STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CITY OF WEST PALM BEACH; SEMINOLE IMPROVEMENT DISTRICT; CALLERY-JUDGE GROVE, L.P.; NATHANIEL ROBERTS; INDIAN TRAIL IMPROVEMENT DISTRICT; and VILLAGE OF WELLINGTON,	)	
Petitioners,	)	
vs.	)	Case Nos. 04-4336GM
	)	04-4337GM
DEPARTMENT OF COMMUNITY AFFAIRS and PALM BEACH COUNTY,	)	04-4650GM
Respondents.	)	

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 April 11-14, 18-20, and May 26, 2005, in West Palm Beach, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether the plan amendment adopted by Ordinance No. 2004-026 on August 24, 2004, is in compliance.

PRELIMINARY STATEMENT

This matter began on August 24, 2004, when Respondent, Palm Beach County (County), adopted Ordinance No. 2004-026, which added a new Objective 3.1 in the Future Land Use Element (FLUE) of the County's Comprehensive Plan (Plan) and deleted FLUE Policy 3.4-c and Capital Improvement Element (CIE) Policy 1.5-c (Amendments). The purpose of the Amendments was to "clarify water and wastewater service delivery policies" for

the Rural Tier and Rural Service Area of the County. On October 29, 2004, Respondent, Department of Community Affairs (Department), issued its Notice of Intent to Find Palm Beach County Comprehensive Plan in Compliance (Notice).

On November 19, 2004, Petitioners, City of West Palm Beach (City), Seminole Improvement District (SID), Callery-Judge Grove, L.P. (Callery-Judge), and Nathaniel Roberts (Roberts), filed their Petition for an Administrative Hearing to Challenge the Proposed Agency Action Determination that the Amendments to the Palm Beach County Comprehensive Plan are in Compliance, as Defined in Section 163.3184, Florida Statutes (Petition). The Petition generally alleged that the Amendments are internally inconsistent with other Plan provisions; are inconsistent with the requirements of Chapter 163, Florida Statutes (2004),[1] Florida Administrative Code Chapter 9J-5, and the State and Regional Comprehensive Plans; and are not supported by adequate data and analysis. This Petition has been assigned Case No. 04-4336GM.

On November 19, 2004, Petitioner, Indian Trail Improvement District (ITID), filed its Petition for Formal Administrative Hearing to Challenge the Proposed Agency Determination that the Palm Beach County Comprehensive Plan Amendment is in Compliance (Petition). Like the earlier Petition, this Petition generally alleged that the Amendments

are internally inconsistent with other Plan provisions; conflict with the requirements of Chapter 163, Florida Statutes, Florida Administrative Code Chapter 9J-5, and the State and Regional Comprehensive Plans; are not supported by adequate data and analysis; and effectively rescind a legislative mandate that authorizes ITID to provide water services within its boundaries. This Petition has been assigned Case No. 04-4337GM.

The two Petitions were forwarded by the Department to the Division of Administrative Hearings (DOAH) on December 6, 2004, with a request that an administrative law judge be assigned to conduct a hearing.

On December 12, 2004, Petitioner, Village of Wellington (Wellington), filed with the Department its Amended Petition for Formal Administrative Hearing (Amended Petition). (An earlier petition had been dismissed, without prejudice, by the Department.) In its Amended Petition, Wellington generally alleged that the Amendments are inconsistent with the requirements of Chapter 163, Florida Statutes, the State and Regional Comprehensive Plans, and Florida Administrative Code Chapter 9J-5; are internally inconsistent with other provisions within the Plan; are not supported by adequate data and analysis; and promote urban sprawl. The Amended Petition was forwarded by the Department to DOAH on December 29, 2004,

and was assigned Case No. 04-4650GM.

By Order dated January 3, 2005, the three cases were consolidated. A Motion to Stay all cases pending the outcome of a related circuit court action filed by Petitioners in Case No. 04-4336GM was denied by Order dated March 7, 2005.

By Notice of Hearing dated December 17, 2004, the cases were scheduled for a final hearing on February 15-17, 22, and 23, 2005, in West Palm Beach, Florida. On January 13, 2005, Wellington's unopposed Motion for Continuance was granted, and the matters were rescheduled to April 11-14 and 18, 2005, at the same location. Continued hearings were held on April 19 and 20 and May 26, 2005, at the same location.

At the final hearing, Petitioners presented the testimony of Terry L. Atherton, Assistant City Administrator; Ken Reardon, City Director of Public Utilities and accepted as an expert; Nathanial T. Roberts, General Manager of Callery-Judge Grove, L.P. and District Manager of SID; Victor Tchelistcheff, a consultant and accepted as an expert; Myra Orlando, a member of the Board of Supervisors of the ITID; Penny A. Riccio, president of the Board of Supervisors of ITID; Christopher Karch, a professional engineer and member of the Board of Supervisors of ITID; Isaac Hoyos, a County Principal Planner; Lorenzo Aghemo, County Planning Director; Robert J. Ori, a certified public accountant and accepted as an expert; Gary D.

Dernlan, the former Director of the County Water Utilities Department; Dr. Ray Liberti, a City Commissioner and accepted as an expert; William D. Reese, a consultant and accepted as an expert; and Franklin P. Schofield, II, Director of Community Services for Wellington and accepted as an expert. Also, they offered Petitioners' Exhibits 5, 5A, 7, 9, 10, 21-26, 28, 29, 32-34, 34-17A, 35, 37, 38, 40, 55, 72, 78N, 82, 83, 85, 86, 97, 98, 98B-1, 98E-1 through 4, 98M, 98R-1 through 3, 107, 109, 110, 119, 134, 137, 139, 141, 156, 157a, 166, 167, 204B, 237, 238, 242-244, 265-281, 283-285, 292, 293, 297, 297A, and 319A. All were received except Exhibits 10, 40, 98M, 106, 107, 109, 110, 119, and 237. In addition, a ruling was reserved on the admissibility of Exhibits 98E-1 through 98E-4, 141, and 156; those exhibits are hereby received in evidence. The County presented the testimony of Lorenzo Aghemo, Planning Director and accepted as an expert; Gary D. Dernlan, former director of the Water Utilities Department and accepted as an expert; and Scott Harder, a consultant and accepted as an expert. Also, it offered County Exhibits 1, 1A-D, 18, 22, 30, 52, 54-56, 59-61, 65, 72-74, 107-112, 170, 180, 182, 191, 196, 198, 268, 269, 303, 304, 307, 309, 311-313, 315-317, 321-330, 333, and 334. All exhibits were received in evidence except Exhibits 318 and 319, on which a ruling was reserved. Those exhibits are hereby received. The

