

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ELOISE COMMUNITY REDEVELOPMENT)
AGENCY, BRUCE BACHMAN and)
JOHNNY BROOKS,)
)
Petitioners,)
)
vs.) Case No. 05-0717GM
)
POLK COUNTY, FLORIDA,)
)
Respondent,)
)
and)
)
DON C. SMITH,)
)
Intervenor.)
)

CITIZENS FOR PROPER PLANNING,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 05-0787GM
)
POLK COUNTY, FLORIDA,)
)
Respondent.)

)

RECOMMENDED ORDER

Notice was given and pursuant to Sections 120.569,
120.57(1), and 163.3187(3)(a), Florida Statutes, on April 6 and
7, 2005, the final hearing was conducted by Charles A.
Stampelos, Administrative Law Judge, in Bartow, Florida.

APPEARANCES

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STATEMENT OF ISSUES

The issues in this case are whether the Small Scale Comprehensive Plan Amendment No. 05S-01 (the Plan Amendment) adopted by Polk County (County) through the enactment of Ordinance No. 05-004 is "in compliance," as that term is defined by Section 163.3184(1)(b), Florida Statutes,¹ and whether Petitioner, Citizens for Proper Planning, Inc. (CPPI), has standing as an "affected person" as defined by Section 163.3184(1)(a), Florida Statutes, in this proceeding.

PRELIMINARY STATEMENT

On February 2, 2005, the Polk County Board of County Commissioners, Polk County, Florida (the Board), after proper notice, adopted Ordinance No. 05-004, which amends the Polk County Future Land Use Map (the FLUM). This Ordinance changes the designated future land use from "Residential Low-4" to "Industrial" for a 9.9-acre parcel of property located on the southwest side of County Road 655 (Snively Avenue) between 5th and 6th Streets located in Section 05, Township 29, Range 26, in Polk County, Florida (the Subject Property).

On or about February 25, 2005, Petitioners, Eloise Community Redevelopment Agency (ECRA), Bruce Bachman, and Johnny Brooks, filed a Petition Challenging Compliance of Small Scale Amendment and Request for Formal Hearing with the Division of Administrative Hearings pursuant to Section 163.3187(3)(a),

Florida Statutes, to contest the Plan Amendment. On or about March 2, 2005, CPPI filed its Petition Challenging Compliance of Small Scale Amendment and Request for Formal Hearing. The two cases were consolidated on March 4, 2005.

The petitions allege that the Plan Amendment is not in compliance with Sections 163.3187(2), 163.3177(2), and 163.3177(6), Florida Statutes; the State's Comprehensive Plan; the Polk County Comprehensive Plan (Comprehensive Plan); the Eloise Community Agency Redevelopment Plan; and Florida Administrative Code Rule 9J-5.

On or about March 1, 2005, Don C. Smith, owner of the Subject Property, filed his Petition for Leave to Intervene, which was granted on March 2, 2005.

On March 9, 2005, an Order of Pre-Hearing Instructions and a Notice of Hearing setting the final hearing for April 6 through 8, 2005, in Bartow, Florida, were entered.

On or about March 11, 2005, Mr. Smith filed Intervenor's Motion to Dismiss or Strike Portions of Petitions Challenging Compliance of Small Scale Amendment. On or about March 16, 2005, Petitioners filed their Response to Intervenor's motion. Intervenor's motion was denied on March 17, 2005.

On March 14, 2005, Petitioners filed a Motion for Summary Final Order and a Request for Judicial Notice of several documents. The Motion for Summary Final Order was supplemented

on March 15, 2005. On March 18, 2005, the County filed a Response to Petitioners' Request for Judicial Notice, a Response to Petitioners' Motion for Summary Final Order, and the Affidavit of Merle H. Bishop, A.I.C.P. On March 21, 2005, Intervenor filed a Response in Opposition to Petitioners' Motion for Summary Final Order, a Response to Petitioners' Request for Judicial Notice, and the Affidavit of Dennis R. Ragsdale, A.I.C.P. Petitioners' motion was treated as a motion to relinquish jurisdiction pursuant to Section 120.57(1)(i), Florida Statutes, and was denied. However, official recognition was taken of several documents and declined as to others. See Order, March 24, 2005, n.1.

On April 1, 2005, the County and Mr. Smith filed a Prehearing Stipulation. On April 4, 2005, Petitioners filed a unilateral Supplement to Prehearing Stipulation. Agreement between the parties was subsequently reached, and an Amended Prehearing Stipulation was filed on April 6, 2005. The Amended Prehearing Stipulation was entered into evidence as Joint Exhibit (JE) 9.

On April 6 and 7, 2005, the final hearing was held in Bartow, Florida. Pursuant to the agreement of the parties, Joint Exhibits 1 through 9 were admitted into evidence.

Petitioners called Johnny Brooks; Bruce Bachman; Joseph G. Jarret, Polk County Attorney; Dr. Elba Cherry, Director of

Housing and Neighborhood Development; Nicolas Mancuso, a real estate appraiser and licensed real estate broker; Don C. Smith; Eric Peterson; George M. Joachim, A.I.C.P., an expert in land use planning; and Jean Reed. Petitioners' Exhibits (EE) 1 through 8 were also admitted into evidence.

The County called Merle H. Bishop, A.I.C.P., Director of the Growth Management Department for Polk County, Florida, and an expert in land use planning. County Exhibits (CE) 1 through 6 were admitted into evidence. Intervenor called Dennis R. Ragsdale, A.I.C.P., an expert in land use planning. Intervenor's Exhibits (IE) 1 through 3 were admitted into evidence.

The Transcript (Tr.) (Volumes I through IV) of the final hearing was filed with the Division on May 9, 2005. Petitioners, Respondent, and Intervenor each filed a Proposed Recommended Order in a timely fashion. Subsequent to the hearing, Intervenor filed the deposition of Mr. Joachim. As the deposition was not admitted in evidence, it was excluded from consideration.

FINDINGS OF FACT

A. The Parties

1. The ECRA is a local special district governmental agency established pursuant to Chapter 163, Part III, Florida Statutes, and is composed of a seven-member board of directors.

The boundaries of the Eloise Community Redevelopment Area include an area consisting of approximately 665 acres within the unincorporated Eloise area of Polk County (the Redevelopment Area). The Subject Property is located within the Redevelopment Area. See JE 8A.

2. The ECRA meets once a month, except July, when they do not normally meet. Its purpose is to discuss and implement the ECRA Redevelopment Plan's six objectives within the Redevelopment Area.

