

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF COMMUNITY)
AFFAIRS,)
)
 Petitioner,)
)
and)
)
KAREN ESTY, BARRY WHITE,)
NATIONAL PARKS CONSERVATION)
ASSOCIATION, and 1000 FRIENDS)
OF FLORIDA, INC.,)
)
 Intervenors,)
)
vs.) Case No. 08-3614GM
)
MIAMI-DADE COUNTY,)
)
 Respondent,)
)
and)
)
DAVID BROWN and LOWE'S HOME)
CENTERS, INC.,)
)
 Intervenors.)
_____)

SECOND CORRECTED RECOMMENDED ORDER

The final hearing in this case was held on December 8 through 12, 2008, and January 28 through 30, 2009, in Miami, Florida, before Bram D.E. Canter, Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether the amendments to Miami-Dade County's Comprehensive Development Master Plan (CDMP), adopted through Ordinance Nos. 08-44 and 08-45, are "in compliance" as that term is defined in Section 163.3184(1)(b), Florida Statutes (2008).¹

PRELIMINARY STATEMENT

On April 24, 2008, Miami-Dade County adopted Ordinance No. 08-44 (Lowe's Amendment) and Ordinance No. 08-45 (Brown Amendment) to change the future land use designation of certain lands on the Land Use Map and to expand the County's Urban Development Boundary to include the re-designated lands. The Miami-Dade County Mayor Alvarez vetoed the two ordinances, but the Board of County Commissioners voted to override the veto on May 6, 2008.

The adopted amendments were sent to the Department of Community Affairs for its compliance review. On July 18, 2008, the Department issued its Notice and Statement of Intent to find the amendments not in compliance. The Department then commenced this administrative proceeding on July 22, 2008, by filing a Petition for Formal Administrative Hearing at DOAH.

Lowe's Home Centers, Inc., and David Brown filed Petitions for Leave to Intervene in support of the County's action, which were granted. National Parks Conservation Association (NPCA) and 1000 Friends of Florida, Inc. (1000 Friends) were initially denied leave to intervene but, upon filing an Amended Petition, were granted leave to intervene in support of the Department. Barry White and Karen Esty also filed for and were granted leave to intervene in support of the Department.

Michael Hatcher, Friends of Redland, and the Urban Environmental League were granted leave to intervene in support of the Department, but withdrew their petitions before the final hearing.

At the final hearing the Department presented the testimony of Mark Woerner, Chief, Metropolitan Planning Section, Miami-Dade Planning and Zoning Department; Manuel Armada, Chief, Planning Research Section, Miami-Dade Planning and Zoning Department; Carolyn Dekle, Executive Director, South Florida Regional Planning Council; and Mike McDaniel, Chief, Office of

Comprehensive Planning, Department of Community Affairs. The Department's Exhibits 3 through 8, 10, 11, 16 through 21, 26, and 33 through 35 were admitted into evidence.

1000 Friends and NPCA presented the testimony of Kahlil Kettering, Biscayne Restoration Program Analyst for NPCA; and Charles Pattison, President and Executive Director of 1000 Friends. Intervenors' Exhibit 33 was admitted into evidence.

Esty and White testified on their own behalves, but did not offer any exhibits.

Miami-Dade County called no witnesses. County Exhibit 11 was admitted into evidence.

David Brown testified on his own behalf and also presented the testimony of Edward Swakon, EAS Engineering, Inc.; Rick Warner, Warner Real Estate Advisors; and Roger Wilburn, Plan Forward. Brown Exhibits 1, 8, 9, 12 through 16, 19, 24, 33, 36c, 40, 42e, 44, 45, 49, 51, and 56 were admitted into evidence.

Lowe's presented the testimony of Jenna Santangelo, Environmental Services, Inc.; Alberto Torres, Holland & Knight; and W. Russ Weyer, Fishkind & Associates. Lowe's Exhibits 1, 3, 4, 6, 14 through 16, 18, 26 through 28, 33, and 34 were admitted into evidence.

Official recognition was taken of numerous statutes, rules, County ordinances, policy statements, and the Strategic Regional

Policy Plan for South Florida. A copy of these documents was placed in the record.

The 10-volume Transcript of the final hearing was filed with DOAH. All parties except Intervenors Esty and White filed timely Proposed Recommended Orders, which were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. The Department is the state land planning agency and is statutorily charged with the duty to review amendments to local comprehensive plans and to determine whether the amendments are "in compliance," pursuant to Section 163.3184, Florida Statutes.

2. The County is a political subdivision of the State and has adopted a local comprehensive plan that the County amends from time to time.

3. 1000 Friends is a Florida not-for-profit corporation that maintains its headquarters in Tallahassee, Florida. Its corporate purpose is to ensure the fair and effective implementation of the Growth Management Act, Chapter 163, Part II, Florida Statutes, through education, lobbying, research and litigation. 1000 Friends has approximately 3,500 members, 174 of whom live in the County.

4. NPCA is a foreign, not-for-profit corporation that is registered to do business in Florida. Its headquarters are in

Washington, D.C. It has a branch office in Hollywood, Broward County, Florida. NPCA's purpose is to protect and preserve national parks, including Everglades National Park. NPCA has approximately 340,000 members, 1,000 of whom live in the County.

5. Barry White and Karen Esty are residents of the County.

6. Lowe's is a for-profit corporation that owns and operates a business in the County.

7. David Brown, along with his father and brother, is a co-applicant for the Brown amendment.

For the purpose of this Recommended Order, the Department and the Intervenors aligned with the Department will be referred to, collectively, as Petitioners.

Standing

8. Lowe's filed the application with the County that resulted in Ordinance No. 08-44 (Lowe's Amendment). Lowe's submitted comments to the County concerning the Lowe's Amendment during the period of time from the County's transmittal of the amendment to the County's adoption of the amendment.

9. Brown filed the application with the County that resulted in Ordinance No. 08-45 (Brown Amendment). Brown resides in the County. Brown is a manager/member of BDG Kendall 172, LLC, which has a contract to purchase the larger of the two parcels on the application site. Brown is also a manager/member of BDG Kendall 162, LLC, which owns and operates a business in

Miami-Dade County. Brown submitted comments to the County at the transmittal and adoption hearings.

10. 1000 Friends submitted comments to the County during the period of time from the transmittal of the amendments to their adoption. 1000 Friends presented its comments to the County on behalf of its members who reside in the County.

11. 1000 Friends does not own property or maintain an office in the County.

12. 1000 Friends does not pay local business taxes in the County and did not show that it is licensed to conduct a business in the County.

13. 1000 Friends has engaged in fundraising, lobbying, and litigation in the County. Its activities include efforts to promote growth management, affordable housing, and Everglades restoration.

