above, except for a few non-conforming uses adjacent to, or near the property, virtually all of the area around the Berry property is designated for residential use. The area to the north and northeast is developed with up-scale (with some homes ranging to as high as $1 million in value), low density, large lot, single-family residential subdivisions, including Harbour Estates, Cedar Cove, Cypress Cove, Gaines Cove, and Valhalla. To the east of the site are more subdivisions, including Eloise Place, Skidmore, Cypress

Point, Lake Eloise Estates, Eloise Pointe Estates, a mobile home park, and Little Lake Estates. The lands to the south are primarily agriculture and in active citrus groves, with eight single-family homes on Pollard Road. Finally, a church will be built on the property directly across the street from the Berry property at the southeast corner of the intersection of Eagle Lake Loop Road and Pollard Road.

28. The County Planning Director agrees that a convenience store (which is an authorized use on CC land), standing alone, is incompatible with adjacent single-family residences. Given this acknowledgement, and the fact that a non-binding, proposed site plan submitted by Berry with its application does not provide for any buffering between the commercial uses and the residential areas, Petitioners contend that none of the conditions required for compatibility in paragraphs a through c have been met, and thus the policy has been violated.

29. The County has made clear, however, that when a final site plan is submitted, there must be "provisions [in the site plan] . . . which buffer incompatible uses from dissimilar uses," as required by the policy. Assuming that this is done at the site plan stage, at least one of the three provisions will be accomplished, thereby satisfying the compatibility requirement. This being so, the plan amendment

does not violate the policy and in this respect is not internally inconsistent with the Plan.

30. Petitioners next contend that the amendment is inconsistent with Policy 2.110-C3, which contains locational criteria for CC property. One such criterion requires that "Convenience Centers shall be located at the intersections of arterial and/or collector roads." Because the property is at a T-shaped intersection (as opposed to a traditional cross intersection with four directions for traffic to move off the site), Petitioners assert that the property is not located at an "intersection" within the meaning of the policy.

31. Eagle Lake Loop Road, on which the northern boundary of the property fronts, is designated as an urban collector road. That road forms an intersection with Pollard Road (a local road) and Eloise Loop Road (also an urban collector road), which meets Eagle Lake Loop Road from the north at the intersection, and then makes a 90 degree turn to the east. (When Eagle Lake Loop Road continues to the east beyond the intersection, it turns into Eloise Loop Road, and later into Thompson Nursery Road, until it eventually intersects with U.S. Highway 17.)

32. There is no dispute that the two collector roads (Eagle Loop Lake Road and Eloise Loop Road) form a T intersection, rather than a traditional cross intersection.

For many years, however, the County has considered a T intersection and a cross intersection to be the same in terms of satisfying Plan requirements. Indeed, at the present time, at least four other CC designated properties within the County are located at T intersections. The County's interpretation of the policy is consistent with sound planning principles, is reasonable and logical, and is more persuasive than the contrary view offered by Petitioners. Accordingly, it is found that the amendment does not conflict with Policy 2.110-C3.

33. Petitioners also contend that the amendment is inconsistent with Policy 2.113-B-3, which provides that "Business-Park Centers shall be located with consideration being given to regional transportation issues, and should be located at the intersections of arterial roads, and preferably on a fixed-route mass-transit line." (Emphasis added.)

34. The use of the word "should" (rather than "shall") is intended to state a preference, but not an absolute requirement, that BPC lands be located at the intersections of arterial roads. According to the County's Planning Director, this is because "most cases that come [before the County] don't meet the ideal situation" of satisfying every requirement, and the County has used this permissive language

to give itself some degree of flexibility in handling cases that do not meet every Plan requirement. Therefore, even though it is preferable that BPC land be located at the intersection of arterial roads, this requirement is not mandatory, and the County has the flexibility to approve a BPC land use change at property not sited at the intersection of arterial roads.