3. The ECRA opposed the Plan Amendment by and through its attorney and submitted oral and written comments, recommendations, and objections to the County regarding the Plan Amendment during the Plan Amendment adoption proceedings. As a part of its presentation to the County regarding the Plan Amendment, the ECRA delivered to the County, ECRA Resolution No. R-05-01, objecting to the Plan Amendment. The parties agree that the ECRA has standing in this proceeding.

4. Petitioner, Bruce Bachman (Mr. Bachman), resides in Winter Haven, Polk County, Florida. His residence is located outside of the Redevelopment Area and is approximately three (3) miles from the Subject Property. He is employed as the operator (since 1980) and general manager of Phoenix Industries, LLP, (Phoenix), located at 621 Snively Avenue, County Road (CR) 655 in Eloise, which is adjacent to and across the street from the

Subject Property. Mr. Bachman has served as the Chairman of the Board of Directors of the ECRA since 1998.

5. Phoenix operates a warehousing and distribution complex for dry, refrigerated, and frozen food products east of Snively Avenue and across the street from the Subject Property. The Phoenix property stretches north and south within an elongated area within the Redevelopment Area, and is open 24-hours a day, seven days a week.² See JE 8A at "30". (The railroad, designated with a red line, runs north and south through the Phoenix property. JE 8A.)

6. Phoenix has spent approximately \$115,000 changing the angles of its buildings and moving docks so that trucks could maneuver on the property, and not have to enter Snively Avenue to do so.

7. Mr. Bachman is involved with the Eloise residential area and the Redevelopment Area generally and his contributions to the Eloise area are well-noted in the record. His work with the community includes working with the students at Snively Elementary School.

8. Individually, and on behalf of the ECRA, Mr. Bachman submitted oral and written comments, recommendations, and objections to the County during the Plan Amendment adoption proceedings. The parties agree that Mr. Bachman has standing in this proceeding.

9. Petitioner, Johnny Brooks (Mr. Brooks), resides at 143 8th Street, Eloise, Polk County, Florida, approximately three (3) blocks southwest from the Subject Property. His home is located within the main residential component of the Redevelopment Area. He was born in Eloise (on 5th Street) and has lived, with his wife, at the 8th Street address for 41 years. Mr. Brooks also serves as Vice-Chairman of the Board of Directors of the ECRA.

10. Although disabled, Mr. Brooks is an active member of the Eloise Community. For example, he and his wife conduct a "homework club" at the Eloise Community Resource Center (opened in 2002) located between 7th and 8th Streets and Snively Avenue, which is east and down the block from his residence. JE 8A at "2". They also use the computer lab at the resource center for adult education. They use the neighborhood Snively/Brooks Park, JE 8A at "4", approximately one block south of the Brooks' residence and west of the Snively Elementary School, JE 8A at "3", for, among other activities, Easter egg hunts and Christmas parties.

11. Mr. Brooks is also involved in the Eloise Neighborhood Association, which offers adult computer classes, GED classes, and classes in English as a Second Language. He and his family use other resources within the Redevelopment Area, such as the Snively Elementary School, and a post office, JE 8A at "1",

which is located approximately one block north of the Subject Property between 4th and 5th Streets, near Snively Avenue.

12. Mr. Brooks attends the Eloise United Methodist Church (built in 1966-1967), which is located on land designated as Industrial (IND) on the FLUM.³ JE 8A at "10". This church is located on the southwest side of Snively Avenue, and approximately five or six blocks south of the Subject Property and approximately two blocks south of the Snively Elementary School and the Snively-Brooks Park.⁴

13. Mr. Brooks submitted oral comments, recommendations, and objections to the County during the Plan Amendment adoption proceedings. The parties agree that Mr. Brooks has standing in this proceeding.

14. CPPI is an organization comprised of approximately two hundred members, located throughout Polk County, Florida. CPPI has been an existing corporation since 2002. No application, request to join or payment of dues is currently required for membership. According to its executive chairperson, Jean Reed, its purpose is to "better plan for our growth in Polk County." Ms. Reed lives approximately one mile east of Eloise and four of five of the CPPI Board of Directors live within a mile of Eloise. All CPPI members live in the County. CPPI had been involved in County hearings and an administrative hearing involving a small scale comprehensive plan amendment. The

organization currently encourages donations and plans to charge dues next year. CPPI submitted oral comments, recommendations and objections to the County during the Plan Amendment adoption proceedings. No evidence was presented to show that CPPI owns real property within the County. The County and the Intervenor dispute CPPI's standing in this proceeding.

15. The County is a political subdivision of the State of Florida, empowered to adopt, implement, and amend its Comprehensive Plan in accordance with the laws of Florida.

16. Intervenor, Don C. Smith (Smith or Intervenor), owns the Subject Property. He purchased the Subject Property of 9.9 acres, which is part of a contiguous 20-acre site, in May of 2003. Mr. Smith learned that the Subject Property had an RL-4 land use designation just prior to his purchase of the Subject Property. The parties agree that Mr. Smith has standing in this proceeding.

B. The Eloise Community Redevelopment Area

17. The Redevelopment Area consists of approximately 665 acres. EE 2, Plan at 30. It is generally bounded by the CSX railroad to the north of US 17; by Lake Lulu and Shell Road on the east; by Snively Avenue (CR 655) on the south; and by Wahneta Canal and a portion of Wahneta farms on the west. JE 8A.⁵ (Snively Avenue is a four-lane undivided, major collector highway, but is not a buffer.)

18. Both historically and presently, the Redevelopment Area has been composed of mixed uses in an urban area. Under the FLUM, there are eight separate land uses within the Redevelopment Area: Industrial (IND), Business Park Center (BPC-2), High Impact Commercial (HIC), Institutional (INST-1), Community Activity Center (CAC), Residential Suburban (RS), Residential Low-1 (RL-1), and Residential Low-4 (RL-4). JE 8A.

19. Beginning at the northern portion of the Redevelopment Area and moving from west to east, south of the CSX railroad and approximately one block south of US 17, the land uses designated on the FLUM are HIC, CAC, and HIC. Moving southward and east of Snively Avenue, the land use designation for a triangular portion of land is BPC-2. The land use designation adjacent to and immediately south of the BPC-2 designation and east of Snively Avenue is designated as IND. The IND designation covers the land in a southerly direction until Snively Avenue intersects with Croton Road. The land to the east and adjacent to the BPC-2 and IND designations is designated as RL-1.