14. 1000 Friends did not show that its activities in the County subject it to the provisions of the CDMP.

15. NPCA submitted comments to the County during the period of time from the transmittal of the amendments to their adoption. NPCA presented its comments to the County on behalf of NPCA members who reside in the County.

16. NPCA does not own property or maintain an office in the County.

17. No evidence was presented to show that NPCA pays business taxes in the County or that it is licensed to conduct business in the County.

18. NPCA did not show that its activities in the County subject it to the provisions of the CDMP.

19. Barry White and Karen Esty are residents of the County. They submitted comments to the County regarding the amendments during the period of time from the transmittal of the amendments to their adoption.

The Amendment Adoption Process

20. The applications which resulted in the Lowe's and Brown Amendments were submitted to the County during the April 2007 plan amendment cycle.

21. The County's review process for comprehensive plan amendments includes a public hearing before the community council which has jurisdiction over the area of the County where the affected lands are located. Following the public hearings on the proposed Lowe's and Brown Amendments, the community councils recommended that the Board of County Commissioners approve the amendments.

22. The County's Planning Advisory Board also reviews proposed amendments before the transmittal and adoption hearings. Following public hearings on the proposed Lowe's and Brown Amendments, the Planning Advisory Board recommended that

the Board of County Commissioners approve the amendments for transmittal and for adoption.

23. The County planning staff recommended that the proposed amendments be denied and not transmitted to the Department. The principal objection of the planning staff was that the expansion of the Urban Development Boundary (UDB), an aspect of both proposed amendments, was unjustified. In November 2007, the Board of County Commissioners voted to transmit the amendments to the Department.

24. The Department reviewed the proposed amendments and issued its Objections, Recommendations, and Comments (ORC) Report on February 26, 2008. In the ORC Report, the Department stated that expanding the UDB would be internally inconsistent with the CDMP because the need for the expansion had not been demonstrated. In addition the Department determined that the Lowe's Amendment was inconsistent with CDMP policies regarding the protection of wetlands, and the Brown Amendment was inconsistent with CDMP policies regarding the protection of agricultural lands.

25. When the amendments came before the Board of County Commissioners after the ORC Report in March 2008, the County planning staff recommended that the amendments be denied, repeating its belief that the expansion of the UDB would be inconsistent with the CDMP.

26. Under the County's Code of Ordinances, an expansion of the UDB requires approval by a two-thirds vote of the Board of County Commissioners. The County adopted the amendments through Ordinances No. 08-44 and 08-45 on April 24, 2008.

27. On April 30, 2008, the Mayor Carlos Alvarez vetoed the ordinances, citing inconsistencies with the UDB policies of the CDMP. His veto was overridden by a two-thirds vote of the Board of County Commissioners on May 6, 2008.

28. On July 18, 2008, the Department issued its Statement of Intent to Find Comprehensive Plan Amendments Not in Compliance.

The Lowe's Amendment

29. The Lowe's Amendment site consists of two parcels located in close proximity to the intersection of Southwest 8th Street, also known as Tamiami Trail, and Northwest 137th Avenue. The easternmost parcel, Parcel A, is 21.6 acres. The adjacent parcel to the west, Parcel B, is 30.1 acres. Neither parcel is currently being used.

30. About 50 percent of both Parcels A and B are covered by wetlands. The wetlands are partially drained and show encroachment by exotic vegetation, including Melaleuca and Australian pine. The Lowe's site is located within the Bird Trail Canal Basin, which the CDMP characterizes as containing "heavily impacted, partially drained wetlands."

31. Both Parcels A and B are currently designated Open Land under the CDMP, with a more specific designation as Open Land Subarea 3 (Tamiami-Bird Canal Basins), and can be used for residences at densities of up to one unit per five acres, compatible institutional uses, public facilities, utility and communications facilities, certain agricultural uses, recreational uses, limestone quarrying, and ancillary uses.

32. East of the Lowe's site is another parcel owned by Lowe's that is designated Business and Office and is within the UDB. North and west of the Lowe's site is Open Land. The Lowe's site is bordered on the south by Tamiami Trail, a six-lane road. Across Tamiami Trail is land designated Business and Office.

33. The Lowe's amendment would reclassify Parcel A as Business and Office and Parcel B as Institution, Utilities, and Communications. The Lowe's Amendment would also extend the UDB westward to encompass Parcels A and B.

34. The Business and Office designation allows for a wide range of sales and service activities, as well as compatible residential uses. However, the Lowe's amendment includes a restrictive covenant that prohibits residential development.

35. The Institution, Utilities, and Communications land use designation allows for "the full range of institution,

communications and utilities," as well as offices and some small businesses.

36. Parcel A is subject to another restrictive covenant that provides that Lowe's shall not seek building permits for the construction of any buildings on Parcel A without having first submitted for a building permit for the construction of a home improvement store.

37. The use of Parcel B is restricted to a school, which can be a charter school. If a charter school is not developed on Parcel B, the parcel will be offered to the Miami-Dade County School Board. If the School Board does not purchase Parcel B within 120 days, then neither Lowe's nor its successors or assigns have any further obligations to develop a school on Parcel B.

The Brown Amendment

38. The Brown Amendment involves four changes to the CDMP: a future land use re-designation from "Agriculture" to "Business and Office"; an expansion of the UDB to encompass the Brown site; a prohibition of residential uses on the site; and a requirement that the owner build an extension of SW 172nd Avenue through the site.

39. The Agriculture designation allows agricultural uses and single family residences at a density of one unit per five acres. The proposed Business and Office land use designation

allows a wide range of commercial uses, including retail, professional services, and office. Residential uses are also allowed, but the Declaration of Restrictions adopted by the County with the Brown Amendment prohibits residential development.

40. The Brown Amendment site is 42 acres. Some of the site is leased to a tenant farmer who grows row crops. The balance is vacant and not in use.

41. The Brown site has a triangular shape. Along the sloping northern/eastern boundary is Kendall Drive. Kendall Drive is a major arterial roadway, a planned urban corridor, and part of the state highway system. On the site's western boundary is other agricultural land. There is commercial development to the east. Along the southern boundary is the 1200-unit Vizcaya Traditional Neighborhood Development, which is within the UDB.

42. The entirety of the Brown site has been altered by farming activities. In the southwest portion of the site is a four-acre, degraded wetland that is part of a larger 28-acre wetland located offsite. The wetland is not connected to any state waters and the Army Corps of Engineers has not asserted jurisdiction over it. The wetland is not on the map of "Future Wetlands and CERP Water Management Areas" in the Land Use Element of the CDMP.

43. The dominant plants in the wetland are exotic species. There is no evidence that any portion of the site is used by any threatened or endangered species.