35. In contrast to the permissive language described above, Policy 2.113-B-4 provides that development within a Business-Park Center shall conform to certain development criteria, including one that

> a. Business-Park Centers shall have frontage on, or direct access to, an arterial roadway, or a frontage road or service drive which directly serves an arterial roadway. Business-Park Centers shall incorporate the use of frontage roads or shared ingress/egress facilities wherever practical.

36. In this case, the closest arterial roadway to Berry's property is State Road 17 to the west, which is four miles away, while State Road 60, another arterial roadway, is approximately six miles to the south. These arterial roads must be accessed, at least at the beginning of the trip, by Eagle Lake Loop Road, a two-lane, 24-foot wide urban collector that runs through predominately residential neighborhoods with some homes having fences within a foot or two from the road.

37. The County interprets the requirement that BPC land have "direct access to an arterial road" to be satisfied if the property fronts on a collector road, which then provides access to an arterial road. Under the County's interpretation, the requirement is met since Eagle Lake Loop Road provides access (albeit 4 to 6 miles away) to State Roads 17 and 60. The County says it has consistently interpreted this provision in this manner for at least ten years, and has approved other applications for changes to BPC when those parcels were located on urban collector roads. (The distance between these other BPC parcels and the arterial roads is not of record, however.)

38. While Policy 2.113-B-1 provides that Business-Park Centers are "not intended to accommodate major commercial or other high-traffic producing facilities," they "are intended to promote employment opportunities within the region by allowing for the establishment of office parks, research and development parks, areas for light-industrial facilities, distribution centers, and mixed-use employment parks." The same policy provides that they must have a usable area of 10 acres or more, have a service-area radius of 20 miles or more, be supported by a population of 150,000 or more people, and have a gross leasable area of 500,000 to 2,000,000 square feet.

39. Given this description of their purpose and characteristics, and the wide range of commercial activities that are allowed on Business-Park Center lands, it is not surprising that Policy 2.113-B-3 provides that BPC lands should be located "at the intersections of arterial roads, and preferably on a fixed-route mass-transit line," while Policy 2.113-B-4 requires that they "have direct frontage on, or direct access to, an arterial roadway, or a frontage road or service drive which directly serves on an arterial roadway." When reading these provisions as a whole, it is unreasonable to conclude, as the County does, that "direct access" contemplates a drive of over 4 miles, partly on a narrow two-lane road, in order to reach an arterial road. Accordingly, on this issue, Petitioners' evidence is the most persuasive, and it is found that the plan amendment conflicts with Policy 2.113-B-4 and in this respect is internally inconsistent with the Plan.

40. Policy 2.110-C3 sets forth the following location criteria for Convenience Centers:

> LOCATION CRITERIA Convenience Centers shall be located at the intersections of arterial and/or collector roads. There shall be the following traveling distance, on public roads, between the center of Convenience Center and the center of any other Convenience Center, or other higher-

> level
> Activity Center, Linear Commercial Corridor, or Commercial Enclave providing for the same convenience shopping needs:
>
> a. One (1) mile within the UDA and UGA
> b. Two (2) miles within the SDA and UEA
>
> This required separation may be reduced if:
>
> a. The higher-level Activity Center, Linear Commercial Corridor or Commercial Enclave within the required distance separation is over 80 percent developed; or
> b. the proposed Convenience Center market-area radius, minimum population support is over 5,000 people.

41. Petitioners contend that this policy has been violated in two respects: the Berry property is not located at the intersection of arterial roads; and there is an existing convenience center located within 0.8 mile of the Barry property, and Berry cannot qualify for a reduction in the required separation, as described in paragraphs a and b.

42. For the reasons stated in Findings of Fact 30-32, it is found that the Berry property is located at the intersection of two collector roads (Eagle Lake Loop Road and Eloise Loop Road) and that a T intersection satisfies the requirements of the policy.

43. As to the second contention, the Berry property is located within an UGA (Urban Growth Area), and an existing convenience store is located at the intersection of Rifle Range Road and Eagle Lake Loop Road, or less than a mile west

of Berry's property. The land use on the property on which the store sits was recently changed (in December 2003) to BPC, which does not allow a convenience store. However, the store is a non-conforming use, having been located at that site before the Plan was adopted.