20. There is a small portion of land near Shell and Croton Roads at the southern boundary of the Redevelopment Area designated as Residential Suburban (RS). (The RS designation continues to the east outside of the Redevelopment Area. Lake Lulu is to the east of the eastern RL-1 and RS designations.) There is also land designated as RL-1 west of Snively Avenue,

bisected by Unnamed Street, extending west of Wahneta Canal and south-southwest of the Snively Elementary School/Snively-Brooks Park area, to the southwestern boundary of the Redevelopment Area.⁶

21. The Snively Elementary School and the Snively-Brooks Park are located in the INST-1 land use designation.⁷ JE 8A. Approximately 150 children walk to and from this elementary school (with another 60 to middle and high schools outside the Redevelopment Area), utilizing the sidewalk bordering the western portion of Snively Avenue. The majority of the children attending the elementary school reside in the RL-4 designated area (mainly between 1st and 9th Streets). Mr. Smith agreed that the elementary school was in close proximity to the Subject Property.

22. Mr. Smith testified that after meetings with the ECRA, he moved the fence in front of the Subject Property and business back ten feet so that the children could have more room to walk down the street. He also instructed his drivers of big trucks and heavy equipment not to enter the Subject Property during times when the children are going to and from school.

23. There are several school crossings, crossing Snively Avenue. There is a bus stop at 5th Street and Snively Avenue for children attending middle and high school. JE 8A at "6".

There are also bus stops on 7th Street and in front of the elementary school. JE 8A at "5" and "7".

24. Except for the residential portions of the CAC and BPC-2 areas, the primary residential area of the Redevelopment Area is generally bounded by US 17 and 1st Street on the north, the Wahneta Canal on the west, and to just north of Snively Elementary School and 9th Street on the south. JE 8A; EE 2, Plan at 6 and Figure 2.

C. The Eloise Community Redevelopment Area Uses

1. In General

25. The Redevelopment Area, for at least the last 40 years, has supported a wide variety of industrial, commercial, institutional, and residential uses.

26. Mr. Brooks and Mr. Smith testified that the Redevelopment Area has supported these mixed uses and has historically been defined by the interrelationship of these various uses with the predominant industrial activities within its boundaries. In the past, the established residential area (RL-4) was once a successful working-class neighborhood which primarily provided homes to those workers who were employed in the citrus plants located within the industrial classified areas. That residential area is now blighted and provides housing for low and moderate income families. Though well

established, the RL-4 residential area contains a substantial number of vacant lots within that residential designated area.

2. Redevelopment Area Problems and Redevelopment

27. During the early 1980's, Eloise was a troubled community, suffering, for example, from theft and vandalism. The community had difficulty finding minority contractors willing to work at Phoenix because of the problems associated with the community.

28. By the early 1990s, the residential area of the Redevelopment Area had deteriorated to such an extent that the Housing and Neighborhood Development Division (HND), an agency of the County, became actively involved in the redevelopment of the community.

29. In 1992, the Eloise Neighborhood Association was formed. In 1996, a Neighborhood Revitalization/Redevelopment Plan was commissioned by HND. This plan was prepared by County staff. Also in 1996, the HND and the Eloise Neighborhood Association prepared the Eloise Neighborhood Revitalization/Redevelopment Plan, which "focused on the 138 acres generally bounded by the CSX Railroad on the east, the railroad and US 17 on the north, the Wahneta Canal on the west, to just south of the Snively Elementary School. Its recommendations included improved social services, land use changes, housing programs and infrastructure improvements."

30. In 1998, a Declaration of Slum and Blight was adopted by the Board through Resolutions Nos. 98-08 and 98-66, which, respectively, made a finding of blighting conditions in Eloise and adopted a redevelopment plan for Eloise. As a result, the ERCA was created pursuant to Section 163.356, Florida Statutes, to rehabilitate, conserve, and/or redevelop the Redevelopment Area.

31. In 2000, the Board, pursuant to Section 163.360, Florida Statutes, adopted Ordinance No. 00-33, approving of the Eloise Redevelopment Plan as the Community Development Plan for the Redevelopment Area. It was the purpose and intent of the Board that the Eloise Redevelopment Plan be implemented in the Redevelopment Area.

32. The Board made numerous findings in Ordinance No. 00-33 including a determination that "[t]he Plan conforms to the general plan of the county as a whole" and that "[t]he Plan conforms to the Polk County Comprehensive Plan." The Board also determined that "[t]he need for housing accommodations has increased in the area."

33. The Eloise Redevelopment Plan has not been adopted as part of the County's Comprehensive Plan. Thus, the Plan Amendment need not be consistent with the Eloise Redevelopment Plan to be "in compliance."

34. The May 2000, Eloise Redevelopment Plan describes the then existing ownership patterns such that "[t]he existing Eloise residential neighborhood between 1st and 9th Streets is subdivided into platted, fifty-foot wide lots. Most are 100-125 feet in depth. Lots along 9th Street abutting the school are platted as 70-foot wide lots. The ownership pattern in this area typically follows the lot lines. Most are individually owned lots. (See Figure 6)." EE 2, Plan at 16. Particularly relevant here, it is also stated: "Lots 33 and 34 [part of the Subject Property] are each approximately 9 acres and are owned by Alterman Transport Corporation (ATC). The site is currently used for storage and, in the past, was zoned GI [General Industrial] and R-3. In the current Comprehensive Plan, however, this site is planned for Residential Suburban (RS) to be compatible with the surrounding neighborhood. The trucks are a legal-nonconforming use and may continue but any future development shall comply with the RS land use district." EE 2, Plan at 16.

35. The Eloise Redevelopment Plan also recommended that the Alterman Trucking Annex, also known as the Alterman Transportation Corporation, be developed for up to 75 single-family homes by the end of 2004. EE 2, Plan at 32; JE 3 at 3 of 27. (The Subject Property was also formerly known as the Alterman Motor Freight Terminal. JE 2, 8/10/2004 site map.)

36. In 2001, the County also changed the classification of the Subject Property from RS to RL-4 pursuant to Ordinance No. 01-45. See Finding of Fact 54.

37. In addition to the creation of the ECRA, the County, through the HND, has attempted to revitalize the Redevelopment Area. Since 1993, HND has spent approximately \$4.4 million dollars in these efforts. These funds have been spent on community policing (\$424,790), slum and blight clearing (\$47,428), housing rehabilitation (\$186,807), parks and recreation (\$149,982), water/sewer/drainage (\$1,094,677), construction of the Eloise Community Center (\$2,147,037), replacement of five homes (\$314,138), and rehabilitation and repair of five homes (\$46,819).

