STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARTIN COUNTY CONSERVATION ALLIANCE, INC., A FLORIDA NOT-FOR-PROFIT CORP.; DONNA MELZER AND ELIZA ACKERLY, INDIVIDUALS AND GROVE HOLDINGS, LLC; GROVES 12, LLC; AND GROVES 14 LLC,	)	
Petitioners,	)	
vs.	)	Case No. 10-0913GM
MARTIN COUNTY AND DEPARTMENT OF COMMUNITY AFFAIRS,	)	
Respondents.	)	
GROVE HOLDINGS, LLC; GROVE 12, LLC; AND GROVES 14, LLC,	)	
Petitioners,	)	
vs.	)	Case No. 10-1142GM
MARTIN COUNTY AND DEPARTMENT OF COMMUNITY AFFAIRS,	)	
Respondents.	)	
MARTIN COUNTY CONSERVATION ALLIANCE, INC., A FLORIDA NOT-FOR-PROFIT CORPORATION AND DONNA MELZER,	)	
Petitioners,	)	
vs.	)	Case No. 10-1161GM
MARTIN COUNTY AND DEPARTMENT OF COMMUNITY AFFAIRS,	)	
Respondents.	)	

MARTIN COUNTY CONSERVATION ALLIANCE, INC., A FLORIDA NOT-FOR-PROFIT CORPORATION AND DONNA MELZER, Petitioners, vs. MARTIN COUNTY AND DEPARTMENT OF COMMUNITY AFFAIRS, Respondents.	)	Case No. 10-1162GM
MARTIN COUNTY CONSERVATION ALLIANCE, INC., A FLORIDA NOT-FOR-PROFIT CORPORATION AND DONNA MELZER, Petitioners, vs. MARTIN COUNTY AND DEPARTMENT OF COMMUNITY AFFAIRS, Respondents.	)	Case No. 10-1163GM
MARTIN COUNTY CONSERVATION ALLIANCE, INC., A FLORIDA NOT-FOR-PROFIT CORPORATION AND DONNA MELZER, Petitioners, vs. MARTIN COUNTY AND DEPARTMENT OF COMMUNITY AFFAIRS, Respondents.	)	Case No. 10-1164GM

CORRECTED RECOMMENDED ORDER

The final hearing in these consolidated cases was held on June 7 through 10, 2010, in Stuart, Florida, before Bram D. E. Canter, Administrative Law Judge of the Division of Administrative Hearings (DOAH). This Order was corrected to show that it has been submitted to the Department of Community Affairs instead of the Administration Commission.

APPEARANCES

For Petitioners Martin County Conservation Alliance, Inc., Donna Melzer, and Elisa Ackerly:

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For Petitioners Groves Holdings, LLC, Groves 12, LLC, and Groves 14, LLC:

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For Respondent Department of Community Affairs:

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STATEMENT OF THE ISSUES

The issues to be determined in this case are whether the amendments to the Martin County Comprehensive Growth Management Plan (CGMP) adopted by Ordinance Nos. 843, 845 (as amended by Ordinance No. 847), 846, 847, 851, 853, and 854 are "in compliance" as that term is defined in Section 163.3184(1)(b), Florida Statutes.[1/]

PRELIMINARY STATEMENT

On December 16, 2009, Martin County amended all the elements of its CGMP, through the simultaneous adoption of Ordinance Nos. 843 through 856 ("Plan Amendments"). On February 10, 2010, following its review of the Plan Amendments, the Department of Community Affairs ("Department") issued a Notice of Intent, determining that, with the exception of one amendment to the Future Land Use Element ("FLUE") adopted by Ordinance No. 845, all the Plan Amendments were in compliance.

The Department filed a petition with DOAH requesting an administrative hearing regarding the FLUE amendment adopted by Ordinance No. 845, which was assigned DOAH Case No. 10-0913GM. Martin County Conservation Alliance, Inc. (MCCA), Donna Melzer,

and Elisa Ackerly jointly petitioned to intervene in support of the Department's determination. Groves Holdings, LLC; Groves 12, LLC; and Groves 14, LLC (referred to collectively as "the Groves") also petitioned to intervene in support of the Department's determination. These petitions to intervene were granted.

The Groves also petitioned for an administrative hearing to challenge the Department's "in compliance" determination regarding the amendments adopted by Ordinance Nos. 846, 847, 851, and 853. The Groves' petition was assigned DOAH Case No. 10-1142GM.

MCCA and Donna Melzer, but not Eliza Ackerly, filed four separate petitions to challenge, respectively, the amendments adopted by Ordinance Nos. 843, 847, 851, and 854. These petitions were referred to DOAH by the Department and assigned DOAH Case Nos. 10-1161GM, 10-1162GM, 10-1163GM, and 10-1164GM.

In summary, seven of the 14 County ordinances were challenged, creating six DOAH cases that were consolidated for hearing.

On March 16, 2010, Martin County adopted Ordinance No. 857, which repealed the amendment in Ordinance No. 845 to which the Department had objected. On April 12, 2010, the Department published an Amended Notice of Intent to find the amendments adopted by Ordinance No. 845, as revised by Ordinance No. 857,

in compliance. The Department then voluntarily dismissed its petition in DOAH Case No. 10-0913GM and moved for realignment of the parties in that case.

The Groves requested leave to amend its petition in DOAH Case No. 10-0913GM to add a challenge on procedural grounds to the County's unilateral repeal of a portion of Ordinance No. 845 through the adoption of Ordinance No. 847. MCCA and Melzer also objected to the process by which Ordinance 845 was changed. The Department moved to strike the challenges and the Department's motion was granted.