The Urban Development Boundary and Urban Expansion Area

44. The principal dispute in this case involves the application of Policies LU-8F and LU-8G of the CDMP regarding the expansion of the UDB. Policy LU-8F directs that adequate supplies of residential and nonresidential lands be maintained in the UDB. If the supply of lands becomes inadequate, Policy LU-8G addresses where the expansion of the UDB should occur.

45. The UDB is described in the Land Use Element:

The Urban Development Boundary (UDB) is included on the LUP map to distinguish the area where urban development may occur through the year 2015 from areas where it should not occur. Development orders permitting urban development will generally be approved within the UDB at some time through the year 2015 provided that level-of-service standards for necessary public facilities will be met. Adequate countywide development capacity will be maintained within the UDB by increasing development densities or intensities inside the UDB, or by expanding the UDB, when the need for such change is determined to be necessary through the Plan review and amendment process.

46. The UDB promotes several planning purposes. It provides for the orderly and efficient construction of infrastructure, encourages urban infill and redevelopment,

discourages urban sprawl, and helps to conserve agricultural and environmentally-sensitive lands.

47. The County only accepts applications for amendments seeking to expand the UDB once every two years, unless they are directly related to a development of regional impact. In contrast, Chapter 163, Florida Statutes, allows two amendment cycles in a calendar year.

48. Amendments that would expand the UDB must be approved by at least two-thirds of the total membership of the Board of County Commissioners. Other types of amendments only require a majority vote of the quorum.

49. Outside the UDB are County lands within the relatively small Urban Expansion Area (UEA), which is described in the CDMP as "the area where current projections indicate that further urban development beyond the 2015 UDB is likely to be warranted some time between the year 2015 and 2025."

50. The UEA consists of lands that the CDMP directs "shall be avoided" when the County is considering adding land to the UDB. They are (1) future wetlands; (2) lands designated Agriculture, (3) hurricane evacuation areas, and (4) lands that are part of the Comprehensive Everglades Restoration Plan. The "future" wetlands on this list are existing wetland areas delineated by the County on Figure 14 of the Land Use Element.

51. A far larger area of the County, mostly west of the UDB and UEA, consists of lands that the CDMP directs "shall not be considered" for inclusion in the UDB. These are water conservation areas, lands associated with Everglades National Park, the Redland agricultural area, and wellfield protection areas.

Policy LU-8F

52. Policy LU-8F of the Land Use Element provides:

The Urban Development Boundary (UDB) should contain developable land having capacity to sustain projected countywide residential demand for a period of 10 years after adoption of the most recent Evaluation and Appraisal Report (EAR) plus a 5-year surplus (a total 15-year Countywide supply beyond the date of EAR adoption). The estimation of this capacity shall include the capacity to develop and redevelop around transit stations at the densities recommended in policy LU-7F. The adequacy of non-residential land supplies shall be determined on the basis of land supplies in subareas of the County appropriate to the type of use, as well as the Countywide supply within the UDB. The adequacy of land supplies for neighborhood- and community-oriented business and office uses shall be determined on the basis of localized subarea geography such as Census Tracts, Minor Statistical Areas (MSAs) and combinations thereof. Tiers, Half-Tiers and combinations thereof shall be considered along with the Countywide supply when evaluating the adequacy of land supplies for regional commercial and industrial activities.

53. There is no further guidance in the CDMP for determining the "adequacy of land supplies" with respect to nonresidential land uses.

54. Neither Chapter 163, Florida Statutes, nor Florida Administrative Code Chapter 9J-5 requires that local governments use a particular methodology to determine the adequacy of nonresidential land supplies.

55. The County's usual methodology for determining need is described in the Planning Considerations Report that the County planning staff prepared for the 2007 amendment cycle. A report like this one is prepared by the staff for each amendment cycle to evaluate the adequacy of the CDMP to accommodate growth and to evaluate pending amendment applications.

56. The County compares a proposed use to its immediate surroundings and the broader area of the County in which the proposed use is located. The basic geographic unit used in the County's need analysis is the Minor Statistical Area (MSA). Larger planning areas, called Tiers, are groupings of MSAs. The County is divided into 32 MSAs and four Tiers.

57. The Lowe's Amendment site is in MSA 3.2, but it is on the border with MSA 6.1, so the two MSAs were consolidated for the County's need analysis regarding the Lowe's Amendment, even though MSA 3.2 is in the North Central Tier and MSA 6.1 is in the South Central Tier.

58. The Brown Amendment is in MSA 6.2, but it is close to MSA 6.1, so the County combined the two MSAs for its need analysis for the Brown Amendment. Both MSAs are in the South Central Tier.

59. The Planning Considerations Report contains a 2007 inventory of commercial land. The only vacant land used in the analysis of available commercial land supply was land zoned for business, professional office, office park, or designated Business and Office on the Land Use Map.

60. Although it is stated in the Planning Considerations Report that lands zoned or designated for industrial uses are often used for commercial purposes, this situation was not factored into the calculation of the available supply of commercial lands. The County also excluded any supply that could be gained from the redevelopment of existing sites. Petitioners contend, therefore, that the County's need for commercial land is less than the planning staff calculated in the Planning Considerations Report.

61. On the other hand, Respondents contend that the County's need for commercial land is greater than the planning staff calculated in the Planning Considerations Report because the County planning staff did not apply a "market factor" for commercial lands as it does for residential lands.

62. A market factor is considered by some professional planners to be appropriate for commercial land uses to account for physical constraints and other factors that limit the utilization of some vacant parcels, and to prevent situations where the diminished supply of useable parcels causes their prices to rise steeply. The CDMP recognizes the problem in stating that:

impediments can arise to the maximum utilization of all lands within the boundaries [of the UDB]. In some urbanized areas, it may be difficult to acquire sufficiently large parcels of land. In other areas, neighborhood opposition to proposed developments could alter the assumed density and character of a particular area.

63. The County used a market factor of 1.5 (50 percent surplus) to determine the need for residential land. The County did not use a market factor in its analysis of the need for commercial land. The Department's expert planning witness, Mike McDaniel, testified that the Department generally supports use of a 1.25 allocation (25 percent surplus).

64. The County's most recent UDB expansions for nonresidential uses (other than Lowe's and Brown) were the Beacon Lakes and Shopyland amendments in 2002. The Beacon Lakes and Shopyland UDB expansions were approved despite the fact that the County did not project a need for more industrial land within the planning horizon. The need determinations for

these amendments were not based on the use of a market factor, but on a perceived need for the particular land uses proposed - - warehouses and related industrial uses on large parcels to serve the Miami International Airport and the Port of Miami.