38. As part of the Eloise Redevelopment Plan, many additional infrastructure improvements have been proposed, such as fire hydrants, turnaround areas for emergency vehicles and fire trucks, storm water installation, and sewer for the Residential Area of Eloise between 1st and 9th Streets and between Snively Avenue and the canal. The proposed projects for water, sewer, and storm water include 350 parcels to be served in this Residential Area.

39. The construction of the Eloise Community Center has been the most costly expense in these efforts. After the County obtained this parcel from Phoenix Industries, it was discovered

that the land was contaminated and more than \$400,000 was spent on environmental clean-up costs for this property.

40. The ECRA and the County have made progress in the area of code enforcement. Furthermore, crime has been cut in half and a drinking ordinance was passed by the County upon request of the ECRA and the Eloise Neighborhood Association. Eloise, with the County's cooperation, also initiated a Community-Oriented Policing program. There has been an increase in construction in the area, both on the residential and commercial/industrial side of Snively Avenue.

41. The ECRA has also been working on a beautification strategy. For example, Phoenix spent \$35,000 for landscaping, removing barbed wire, installing an irrigation system, and installing an attractive entrance to its facilities. Further beautification is planned for other areas along Snively Avenue, the main gateway to the area from US 17, and improvements to Snively Elementary School, for which the ECRA allocated up to \$10,000.

42. Currently, the socio-economic status of the families living within the residential portion of the Redevelopment Area is low and moderate income. But, as noted above, the area is being revitalized, including the addition of several Habitat for Humanity-built homes. Mr. Bachman confirmed that "[t]hings have

changed now," including the employment of minorities and an increase in diversity at the elementary school.

D. The Subject Property

43. The Subject Property is located within the Redevelopment Area on the southwest side of Snively Avenue between 5th and 6th Streets. JE 8A. The Subject Property consists of approximately 9.9 acres, which is part of a 20-acre parcel owned by Mr. Smith. Tr. 261. (There is a vacant parcel not subject to the Plan Amendment, also acquired by Mr. Smith at the same time, adjacent to and west of the Subject Property, which appears to be within a flood zone area. JE 8A at "46". The canal serves as the western border for this parcel.)

44. Currently, there are ten to eleven residences along 5th Street, north of the Subject Property, and ten residences between the Subject Property and 6th Street, south of the Subject Property. See EE 7. There does not appear to be any appreciable distance between these residences and the Subject Property.

45. Aside from the residential homes north and south of the Subject Property, there are also retail, auto repair, and other commercial uses which border on Snively Avenue. See, e.g., IE 1, aerial with 15 photographs; JE 3 at 5 of 27; Tr. 295-297; JE 8A.

46. According to Mr. Smith, he requested the land use designation change to cure the non-conforming status of the Subject Property. All operations on the Subject Property had ceased for less than one year when he purchased the Subject Property.

47. The Subject Property has historically and, except as noted above, continuously been utilized since the late 1960's for industrial-type purposes, including motor freight activities which include loading and unloading citrus trucks, racking, truck repair, and truck weighing. These activities would not necessarily be restricted to an Industrial land use designation;⁸ the current use of the Subject Property as a motor freight terminal is also permitted within a BPC-2 land use designation. There has been no substantial change in the use of the Subject Property since 1980.⁹

48. Mr. Brooks testified that while he was growing up in Eloise, the Subject Property "was primarily truck parking for the citrus plant." He "worked for the scale house back in the late 60's before the plant went down and all [they] did was like park the trucks there for unloading and which would be in the citrus plant itself." However, he never knew the Subject Property "to be an industrial park itself," during the late 1960's.

49. Historically, Mr. Snively, who died in 1957, owned several different businesses across the street from the Subject Property, including a fresh fruit packing house, JE 8A at "20", juice plant, JE 8A at "21", concentrate plant, JE 8A at "22". The plant closed in 1969 or 1970.

50. In and around 1972, during the summer, Mr. Smith worked for the Snively operation when they parked their citrus trucks on the Subject Property and then for the Alterman operation on-site when he loaded and unloaded trucks.

51. Under the County's zoning ordinance adopted in November 1970, the Subject Property, along with the Phoenix Industries Property, its adjoining property, and the property southeast and adjacent to Snively Elementary School, were zoned as General Industrial (GI). Like the Subject Property, this industrial area is located east and immediately adjacent to property classified as residential (RS) (although the property is presently undeveloped).

52. By an amendment to the FLUM adopted by Ordinance No. 91-06 on April 19, 1991, the Subject Property was classified as RS, rather than IND.¹⁰ At the same time, the Phoenix Industries Property, its adjoining property, and the property immediately adjacent to Snively Elementary all maintained their Industrial classification.

53. The May 2000 Eloise Redevelopment Plan recommended, in part, consideration of "a plan amendment from RS to RL-4 for the properties north of Snively [Elementary] School and west of Snively Avenue" which included the Subject Property. EE 2, Plan at 38.

54. On July 11, 2001, the County adopted Ordinance No. 01-45, which changed the land use designation on the FLUM from RS to RL-4, for all of the property (including the Subject Property) between 1st Street and just south of 9th Street and between Snively Avenue on the east and the canal on the west. EE 1 at map page 2. The land use designation for the Snively-Brooks Park was also changed to INST-1 from IND. Other land use designations were changed pursuant to Ordinance No. 01-45. EE 1. See also Tr. 130-136, 139-140. The FLUM changes implemented strategies set forth in the Eloise Redevelopment Plan and adopted recommended changes to the FLUM. See Tr. 163.

55. The RL-4 designated property is located immediately adjacent to and on the north, west, and south sides of the Subject Property. JE 8A. Across Snively Avenue from the RL-4 property is the industrial area which was previously used in the citrus industry and which is currently used by Phoenix warehousing and trucking activities. JE 8A.

56. "The purpose of the [RL-4] District is to provide areas for low density residential needs of residents in urban

areas who desire areas with smaller lots, a minimum of 6,000 square feet." § 204A7., Land Development Code (LDC).

57. The County and Mr. Smith contend that the Subject Property was mistakenly or erroneously classified as RS in 1991 and RL-4 in 2001. However, the preponderance of the evidence indicates that no mistake or error was made in 1991 or 2001 based, in part, on the chronology of events regarding the land use changes mentioned above.