Martin County demanded expeditious resolution of the proceedings, pursuant to Section 163.3189(3)(a), Florida Statutes. The final hearing was held within 30 days after receipt of the demand, as required by this statute.

At the final hearing, Joint Exhibits 2 through 7 were admitted into evidence. Groves presented the testimony of Lawrence G. Mango, James Sherman, Samantha Horowitz, Nicki Van Vonno, Morris Crady, and Richard D. Warner. Groves' Exhibits 2 through 19, 24, 27, 28, 31 through 33, 35, and 36 were admitted into evidence.

MCCA, Melzer, and Ackerly presented the testimony of Clyde Dulin, Mike McDaniel, Margaret Ketter, John Polley, Don Donaldson, Charles Pattison, Robert Washam, Lloyd Brumfield, Tom Tomlinson, Henry Iler, Samantha Horowitz, Nicki Van Vonno,

Howard Heims, Kevin Freeman, Taryn Kryzda, and Elisa Ackerly. MCCA Exhibits 3, 10, 18, 33, 43 through 46, 62, and 63 were admitted into evidence.

Martin County presented the testimony of Nicki Van Vonno, Clyde Dulin, Samantha Horowitz, Don Donaldson, John Polley, and Mike McDaniel. Martin County's Exhibits 1 through 4, 10, 12 through 14, 16, and 18 through 20 were admitted into evidence.

The Department presented the testimony of Robert Dennis. The Department did not offer any exhibits into evidence.

The seven-volume Transcript of the final hearing was filed with DOAH. The parties' request for an expansion of the page limit for their proposed recommended orders was granted. All parties timely filed proposed recommended orders that 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 charged with the duty to review comprehensive plan amendments and to determine whether they are "in compliance," as that term is defined in the Section 163.3184(1), Florida Statutes.

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

3. Groves Holdings, LLC, is a Florida limited liability company. Groves Holdings, LLC operates a real estate management and investment business in the County that manages the leasing, entitlement, and disposition of lands owned by its related subsidiaries Groves 12, LLC, and Groves 14, LLC.

4. Groves 12, LLC, and Groves 14, LLC, are Florida limited liability companies wholly owned by Groves Holdings, LLC. Groves 12, LLC, owns 2,800 acres of citrus grove. Groves 14, LLC, owns 1,700 acres of land being developed as a residential community and equestrian club known as Hobe Sound Polo Club.

5. The land owned by Groves 12, LLC, is located in the rural area of the County, approximately one mile from the closest boundary of an urban service district. The land being developed by Groves 14, LLC, is also located in the rural area. Groves 14, LLC, also owns 450 acres not being developed that are located partially within the rural area and partially within an urban service district

6. The Groves submitted written comments regarding the Plan Amendments to the County during the period of time beginning with the transmittal hearing and ending with the adoption of the Plan Amendments.

7. Donna Melzer and Eliza Ackerly each owns real property in and resides in Martin County. Melzer and Ackerly each submitted comments regarding the Plan Amendments to the County

during the period of time beginning with the transmittal hearing and ending with the adoption of the Plan Amendments.

8. MCCA is a not-for-profit Florida corporation incorporated in 1997 for the purposes of conserving the natural resources of Martin County, and maintaining and improving the quality of life for residents of the County. Its members include individuals and corporate and non-corporate entities. A substantial number of its members reside, own property, or operate a business in Martin County.

9. MCCA engages primarily in lobbying, public advocacy, and litigation in Martin County regarding the CGMP. MCCA conducts membership meetings, sends a newsletter to members and others, and sometimes hosts meetings open to the general public. MCCA is also involved in environmental preservation activities in Martin County, including educational meetings, field trips, and lobbying for public purchase of lands for conservation.

10. No evidence was presented to show that MCCA owns property in the County, maintains an office in the County, or holds a business or occupational license.

11. MCCA submitted comments to the County regarding the Plan Amendments, on behalf of its members, during the period of time beginning with the transmittal hearing and ending with the adoption of the Plan Amendments.

Hereafter, MCCA, Donna Melzer, and Eliza Ackerly will be referred to collectively as MCCA.

The Plan Amendments

12. Section 163.3191(1), Florida Statutes, requires each local government to conduct an evaluation and appraisal of its comprehensive plan every seven years and to prepare an Evaluation and Appraisal Report ("EAR"). Martin County initiated its second evaluation and appraisal process in 2007, culminating in the adoption of an EAR in July 2008.

13. Section 163.3191(10), Florida Statutes, requires a local government to adopt comprehensive plan amendments based on the recommendations in the EAR in a single amendment cycle within 18 months after adopting the EAR. The County's proposed EAR-based amendments were sent to the Department in September 2009. The Department issued its Objections, Recommendations, and Comments ("ORC") Report the next month.

14. After considering and responding to the ORC Report, the County adopted Ordinance Nos. 842 through 856 on December 16, 2009, amending all the elements of the CGMP. The Department reviewed the Plan Amendments and determined that a new "Essential Services Nodes" policy of the FLUE adopted by Ordinance No. 845 was not in compliance. The Department determined that all of the other amendments adopted by Martin County were in compliance.

15. The County adopted Ordinance No. 857, which rescinded the Essential Services Nodes policy to which the Department had objected. The decision to rescind the policy was made unilaterally by the County. The rescission was not pursuant to a compliance agreement with the Department. Based on the County's rescission of the Essential Services Nodes policy, the Department determined that Ordinance No. 845, as amended by Ordinance No. 857, was in compliance.