Department presented the testimony of Roger A. Wilburn, a principal planner and accepted as an expert. Also, it offered Department Exhibits 1, 2, and 6-8, which are received in evidence. In addition, the undersigned granted the County's Request for Official Recognition of Chapters 57-1697, 67-1880, 70-861, and 2003-420, Laws of Florida; the Palm Beach County Code of Ordinances relating to water, sewer, and sewage disposal; the Lee County Comprehensive Plan; the St. Johns County Comprehensive Plan; and the Treasure Coast Regional Policy Plan. The City's Request for Judicial [Official] Recognition of Chapters 67-2169, 89-476, 89-479, 89-480, 90-461, and 96-477, Laws of Florida, which pertain to the City's Beach Water Catchment Area, was also granted. Finally, SID's opposed Request for Judicial [Official] Notice of Chapter 2005-238, Laws of Florida, filed on June 20, 2005 (or after the final hearing), is hereby granted.

The Transcript of the hearing (twelve volumes) was filed on May 31, 2005. By agreement of the parties, the time for filing proposed findings of fact and conclusions of law was extended to June 20, 2005. The filings were timely made, 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. The County's original Plan was adopted on August 31, 1989, and became effective on September 11, 1989. In 2000, the County amended its Plan by establishing a Managed Growth Tier System, which includes five classifications of land (Urban/ Suburban, Exurban, Rural, Agricultural Reserve, and Glades), along with three classes of service areas within the County to guide delivery of public services: Urban Area, Limited Urban Service Area, and Rural Service Area (RSA). It also assigned different levels of service for potable water and wastewater for each service area. At the same time, the County amended its FLUE to add a new Policy 3.4-c, which provides as follows:

> The County shall neither provide nor subsidize the provision of centralized potable water or sanitary sewer in the Rural Service Area, unless urban levels of service are required to correct an existing problem, prevent a projected public health hazard or prevent significant environmental degradation, or the areas meet the criteria described in Future Land Use Policy 3.4.b.

2. The County intended Policy 3.4-c to implement the Managed Growth Tier System by limiting the provision of centralized utility service in the Rural Tier. The effect of

this new policy was to prohibit the County from providing urban levels of utility services outside its existing service area boundaries in the RSA unless necessary to correct or prevent a public health hazard, existing problem related to urban levels of service, or environmental degradation.

3. In February or March 2003, the County Planning Department began assessing ways to address the problem of overlapping utility service in the RSA. Shortly thereafter, the Florida Legislature passed the Scripps Law (Chapter 2003-420, Laws of Florida), which took effect on November 3, 2003. Both of these factors led to the development of the Amendments in issue here. In late 2003, the County staff began the actual development of new amendments to its Plan (also known as Round 04-1 Plan Amendments) that would allow the County to provide services into the RSA. More specifically, the staff proposed to add a new FLUE Policy 3.1, which (as finally drafted) read as follows:

> The Palm Beach County Water Utilities Department shall provide potable water, reclaimed water and wastewater service to all unincorporated areas of the County except those unincorporated areas where the Palm Beach County Board of County Commissioners has entered or enters into a written agreement that provides utility service area rights to a public or privately owned potable water, reclaimed water, and/or wastewater utility, or in areas where the Palm Beach County Water Utilities Department is specifically

> excluded from providing utility service by Florida law. Palm Beach County Water Utilities Department shall continue to provide utility services to incorporated areas where service is already being provided by the County, or as provided for under utility service area agreements or as allowed for by law.

In general terms, the new policy designated the County as a service provider of water and wastewater services for unincorporated areas of the County where the County has, or will enter into, interlocal agreements except where excluded by interlocal agreement or by law. The effect of the amendment is to allow the County to extend potable water and wastewater services to unincorporated areas of the County, particularly "the western communities," where it currently does not do so.

4. The County staff also proposed to delete FLUE Policy 3.4-c, described in Finding of Fact 1, which was previously adopted in 2000. Finally, the County staff proposed to delete another policy adopted in 2000, CAI Policy 1.5-c, which read as follows:

> Urban levels of service shall not be provided by any governmental entity (outside of its existing service area boundary) within the Rural Service Area of the unincorporated area, except where:
>
> (1) The Rural Service Area receives urban services pursuant to Objective 1.1 in the Element, or

> (2) An urban level of service is required to correct a demonstrated public health, or
>
> (3) Development on a parcel in the Rural Tier that is adjacent to water and/or sewer lines which existed prior to the adoption of the Comprehensive Plan in 1989 shall be allowed to connect to those existing lines and shall be allowed to connect to public sewer and/or water when required by the Public Health Department. This policy shall not allow the extension of new water and/or sewer lines into the Rural Tier to serve development without first amending the Service Area Map and the Future Land Use Atlas to reflect a change in the service area boundary.

5. By deleting these two provisions, the County would no longer be prevented from providing utility services in the RSA unless certain conditions were met. (The staff also proposed to delete FLUE Policy 1.4-k, but that deletion is not in issue in these proceedings.)

6. On January 14, 2004, the County initiated the adoption process by transmitting Notice of the Amendments to the Intergovernmental Plan and Amendment Review Committee (IPARC), which is made up of all the local governments and special districts in the County, including the City, Wellington, SID, and ITID. IPARC acts as a clearinghouse for all comprehensive plan amendments prepared by the IPARC members. IPARC in turn distributed the notice to its members, including the City, Wellington, SID, and ITID.

7. After a public hearing on March 12, 2004, before the County's Local Planning Agency (known as the Land Use Advisory Board), by an 11-0 vote it recommended denial of Round 04-1 Plan Amendments and recommended that the County meet with the affected parties to resolve problems voiced by various attendees, including the City, SID, and ITID. On April 2, 2004, the County held a meeting with interested persons in an attempt to resolve objections to the Amendments before they were presented to the Board of County Commissioners. The objections were not resolved.