58. Merle H. Bishop, A.I.C.P., the current Director of Growth Management for the County, has been an employee of Polk County for 30 years, and was involved in the adoption of the original Comprehensive Plan in 1991. In preparing land use designations for the initial FLUM, he used aerial photographs primarily and the existing zoning at the time. Since that time, he and staff have discovered errors in mapping the land uses of property, including industrial. Typically, the errors have been corrected when presented to the Board for comprehensive plan changes to the FLUM.

59. Mr. Bishop testified that pursuant to a policy in the Comprehensive Plan, the County desired to "recognize industrial uses." Tr. 444-445. According to Mr. Bishop, an active industrial use would only be eliminated with good reason, i.e., such as it was a remote and isolated industrial use. Tr. 455. According to Mr. Bishop, the Subject Property, the

southern parcel by the elementary school, and the Phoenix Industries property made up a major industrial use area.

Tr. 456.

60. Although Mr. Bishop stated the Subject Property "would have been" designated as Industrial in 1991 given its use, Tr. 511-512, Mr. Bishop could not "say whether or not [they] missed this on the map when [they] mapped it. I mean it appears -- I mean, when you look at the map, it's very general; or whether there was an intention to not map it." Tr. 483-484. Mr. Bishop did not testify persuasively that the Board, in 1991 or in 2001, erroneously designated the Subject Property as RS and then RL-4.

61. The February 2, 2005, staff report, mentions the applicant's contention that a mapping error occurred, but implicitly rejects this argument. JE 3 at 11 and 12 of 27.

Staff stated:

The site has recently changed ownership and the current property owner wants the non-conforming uses to become conforming uses. Recognizing the existing use will enable to [sic] owner to continue utilizing the site as it has historically been used and allow the redevelopment of the property as needed. In addition, the use has remained the same since the early 1970's according to the applicant. The applicant also states that Policy 2.113-A2 of the Comprehensive Plan states that the [FLUM] Series shall include all major existing industrial areas; since the property has historically been used for industrial uses, the recognition of the site will correct the County's mapping error. On the other hand, staff and the ECRA has [sic] indicated, for this and the prior requested land use change (CPA 04A-05), that the impacts to the residential neighborhood is [sic] more

significant than the redevelopment of the site for commercial or industrial uses. The County worked with the residents, business owners, and land owners in the area to develop a redevelopment plan, in which, the site was intentionally made non-conforming by the community and the County in order to create separation between the industrial uses across the street from the residential uses on the west side of CR 655 (Rifle Range Road [sic]). Therefore, the applicant's primary argument for recognizing the historical use is not relevant.

JE 3 at 12 of 27.

62. Mr. Bishop was not directly involved with the staff review although he participated at the public hearing before the Board.

63. If the Subject Property were vacant, Mr. Bishop would not recommend an Industrial land use designation. He supports the land use change because of the existing (at the time) use of the Subject Property and to have the property be a conforming use. Tr. 506-507.

64. The history of industrial-type use on both the Subject Property and other sites in the Redevelopment Area has been a subject of significant concern. Although no tests have been conducted to determine whether the Subject Property is contaminated, Dr. Cherry testified that as a result of its long industrial use, it is likely that contamination will be present, which would render its use for residential purposes not realistic. Tr. 221-223. Since the subject property is located near the property upon which the community center was

constructed and both parcels were part of a larger industrial area and utilized for similar uses, Dr. Cherry suspects that the Subject Property will likewise be contaminated. Tr. 222.

65. If the Subject Property is contaminated, it is Dr. Cherry's opinion that there will be insufficient funds to clean the area. Tr. 219. Consequently, Dr. Cherry opined that if the Subject Property could not be used for industrial purposes, it would likely be unable to be developed as residential and most likely would be abandoned, thereby becoming a "brownfield." This would significantly burden the redevelopment efforts in the Redevelopment Area.

66. However, the Subject Property has not been declared a "brownfield" and no finding can be made regarding the environmental condition of the Subject Property based upon the record of this case.

E. The Small Scale Plan Amendment Application and Adoption

67. On or about August 10, 2004, Mr. Smith filed an application requesting the County to re-designate the land use of the Subject Property from RL-4 to IND. JE 2. According to the "Narrative Summary," "[t]his change will provide for the continuation of historical motor freight uses and provide for optional industrial uses." Id.

68. On January 4, 2005, the County published Notice in a newspaper of local circulation providing that the Board would

consider the adoption of the Plan Amendment at its meeting of January 19, 2005. At the January 19, 2005, meeting, the County tabled consideration of the Plan Amendment to its meeting of February 2, 2005.

69. The Polk County Planning Division Staff report is dated February 2, 2005. This report contains a detailed analysis of the application. The Planning Division recommended denial of the Plan Amendment. (The report indicates that the Planning Commission recommended approval (3 to 1 vote) of the Plan Amendment.) The Planning Division found, in part, that "the proposed development request **IS NOT** compatible with surrounding land uses and general character of the area of the residential uses on the southern side of Snively Avenue (CR 655) and **IS NOT** consistent with the Polk County Comprehensive Plan for a land use change to Industrial (IND) because it would likely intrude into the existing residential neighborhood, allow for more intensive uses to be developed next to existing homes, and not be consistent with the approved Eloise Redevelopment Plan." (Emphasis is original).

70. On February 2, 2005, the Board voted to adopt the Plan Amendment by the adoption of Ordinance No. 05-004.

CONCLUSIONS OF LAW

A. Jurisdiction

71. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), and 163.3187(3)(a), Fla. Stat.

B. Standing

72. The parties agree that the ECRA, Mr. Brooks, Mr. Bachman, and Mr. Smith have standing in this proceeding. The standing of CPPI, however, is in dispute.

73. In order to have standing to challenge a small scale amendment to a comprehensive plan, the party must be an "affected person" as that term is defined by Section 163.3184(1)(a), Florida Statutes. Relevant here, the statute provides:

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

Id.