16. All of the Plan Amendments are text amendments. The Future Land Use Map ("FLUM") is not changed.

Urban Service Districts

17. The CGMP establishes urban service districts (USDs) in the County. There is an Eastern USD and an Indiantown USD. These USDs are subdivided into a primary USD and a secondary USD.

18. About 87 percent of the County's population resides east of the Florida Turnpike in the Eastern USDs. The Indiantown USDs, which are west of the Florida Turnpike, are separated from the Eastern USDs by more than 20 miles of mostly agricultural lands.

19. The primary purpose of the USDs is to prevent urban sprawl by directing growth to those areas where urban public facilities and services are available or are programmed to be available at appropriate levels of service. The provision of

urban public facilities and services is generally limited to USDs. The term "public urban facilities and services" is defined in the CGMP as "regional water supply and wastewater treatment/disposal systems, solid waste collection services, acceptable response times for sheriff and emergency services, reasonably accessible community park and related recreational facilities, schools and the transportation network."

20. Under FLUE Policy 4.7A.2, urban development, including commercial, industrial, mixed-use, and urban residential land uses may only be located within the Primary USDs. FLUE Policy 4.7B.1 permits low density residential use (half-acre lots or greater) in the Secondary USD. No urban or suburban uses and no utility services such as water and sewer may extend outside the USD boundaries.

21. Most of the lands outside the Primary and Secondary USDs are designated Agricultural, but there are also lands designated Public Conservation and Public Utilities.

MCCA's Issues

Section 1.10

22. Chapter 1 of the CGMP is entitled "Preamble" and addresses general topics such as the legal status of the CGMP, the continuing evaluation of the CGMP, and amending the CGMP. The Preamble contains no goals, objectives, or policies. MCCA objects to a sentence in Section 1.10 of the Preamble, adopted

by Ordinance No. 843, which states, “This Plan shall be adopted by ordinance and shall supersede the 1990 Comprehensive Plan and all related amendments.” MCCA contends that this sentence will create problems and confusion if some of the Plan Amendments are determined to be in compliance, but other amendments are determined to be not in compliance.

23. There is no confusion. The reference to “This Plan” in Section 1.10 is reasonably interpreted to refer to the entire CGMP, as amended by the latest EAR-based amendments that are either already in effect or will become effective following the conclusion of these consolidated cases.[2/]

Chapter 2 Definitions

24. MCCA objects to several definitions added in Chapter 2 of the CGMP, but the evidence presented does not show an internal consistency or other "in compliance" issue.

FLUE Goal 4.7

25. MCCA objects to the changes in FLUE Goal 4.4G, which would be re-designated Goal 4.7. Existing Goal 4.4G states:

> 4.4G *Goal (encourage urban development in urban service areas)* Martin County shall regulate urban sprawl tendencies by directing growth in a timely and efficient manner to those areas where urban public facilities and services are available, or are programmed to be available, at the levels of service adopted in this Growth Management Plan. (italics in original)

New Goal 4.7 states:

> *Goal 4.7.* To regulate urban sprawl by directing growth in a timely and efficient manner to areas with urban public facilities and services, where they are programmed to be available, at the levels of service adopted in this Plan. (italics in original)

26. MCCA contends that the removal of the word "shall" in the new goal "removes the mandatory restriction." The County did not intend to make a substantive change to Goal 4.4G. In this particular context, the removal of the word "shall" does not require a different interpretation or application of the goal. It is not a substantive change.

FLUE Policy 4.12A.2

27. MCCA's major objection to Ordinance No. 845 is with new FLUE Policy 4.12A.2. Most of the objections raised by MCCA to other changes in the CGMP are directly related to MCCA's objection to Policy 4.12A.2. MCCA contends that this new policy, which allows "small-scale service establishments" outside the USDs, fails to include reasonable controls on commercial development and will adversely affect agricultural uses and the quality of life of rural residents.[3/] Policy 4.12A.2 states:

> *Restrictions outside urban service districts.* Outside urban service districts, development options shall be restricted to low-intensity uses, including Agricultural lands, not exceeding one unit per 20 gross acres; Agricultural Ranchette lands not exceeding one unit per five gross acres; and small-scale service establishments necessary

> to support rural and agricultural uses. (italics in original)

28. Martin County contends that this policy is not a substantive change because nearly the same wording already exists as Section 4.6.D.4 in a part of the FLUE entitled "Implementation Strategies," and the section was merely re-located and re-designated as Policy 4.12A.2.

29. Section 4.6.D.4 provides:

> *Development outside the urban services district shall be restricted to low intensive development in order to promote cost-effective practices in the delivery of public services.* Outside Urban Service Districts development options shall be restricted to low intensity uses including agriculture and agricultural ranchettes, not exceeding one unit per 5 gross acres, and small-scale service establishments necessary to support rural and agricultural uses as provided by section 6.4.A.5.e., Housing Service Zones in the Housing Element. (italics in original)

The reference in this policy to Housing Service Zones is an error. Sometime in the past, the County deleted provisions in the CGMP regarding Housing Service Zones, but overlooked this particular reference.

30. Comparing Section 4.6.D.4 with new Policy 4.12A.2, the significant changes appear to be that Section 4.6.D.4 is transformed from a "strategy" to a "policy," and the new policy no longer ties small-scale service establishments to Housing Service Zones.

31. However, the determination of whether a substantive change was made in the replacement of Section 4.6.D.4 with new Policy 4.12A.2 also requires consideration of Policy 4.4.G.1.e, which states:

> Martin County shall provide reasonable and equitable options for development outside of Primary Urban Service Districts, including agriculture and small-scale service establishments necessary to support rural and agricultural uses.