65. The evidence indicates that the County's exclusion from its analysis of industrial lands that can be used for commercial purposes, and additional commercial opportunities that could be derived from the redevelopment of existing sites, is offset by the County's exclusion of a market factor. If the supply of commercial land had been increased 25 percent to account for industrial lands and redevelopment, it would have been offset by a 1.25 market factor on the demand side. The calculations made by the County in its Planning Considerations Report would not have been materially different.

66. The Planning Considerations Report analyzes commercial demand (in acres) through the years 2015 and 2025, and calculates a "depletion year" by MSA, Tier, and countywide. A depletion year is the year in which the supply of vacant land is projected to be exhausted.

67. If the depletion year occurs before 2015 (the planning horizon for the UDB), that is an indication that additional lands for commercial uses might be needed.

68. The County planning staff projected a countywide depletion year of 2023, which indicates there are sufficient

commercial lands in the County through the planning horizon of 2015. The County then projected the need for commercial land by MSA and Tier.

69. MSA 3.2, where the Lowe's site is located, has a depletion year of 2025, but when averaged with MSA 6.1's depletion years of 2011, results in an average depletion year of 2018. The North Central Tier, in which the Lowe's Amendment site is located, has a depletion year of 2023.

70. The County's depletion year analysis at all three levels, MSA, Tier, and countywide, indicates no need for more commercial lands in the area of the Lowe's site.

71. MSA 6.2, where the Brown site is located, has a depletion year of 2017, but when combined with MSA 6.1's depletion of 2011, results in an average depletion year for the two MSAs is 2014. The South Central Tier, in which the Brown Amendment site is located, has a depletion year of 2014.

72. Therefore, the County's depletion year analysis, at the MSA and Tier levels, indicates a need for more commercial lands in the area of the Brown site.

73. The County also analyzed the ratio of commercial acres per 1,000 persons by MSA, Tier, and county-wide. The countywide ratio is not a goal that the County is seeking to achieve for all Tiers and MSAs. However, if a Tier or MSA shows a ratio

substantially lower than the countywide ratio, that MSA or Tier might need more commercial lands.

74. The countywide ratio of commercial lands per 1,000 persons is projected to be 6.1 acres per 1,000 persons in 2015. MSA 3.2, in which the Lowe's site is located, has a ratio of 11.3 acres per 1,000 persons. MSA 6.1 has a ratio of 2.6 acres. The average for the two MSAs is 6.95 acres. The ratio for all of the North Central Tier is 6.3 acres per 1,000 persons.

75. Therefore, a comparison of the countywide ratio with the MSAs and Tier where the Lowe's site is located indicates there is no need for additional commercial lands in the area of the Lowe's site.

76. MSA 6.2, where the Brown site is located, has a ratio of 4.1 acres per 1,000 persons. When combined with MSA 6.1's ratio of 2.6 acres, the average for the two MSAs is 3.35 acres. The ratio for all of the South Central Tier is 4.5 acres per 1,000 persons. Therefore, a comparison with the countywide ratio of 6.1 acres indicates a need for additional commercial lands in the area of the Brown site.

77. The County's need analysis treated the Kendall Town Center as vacant (i.e., available) commercial land, but the Kendall Town Center is approved and under construction. If the Kendall Town Center had been excluded, the County's projected

future need for commercial land in the area of the Brown site would have been greater.

78. The Planning Considerations Report does not discuss parcel size in its commercial need analysis. Lowe's contends that the County should have considered whether there is a need for larger "community commercial" uses in the area of the Lowe's site. Policy LU-8F refers only to the need to consider (by "Tiers, Half-Tiers and combinations thereof") the adequacy of land supplies for "regional commercial activities."

79. Lowe's planning expert testified that there are few undeveloped commercial parcels in MSAs 3.2 and 6.1 that are ten acres or more, or could be aggregated with contiguous vacant parcels to create a parcel bigger than ten acres.

80. Lowe's submitted two market analyses for home improvement stores, which conclude that there is a need for another home improvement store in the area of the Lowe's site.

81. The market analyses offered by Lowe's differ from the County's methodology, which focuses, not on the market for a particular use, but on the availability of commercial lands in appropriate proportion to the population. Even when it is reasonable for the County to consider the need for a unique use, the County's focus is on serving a general public need, rather than on whether a particular commercial use could be profitable in a particular location.

82. Some of the assumptions used in the market analyses offered by Lowe's were unreasonable and biased the results toward a finding of need for a home improvement store in the study area. The more persuasive evidence shows that there is no need for more commercial land, and no need for a home improvement store, in the area of the Lowe's site.

83. Lowe's Parcel B is proposed for use as a school. The elementary, middle and high schools serving the area are over-capacity. Lowe's expects the site to be used as a charter high school.

84. Using an inventory of lands that was prepared by the County staff, Lowe's planning expert investigated each parcel of land located within MSAs 3.2 and 6.1 that was over seven acres² and determined that no parcel within either MSA was suitable for development as a high school.

85. The record is unclear about how the Lowe's Amendment fits into the plans of the County School Board. The proposition that there are no other potential school sites in the area was not firmly established by the testimony presented by Lowe's. The need shown for the school site on Parcel B does not overcome the absence of demonstrated need for the Business and Office land use on Parcel A.

86. It is beyond fair debate that that the Lowe's Amendment is inconsistent with Policy LU-8F.

87. The County's determination that the Brown Amendment is consistent with Policy LU-8F is fairly debatable.

Policy LU-8G

88. Policy LU-8GA(i) identifies lands outside the UDB that "shall not be considered for inclusion in the UDB. Policy LU-8G(ii) identifies other lands that "shall be avoided," including (1) future wetlands, (2) lands designated Agriculture, (3) hurricane evacuation areas, and (4) lands that are part of the Comprehensive Everglades Restoration Plan.

89. A peculiarity of the UEA is that it is composed entirely of lands that "shall be avoided" when the County considers adding lands to the UDB. The Department contends that "shall be avoided" means, in this context, that the County must make "a compelling showing that every other option has been exhausted" before the UDB can be expanded. However, the CDMP does not express that specific intent. The CDMP does not provide any direct guidance about how compelling the demonstration must be to expand the UDB.

90. Policies LU-8F and LU-8G appear to call for a balancing approach, where the extent of the need for a particular expansion must be balanced against the associated impacts to UEA lands and related CDMP policies. The greater the needs for an expansion of the UDB, the greater are the impacts

that can be tolerated. The smaller the need, the smaller are the tolerable impacts.

91. Because the need for the Lowe's Amendment was not shown, the application of the locational criteria in Policy LU-8G is moot. However, the evidence presented by Lowe's is addressed here.