8. On April 5, 2004, by a 5-0 vote, the Board of County Commissioners approved transmittal of the Amendments to the Department, other commenting agencies, and each unit of local government or governmental agency that had filed a written request for copies of the Amendments. The Amendments were transmitted to the Department on April 15, 2004.

9. Between January 2004 and August 2004, the County held at least 37 meetings with utilities and other interested persons to discuss the Amendments, including three meetings with the City, at least five meetings with SID, at least ten meetings with ITID, and at least two meetings with Wellington. In addition, the County invited all utilities to attend meetings on April 28, 2004, at three locations to discuss utility service area boundaries. These meetings were attended

by approximately 25 different utilities, including the City, SID, ITID, and Wellington. As a result of these meetings, the County prepared and distributed utility service area maps in an attempt to demonstrate the necessity for better coordination between utilities.

10. On May 21, 2004, the Treasure Coast Regional Planning Council notified the County of no objection or comments regarding the Amendments.

11. On June 19, 2004, the Department issued its Objections, Recommendations, and Comments Report, which did not identify any objections, recommendations, or comments with respect to the Amendments.

12. On June 22, 2004, the South Florida Water Management District (District) notified the Department of no objections or comments regarding the Amendments.

13. After a public meeting on August 24, 2004, by a 5-1 vote, the Board of County Commissioners adopted Ordinance No. 2004-26 enacting the Amendments, and they were transmitted to the Department on September 14, 2004. On October 29, 2004, the Department issued its Notice determining the Amendments were in compliance.

14. On November 19, 2004, Petitioners (except Wellington) filed Petitions challenging the Amendments. Wellington filed its Amended Petition on December 16, 2004.

B. The Parties and Their Standing

15. The City is a municipality and adjoining local government of the County, operating its own water and wastewater utility system. The City owns the largest water treatment plant in the County and has an extensive wastewater treatment system, including partial ownership in the East Central Regional Water Reclamation Facilty, the largest wastewater plant in the County. It owns property and currently provides bulk service to entities located within the unincorporated area of the County, including ITID. It submitted written objections to the County during the adoption process and has standing to bring this action.

16. SID is an independent special district created by special act of the legislature in 1970. It lies within the unincorporated area of the County and has the authority to provide water and wastewater service within and without its boundaries. At present, SID provides potable water service within and without its boundaries, but only provides wastewater service within its boundaries. SID owns property in the unincorporated area and submitted objections to the County during the adoption process. These facts establish that SID has standing as an affected person to challenge the Amendments.

17. Callery-Judge is a limited partnership, which owns and operates citrus groves on property located within the unincorporated area. It also submitted objections to the County during the adoption process. Callery-Judge is an affected person and has standing to participate in this matter.

18. Mr. Roberts owns property in the unincorporated area, including Callery-Judge, of which he is the General Manager. He submitted objections to the Amendments during the adoption process and is an affected person.

19. ITID is an independent special district created by special act of the legislature in 1957. (In 2002, the Legislature amended and reenacted ITID's enabling legislation.) In 1998, ITID began operating a water and wastewater system within the unincorporated area. ITID does not generate its own potable water or treat its wastewater. It obtains bulk water from the City and SID and bulk wastewater service from the City. ITID owns property within the unincorporated area and submitted objections to the amendment during the adoption process. As such, it is an affected person within the meaning of the law.

20. Wellington is a municipality and adjoining local government of the County and operates a utility providing water and wastewater service within its boundaries and outside

to several developments. It also submitted objections to the County during the adoption of the Amendments. Because Wellington does not own property or operate a business within the unincorporated area of the County, in order to demonstrate standing, it must show that the Amendments will produce substantial impacts on the increased need for publicly funded infrastructure or substantial impacts on areas designated for protection or special treatment within its jurisdiction. See § 163.3184(1)(a), Fla. Stat. Wellington bases its standing on alleged increases in traffic and the use of parks within its boundaries, which purportedly will occur as a result of the Amendments. While Wellington could not give a precise amount (in terms of dollars) of those impacts, the testimony of its Director of Community Services established that the availability of centralized water and sewer services in the areas adjoining Wellington will arguably lead to higher density development patterns, which in turn will lead to an increased need for publicly funded infrastructure. As such, Wellington is an affected person and has standing to challenge the Amendments.

21. The Department is the state planning agency charged with responsibility for reviewing and approving comprehensive plans and amendments.

22. The County is a political subdivision of the State of Florida and is responsible for adopting a comprehensive plan and amendments thereto, including the Amendments. The County Water Utilities Department currently serves approximately 425,000 people, making it the largest utility provider in Palm Beach County and the third largest in the State of Florida.

C. The Current Plan

23. As noted above, the County initially adopted its current Plan on August 31, 1989, by Ordinance No. 89-17. The Plan has been amended numerous times since its initial adoption. The original 1989 Plan and all subsequent amendments up to the ones at issue in this proceeding have been found in compliance by the Department.

24. The current Plan is made up of sixteen elements, nine of which are mandatory, and seven of which are optional. The parties have indicated that the Utilities Element, CIE, Intergovernmental Coordination Element, and FLUE are relevant to this controversy; therefore, a brief description of their content and purpose is necessary.

25. The purpose of a Utilities Element is to provide necessary public facilities and services correlated to future land uses. See § 163.3177(6)(c), Fla. Stat., and Fla. Admin. Code R. 9J-5.011. The existing Utilities Element contains

potable water, wastewater, drainage, and solid waste sub-elements. The aquifer recharge sub-element is found in the Coastal Management Element. The Utilities Element and the aquifer recharge sub-element of the Coastal Management Element constitute the "general sanitary sewer, solid waste, drainage, potable water, and natural groundwater aquifer recharge element" referenced in Section 163.3177(6)(c), Florida Statutes, and Florida Administrative Code Rule 9J-5.011. The existing Utilities Element has been found in compliance with applicable provisions of statute and rule.