32. Policy 4.4.G.1.e is already designated as a policy and it does not tie small-scale service establishments to Housing Service Zones. Therefore, although Section 4.6.D.4 differs from new Policy 4.12A.2, there is no substantive difference between new Policy 4.12A.2 and existing Policy 4.4.G.1.e.

33. MCCA asserts that Policy 4.12A.2 and Policy 4.4.G.1.e differ substantively because the former does not have the "agricultural land use designation limits on uses allowed" that are in Policy 4.4.G.1.e. However, as shown above, both policies allow for small-scale service establishments that support rural uses as well as agricultural uses.

34. In support of its arguments about small-scale service establishments, MCCA also points to existing FLUE Policy 4.4.G.1.b (re-designated Policy 4.7A.2) and "implementation strategy" 4.6.D.3 (to be deleted) which require commercial uses to be located in the Primary USDs. The policy and implementation

strategy that restrict commercial uses to the Primary USDs co-exist in the CGMP with Policy 4.4.G.1.e, which allows small-scale service establishments outside the Primary USDs. Therefore, in whatever manner the County currently reconciles these policies and strategies, that reconciliation pre-dates the EAR-based amendments. The FLUE amendments adopted by Ordinance No. 845 do not alter the situation.

35. MCCA refers to the County planning staff's report associated with another proposed plan amendment known as "Becker B-4" in support of MCCA's argument that the amendments at issue in the present case have substantively changed the FLUE with regard to small-scale service establishments. However, none of MCCA's allegations regarding the relevance of the Becker B-4 staff report are borne out. If the Becker B-4 amendment is adopted by the County, it will be subject to its own "in compliance" review.

36. In summary, when all relevant provisions of the CGMP are taken into account, the changes made by Ordinance No. 845 that are related to small-scale service establishments are not substantive changes to the CGMP.

37. MCCA’s claims of internal inconsistency that are based on MCCA’s objections to new Policy 4.12A.2 must also fail as unsupported by evidence of a substantive change.

38. MCCA's claim that the County did not demonstrate a need for more commercial uses outside the USDs (based on the allowance for small-scale service establishments) must also fail as unsupported by evidence of a substantive change.

39. MCCA's claim that the allowance for small-scale service establishments constitutes a failure of the County to discourage urban sprawl must also fail as unsupported by evidence of a substantive change.

FLUE Policy 4.5F.4

40. MCCA objects to the changes to Policy 4.5F.4, which allows planned unit developments (PUDs) designed to preserve open space, environmentally sensitive lands, and agricultural land uses. These PUDs can be located in areas currently designated Agricultural and can include residential lots greater than two acres in size if certain criteria are met. MCCA contends that this policy is inconsistent with Policy 4.13A.1, which restricts residential densities in agricultural areas to 20-acre residential lots.

41. The allowance in Policy 4.5F.4 for PUDs with residential lots smaller than 20 acres already exists. Therefore, in whatever manner the County currently reconciles Policies 4.5F.4 and 4.13A.1, that reconciliation pre-dates the EAR-based amendments. The FLUE amendments adopted by Ordinance No. 845 do not alter the situation.

42. Furthermore, a PUD created under Objective 4.5F requires a plan amendment. It appears that one of the purposes of this requirement is to re-designate any agricultural lands to a residential future land use designation.[4/]

FLUE Objective 4.7A

43. MCCA objects to the removal of the word "shall" from existing FLUE Objective 4.4.G.1 (which would be re-designated as Objective 4.7A). MCCA argues that the existing objective prohibits commercial uses outside the Primary USDs and that the removal of the word "shall" will allow commercial uses outside the USDs. However, the objective does not prohibit commercial uses outside the Primary USDs. The objective states that the County "shall concentrate higher densities and intensities of development" in the Primary USDs. To concentrate a land use in one location does not mean to prohibit it elsewhere. It is Policy 4.7A.2 that requires new commercial uses to be located in the Primary USDs.

44. In this particular context, the removal of the word "shall" does not require a different interpretation or application of Objective 4.7A. It is not a substantive change.

FLUE Policy 4.9H.2

45. MCCA objects to new Policy 4.9H.2, regarding residential PUDs, because the policy indicates that commercial uses can be included in a residential PUD, even if the PUD is

located outside the Primary USDs. Policy 4.7A.2 requires all new commercial development to be located in the Primary USDs. Objective 4.5F and its associated policies allow for residential PUDs in agricultural areas outside the USDs, but do not indicate that the PUDs in agricultural areas can include commercial uses. Policy 4.9H.2 conflicts with Policy 4.7A.2 and with Objective 4.5F and its associated policies

FLUE Policy 4.13A.7.(1)(d)

46. MCCA objects to new Policy 4.13A.7.(1)(d), which allows one “accessory dwelling unit” on a residential lot. Accessory units cannot be sold separately from the primary dwelling unit and are not counted as separate units for purposes of density calculations.

47. MCCA's argument regarding accessory dwelling units assumes that the new policy allows accessory units in the rural areas of the County, outside the Primary USDs. However, Policy 4.13A.7.(1)(d) appears under the heading "General policies for all urban Residential development." The term "urban" is not defined in the CGMP, but there are several FLUE policies that direct urban residential densities to the Primary USDs, such as Policies 4.7A.2 and 4.7A.3. Objective 4.7A directs densities greater than two units per acre to the Primary USDs, which indicates that densities greater than two units per acre are urban densities.