92. Within the meaning of Policy LU-8G(ii)(a), the wetlands that "shall be avoided" are those wetlands that are depicted on the Future Wetlands Map part of the Land Use Element of the CDMP. About 50 percent of the Lowes site is covered by wetlands that are on the Future Wetlands Map.

93. Petitioners speculated that the construction of a Lowe's home improvement store and school on the Lowe's site could not be accomplished without harm to the wetlands on the site, but they presented no competent evidence to support that proposition. The wetland protections afforded under the environmental permitting statutes would not be affected by the Lowe's Amendment.

94. Nevertheless, this is a planning case, not a wetland permitting case. It is a well-recognized planning principle that lands which have a high proportion of wetlands are generally not suitable for land use designations that allow for intense uses. The Lowe's Amendment runs counter to this principle.

95. Policy LU-8F(iii) identifies areas that "shall be given priority" for inclusion in the UDB:

- a) Land within Planning Analysis Tiers having the earliest projected supply depletion year;
- b) Lands contiguous to the UDB;
- c) Locations within one mile of a planned urban center or extraordinary transit service; and
- d) Lands having projected surplus service capacity where necessary services can be readily extended.

96. The Lowe's site satisfies all but the first criterion. The Lowe's site is in the Tier with the latest projected supply depletion year.

97. It is beyond fair debate that that the Lowe's Amendment is inconsistent with Policy LU-8G.

98. Because a reasonable showing of need for the Brown Amendment was shown, it is appropriate to apply the locational criteria of Policy LU-8G. The Brown Amendment would expand the UDB into an area of the UEA that is designated Agriculture. The single goal of the CDMP's Land Use Element refers to the preservation of the County's "unique agricultural lands." The CDMP refers elsewhere to the importance of protecting "viable agriculture." Brown argued that these provisions indicate that the County did not intend to treat all agricultural lands similarly, and that agricultural activities like those on the

Brown site, that are neither unique nor viable, were not intended to be preserved. Petitioners disagreed.

99. The County made the Redland agricultural area one of the areas that "shall not be considered" for inclusion in the UDB. Therefore, the County knew how to preserve "unique" agricultural lands and prevent them from being re-designated and placed in the UDB.

100. The only evidence in the record about the economic "viability" of the current agricultural activities on the Brown site shows they are marginally profitable, at best.

101. The Brown site is relatively small, has a triangular shape, and is wedged between a major residential development and an arterial roadway, which detracts from its suitability for agricultural operations. These factors also diminish the precedent that the re-designation of the Brown site would have for future applications to expand the UDB.

102. The Brown site satisfies all of the criteria in Policy LU-8G(iii) to be given priority for inclusion in the UDB.

103. The County's determination that the Brown Amendment is consistent with Policy LU-8G is fairly debatable.

Policy EDU-2A

104. Policy EDU-2A of the CDMP states that the County shall not purchase school sites outside the UDB. It is not

clear why this part of the policy was cited by Petitioners, since the Lowe's Amendment would place Parcel B inside the UDB.

105. Policy EDU-2A also states that new elementary schools "should" be located at 1/4 mile inside the UDB, new middle schools "should" be located at least 1/2 mile inside the UDB, and new high schools "should" be located at least one mile inside the UDB. The policy states further that, "in substantially developed areas," where conforming sites are not available, schools should be placed as far as practical from the UDB.

106. Petitioners contend that the Lowe's Amendment is inconsistent with Policy EDU-2A because Parcel B, the school site in the Lowe's Amendment, would be contiguous to the UDB if the Lowe's Amendment were approved.

107. However, when a policy identifies circumstances that allow for an exception to a stated preference, it is necessary for challengers to show that the exceptional circumstances do not exist. It was Petitioners' burden to demonstrate that there were conforming school sites farther from the UDB in the area of the Lowe's site. Petitioners did not meet their burden.

108. The County's determination that the Lowe's Amendment is consistent with Policy EDU-2A is fairly debatable.

Urban Sprawl

109. 1000 Friends and NPCA allege that the Brown and Lowe's Amendments would encourage the proliferation of urban sprawl. The Department did not raise urban sprawl as an "in compliance" issue.

110. Florida Administrative Code Rule 9J-5.006(5)(g) identifies 13 "primary indicators" of urban sprawl. The presence and potential effects of multiple indicators is to be considered to determine "whether they collectively reflect a failure to discourage urban sprawl." Fla. Admin. Code R. 9J-5.006(5)(d).

111. Indicator 1 is designating for development "substantial areas of the jurisdiction to develop as low-intensity, low-density, or single use development or uses in excess of demonstrated need." It was found, above, that the County had a reasonable basis to determine there was a need for the Brown Amendment, but not for the Lowe's Amendment. Therefore, this indicator is triggered only by the Lowe's Amendment.

112. Indicator 2 is designating significant amounts of urban development that leaps over undeveloped lands. The facts do not show that undeveloped lands were leaped over for either of the amendments.

113. Indicator 3 is designating urban development "in radial, strip, isolated, or ribbon patterns." The Lowe's and Brown Amendments do not involve radial or isolated development patterns. What would constitute a "ribbon" pattern was not explained. Not every extension of existing commercial uses constitutes strip sprawl. Other factors need to be considered. For example, both the Lowe's and Brown sites are at major intersections where more intense land uses are commonly located. Under the circumstances shown in this record, this indicator is not triggered for either amendment.

114. Indicator 4 is premature development of rural land that fails to adequately protect and conserve natural resources. This indicator is frequently cited by challengers when an amendment site contains wetlands or other natural resources, without regard to whether the potential impact to these resources has anything to do with sprawl.

115. In the area of the Lowe's site, the UDB generally divides urbanized areas from substantial wetlands areas that continue west to the Everglades. The Lowe's Amendment intrudes into an area dominated by wetlands and, therefore, its potential to affect wetlands is an indication of sprawl.

116. In the area of the Brown Amendment, the UDB generally separates urbanized areas from agricultural lands that already have been substantially altered from their natural state. The

Brown Amendment invades an agricultural area, not an area of natural resources. Therefore, the potential impacts of the Brown Amendment on the small area of degraded wetlands on the Brown site do not indicate sprawl.

117. Indicator 5 is failing to adequately protect adjacent agricultural areas and activities. Because this indicator focuses on "adjacent" agricultural areas, it is not obvious that it includes consideration of effects on the amendment site itself. If this indicator applies to the cessation of agricultural activities on the Brown site, then the Brown Amendment triggers this primary indicator. If the indicator applies only to agricultural activities adjacent to the Brown site, the evidence was insufficient to show that this indicator is triggered.