26. Section 163.3177(3)(c), Florida Statutes, and Florida Administrative Code Rule 9J-5.016 contain requirements for the capital improvements element of a comprehensive plan. The existing CIE complies with these requirements. Objective 1.7 and Policy 1.7-a describe how the County implements the CIE. Pursuant to these requirements, the CIE is updated annually at the same time as the County budget.

27. Table 10 of the CIE reflects the water utilities revenue and expenditures for the then current budget year and five years into the future. Table 10 was not updated when the Amendments were adopted because any future changes to the County's capital expenditures resulting from the Amendments would be made through the annual budget update process.

28. The Intergovernmental Coordination Element contains provisions encouraging coordination between the County and adjoining municipalities and special districts in order to more efficiently meet the needs of the County residents. (There are more than 25 municipalities and special districts within the County.) This Element has previously been found in compliance with Section 163.3177(6)(h), Florida Statutes, and Florida Administrative Code Rule 9J-5.015.

29. One of the coordination tools identified in the Intergovernmental Coordination Element is the IPARC, described in Finding of Fact 5, which acts as a clearinghouse for all comprehensive plan amendments prepared by the IPARC members. IPARC distributes notice of plan amendments to all members, who then have the opportunity to provide comments regarding the proposed action.

30. Section 163.3177(6)(a), Florida Statutes, and Florida Administrative Code Rule 9J-5.006 contain requirements for the future land use element of a comprehensive plan, including the future land use map (FLUM). According to the Plan, the FLUE "is the nucleus of the . . . Plan" and "defines the components of the community and the interrelationship among them, integrating the complex relationships between land use and all of the other elements of the Plan that address the physical, social, and economic needs of the people who live,

work, and visit Palm Beach County." Both the existing FLUE and the current FLUM have been found in compliance. The Amendments do not alter the FLUM, but they do change FLUE Policy 3.1-c and delete FLUE Policy 3.4-c.

31. As noted above, in 2000 the County adopted a Managed Growth Tier System, which is a planning tool intended to manage growth and protect varying lifestyles in the County. The Managed Growth Tier System consists of five categories or tiers, which are described in Objective 1.1 of the Plan. Objectives 1.2 through 1.6 govern development within the five tiers. FLUE Table 2.1-1 establishes permitted densities for each of the tiers.

32. The Amendments do not modify any Goals, Objectives, or Policies governing the five tiers, with the exception of FLUE Policy 1.4-k. However, Petitioners have not challenged the proposed deletion of FLUE Policy 1.4-k and it is not one of the Amendments at issue in this proceeding. Additionally, the Amendments will not alter the permitted densities for any of the tiers.

33. Concurrency Management refers to the system adopted in the CIE to ensure that infrastructure, which meets or exceeds the established minimum level of service standards, is in place concurrent with development approval. According to FLUE Policy 3.5-a, development orders and permits shall not be

approved unless services and facilities meet or exceed the minimum levels of service.

34. FLUE Objective 3.1 establishes three graduated service areas in Palm Beach County -- the Urban, Limited Urban Service, and Rural Service Areas. Each service area corresponds to one or more of the five tiers. The minimum levels of service required for each area are listed in FLUE Table 3.1-1.

35. According to FLUE Table 3.1-1, FLUE Policy 3.5-a, and Utilities Element Policies 1.2-g and 1.3-e, the minimum levels of service in the RSA for potable water and sewage are on-site wells and septic tanks, respectively. With the exception of water and sewer, the other minimum levels of service are the same for all three service areas. The Amendments do not alter the minimum levels of service for any service area.

36. Through its planning expert, Wellington contended that the Amendments will cause a de facto change to the minimum levels of service. However, the extension of centralized water and sewer service into the RSA does not change the established minimum levels of service.

37. Petitioners also argue that the Amendments will increase minimum levels of service in the RSA for traffic and parks. However, the minimum levels established in FLUE Table

3.1-1 for all services and facilities, other than potable water and sanitary service, are County-wide standards.

D. Reasons for Adopting the Plan Amendments

38. Policy 3.4-c did not have its intended effect because it prevented the County from providing service to the Rural Tier. After 2000, repeated efforts by the County to negotiate the service areas of the numerous entities operating utility services in the unincorporated area were unsuccessful. Indeed, "there was not a willingness of many utility providers to agree on anything." This created a lack of coordination and planning as to the provision of services in the Rural Tier.

39. The City, SID, and ITID each have utility service areas which overlap the service area of other utility providers. In particular, portions of the Acreage, a community located in the central-western unincorporated area of the County, fall under the claimed utility jurisdiction of SID, ITID, Cypress Grove Community Development District, and the Village of Royal Palm Beach (Royal Palm Beach).

40. The City is also rapidly expanding service in the unincorporated area by entering into bulk water service agreements with a number of utilities located in the Rural Tier, including Royal Palm Beach, Seacoast Utilities Authority, and ITID. The City intends further expansion of

bulk service in the Rural Tier, so as to increase utility revenues. It views the Amendments as affecting its substantial interests by potentially limiting these revenues.

41. Royal Palm Beach claims an exclusive utility service area which overlaps the utility service areas claimed by SID and ITID. Royal Palm Beach is located entirely within the legislative boundaries of ITID and claims all of ITID as its service area.

42. The Amendments support the authority granted to the County by the Scripps Law. That law gives the County the exclusive right to provide water and wastewater service to the Scripps Biomedical Research Facility and to construct utility facilities within and without the boundaries of the Scripps project. The enactment of the Scripps Law reinforced the need for the Amendments, as the Scripps Biomedical Research Facility will be located in the unincorporated area. Existing FLUE Policy 3.4-c is arguably inconsistent with the Scripps Law because it prevents the County from providing utility service in the RSA. Since the Scripps Law supersedes all other contrary provisions of Florida Law, it logically follows that FLUE Policy 3.4-c should be repealed.

43. The Amendments are also supported by the provisions of the County Code of Ordinances Sections 27-16 through 27-22, which codify County ordinances that were adopted in the 1970s

and deal with utility service. These ordinances authorize the County to designate a Control Area in the unincorporated area and to require County approval of any water and wastewater facilities constructed in these areas.