48. In order to maintain internal consistency, accessory units would have to be confined to areas of the FLUM designated for urban residential density. See FLUE Objective 4.13A.7.

49. The County's proposal to not count accessory uses for density purposes was shown to be a professionally acceptable planning practice. Accessory units are similar to residential additions, converted garages, and other changes that can add bedrooms and residents on a residential lot, but which traditionally have been disregarded when calculating density. FLUE Policy 4.13A.8.(5)

50. MCCA contends that changes made to Policy 4.13A.8.(5), regarding Expressway Oriented Transient Commercial Service Centers ("Expressway Centers"), combined with the proposed deletion of Section 4.6.D.3 of the "Implementation Strategies," allows for more commercial development without data and analysis to support the need for additional commercial development.

51. Policy 4.13A.8.(5) creates Expressway Centers at three large Interstate 95 interchange locations in the County as a special land use designation to accommodate the unique needs of people traveling through the County. Section 4.6.D.3 (which ordinance No. 845 would delete) allows a waiver for Expressway Centers from the general requirements applicable to the USDs if an applicant for a waiver meets certain criteria. MCCA contends that the waiver process weighs "the traveling public’s needs

against the value of the urban boundary." That is not an accurate description of the waiver process, because none of the criteria mentions the urban boundary.

52. MCCA contends that the waiver process has been replaced with a "market need test" in Policy 4.13A.8.(5) without supporting data and analysis and that the change encourages urban sprawl. Policy 4.13A.8.(5) requires a market feasibility analysis to show that "the uses proposed are warranted by the traveling public they are intended to serve." MCCA presented no evidence on the County's past applications of Section 4.6.D.3 and Policy 4.13A.8.(5). MCCA failed to show how the demonstration required for a waiver under Section 4.6.D.3 is substantively different and more protective than the demonstration required to establish an Expressway Center under Policy 4.13A.8.(5). MCCA failed to show how the creation of Expressway Centers or the specific amendments to Section 4.6.D.3 and Policy 4.13A.8.(5) will lead to more commercial uses outside the Primary USDs, so as to encourage urban sprawl.

State Comprehensive Plan

53. MMCA failed to present evidence or argument to demonstrate that any of the Plan Amendments is inconsistent with the State Comprehensive Plan.

Other Issues

54. MCCA raised other issues in its petitions for which it did not present evidence at the final hearing. With regard to all the issues raised by MCCA that are not specifically addressed above, MCCA failed to prove an inconsistency.

The Groves' Issues

55. The Groves' principal objection to the Plan Amendments is with the County's methodology for determining the need for residential dwelling units, which is based in large part on the a residential capacity analysis (RCA) set forth in FLUE Policy 4.1D.4, adopted by Ordinance No. 845.

56. The Groves contend that the RCA overestimates the capacity or supply of dwelling units on vacant lands that can be used to meet projected population growth. Because need is derived from a comparison of supply and demand, the Groves contend that the RCA's overestimation of supply will always cause the County to underestimate the need for additional dwelling units.

57. FLUE Policy 4.1D.4 provides:

> The County shall consider the following factors in its residential capacity analysis:
>
> 1. The current peak population, based on the University of Florida's Bureau of Economic and Business Research (BEBR) medium population, shall be used to demonstrate the

unit need in the fifteen year planning period;

2. A market factor of 125 percent shall be applied to the unit need;

3. The Eastern Urban Service District and the Indiantown Urban Service District shall be considered separately;

4. Maximum density shall be calculated for Future Land Use categories in which residential development is allowed;

5. Wetland acreage shall be subtracted from the vacant, undeveloped acreage;

6. Because some land will be taken up by non-residential uses such as roads and utilities, a reduction of 8.5 percent shall be calculated to account for such uses.

58. In the past, Martin County used a similar methodology for determining residential need, but it was not a part of the CGMP.

59. New FLUE Policy 4.1D.3 requires that a new RCA be performed every two years. The RCA is to be used to evaluate future plan amendments and future changes to USD policies.

60. The Groves did not dispute the County's calculation of residential demand, the number of dwelling units needed to serve the projected population through the planning period 2010 to 2025. As stated in FLUE Policy 4.1D.4, demand is based on mid-range population projections from the University of Florida's Bureau of Economic and Business Research, which is then adjusted by a 125 percent market factor. A market factor is a multiplier

that is applied to account for factors that prevent the full or efficient use of densities allowed by a FLUM.

61. FLUE Policy 4.1D.4 requires that the Eastern USDs and the Indiantown USDs be considered separately. This requirement is based on an historical pattern of higher population growth east of the Florida Turnpike and the expectation that the pattern will continue into the foreseeable future.

62. The County projected an increase of 17,598 new residents in the Eastern USDs and an increase of 754 in the Indiantown USDs by 2025. When these figures are divided by average persons per household (2.21), the result is a demand for 7,963 dwelling units in the Eastern USDs and 341 dwelling units in the Indiantown USDs.

63. Applying the market factor of 125 percent results in a demand for 9,954 dwelling units in the Eastern USDs, and 426 units in the Indiantown USDs for the 2010-2025 planning period.

64. To calculate the residential supply of dwelling units that can be developed on existing vacant lands, FLUE Policy 4.1D.4 directs that the calculation begin by determining the maximum density allowed under each future land use category of the vacant lands. In the following discussion, the maximum density allowed under a future land use designation will be referred to as the “theoretical” maximum density.

65. It is the general practice of the Department to require local governments to use theoretical maximum densities in a need analysis unless there are policies in the comprehensive plan preventing landowners from attaining the theoretical maximum densities. However, like the Department's general practice to accept a market factor no greater than 125 percent, these are not requirements explicitly stated in Department rules from which the Department never deviates.