74. CPPI is an organization comprised of approximately 200 members. No members reside or own property within the Eloise neighborhood, but all members live in the County. There is no evidence, however, that CPPI owns property within the County. According to its chairperson, Jean Reed, its purpose is to "better plan for our growth in Polk County." The organization currently encourages donations and plans to charge dues next year. Ms. Reed testified that, on behalf of CPPI, she submitted oral comments regarding the Plan Amendment during the adoption proceedings. It is at least "debatable," based on existing precedent, that CPPI is operating a business in Polk County. See The Sierra Club, et al. v. St. Johns County, et al., Case No. 01-1851GM and 01-1852GM, 2002 WL 1592234 (DOAH May 20, 2002; DCA July 30, 2002), aff'd, 857 So. 2d 897 (Fla. 5th DCA 2003). Accordingly, CPPI has standing in this proceeding. But see Durham v. Berry, Case No. 03-0593GM, 2004 WL 364174 (DOAH Feb. 24, 2004)(Administrative Law Judge concluded that CPPI did not have standing), (Admin. Comm. June 24, 2004)(Administration Commission concluded the issue was debatable, but did not decide the issue).¹¹

C. Burden of Proof and Standard of Review

75. Section 163.3187(3)(a), Florida Statutes, provides that in cases challenging a small scale development amendment, "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 by a preponderance of the evidence that the amendment is not in compliance with the requirements of this act." Thus, the burden rests on the Petitioners to show by a preponderance of the evidence that the Plan Amendment is not "in compliance." See Denig v. Town of Pomona Park, Case No. 01-4845GM, 2001 WL 1592220 (DOAH June 18, 2002; Admin. Comm. Oct. 23, 2002).

76. Relevant here, "in compliance" means consistent with the requirements of Sections 163.3177, 163.3178, 163.3180, 163.3191, and 163.3245, Florida Statutes, and with Florida Administrative Code Chapter 9J-5. § 163.3184(1)(b), Fla. Stat. See Amended Prehearing Stipulation, JE 9 at 11-14.

D. County's Comprehensive Plan

77. Although the parties agree that the Comprehensive Plan must be read in its entirety to determine how the provisions relate to one another, Petitioners raise several provisions of the Plan as being germane to the consideration of the Plan Amendment. Specifically, the parties dispute the interpretation and application of the following provisions: Section 1.103 (Purpose and Intent), Division 1.200 (Basic Principles), Policy 2.102-A1 (Compatibility), Policy 2.102-A9 (Location Criteria), Policy 2.102-A10 (Urban Sprawl), Objective 2.109-B (Reduction of

Incompatible Land Uses), Section 2.113 (Industrial and Business Park Center), Objective 2.113-A, Policy 2.113-A1 (Characteristics), Policy 2.113-A2 (Designation and Mapping), Policy 2.113-A3 (Location Criteria), Objective 2.124-F (Redevelopment Districts), Policy 2.124-F1 (Designation and Mapping), Policy 2.124-F3 (Redevelopment District Revitalization Plans), Policy 2.124-F4 (Redevelopment Activities), Policy 2.124-F5 (Adoption of Redevelopment District Revitalization Plans), and Section 2.129 (Implementation). These provisions are discussed separately below.

78. Section 1.103 of the Comprehensive Plan expressly states that the Comprehensive Plan was developed pursuant to Florida's growth-management mandate, but the Comprehensive Plan recognizes that it must consider the unique characteristics of the County, its historical trends, current conditions, and "citizen aspirations for a future Polk County with a desirable quality of Life." The Plan Amendment is premised on the County's individual characteristics and historical trends. Specifically, the evidence shows that the Redevelopment Area has historically been utilized for mixed purposes. In the Redevelopment Area, one significant use is industrial and the Subject Property has been a part of that use.

79. The County approved the "Basic Principles" document on May 2, 1989. Division 1.200 lists the "Basic Principles," which

were approved. Among these "Basic Principles" is Division 1.200(4), which states that "[r]esidential neighborhoods are collectively recognized as an important asset to be protected." This and the other basic principles were used to guide the establishment of the Comprehensive Plan.

80. Policy 2.102-A1 provides that "[l]and shall be developed so that adjacent uses are compatible with each other. . . ." This policy further sets forth several general techniques which can be used to mitigate the adverse impacts between incompatible land uses. However, this section is inapplicable to this matter, as its express provisions address the development of property, whereas the Subject Property has already been developed as an industrial-type use. Even if this provision applied, the provision does not represent a bar to the approval of incompatible land uses but, rather, encourages the utilization of innovative techniques such as buffers, limiting scale and intensity or transitions to minimize adverse impacts.

81. Policy 2.102-A9 requires the County to consider several factors when determining the appropriateness of establishing or expanding any land use or development area. Policy 2.109-A9: a. and c. requires consideration of the "nearness to incompatible land uses and future land uses, unless adequate buffering is provided" and "distance from populated areas." However, this provision requires that the County

consider these factors and does not constitute a bar to the Plan Amendment. Further, implicit in this criterion is that the County should consider buffering to minimize adverse impacts. These are matters which are more properly considered in the development approval stage. Similarly, Policy 2.109-A9: e.2. requires consideration of the adequacy of sanitary sewer. Though sanitary sewer is not presently available to the Subject Property, it has been approved and will be available within a reasonable period of time. As expressly written, the County is bound only to consider these factors. Therefore, since these provisions do not use language that would make these factors obligatory, the Plan Amendment need not be consistent with each factor. There was no evidence presented to show that any of these factors were not considered by the County and, therefore, the Plan Amendment is not inconsistent with this section.

82. Policy 2.102-A10 addresses urban sprawl and lists certain criteria the County must consider when determining whether to establish or expand any land use or development area. This provision, however, is inapplicable for several reasons. First, the Subject Property is already part of an established urbanized area and consists of a variety of mixed uses, including an industrial-type use. Second, though Petitioners argue that the approval does not promote residential infill, for example, the policy itself does not require that the infill be

residential, only that infill should be promoted, industrial or otherwise.

83. Objective 2.109-B states: "Polk County shall provide for the reduction and/or elimination of incompatible land uses, and shall further control land use intensities, through the establishment of revised land use regulations as part of the Land Development Code adopted by the County under Section 163.3202(1), F.S." Policy 2.109-B1 states: "Polk County shall encourage the elimination or reduction of uses inconsistent with the County's character and future land uses by implementing the provisions included in the "Implementation" section (2.129-A2.c.1)." Policy 2.129-A2:c.1 requires the County's Land Development Code to incorporate regulations, procedures, and standards which include "[r]egulations and procedures to address existing development and potential development, to include, but not limited to: 1. existing non-conformities, including uses, lots, structures, and site characteristics (parking, signage, access, etc.)"

84. The County implemented Policy 2.129-A2:c.1., by enacting Section 120 C.1. of the Land Development Code, which provides, in part, that "[i]t is the intent of this section to require the cessation of certain non-conformities and to permit others to continue until they are removed or cease, but not to encourage their survival." Section 120 C.2. provides that "[i]t

is further the intent of this section that non-conformity shall not be used as grounds for addition or expansion, except as specifically provided by this Section." Further, Section 120 D. provides that "[n]on-conforming development may not be intensified, enlarged, expanded, altered or replaced except as provided in this Section."