44. In summary, the County adopted the Amendments to avoid service area disputes between utility providers such as those described above, to prevent wasteful and duplicative utility services, to implement the Legislature’s mandate regarding the Scripps Biotechnology Park, to ensure a sufficient water supply to meet the reasonable development needs of the unincorporated area, and to enforce the provisions of the County Code of Ordinances.

E. Petitioners' Objections

a. Data and analysis

45. Petitioners contend that the only data and analyses submitted by the County to support the Amendments are contained in a rather brief County Staff Report (Petitioners' Exhibit 5), and that no other documentation was actually forwarded to the Department. They further contend that the Amendments must be based on demographic, economic, and fiscal studies, and that none were utilized by the County. Because of these omissions, they argue that the Amendments violate relevant statute and rule provisions and are not in compliance.

46. Section 163.3177(8) and (10)(e), Florida Statutes, and Florida Administrative Code Rule 9J-5.005(2) require that plan amendments be based on relevant and appropriate data and analyses applicable to each element. In determining whether a plan amendment complies with this requirement, the Department reviews each amendment on a case-by-case basis. In doing so, it does not require the same amount or type of data for all plan amendments. See, e.g., Zemel et al. v. Lee County et al., DOAH Case No. 90-7793 (DOAH Dec. 16, 1992, DCA June 22, 1993)(projections of aquifer thickness and transmissivity do not require the same precision as calculating volume-to-capacity ratios for levels of service on road segments); 1000 Friends of Florida et al. v. Department of Community Affairs et al., DOAH Case No. 04-4492GM, 2005 WL 995004 at *15 (DOAH April 28, 2005, DCA May 9, 2005)("a numeric analysis is not necessary to justify industrial uses since they may be goal-based and aspirational"). For example, if amendments merely represent a policy or directional change and depend on future activities and assessments (i.e., further analyses and decision-making by the local government), the Department does not require the degree of data and analyses that other amendments require. (These amendments have sometimes been referred to as aspirational amendments. See Collier County v. City of Naples et al., DOAH Case No. 04-1048GM, 2004 WL

1909265 at *5 and *6 (DOAH Aug. 24, 2004, DCA Dec. 28, 2004)). Conversely, amendments which are mandatory in nature, that is, amendments which are required to be implemented by Chapter 163, Florida Statutes, or Florida Administrative Code Chapter 9J-5, require more data and analyses. Thus, under Department interpretations of the relevant statutory and rule provisions, if an amendment does not have an immediate impact on the provision of services in the unincorporated area, is policy-based, does not require any capital improvement expenditures at the time the amendment is adopted, and simply represents a directional change in the County's long-term water utility planning, it is similar to an aspirational amendment and can be based on less data and analyses than might otherwise be required.

47. Here, the County’s actual policy regarding utility service areas will depend on future activities and assessments. The Amendments do not require the County to take any immediate action. The Amendments do not mandate that existing utility customers in the RSA switch to the County. The Amendments do not authorize any new development in the Rural Tier, and any future development would have to be approved by the Board of County Commissioners through the normal development approval process. Therefore, the Amendments are akin to an aspirational amendment and do not

require the degree of data and analyses that are required for other amendments.

48. The County Staff Report identifies, albeit in brief fashion, data and analyses in support of the Amendments. It provides, among other things, that the Amendments are necessary because "[t]he lack of County participation as a service provider has created a void in effective long-term utility planning, resulting in duplicative service lines, inefficient services in the RSA, overlapping utility jurisdictions and, absence of some written agreements defining service areas." The Staff Report further identifies the County's authority to provide service and the necessity for the Amendments to allow the County to provide service to the Biotechnology Research Park in northwest Palm Beach County.

49. In addition, a number of documents presented at hearing provide data and analyses in support of the Amendments. In considering these documents, the undersigned notes that all data or analysis available and existing at the time of the adoption of the plan amendment may be relied upon to support an amendment in a de novo proceeding and may be raised or discussed for the first time at the administrative hearing. Zemel, supra; McSherry et al. v. Alachua County et al., DOAH Case No. 02-2676GM, 2004 WL 2368828 at *54 (DOAH Oct. 18, 2004, DCA May 2, 2005); Melzer et al. v. Martin

County et al., DOAH Case Nos. 02-1014GM and 02-1015GM, 2003 WL 2150756 at *33 (DOAH July 1, 2003, DCA Sept. 26, 2003 and Oct. 24, 2003). The District's Districtwide Water Supply Assessment identifies future potable water demands for various utilities in the County. The District's Lower East Coast Regional Water Supply Plan describes the available raw water supply to meet future demands in the County. The District's CUP-CERP (Consumptive Use Permit-Comprehensive Everglades Restoration Plan) Guiding Principles lists interim water use permitting guidelines, which indicate utilities may experience problems obtaining permitted allocations beyond what is needed to meet their 2005 demands. District Water Use Permit 50-00135-W is the County's 20-year water use permit, which confirms that the County is the only utility in the unincorporated area with a guaranteed, long-term potable water allocation. The information contained in these documents confirms the County's ability to act as the default water utility provider in the unincorporated area.

50. The County Linking Land Use and Water Supply Plan, Water and Wastewater Master Plan, Reclaimed Water Master Plan, Raw Water Master Plan, 20-Year Wastewater Collection System Master Plan, and Projected Yearly Capital Expenditures each provide data and analysis, which support the County's ability

to serve as the default utility provider in the unincorporated area.

51. As a water management district study, the District's documents are professionally accepted sources, which constitute appropriate data and analyses under Florida Administrative Code Rule 9J-5.005(2)(c). Similarly, the County's reports constitute existing technical studies, which are also appropriate data and analysis.

52. Petitioners contend that the County was required to collect new data and prepare a comparative analysis of the County Water Utilities Department and other utility providers in the unincorporated area. However, according to Florida Administrative Code Rule 9J-5.005(2)(b), local governments are not required to collect new data in support of a plan amendment. Further, neither Florida Administrative Code Rule 9J-5.005(2) nor Section 163.3177, Florida Statutes, requires a comparative analysis.