66. FLUE Policy 4.1D.4 incorporates two limiting factors that prevent the attainment of theoretical maximum densities: (1) wetlands and (2) roads rights-of-way and utility easements.

67. Development is generally prohibited in wetlands. However, landowners whose lands contain wetlands can transfer half of the “lost” density associated with the wetland acreage to the uplands. Therefore, in calculating the acreage of vacant lands that are available for residential development, the RCA subtracts half the wetland acreage.

68. The County also reduces the total vacant land acreage by 8.5 percent to account for the loss of developable acreage due to the presence of road rights-of-way and utility easements within which development is prohibited.

69. After reducing the total acres of vacant lands in the USDs to account for wetlands and for rights-of-way and utilities, the County determined that there is a supply or

vacant land capacity of 5,790 dwelling units in the Eastern USDs and 5,335 units in the Indiantown USDs.

70. The County then adjusted these numbers to account for approved residential developments that have not yet been constructed. This adjustment resulted in final calculation of the existing supply in the Eastern USDs of 9,339 dwelling units and an existing supply in the Indiantown USDs of 6,686 dwelling units.

The Groves' Critique of the RCA

71. The Groves argue that the RCA overestimates supply by failing to account for other policies of the CGMP that restrict development and prevent a landowner from attaining the theoretical maximum density.

72. Conservation and Open Space Element (COSE) Policy 9.1G.4 requires the preservation of a wetland buffer around a wetland. There was conflicting evidence about whether the County credits the landowner for the acreage set aside as a wetland buffer.

73. The Groves contend that no credit is given and cites Table 4-2 of the FLUE, which indicates that wetland buffer acreage is not subtracted to arrive at the total available acreage that can be developed. The Groves also point to the testimony of a County planner, who stated that the County intended to subtract buffer acreage from vacant land acreage,

but ultimately did not do so "based on adamant public comment." However, the County's planning director, Nicki Van Vonno, stated that "[Y]ou do get the full density off of the buffer land."

74. It would be logical for the County to not subtract wetland buffer acreage when calculating residential capacity if the landowner is getting full credit for the buffer acreage. Therefore, it is found that the County allows a full transfer of the density associated with wetland buffer acreage to the uplands.

75. COSE Policy 9.1G.5 requires that 25 percent of upland native habitat on a site be preserved. The landowner is allowed to transfer density from these native upland habitat areas to the unaffected areas of the property. Nevertheless, the Groves contends that COSE Policy 9.1G.5 impairs the ability of landowners to attain the theoretical maximum density.

76. The CGMP also requires a portion of the site be set aside for sufficient water retention and treatment. The RCA does not account for any loss of density caused by water retention and treatment areas.

77. The County had proposed to reduce the theoretical maximum density by 15 percent to account for "surface water management and required preservation," but abandoned the idea when the Department objected to it as not adequately supported by data and analysis.

78. The evidence presented at the hearing was insufficient to establish that the requirements of the CGMP associated with surface water management and preservation reduces the theoretical maximum density of residential lands by 15 percent.

79. The County has a mixed-use land use category called Commercial-Office-Residential (COR). The County allows only a third of a COR parcel to be developed for residential uses and this practice reduces the theoretical maximum density of COR lands. However, the RCA assumes 100 percent of the COR acreage is available for residential use. The County attempted to justify this discrepancy by pointing out that the limitation of residential uses on COR lands is not incorporated into the CGMP. However, it is an undisputed fact (datum) that the County's practice reduces residential capacity on COR lands. The RCA fails to account for this fact.

80. If the RCA accounted for the limitation of residential development on COR lands, the supply of dwelling units in the Eastern USDs would be reduced by 733 units.

81. FLUE Policy 4.13A.7.(1)(a) establishes a 40-foot height limit countywide which sometimes prevents a landowner from attaining the theoretical maximum density.

82. The RCA does not account for any loss of density caused by building height restrictions.

83. FLUE Policies 4.1F.1 through 4.1F.3 require transitional density zones when land is developed at a higher density than adjacent lands. FLUE Policy 4.1F.2 establishes a zone (or "tier") abutting the adjacent land, equal to the depth of an existing adjacent residential lot in which development is restricted, to the same density and compatible structure types (e.g., height) as on the adjacent property.

84. The RCA does not account for any loss of density due to the tier policies.

85. Although the landowner is allowed to transfer density to the unaffected portion of the property in the case of some development restrictions imposed by the CGMP, there is not always sufficient acreage remaining to make full use of the transferred density.

86. The Groves' expert witness, Rick Warner, reviewed residential development projects that had been approved or built during the past 15 years in the Eastern USDs and compared the actual number of approved or built units to the theoretical maximum density allowed by the applicable land use designation for the property at the time of approval. Warner determined that, on average, the projects attained only about 45 percent of the theoretical maximum density.

87. The Groves presented the testimony of Morris Crady, who testified that, of the 14 development projects in the County

that he was involved in, CGMP policies caused the projects to be developed at 1,285 units fewer than (about 41 percent of) the maximum theoretical density.

88. Comparing the County's estimated demand for 9,954 dwelling units in the Eastern USDs through 2025 with the County's estimated supply of 9,339 dwelling units, indicates a deficit of 615 dwelling units.

89. Comparing the County's estimated demand for 426 dwelling units in the Indiantown USDs through 2025 with the County's estimated supply of 6,686 dwelling units, indicates a surplus of 6,260 dwelling units.