85. The Subject Property is a legally recognized non-conforming use because the Subject Property was used as an industrial-type use prior to the adoption of the Comprehensive Plan. Although the Comprehensive Plan authorizes consideration of, for example, the availability of buffering and other techniques to mitigate the incompatibility, it does not authorize the continuation of the present use or an industrial use with a greater intensity (which could be potentially allowed) as a conforming use. Approval of the Plan Amendment is inconsistent with Objective 2.109-B and Policy 2.109-B1 because it furthers and encourages the continuation of a non-conforming and otherwise incompatible (with existing residential land uses to the north and south) industrial-type use. See generally Parsons v. Putnam County, Department of Community Affairs, and Florida Racing of Putnam County, Inc., Case No. 02-1069GM, 2002 WL 21019498 (DOAH May 2, 2003; DCA Determination of Noncompliance June 24, 2003; Admin. Comm. Final Order of Dismissal Oct. 24, 2003).

86. Section 2.113 sets forth the requirements for the location of Industrial and Business Park Center land uses within the County. Objective 2.113-A requires the Comprehensive Plan to provide for the development of industrial land through, in part, "the designation of Industrial lands on the [FLUM] Series." Policy 2.113-A1 describes the characteristics of industrial land. See Endnote 8. Policy 2.113-A2 pertains to "designation and mapping."

87. Policy 2.113-A2, pertaining to "designation and mapping," is at the center of the dispute between the parties and states:

Industrial areas shall be designated and mapped on the Future Land Use Map Series as "Industrial" (IND); shall include all major existing industrial areas; and shall provide for the projected future industrial development needs of the County.

Consistent with this policy, the County designated and mapped "Industrial areas," such as the Phoenix property, beginning in 1991.

88. Policy 2.113-A3 provides location criteria for establishing new industrial areas. Among other factors considered, "[i]ndustrial facilities should group together in planned industrial districts on sites capable of being expanded and developed in stages" and "[i]ndustrial districts shall be

separated significant distances from schools and developed residential areas." Policy 2.113-A3:d. and e.¹²

89. Policy 2.113-A4 provides that "[d]evelopment within an Industrial area shall conform to" several criteria such as: "a. Permitted uses include facilities for the processing, fabrication, manufacturing, recycling, bulk material storage, and distribution of goods, disposal yards, and limited retail commercial in accordance with Policy 2.113-A4.b. Other non-residential uses that produce significant amounts of noise, odor, vibration, dust, and lighting on and off-site may be permitted within an industrial district through conditional approval. Permitted uses also include any use found within a Business-Park Center."

90. Ultimately, as noted by the County in its Proposed Recommended Order, the crux of this dispute rests on whether the County erroneously classified the Subject Property as RS and later RL-4 on the FLUM.

91. As an initial matter, despite Petitioners' contrary assertions, there is authority to consider whether the designations of RS and RL-4 were made in error. See Island, Inc. v. City of Bradenton, 884 So. 2d 107 (Fla. 2d DCA 2004).

92. While Policy 2.113-A2 may have required the County to designate and map the Subject Property as Industrial on the FLUM when the Comprehensive Plan was originally adopted, the County

chose not to do so in 1991 or in 2001. Rather, the Subject Property was designated and mapped RS and then RL-4 in 1991 and 2001, respectively. There is no persuasive support for the proposition that the designation and mapping of the Subject Property as RS in the adoption of the FLUM 1991 or RL-4 as amended in 2001 was in error.

93. It appears that the County was not made aware of this issue until the application process for the Plan Amendment commenced and it was informed that the classification was allegedly erroneous. Tr. 483. The record contains no specific finding by the Board regarding its approval of the Plan Amendment that the 1991 and 2001 land use designations of the Subject Property were erroneous and no reasonable inference can be drawn from the evidence that an error was made in 1991 and 2001.

94. It is concluded that, for the purpose of designating a land use for the Subject Property, the Plan Amendment is construed as approval to establish a new industrial area, and, accordingly, must not be inconsistent with the location criteria in Policy 2.113-A3, and, in particular, subparagraphs d. and e.

95. The preponderance of the evidence establishes that the Subject Property is not capable of expansion to the west, or north and south unless the residential property is used. Further, the Subject Property is within close proximity to the

elementary school and is adjacent to residential areas to the north and south. The Plan Amendment is inconsistent with Policy 2.113-A3: d. and e.

96. Petitioners also raise several claims relating to perceived conflict between the Plan Amendment and the Redevelopment Plan of ECRA. However, a plan amendment need not be consistent with a redevelopment plan to be "in compliance," as that term is defined.

97. Petitioners also raise several provisions of the Comprehensive Plan relating to redevelopment efforts. These include Objective 2.124-F, which requires the County to address areas in need of revitalization by creating redevelopment districts and redevelopment plans to rehabilitate, revitalize, and/or redevelop these areas, and Policy 2.124-F1, which addresses the designation and mapping of redevelopment districts and lists what is intended to be accomplished by the redevelopment districts and revitalization plans. These provisions are irrelevant to comprehensive plan amendments.

98. Similarly, Policy 2.124-F3, which requires the establishment of revitalization plans for each redevelopment district and sets forth strategies for the preservation, rehabilitation, and/or redevelopment of these areas, is also irrelevant to comprehensive plan amendments.

99. Petitioners cite Policy 2.124-F4, which requires the County to implement the purpose and intent of Policy 2.124-F1 and further sets forth permitted uses within a redevelopment plan and development criteria. This provision obligates the redevelopment plan to meet the requirements of the Comprehensive Plan. These standards only apply to the initial development of the revitalization plan and are irrelevant to comprehensive plan amendments.

100. Policy 2.124-F5 states that upon approval by the Board, the revitalization plan will become the official revitalization plan for the redevelopment district. This provision is also irrelevant to comprehensive plan amendments.

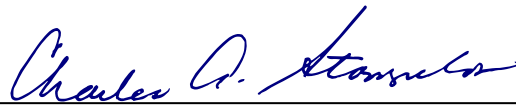
101. In sum, based upon the evidence submitted and the testimony provided, it is concluded that the Subject Property was not classified in error in the adoption of the FLUM in 1991 or when amended in 2001 and that the Plan Amendment is not "in compliance," as that term is defined by Section 163.3184(1)(b), Florida Statutes, because it is inconsistent with several provisions of the Comprehensive Plan. See also § 163.3177(2) and (6)(a), Fla. Stat.; Fla. Admin. Code R. 9J-5.005(5) and 9J-5.006(3)(b)3. and (3)(c)2.