53. It is at least fairly debatable that the Amendments are supported by relevant and adequate data and analyses.

b. Intergovernmental Coordination

54. Petitioners also contend that in order to comply with the Intergovernmental Coordination Element of the Plan, the County must inventory and analyze the facilities and services provided by other utility providers in the areas

affected by the Amendments. In other words, they contend that without data and analysis relative to other providers, the coordination function is incapable of being done and is meaningless and renders the Amendments inconsistent with Florida Administrative Code Rule 9J-5.015. (That rule sets forth in detail the data requirements upon which the element in a local government's comprehensive plan must be based, and the goal statements, specific objectives, and policies which must be found in the element.)

55. Section 163.3177(6)(h), Florida Statutes, and Florida Administrative Code Rule 9J-5.015 set forth requirements for the intergovernmental coordination element of a comprehensive plan. The existing Intergovernmental Coordination Element has been found to be in compliance. The Amendments do not modify this element.

56. Although not required for purposes of compliance, the County followed intergovernmental coordination procedures in the comprehensive plan when adopting the Amendments. The Amendments were submitted to IPARC for review by member governments prior to their consideration by the Board of County Commissioners. The County met with other utility providers and interested persons no less than 37 times to discuss the Amendments. Further, Petitioners' own witnesses concede that their representatives attended multiple meetings

with the County regarding the Amendments. Such efforts demonstrate that the County substantively complied with the Intergovernmental Coordination Element. Petitioners' contention that these meetings were not conducted in good faith has been rejected.

57. Petitioners implicitly suggest that intergovernmental coordination means acquiescing to the position of an objector. If this were true, adjacent local governments would have veto power over the County's ability to enact plan amendments, a result not contemplated by the statute. The intergovernmental coordination requirements of Section 163.3177(6)(h), Florida Statutes, and Florida Administrative Code Rule 9J-5.015 do not require that local governments resolve all disputes regarding a comprehensive plan and its amendments to the satisfaction of all interested persons, but only that the local government take into consideration input from interested persons. See, e.g., Department of Community Affairs et al. v. Lee County et al., DOAH Case Nos. 89-1843GM and 90-7792GM, 1990 WL 749359 (DOAH Jan. 7, 1993, Admin. Comm. Feb. 10, 1994). The numerous meetings held by the County demonstrate adequate consideration of opposing views.

58. It is at least fairly debatable that the County satisfied the intergovernmental coordination requirements of Section 163.3177(6)(h), Florida Statutes.

c. Economic Feasibility/Comparative Analysis

59. Petitioners argue that the Amendments fail to comply with Section 163.3177(2), Florida Statutes, which requires that "the comprehensive plan shall be economically feasible." Petitioners claim that in order to establish economic feasibility, the County first should have conducted a comparative economic analysis of the cost of utility service in the unincorporated area by various existing and hypothetical service providers. However, this construction of the statute is at odds with the Department's interpretation.

60. The Department does not interpret the economic feasibility requirement of Section 163.3177(2), Florida Statutes, as requiring such a comparison. Instead, it construes the statute as only requiring that a plan amendment be realizable in financial terms, that is, that the local government has the financial ability to achieve what is specified in the amendment. See Resolution Trust Corp. v. Department of Community Affairs et al., DOAH Case No. 94-5182GM, 1995 WL 1052797 *6 (DOAH April 19, 1995, Admin. Comm. Sept. 4, 1998)("Economic feasibility means plans should be realizable in financial terms."). Compare Southwest Fla.

Water Mgmt. District et al. v. Charlotte County et al., 774 So. 2d 903, 916 (Fla. 2d DCA 2001), where the Court interpreted the use of the term "economically feasible" in a proposed Basis of Review provision as meaning "financially feasible or financially 'doable' . . . [and the] financial ability of a WUP applicant to institute reuse." The Department's interpretation of the statute was not shown to be unreasonable or clearly erroneous.

61. The evidence shows that the Amendments are financially realizable. The County Water Utilities Department is one of the financially strongest utilities in the nation. It has the highest municipal bond rating (AAA) granted by the three major rating agencies. As of August 24, 2004, no other utility in the State of Florida had achieved an AAA rating from the three bond rating agencies, and the County Water Utilities Department is among only a handful of utilities nationwide to have achieved that status. Petitioners have acknowledged that the County is a very strong utility from a financial perspective. Given the County's strong financial state, it is qualified and able to serve as the default provider in the unincorporated area.

62. In summary, it is fairly debatable that the Amendments are economically feasible as the term is used in Section 163.3177(2), Florida Statutes, because the County has

the financial ability to extend utility service to the unincorporated area.

d. Urban sprawl

63. Wellington (but not the other Petitioners) essentially contends that the Amendments will promote urban sprawl because the County will now allow new urban services (water and wastewater) into undeveloped areas thereby resulting in urban development.

64. Florida Administrative Code Rule 9J-5.006(5) contains standards discouraging the proliferation of urban sprawl. Existing provisions in the Plan, including the Managed Growth Tier System, prevent urban sprawl within the County. Florida Administrative Code Rule 9J-5.006(5)(k) provides in part that "if a local government has in place a comprehensive plan found in compliance, the Department shall not find that plan amendment to be not in compliance on the issue of discouraging urban sprawl solely because of preexisting indicators if the amendment does not exacerbate existing indicators of urban sprawl within the jurisdiction." The Amendments do not affect existing growth management provisions in the Plan and thus will not exacerbate urban sprawl. Although not required, the amendment of FLUE Policy 1.4-k, which Petitioners did not challenge, will also have the

effect of maintaining the status quo with respect to urban sprawl.