118. Indicators 6, 7, and 8 are related to the orderly and efficient provision of public services and facilities. Urban sprawl is generally indicated when new public facilities must be created to serve the proposed use. Petitioners did not show that new public facilities must be created to serve the Lowe's or Brown sites. The proposed amendments would maximize the use of existing water and sewer facilities. Petitioners did not show that the amendments would cause disproportionate increases in the costs of facilities and services.

119. Indicator 9 is failing to provide a clear separation between rural and urban uses. The Lowe's Amendment would create an irregular and less clear separation between urban and rural uses in the area and, therefore, the Lowe's Amendment triggers this indicator. The Brown Amendment does not trigger this indicator because of it is situated between the large Vizcaya development and Kendall Drive, a major arterial roadway. The Brown Amendment would create a more regular separation between urban and rural uses in the area.

120. Indicator 10 is discouraging infill or redevelopment. The CDMP delineates an Urban Infill Area (UIA) that is generally located east of the Palmetto Expressway and NW/SW 77th Avenue. Petitioners did not demonstrate that the Brown and Lowe's Amendments discourage infill within the UIA. Petitioners did not show how any particular infill opportunities elsewhere in the UDB are impaired by the Lowe's and Brown Amendments.

121. However, the expansion of the UDB would diminish, at least to a small degree, the incentive for infill. This indicator, therefore, is triggered to a small degree by both amendments.

122. The CDMP promotes redevelopment of buildings that are substandard or underdeveloped. Petitioners did not show how any particular redevelopment opportunities are impaired by the Lowe's and Brown Amendments.

123. However, the expansion of the UDB would diminish, at least to a small degree, the incentive to redevelop existing properties. This indicator, therefore, is triggered to a small degree by both amendments.

124. Indicator 11 is failing to encourage or attract a functional mix of uses. Petitioners failed to demonstrate that this primary indicator is triggered.

125. Indicator 12 is poor accessibility among linked or related uses. No evidence was presented to show that this indicator would be triggered.

126. Indicator 13 is the loss of "significant" amounts of open space. These amendments do not result in the loss of significant amounts of open space, whether measured by acres, by the percentage of County open lands converted to other uses, or by any specific circumstances in the area of the amendment sites.

127. Evaluating the Lowe's Amendment using the primary indicators of urban sprawl and the criteria in Florida Administrative Code Rule 9J-5.006(5)(h) through (j), it is found by a preponderance of the evidence that the County's adoption of the Lowe's Amendment fails to discourage the proliferation of urban sprawl.

128. Evaluating the Brown Amendment using the primary indicators of urban sprawl and the criteria in Florida

Administrative Code Rule 9J-5.006(5)(h) through (j), it is found by a preponderance of the evidence that the County's adoption of the Brown Amendment does not fail to discourage the proliferation of urban sprawl.

Land Use Analysis

129. The Department claims that the Lowe's and Brown Amendments are inconsistent with Florida Administrative Code Rule 9J-5.006(2)(c), which requires that the land use element of a comprehensive plan be based on an analysis of the amount of land needed to accommodate projected population. The Department believes the analyses of need presented by Lowe's and Brown's consultants were not professionally acceptable.

130. Petitioners proved by a preponderance of the evidence that there was no need for the Lowe's Amendment. Therefore, the Lowe's Amendment is inconsistent with Florida Administrative Code Rule 9J-5.006(2)(c).

131. A preponderance of competent, substantial, and professionally acceptable evidence of need, in conformance with and including the methodology used by the County planning staff, demonstrated that the Brown Amendment is consistent with Florida Administrative Code Rule 9J-5.006(2)(c).³

Florida Administrative Code Chapter 9J-5 - Natural Resources

132. Petitioners contend the Lowe's Amendment is inconsistent with the provisions of Florida Administrative Code

Chapter 9J-5, which require that the land use element of every comprehensive plan contain a goal to protect natural resources, and that every conservation element contain goals, objectives, and policies for the protection of vegetative communities, wildlife habitat, endangered and threatened species, and wetlands. Petitioners failed to prove by a preponderance of the evidence that the CDMP does not contain these required goals, objectives, and policies. Therefore, Petitioners failed to prove that the Lowe's amendment is inconsistent with these provisions of Florida Administrative Code Chapter 9J-5.⁴

The State Comprehensive Plan

133. Petitioners contend that the Lowe's and Brown amendments are inconsistent with several provisions of the State Comprehensive Plan.

134. Goal (9)(a) of the State Comprehensive Plan and its associated policies address the protection of natural systems. Petitioners contend that only the Lowe's Amendment is inconsistent with this goal and its policies. For the reasons stated previously, Petitioners showed by a preponderance of the evidence that the County's adoption of the Lowe's Amendment is inconsistent with this goal and its policies.

135. Goal (15)(a) and its associated policies address land use, especially development in areas where public services and facilities are available. Policy (15)(b)2. is to encourage a

separation of urban and rural uses. Because the Lowe's Amendment is inconsistent with Policies LU-8F and LU-8G of the CDMP, the County's adoption of the Lowe's Amendment is inconsistent with this goal and policy. For the reasons stated above, Petitioners failed to show by a preponderance of the evidence that the County's adoption of the Brown Amendment is inconsistent with this goal and its associated policies.

136. Goal (16)(a) and its associated policies address urban and downtown revitalization. Although the expansion of the UDB diminishes the incentive to infill or redevelop, Petitioners did not show this effect, when considered in the context of the CDMP as a whole and the State Comprehensive Plan as a whole, impairs the achievement of this goal and its associated policies to an extent that the proposed amendments are inconsistent with this goal of the State Comprehensive Plan and its associated policies.

137. Goal (17)(a) and its associated policies address the planning and financing of and public facilities. For the reasons stated previously, Petitioners failed to prove by a preponderance of the evidence that the County's adoption of the proposed amendments is inconsistent with this goal and its associated policies.

138. Goal (22)(a) addresses agriculture. Policy(b)1. is to ensure that state and regional plans are not interpreted to

permanently restrict the conversion of agricultural lands to other uses. This policy recognizes that agricultural landowners have the same right to seek to change the use of their lands, and that engaging in agricultural activities is not a permanent servitude to the general public.

139. The policies cited by Petitioners (regarding the encouragement of agricultural diversification, investment in education and research, funding of extension services, and maintaining property tax benefits) are not affected by the Brown Amendment.

140. For the reasons stated above, Petitioners failed to prove by a preponderance of the evidence that the County's adoption of the Brown Amendment is inconsistent with this goal and its associated policies.

141. Goal (25)(a) and its associated policies address plan implementation, intergovernmental coordination and citizen involvement, and ensuring that local plans reflect state goals and policies. Because the Lowe's Amendment is inconsistent with Policies LU-8F and LU-8G of the CDMP, and was found to contribute to the proliferation of urban sprawl, Petitioners proved by a preponderance of the evidence that the County's adoption of the Lowe's Amendment is inconsistent with this goal and its associated policies.