RECOMMENDATION

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

RECOMMENDED that the Administration Commission enter a final order concluding that the Plan Amendment adopted by Polk County Ordinance No. 05-004 is not "in compliance" as defined in Section 163.3184(1)(b), Florida Statutes.

DONE AND ENTERED this 8th day of July, 2005, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of July, 2005.

ENDNOTES

^{1/} All citations are to the 2004 codification of the Florida Statutes unless otherwise indicated.

^{2/} The Phoenix Industries' business property was considered a major industrial area when this property received an Industrial land use designation in 1991.

^{3/} There are a number of other churches in the vicinity of the Subject Property. The Pentecostal Church of God, JE 8A at "11", the Church of God, JE 8A at "12", the Church Of Christ, JE 8A at "13", and the Southern Baptist Spanish Church, JE 8A at "14", are located on the southwest side of Snively Avenue, approximately between 1st and 5th Streets, and northwest of the Subject Property.

^{4/} A packing operation is located southeast of Snively Elementary School within the IND land use designation. JE 8A at "19". There is a residence located on the corner of the property designated as RL-4 land use just north of the church and packing operation and adjacent to the school. JE 8A at "33".

^{5/} According to the Eloise Redevelopment Plan, the foregoing "boundaries were established in order to address the areas of concentrated blighting conditions while providing sites for additional development and future tax base. The area boundary was expanded beyond the existing Eloise residential neighborhood in order to protect it [sic] borders from [sic] further incompatible development." EE 2, Plan at 6. It is further stated: "Ten percent of the area is residential and 15% is industrial and commercial. Most of the area with the CRA boundary is wetland, vacant or undeveloped (62.2%). The housing is older stock and is primarily located on the west side of Snively Avenue while the industrial is located on the east side. The South half of the area is vacant or pastured land." Id.

^{6/} It appears that the RL-1 land use designations cover areas that are either wetlands and/or in flood prone areas. (EE 2, Plan at 30). (As of 2000, of the 665 acres in the Redevelopment Area, it was estimated that 225 acres are potential wetlands/flood plain, 188 acres are developable uplands, with 252 acres of developed area. Id.) Most of this area is undeveloped and, as a result of the presence of wetlands, unlikely to be developed ("Wetlands Area"). Though both the Residential Area and the Wetlands Area are included within the Redevelopment Area, the character of each differs significantly. As such, the determination as to whether the Plan Amendment is "in compliance" must be evaluated by the significant differences of the two areas within the Redevelopment Area. Though the Wetlands Area is primarily classified as residential, the impacts of the Plan Amendment are the most significant on the variety of mixed land uses contained within the Residential Area and not on the Wetlands Area.

^{7/} It has been said that the school "is the center of Eloise - both physically and psychologically. . . . The school was built in September 1948 and was expanded in 1956." In 2000, the school "was selected as a 'School of Choice,' with special emphasis on communications. Technology and work force preparation." The Snively/Brooks Park is located adjacent and west of the school and was completed in approximately 1997. The

park "is used by the school during school hours and is open to the public during other daylight hours. The park facilities include a jogging path with exercise stations; a baseball diamond; two basketball courts; covered picnic tables and barbeque equipment; playground swing and equipment; and a storage/bathroom facility."

^{8/} Mr. Smith testified that on and off-site, the activities on the Subject Property emit a low amount of noise, no odors, low amounts of vibration, little or no dust, and a medium level of lighting. However, he also testified that current on-site uses of the Subject Property include on-site fuel storage and fueling, on-site truck and equipment repair, and maintenance. Under the Comprehensive Plan, "[i]ndustrial lands are characterized by facilities for the processing, fabrication, manufacturing, recycling, and distribution of goods, and may contain any use also found within a Business-Park Center. However, land use activities that operate externally to enclosed structures may be permitted within an Industrial [FLUM] classification. Industrial districts are also the appropriate location for land use activities that produce a significant amount of noise, odor, vibration, dust, and lighting on and off-site that do not produce a physical product."

^{9/} The Polk County Division Staff Report provides a chronology of the use of and land use designations for the Subject Property as "Findings of Fact" and, in part, states: "The majority of the homes on the 5th and 6th Streets were built between 1922 and 1969, which is prior to the GI zoning [with the adoption of the Zoning Ordinance on November 1, 1970, via County referendum] and development of the Alterman Truck Terminal site [part of the Subject Property] for the existing uses, based on staff's research of the surrounding properties utilizing the Property Appraiser's Office data." (JE 3 at 3 of 27).

^{10/} It appears that the Comprehensive Plan was adopted on November 18, 1992. JE 1; but see JE 3 at 1 of 27, stating that the Comprehensive Plan was adopted on May 1, 1991, and that the land use designation of the Subject Property was changed on May 1, 1991, on the FLUM, to RL, rather than, as stipulated, Amended Prehearing Stipulation at 9, to RS on April 19, 1991. Mr. Bishop explained that the Comprehensive Plan was initially adopted in March or April of 1991. It was transmitted to the Department of Community Affairs. The Department issued a report finding the plan not in compliance. Thereafter, the

Department's concerns were satisfied and the County readopted the Comprehensive Plan in 1992. Tr. 503-504.

^{11/} The Final Order in the Durham case struck the portions of the Recommended Order addressing standing because it was unnecessary to rule on the issue of CPPI's standing because another party had standing. The striking of this portion of the Recommended Order does not impact this case, however, because the Final Order did not address the merits of CPPI's standing.

^{12/} Mr. Jarret, County Attorney, opined that Policy 2.113-A3: e. "would be dispositive" if the use of the Subject Property is "a new development," but the opinion would change if it was "a preexisting industrial use." Tr. 176, 178. See also EE 4. (The Transcript reference to "subparagraph B of the 2.113-A3" should be subparagraph e.) When Mr. Jarret wrote his January 27, 2005, Memorandum, EE 4, he believed that the use of the Subject Property "was new." Subsequently, he re-examined the issue and determined that perhaps it could be argued that it was not, in fact, new. Tr. 183. He believed the issue needed to be addressed and he was concerned that "this issue was being ignored totally by both sides." Tr. 184.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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