65. At the same time, the Amendments do not directly or indirectly authorize new development and are only aspirational in nature. Any extension of water and sewer lines into the unincorporated area does not necessarily create urban sprawl because development is not automatically authorized by these activities. Even Wellington's planning expert concurred that urban sprawl is not caused by the provision of utility services, but by the Board of County Commissioners' approval of development orders. It is at least fairly debatable that the Amendments will not encourage urban sprawl in contravention of the Plan.[2]

e. Internal consistency

66. Petitioners next contend that the Amendments fail to comply with Sections 163.3177(2), 163.3177(10)(a), and 163.3187(2), Florida Statutes, and Florida Administrative Code Rule 9J-5.005(5), which require that all elements of a comprehensive plan be consistent with each other. In addressing this objection, only those inconsistencies expressly alleged in their Petitions and Amended Petition will be considered. See, e.g., Heartland Environmental Council v. Department of Community Affairs et al., DOAH Case No. 94-

2095GM, 1996 WL 1059751 at *19 (DOAH Oct. 15, 1996; DCA Nov. 25, 1996).

i. Future Land Use Element

67. Petitioners first contend that the Amendments are inconsistent with Goal 3, Objective 3.1, and Policies 3.1-a and 3.1-b of the FLUE. These provisions require that the County "define graduated service areas for directing services to the County's diverse neighborhoods and communities in a timely and cost-effective manner"; that the County establish graduated service areas "to distinguish the levels and types of services needed within a Tier, consistent with the characteristics of the Tier," which include "the need to provide cost effective services"; that the County establish Urban, Limited Urban Service, and Rural Service Areas based on several factors in Table 3.1.1, including "[t]he cost and feasibility of extending services"; and that the County review minimum levels of service "during preparation of the Evaluation and Appraisal Report [EAR] and the Comprehensive Plan as amended." The latter provision also requires that each service provider determine the maximum and available capacity of their facilities and services for this review.

68. The first broad goal is implemented through the County's existing Managed Growth Tier System and is not affected by the identity of the utility provider. Also, the

Amendments do not alter the Managed Growth Tier System, nor do they alter the existing minimum levels of service required for the RSA.

69. Similarly, FLUE Objective 3.1 is not affected, as the Amendments only have the potential to change the utility provider in certain areas, and not the level of service provided within the RSA. Further, the Amendments do not change the existing service area boundaries and established service area definitions.

70. As to Policy 3.1-a, the service areas have been established and found in compliance and the Amendments do not alter the service area designations or Table 3.1-1. Therefore, they are not inconsistent with Policy 3.1-a.

71. Finally, Policy 3.1-b is not affected by the Amendments because the minimum levels of service are not altered and the Amendments are not the product of an EAR.

ii. Capital Improvements Element – Table 10

72. Table 10 of the CIE describes water and sewer revenues, operating revenues, federal/state grants, other revenues, bond/ loan proceeds, fund balances, total water and sewer revenues, water and sewer operating expenditures, water and sewer capital projects, annual surplus/deficit, and cumulative surplus/deficit for fiscal years 2004-2009. Petitioners contend that the Amendments are inconsistent with

this provision because the Table has not been amended to reflect the expenditures that will be made by the County as a result of the Amendments.

73. This Table is not affected because the Amendments do not require any changes to the County's capital expenditures. If changes do occur as a result of the County's planned extension of utility service into the unincorporated area, the capital improvements associated with extension of service will be addressed in subsequent annual updates of Table 10.

iii. Intergovernmental Coordination Element

74. Petitioners contend that the Amendments are inconsistent with Goal 1 and Objective 1.1 of the Intergovernmental Coordination Element, which require the County to "provide a continuous coordination effort with all affected governmental entities" and to "utilize existing mechanisms to coordinate planning efforts with the plans of school boards, other units of local government providing services, adjacent municipalities, adjacent counties, the region, the State, and residents of Palm Beach County." Petitioners essentially claim that the Amendments were adopted and transmitted without coordination with other local governments, as required by the goal and policy. As explained above, the evidence shows that the Amendments were submitted to IPARC for review by each of the local governments and

special districts located in the County, these entities were given ample opportunity to comment or object to the Amendments, and the County utilized existing mechanisms to coordinate planning efforts. Therefore, the Amendments are consistent with these portions of the Intergovernmental Coordination Element.

75. Petitioners also contend that the Amendments conflict with Goal 4, Policy 4.1-a, and Policy 4.1-b of the Intergovernmental Coordination Element. The broad goal relates to coordination of "service provision to assure the most effective and efficient service delivery for the residents of Palm Beach County and its municipalities," while the two policies require that the County coordinate with special taxing districts and each municipality within the County during "the concurrency management and development review processes" and in defining the "ultimate boundaries of that entity's sewer and water service areas."

76. The Amendments are consistent with the goal because their purpose is to create more effective and efficient service delivery by encouraging utility providers to enter into agreements which establish exclusive service areas and eliminate overlapping service areas.

77. For similar reasons, the Amendments are consistent with Policy 4.1-a because the County coordinated with each of

the special taxing districts through IPARC and numerous subsequent meetings relating to the Amendments.

78. Finally, the main purpose of the Amendments is to prevent overlapping utility service areas and to encourage utility providers to enter into agreements defining service areas. Therefore, they are not inconsistent with Policy 4.1-b.

iv. Treasure Coast Regional Planning Council Plan

79. Petitioners next allege that the Amendments are inconsistent with Goal 8.1, Regional Strategy 8.1.1, and Regional Policies 8.1.1.3 and 8.1.1.4 of the Treasure Coast Regional Planning Council's Regional Policy Plan (Regional Policy Plan). In order for a plan amendment to be consistent with a regional policy plan, Section 163.3177(10)(a), Florida Statutes, requires that plan amendments be consistent with the regional plan "as a whole," and that no specific goal or policy be "applied in isolation from the other goals and policies in the plans." Because the Petitions and Amended Petition do not allege that the Amendments are inconsistent with the Regional Policy Plan as a whole, their challenge must necessarily fail. See, e.g., 1000 Friends of Florida, Inc., supra at *38.

80. Even if a provision in the Regional Policy Plan could be viewed in isolation, the Amendments are consistent

with Regional Goal Regional Goal 8.1, which requires "public facilities which provide a high quality of life." Nothing in the Amendments would impair the provision of a high quality of life. One of the purposes of the Amendment is to more efficiently provide utility service by defining service areas and improving the provision of services.

81. Regional Strategy 8.1.1 relates to the provision of "levels of public service necessary to achieve a high quality of life cost-effectively." The Amendments are not inconsistent with this strategy, as they are designed to help the County implement the existing objectives and policies relating to this strategy.

82. The purpose of Regional Policy 8.1.1.3 is to "encourage patterns of development which minimize the public cost of providing service, maximize use of existing service systems and facilities and take into full consideration environmental/ physical limitations." As stated above, one purpose of the Amendments is to provide more efficient and cost-effective utility service by encouraging providers to enter into agreements that prevent overlapping service areas and avoid duplication of services.