142. Petitioners proved by a preponderance of the evidence that when the State Comprehensive Plan is construed as a whole, the County's adoption of the Lowe's Amendment is inconsistent with the State Comprehensive Plan.

143. Petitioners failed to prove by a preponderance of the evidence that when the State Comprehensive Plan is construed as a whole, the County's adoption of the Brown Amendment is inconsistent with the State Comprehensive Plan.

Strategic Regional Policy Plan

144. Petitioners claim that the Lowe's Amendment is inconsistent with Goals 11, 12, and 20 of the Strategic Regional Policy Plan of the South Florida Regional Planning Council (SFRPC) and several policies associated with these goals. The SFRPC reviewed the proposed Brown Amendment and found it was generally consistent with the Strategic Regional Policy Plan.

145. Goal 11 and its associated policies encourage the conservation of natural resources and agricultural lands, and the use of existing and planned infrastructure. For the reasons stated previously, Petitioners proved by a preponderance of the evidence that the County's adoption of the Lowe's Amendment is inconsistent with this goal and its associated policies.

146. Goal 12 and its associated policies encourage the retention of rural lands and agricultural economy. The CDMP

encourages the retention of rural lands and agricultural economy.

147. Because it was found that the Lowe's Amendment was inconsistent with Policies LU-8F and LU-8G, Petitioners proved by a preponderance of the evidence that the County's adoption of the Lowe's Amendment was inconsistent with this regional goal and its policies.

148. Goal 20 and its associated policies are to achieve development patterns that protect natural resources and guide development to areas where there are public facilities. Because it was found that there is no need for the Lowe's Amendment and that it constitutes urban sprawl, Petitioners proved by a preponderance of the evidence that the County's adoption of the Lowe's Amendment is inconsistent with these regional goal and policies.

CONCLUSIONS OF LAW

149. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 163.3184(10), Florida Statutes.

Standing

150. In order to have standing to challenge a plan amendment, a challenger must be an "affected person," which is defined in Section 163.3184(1)(a), Florida Statutes, as a person

who resides, owns property, or owns or operates a business within the local government whose comprehensive plan amendment is challenged, and who submitted comments, recommendations, or objections to the local government during the period of time beginning with the transmittal hearing and ending with amendment's adoption.

151. Based on the stipulated facts, Petitioners White and Esty have standing as affected persons.

152. Both 1000 Friends and NPCA claim standing as "affected persons," on the ground that they own and operate businesses in Dade County. However, the phrase "owns or operates a business," as used in the statute, refers to activities "of a type which might make the business potentially subject to the constraints of the local comprehensive plan." St. Joe Paper Co. v. Dep't of Community. Affairs, 657 So. 2d 27, 29 (Fla. 1st DCA 1995); Potiris v. Dep't of Cmty. Affairs, 947 So. 2d 598 (Fla. 4th DCA 2007). This essential nexus was not established in the record by 1000 Friends or NPCA.

153. 1000 Friends and NPCA do not pay the business tax required to operate a business in the County. They do not allege that they are liable for non-payment of the tax or that they are exempt from the tax. The logical conclusion is that they do not qualify as a business in the County.

154. In general, an association has standing to sue on behalf of its members when a substantial number of them would otherwise have standing to sue in their own right and the interests that the association seeks to protect are germane to its purposes. See Fla. Home Builders Ass'n v. Dept. of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982).

155. 1000 Friends of Florida and NPCA made comments on the Lowe's and Brown amendments during the County's comprehensive plan amendment process on behalf of a substantial number of their members who reside in the County. Lowe's argues that this was not sufficient for associational standing, because no individual member of either 1000 Friends or NPCA was shown to have presented comments to the County, so no member would have standing as an affected person in his or her own right. That argument is rejected because it would mean that no person or entity would have standing as an affected person if comments were presented to the local government on the person's or entity's behalf by a representative (such as a lawyer).

156. The use of a representative should not prevent the standing of the person or entity being represented. For purposes of standing, there should be no distinction in comprehensive plan amendment cases between a corporation which presented comments to the local government through its lawyer,

and members of an association who presented comments through their lawyer or an officer of the association.

157. 1000 Friends and NPCA meet the requirements for associational standing.

Burden and Standards of Proof

158. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue of the proceeding. See Young v. Department of Community Affairs, 625 So. 2d 831 (Fla. 1993). As the parties maintaining this action to assert that the Lowe's and Brown amendments are not in compliance, Petitioners have the burden of proof.

159. Section 163.3184(10)(a), Florida Statutes, provides that, in a proceeding initiated by the Department's finding of not in compliance,

the local government's determination that the comprehensive plan or plan 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 comprehensive plan or plan amendment is not in compliance. The local government's determination that elements of its plans are related to and consistent with each other shall be sustained if the determination is fairly debatable.

160. In Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997), the fairly debatable standard of review was described as "a highly deferential standard requiring approval

of a planning action if reasonable persons could differ as to its propriety." Quoting from City of Miami Beach v. Lachman, 71 So. 2d 148, 152 (Fla. 1953), the Court stated further:

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

690 So. 2d at 1295.

In Compliance

161. Amendments to local government comprehensive plans are subject to review by the Department under Chapter 163, Part II, to determine whether the amendments are "in compliance." The term "in compliance" is defined in Section 163.3184(1)(b), Florida Statutes:

In compliance means consistent with the requirements of ss. 163.3177, when a local government adopts an educational facilities element, 163.3178, 163.3180, 163.3191, and 163.3245, with the state comprehensive plan, with the appropriate strategic regional policy plan, and with chapter 9J-5, Florida Administrative Code, where such rule is not inconsistent with this part and with the principles for guiding development in designated areas of critical state concern and with part III of chapter 369, where applicable.

Data and Analysis

162. Plan amendments must be based upon "appropriate" data. § 163.3177(10)(e), Fla. Stat. The analysis of

appropriate data must be professionally acceptable. However, the Department may not evaluate whether one methodology of analysis is better than another. Id.

163. Unfortunately, the statute's reference to data that is professionally acceptable assures that, in nearly every growth management case, parties will criticize the work and testimony of opposing expert witnesses as being not professionally acceptable. In most cases, the disputes are over differences of opinion that are common in all professions. Two widely different methodologies with widely different results can both be professionally acceptable. Therefore, rather than pronouncing a party's evidence as professionally unacceptable, it is usually more appropriate to simply give less weight to the evidence that is less persuasive. That is what the Administrative Law Judge did in this case.