90. The County decided to make no changes to the FLUM because it believes the projected population can be accommodated with existing land use designations.

91. The Groves argue that, because the RCA overestimates supply, the deficit in the Eastern USDs is actually substantially larger.[5/] For example, taking into account the County's policy regarding limiting residential uses on COR lands, the deficit would be 1,348 units in the Eastern USDs. The deficit would be enlarged by the effects of the other factors discussed above that reduce a landowner's ability to attain the theoretical maximum density.

92. The County contends that there is additional residential capacity outside the USDs that should be considered.

The County also points to the large surplus of available dwelling units in the Indiantown USDs. The County asserts that there is excess supply to meet the need when all the available dwelling units in the County are considered. These other considerations, however, are not a part of the RCA and, therefore, are in conflict with the RCA.

Acres vs. Dwelling Units

93. The Groves assert that County's determination of residential does not identify the amount of land needed for each category of land use as required by law, but, instead, expresses need solely in terms of total dwelling units.

94. The Department has accepted residential need analyses expressed in dwelling units.

95. Dwelling units can be converted into acreages, but only if one is told what density to apply. A local government must determine how many dwelling units it wants in each land use category in order to convert a need expressed in total dwelling units into a need expressed in acreages.

96. Martin County believes that it has a sufficient supply of dwelling units to meet the projected population through the planning period. Apparently, the County is also satisfied with the existing size and distribution of future land use categories as depicted on the FLUM. The existing vacant land acreages for each land use category, set forth in the CGMP, represents the

amount of land in each land use category that the County believes is needed to meet the projected population.

97. However, there is an imbalance in the various types of residential land uses in the Eastern USDs. For example, there are only 13 acres of high density residential land and 57 acres of medium density residential land remaining in the Eastern USDs. In contrast, there are 2,950 acres of rural residential lands.

98. The County has acknowledged that its past emphasis on low-height and low-density has contributed to a lack of affordable housing. The Treasure Coast Regional Planning Council noted that the small amount of vacant land in the County available for medium and high residential development contributes to the lack of affordable housing in the County.

99. The Plan Amendments include policies which are designed to address the imbalances in land uses and the lack of affordable housing. These policies include permitting accessory dwelling units for urban residential development; allowing a 10 du/ac density bonus and an affordable housing density bonus in Medium Density Residential developments; reducing the criteria for an affordable housing density bonus in High Density Residential developments; and reviewing residential capacity in the Indiantown USDs.

Commercial Need

100. There is no state-wide standard for the amount of commercial, industrial, institutional, conservation, or agricultural lands that a local government must identify in its comprehensive plan in order to accommodate its projected population.

101. The County acknowledges that there is a deficit of commercial land necessary to accommodate economic needs, but no changes in the FLUM are proposed as part of these EAR-based amendments.

CONCLUSIONS OF LAW

Standing

102. For 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.

103. The Administration Commission liberally interprets "operating a business" for the purpose of standing as an affected person. See Dept. of Comm. Affairs v. Miami-Dade

County, DOAH Case No. 08-3614GM (Admin. Comm'n July 30, 2009) (1000 Friends' fundraising, lobbying, and litigation activities and efforts to promote growth management, affordable housing, and Everglades restoration in Miami-Dade County were sufficient to establish that 1000 Friends operates a business).

104. MCCA's regular and frequent activities in Martin County to promote growth management and environmental protection are sufficient to establish that MCCA operates a business within the County. Therefore, MCCA has standing as an affected person.

105. In general, an association has standing to sue on behalf of its members when a substantial number of them would 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). MCCA has standing as an association representing affected persons.

106. Melzer and Ackerly have standing as affected persons.

107. The Groves have standing as affected persons.

Burden and Standard of Proof

108. Pursuant to Section 163.3184, Florida Statutes, the Department is to determine whether comprehensive plan 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.

109. A person who challenges a plan amendment as being not in compliance bears the burden of proof. See Young v. Department of Community Affairs, 625 So. 2d 831 (Fla. 1993).

110. The Department found the Plan Amendments to be "in compliance." Therefore, pursuant to Section 163.3184(9)(a), Florida Statutes, the Plan Amendments shall be determined to be in compliance if Martin County's determination of compliance is fairly debatable.

111. The term "fairly debatable" is not defined in Chapter 163, Part II, Florida Statutes. The Florida Supreme Court in Martin County v. Yusem, 690 So. 2d 1288 (Fla. 1997), held that ["t]he fairly debatable standard is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety." Id. at 1295.

112. The standard of proof to establish a finding of fact is preponderance of the evidence. See § 120.57(1)(j), Fla. Stat.

Non-substantive Changes

113. Martin County argues that non-substantive amendments to a comprehensive plan are not subject to an "in compliance" determination. That is not a correct statement of the law because it would allow local governments to decide what amendments must be submitted to the Department for compliance review. The correct statement is that, after a comprehensive plan is determined to be in compliance, any non-substantive amendments to the plan should also be determined to be in compliance.

114. It appears that MCCA, while participating in the EAR-based amendment process, became aware of the potential applications of FLUE policies that MCCA believes would be harmful to the rural areas of the County. However, MCCA's attribution of these perceived problems to the EAR-based amendments is misplaced. MCCA showed that some FLUE policies are unclear and, therefore, could create problems, but MCCA did not show that the lack of clarity was created by the Plan Amendments.

Data and Analysis

115. Section 163.3177(10)(e), Florida Statutes, requires plan amendments to be based upon appropriate data. Florida Administrative Code Rule 9J-5.005(2)(a) requires all amendments to be based on relevant and appropriate data and analysis.