44. The locational requirement in Policy 2.110-C-3 that CC lands within the UGA be located at least a mile apart is not the least bit vague or ambiguous: CC designated lands (and not individual convenience stores, as Petitioners suggest) must be separated by at least a mile, unless one of the two criteria for reducing this separation is met. Because there is no CC land within a one-mile radius of the Berry land, the policy has not been violated.

45. Policy 2.113-B-1 sets forth the following relevant characteristic for Business-Park Centers:

> General characteristics of Business-Park Centers are:
>
> Usable Area 10 acres or more

46. There is no dispute that the useable area for the BPC land is only 6.06 acres, or approximately 60 percent of the required acreage. Petitioners contend that the amendment violates the foregoing policy because the useable area on Barry's property is much less than "10 acres or more."

47. While the former County Planning Director conceded

that the 10-acre usable area requirement is "mandatory," he justified the amendment on the ground that the 6.06 acres "approximates" 10 acres, and thus satisfies the policy. In the same vein, the current County Planning Director asserted that if Berry was proposing a stand-alone BPC, it would have been required to have 10 usable acres. In this case, though, he pointed out that the Berry property will be used for a nonresidential mixed use (BPC and CC) totaling almost 10 acres, and therefore Berry has satisfied the requirement. The Planning Director admitted, however, that nothing in the Plan specifically allows this type of exception. He justified the County's action on the theory that the Plan "doesn't anticipate every situation that comes in," and "interpretations have to be made of the comprehensive plan and how it's applied."

48. The requirement that Business-Park Centers have a usable area of 10 or more acres is clear and unambiguous, was characterized as being "mandatory," and is not subject to any exceptions in the Plan. This being so, the County's interpretation is found to be unreasonable and contrary to the plain language in the policy, and in this respect the plan amendment is internally inconsistent with the Plan.

CONCLUSIONS OF LAW

49. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569, 120.57, and 163.3187(3), Florida Statutes.

50. In order to have standing to file a petition challenging a small scale development amendment, or to participate in the proceeding as an intervenor, the challenger or intervenor must be an affected person. See § 163.3187(3)(a), Fla. Stat. An "affected person" is defined in Section 163.3184(1)(a), Florida Statutes, as follows:

> "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; and adjoining local governments that can demonstrate that the plan or plan amendment will produce substantial impacts on the increased need for publicly funded infrastructure or substantial impacts on areas designated for protection or special treatment within their jurisdiction. 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.

Under this straightforward definition, besides having to submit comments, recommendations, or objections (oral or

written) to the County prior to the adoption of the amendment, a person (or corporation) must also own property, reside, or own or operate a business within the boundaries of the County in order to have standing. Since the word "business" is not defined, that word should be given its plain and ordinary meaning. See, e.g., State, Dep't of Bus. Reg. Div. of Alcoholic Bev. & Tobacco v. Salvation Limited, Inc., 452 So. 2d 65, 67 (Fla. 1st DCA 1984)(where a statute does not define a term, it should be given its plain and ordinary meaning); State v. J.H.B., 415 So. 2d 814, 815 (Fla. 1st DCA 1982 ("if a statute or rule uses a word without defining it, then its common or ordinary meaning applies"). "Business" means in part: "The occupation, work, or trade in which one is engaged . . . A specific pursuit or occupation . . . Commercial, industrial, or professional dealings . . . A commercial enterprise or establishment." See Webster's II New College Dictionary, p. 149 (1999). In other words, in order to be operating a business, the affected person (or corporation) must be pursuing some form of a trade, profession, vocation, or similar endeavor, as those activities are commonly understood.

51. The evidence shows that Berry and Durham own property (and operate a business as well) within the County, and they also submitted oral or written comments to the County

prior to the adoption of the amendment. As such, they qualify as affected persons within the meaning of the law.