83. Finally, the purpose of Regional Policy 8.1.1.4 is to "develop local Capital Improvement Programs which maximize development of existing systems before allocating funds to

support new public facilities in undeveloped areas." Because the Amendments do not alter the County's Capital Improvement Programs, they do not implicate this policy.

v. State Comprehensive Plan

84. Petitioners further allege that the Amendments are inconsistent with two goals in the state comprehensive plan, which are codified in Section 187.201, Florida Statutes. Like regional policy plans, Section 163.3177(10)(a), Florida Statutes, provides that for purposes of determining consistency, the state plan is to be construed as a whole, with no specific goal or policy applied in isolation from the other goals and policies. If a plan appears to violate a provision of the state plan, a balanced consideration must be given to all other provisions of both the state and local plan to determine whether a local comprehensive plan is consistent with the state plan. Petitioners have not alleged that the Amendments are inconsistent with the state comprehensive plan as a whole. Therefore, their challenge to the Amendments must necessarily fail. See 1000 Friends of Florida, Inc., supra; Heartland Environmental Council, supra.

85. Assuming that a provision within the state comprehensive plan can be viewed alone, Section 187.201(17)(a), Florida Statutes, provides that "Florida shall

protect the substantial investments in public facilities that already exist and shall plan for and finance new facilities to serve residents in a timely, orderly, and efficient manner." Petitioners contend that because the Amendments fail to protect the public facilities that already exist in the unincorporated area of the County, the Amendments conflict with this goal. The Amendments are not inconsistent with this goal because their purpose is to implement the Plan provisions in a timely, orderly, and efficient manner. Further, the Amendments are consistent with the specific provisions of Section 187.201(17)(b), Florida Statutes.

86. Petitioners also allege that the Amendments contradict the requirements of Section 187.201(20)(a), Florida Statutes, which deals with cooperation between levels of government, elimination of needless duplication, and promotion of cooperation. Again, the purpose of the Amendments is to eliminate duplication and promote cooperation between entities by encouraging utility providers to enter into interlocal agreements with the County that define exclusive service areas and prevent duplication of services. Further, the Amendments are consistent with the specific provisions of Section 187.201(20)(b), Florida Statutes.

f. Other Objections

87. Finally, any other contentions raised in the Petitions and Amended Petition not specifically addressed herein have been considered and found to be without merit.

CONCLUSIONS OF LAW

88. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569, 120.57(1), and 163.3184(9), Florida Statutes.

89. In order to have standing to challenge the Amendments, Petitioners must be affected parties, as that term is defined in Section 163.3184(1)(a), Florida Statutes. The City, ITID, SID, Callery-Judge, and Mr. Roberts each owns property within the unincorporated area of the County and submitted timely objections to the Amendments. Likewise, Wellington qualifies as an affected party since it also submitted timely objections to the Amendments and established that the Amendments would arguably (at some future time) produce substantial impacts on the increased need for publicly funded infrastructure. As such, each Petitioner has standing to challenge the Amendments.

90. Once the Department renders a notice of intent to find a comprehensive plan provision to be in compliance, as it did here, those provisions "shall be determined to be in compliance if the local government's determination is fairly

debatable." Therefore, Petitioners bear the burden of proving beyond fair debate that the challenged amendments are not in compliance. This means that "if reasonable persons could differ as to its propriety," a plan amendment must be upheld. Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997). Or, as another court has stated, where there is "evidence in support of both sides of a comprehensive plan amendment, it is difficult to determine that the County's decision was anything but 'fairly debatable.'" Martin County v. Section 28 Partnership, Ltd., 772 So. 2d 616, 621 (Fla. 4th DCA 2000).

91. In the context of the challenges here, to be "in compliance," a plan amendment must be consistent with the requirements of Sections 163.3177, 163.31776, 163.3178, 163.3180, and 163.3245, Florida Statutes, the state comprehensive plan, the appropriate strategic regional policy plan, and Florida Administrative Code Chapter 9J-5.

92. For the reasons given in the Findings of Fact, Petitioners have failed to establish beyond fair debate that the Amendments are not supported by adequate data and analyses, that they are internally inconsistent with other Plan provisions, that they conflict with relevant provisions of Chapter 163, Florida Statutes, that they encourage urban sprawl, and that they are inconsistent with the strategic regional policy plan, the state comprehensive plan, or Florida

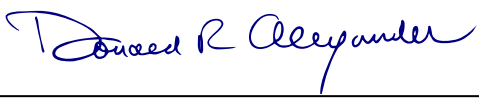
Administrative Code Chapter 9J-5, as alleged in their Petitions and Amended Petition. While many of the arguments raised by Petitioners are plausible and supported by some evidence, there is also evidence showing that the Department's determination that the Amendments are in compliance was appropriate and correct. Therefore, because reasonable persons can disagree over the propriety of the Amendments, Yusum, supra, and there is evidence on "both sides of [the] comprehensive plan amendment[s], it is difficult to determine that the County's decision was anything but 'fairly debatable.'" Martin County, supra.

RECOMMENDATION

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

RECOMMENDED that the Department of Community Affairs enter a final order determining that the Amendments adopted by Ordinance No. 2004-026 on August 24, 2004, are in compliance.

DONE AND ENTERED this 18th day of July, 2005, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of July, 2005.

ENDNOTES

1/ All future references are to Florida Statutes (2004).

2/ Wellington also relies on the cases of Starr et al. v. Dept. of Community Affairs et al., DOAH Case Nos. 98-0449GM, 98-0701GM, 98-0702GM, and 98-0704GM, 2000 WL 248379 (DOAH Feb. 11, 2000, DCA May 16, 2000), as supporting its contention that the extension of utility services into the undeveloped areas will encourage urban sprawl. In Starr, the local government (Charlotte County) had adopted a plan amendment that required it to provide centralized water and sewer services to a chain of barrier islands just offshore. The administrative law judge found the plan amendment not in compliance because the mandatory centralized water connection policies were internally inconsistent with plan provisions tending to discourage urban sprawl. Id. at *54. In its Final Order, however, the Department rejected those findings (and the attendant conclusion regarding urban sprawl) and determined the amendment to be in compliance.

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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.