Internal Consistency

164. Subsection 163.3177(2), Florida Statutes, requires the elements of a comprehensive plan to be internally consistent. Plan amendments must preserve the internal consistency of the plan. See § 163.3187(2), Fla. Stat.

165. It is beyond fair debate that that the Lowe's Amendment is inconsistent with Policies LU-8F and LU-8G.

166. The County's determination that the Brown Amendment is consistent with Policies LU-8F and LUG-8 is fairly debatable.

167. The County's determination that the Lowe's Amendment is consistent with Policy EDU-2A is fairly debatable.

Urban Sprawl

168. Urban sprawl is defined in Florida Administrative Code Rule 9J-5.03(134):

"Urban sprawl" means urban development or uses which are located in predominantly rural areas, or rural areas interspersed with generally low-intensity or low-density urban uses, and which are characterized by one or more of the following conditions:

(a) The premature or poorly planned conversion of rural land to other uses;

(b) The creation of areas of urban development or uses which are not functionally related to land uses which predominate the adjacent area; or

(c) The creation of areas of urban development or uses which fail to maximize the use of existing public facilities or the use of areas within which public services are currently provided. Urban sprawl is typically manifested in one or more of the following land use or development patterns: Leapfrog or scattered development; ribbon or strip commercial or other development; or large expanses of predominantly low-intensity, low-density, or single use development.

169. When a comprehensive plan has previously been found in compliance, the pre-existence of indicators of urban sprawl that are not exacerbated by a plan amendment cannot form the basis for a determination of not in compliance. Fla. Admin. Code R. 9J-5.006(5)(k).

170. Florida Administrative Code Rule 9J-5.006(5)(g) describes 13 primary indicators of urban sprawl. Florida Administrative Code Rule 9J-5.006(5)(d) states that "The presence and potential effects of multiple indicators shall be considered to determine whether they collectively reflect a failure to discourage urban sprawl."

171. The urban sprawl analysis must also apply the criteria in Florida Administrative Code Rule 9J-5.006(5)(h) through (j), which require the consideration of surrounding land uses and circumstances.

172. Petitioners demonstrated by a preponderance of the evidence that the County's adoption of the Lowe's Amendment causes the CDMP, when considered as a whole, to fail to discourage the proliferation of urban sprawl.

173. Petitioners failed to demonstrate by a preponderance of the evidence that the Brown Amendment causes the CDMP, when considered as a whole, to fail to discourage the proliferation of urban sprawl.

Florida Administrative Code Chapter 9J-5 - Natural Resources

174. Petitioners contend the Lowe's Amendment is inconsistent with numerous provisions of Florida Administrative Code Chapter 9J-5 which require that the land use element of every comprehensive plan contain a goal to protect natural resources, and that every conservation element contain goals,

objectives, and policies for the protection of vegetative communities, wildlife habitat, endangered and threatened species, and wetlands. Petitioners failed to prove by a preponderance of the evidence that the CDMP does not contain these required goals, objectives, and policies.

175. In other cases involving challenges to land use map amendments, the Department has cited provisions of Florida Administrative Code Chapter 9J-5 that require comprehensive plans to contain certain goals, objectives, and policies as surrogates for a claim under Florida Administrative Code Rule 9J-5.005(4)(b), which states that a land use map amendment "must reflect goals, objectives, and policies within all elements." The proper claim would be inconsistency with Florida Administrative Code Rule 9J-5.005(4)(b), with an identification of the specific goals, objectives, and policies of the local government comprehensive plan (rather than provisions in Rule 9J-5) that the Department contends are not reflected in the map amendment.

Florida Administrative Code Rule 9J-5.006(2)(c)

176. Related to Policy LU-8F of the CDMP is Florida Administrative Code 9J-5.006(2)(c), which requires the Land Use Element to be based on an analysis of the amount of land needed to accommodate the projected population.

Petitioners claim that the Lowe's and Brown Amendments are inconsistent with this rule, primarily because they contend the need analyses for the amendments were not professionally acceptable.

177. Based on the finding that the need for the Lowe's amendment was not demonstrated, the County's adoption of the Lowe's Amendment is inconsistent with Florida Administrative Code 9J-5.006(2)(c).

178. A preponderance of competent, substantial, and professionally acceptable evidence of need, in conformance with and including the methodology used by the County planning staff, demonstrated that the Brown Amendment is consistent with Florida Administrative Code Rule 9J-5.006(2)(c).

State Comprehensive Plan

179. The State Comprehensive Plan establishes general planning goals and policies. It would be a rare situation for a plan amendment to be inconsistent with the State Comprehensive Plan if it is consistent with the local comprehensive plan and the criteria found in Florida Administrative Code Chapter 9J-5.

180. Petitioners proved by a preponderance of the evidence that when the State Comprehensive Plan is construed as a whole, the County's adoption of the Lowe's Amendment is inconsistent with the State Comprehensive Plan.

181. Petitioners failed to prove by a preponderance of the evidence that when the State Comprehensive Plan is construed as a whole, the County's adoption of the Brown Amendment is inconsistent with the State Comprehensive Plan.

Strategic Regional Policy Plan

182. Because it was found that there is no need for the Lowe's Amendment and that it constitutes urban sprawl, Petitioners proved by a preponderance of the evidence that the County's adoption of the Lowe's Amendment is inconsistent with the Strategic Regional Policy Plan.

183. It is not clear that Intervenors Esty and White withdrew their claim that the Brown Amendment is inconsistent with the Strategic Regional Policy Plan. However, Petitioners failed to prove by a preponderance of the evidence that the County's adoption of the Brown Amendment is inconsistent with the Strategic Regional Policy Plan.

Conclusion

184. Petitioners proved that, in construing the CDMP in its entirety, the County's adoption of the Lowe's Amendment is not in compliance.

185. Petitioners failed to prove that, in construing the CDMP in its entirety, the County's adoption of the Brown Amendment is not in compliance.

RECOMMENDATION

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

RECOMMENDED that the Administration Commission enter a final order determining that:

1. Ordinance No. 08-44, the Lowe's Amendment, is not in compliance, and
2. Ordinance No. 08-45, the Brown Amendment, is in compliance.

DONE AND ENTERED this 13th day of May, 2009, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of May, 2009.

ENDNOTES

1/ Unless otherwise indicated, all references to the Florida Statutes are to the 2008 codification.

2/ Seven acres is the minimum acreage required for a high school site under the Guidelines for State Requirements for Educational Facilities.

3/ The Department objected to the use of population projections that differed from the projections made by the County and which are integrated into the CDMP. Neither the finding made here nor the other findings in this Recommended Order are based on population projections that differ from the County's projections.

4/ See paragraph 175.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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