52. As to CPPI, which neither owns property or a business in the County, one of its members submitted oral or written objections to the County on its behalf prior to the adoption of the amendment. While the record shows that CPPI conducts (or was suppose to conduct) an annual meeting, encourages donations, helps educate and inform its members on growth management issues, and prepared and circulated petitions opposing the challenged amendment, none of these activities constitutes the operation of a "business," as that term is commonly understood. Therefore, it is concluded that the activities described above do not equate to the operation of a business.

53. While this interpretation may be viewed by some as being unduly restrictive, had the Legislature intended to place a more expansive meaning on the term "business," so as to include these other types of non-traditional business activities, it could have easily done so. Accordingly, CPPI is not an affected person and lacks standing to file a petition. Even so, CPPI has been allowed to fully participate in this proceeding and to have its claims addressed in this Recommended Order. Further, its co-Petitioner, Durham, has

standing to continue to pursue the common interests of the two parties.

54. Section 163.3187(3)(a), Florida Statutes, provides that in a small scale development amendment case, "the local government's determination that the small scale development amendment is in compliance is presumed to be correct. The local government's determination shall be sustained unless it is shown that the amendment is not in compliance with the requirements of this act." The statute requires, then, that the County's determination be accepted as correct unless the preponderance of the evidence establishes otherwise. In other words, the test here is whether the evidence supports or contradicts the determination of the County. See Denig v. Town of Pomona Park, DOAH Case No. 01-4845 (Admin. Comm., Oct. 23, 2002). The parties do not dispute this proposition.

55. Petitioners first contend that the plan amendment violates Section 163.3187(1)(c)1., Florida Statutes, which requires that "the proposed amendment involves a use of 10 acres or fewer." Petitioners assert that the strips of land being dedicated to the County as right-of-way are "essential infrastructure" for the amendment and should have been included in the total acreage. As previously found, however, the dedicated land is not essential infrastructure for the amendment, there is no provision in the Plan which requires

that an applicant include the right-of-way in the total acreage, and even if Barry had included the strips in his total acreage, it could have easily reduced the size of the CC or BPC parcels, or both, to still meet the 10-acre threshold. Cf. Parker v. St. Johns County et al., DOAH Case No. 02-2658, 2003 WL 31846456 (Dept. Comm. Affrs, Feb. 27, 2003)(inclusion of future use of public right-of-way in small scale acreage calculation not required).

56. Petitioners also challenge the consistency of the amendment with other provisions in the Plan. Internal consistency is, of course, required by Section 163.3187(2), Florida Statutes. See also Coastal Development of North Fla., Inc. et al. v. City of Jacksonville, 788 So. 2d 204, 208 (Fla. 2001)("[t]he FLUM must be internally consistent with the other elements of the comprehensive plan").

57. Petitioners contend that the plan amendment is contrary to FLUE Policies 2.102-A1, 2.113-B-3, 2.113-B-4, 2.110-C3, and 2.113-B-1 and thus the amendment is internally inconsistent with the Plan, in violation of Section 163.3187(2), Florida Statutes.

58. For the reasons stated in the Findings of Fact, the preponderance of the evidence supports the County's determination that the plan amendment does not conflict with Policies 2.102-A1, 2.113-B-3, and 2.113-B-1. Conversely, the

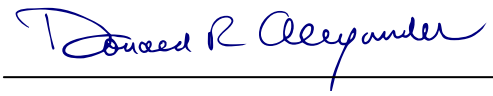
preponderance of the evidence establishes that the County's determination of the amendment's consistency with Policies 2.113-B-4 and 2.110-C3 was incorrect, and that the amendment conflicts with those provisions, in violation of Section 163.3177(2), Florida Statutes. This being so, the amendment is not in compliance.

RECOMMENDATION

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

RECOMMENDED that the Administration Commission enter a final order determining that the small scale development amendment (CPA2003S-02) adopted by Polk County by Ordinance No. 03-03, as amended by Ordinance No. 03-19, is not in compliance.

DONE AND ENTERED this 24th day of February, 2004, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 24th day of February, 2004.

ENDNOTE

1/ Unless otherwise indicated, all future references are to Florida Statutes (2003).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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