116. To be based on data means to react to it in an appropriate way and to the extent indicated by the data. See Fla. Admin. Code R. 9J-5.005(2)(a).

117. The data which may be relied upon in this proceeding are not limited to the data which were specifically identified or used by the County in proceedings leading up to the adoption of the Plan Amendments. All data available to the County and in existence at the time of adoption of the Plan Amendments may be relied upon to support the amendments. See Zemel v. Lee County, DOAH Case. No. 93-2260GM, aff'd, 642 So. 2d 1367 (Fla. 1st DCA 1994).

118. Analysis which may support a plan amendment need not have been in existence at the time of adoption of the plan amendment. Data existing at the time of the adoption may be subject to new analysis through the time of the administrative hearing. Id.

119. The RCA in FLUE Policy 4.1D.4 is not based on the best available data. It fails to react appropriately to the best available data. As a result, the RCA fails to accomplish its purpose to accurately determine residential capacity or supply. It overestimates supply and, therefore, would cause the County to underestimate need.

120. Policy 4.1D.4 is not based on the best available data and analysis regarding the effect of CGMP provisions to reduce a

landowner's ability to attain the theoretical maximum density allowed by the land use designation. The effect of each separate development limitation was not quantified, but the combined effect of all the limitations was sufficiently quantified to prove that their effect is substantially greater than accounted for in Policy 4.1D.4.

121. The County's response that it has already been using a similar methodology is unpersuasive. The County was not using the identical methodology and the methodology was not previously subject to a compliance review.

122. The County's response that the underestimation of residential capacity is offset if one considers the residential capacity outside the USDs is unpersuasive because Policy 4.1D.4 does not provide for that consideration.

123. The County's response that the deficit in the Eastern USDs is offset if one considers the surplus in the Indiantown USDs is unpersuasive because Policy 4.1D.4 specifically requires that these USDs be considered separately.

124. The Groves proved beyond fair debate that Policy 4.1D.4 is not based on the best available data and analysis.

Acres v. Dwelling Units

125. Section 163.3177(6)(a), Florida Statutes, requires that "[t]he future land use plan shall be based upon surveys, studies, and data regarding the area, including the amount of

land required to accommodate anticipated growth." This requirement is also found in Florida Administrative Code Rule 9J-5.006(2)(c), which requires that the FLUE be based upon the amount of land needed to accommodate the projected population, including the estimated gross acreage needed by land use category.

126. The Groves' assertion that the County failed to express residential need in terms of the amount of land needed in each land use category was refuted because specific acreages for all land use categories were calculated and shown by the County.

Affordable Housing

127. The Groves entwined their issue about the County's failure to express residential need in terms of the amount of land needed with the Groves' issue about the County's failure to address the shortage of affordable housing. These issues are related, but they are separate issues. The Groves' affordable housing issue is more precisely a challenge to the County's failure to increase the amount of medium and high density residential lands as a means to provide more affordable housing.

128. The County addressed affordable housing in the Plan Amendments. Although the record evidence supports the Groves' contention that the changes made by the County's are not likely

to substantially alleviate the shortage of affordable housing, the changes would result in some improvement.

129. An "in compliance" determination is not a determination of whether a plan amendment is the best or most effective means to accomplish a comprehensive planning objective.

130. The County's determination that the Plan Amendments are in compliance with regard to affordable housing, is fairly debatable.

Internal Consistency

131. The elements of a comprehensive plan must be coordinated and consistent. § 163.3177(2), Fla. Stat.

132. Because Policy 4.9H.2, regarding residential PUDs, indicates that commercial uses can be part of a residential PUD, even if the PUD is outside the Primary USDs, it conflicts with Policy 4.7A.2, which requires all new commercial development to be located in the Primary USDs. Policy 4.9H.2 also conflicts with Objective 4.5F and the policies that implement the objective.

133. MCCA proved that it is beyond fair debate that Policy 4.9H.2 causes the CGMP to be internally inconsistent.

Ordinance No. 847

134. The issues raised by Intervenors in DOAH Case No. 10-0913GM regarding the adoption through Ordinance No. 845

of a new policy for “Essential Services Nodes” are moot due to the County’s rescission of the policy by Ordinance No. 857. The Department’s position is that when a local government unilaterally rescinds all or part of a plan amendment, the rescinding ordinance is not itself a comprehensive plan amendment. That is a reasonable interpretation and application of Chapter 163, Florida Statutes.

135. MCCA asserts that the only cases cited by the Department in support of its position are cases in which an entire ordinance (and, therefore, all of the amendments included in the ordinance) was rescinded. However, MCCA cites no cases to support its own argument that the County had to rescind all (or nothing) of Ordinance No. 845. The cases that are most closely-related in procedural posture support the Department, not MCCA.

136. The Department voluntarily dismissed its petition challenging Ordinance No. 845 when the proposed new Essential Services Nodes policy was rescinded by the County. It is a fundamental right of a party to dismiss a legal action or claim. It is a right that should not be destroyed or discouraged unless the Legislature’s intent to do so is clearly expressed by statute. There is no such clear expression in Section 163.3184.

137. Because this is a de novo proceeding to determine agency action, the Department could change its position on any

disputed issue by notifying the Administrative Law Judge and the other parties, which the Department did in this case by filing a notice of voluntary dismissal.[6/]

138. The fact that a procedure has been established for the Department and a local government to resolve their disputes through a "compliance agreement" does not constitute a prohibition against a local government's rescission of a plan amendment to which the Department is opposed. Following the rescission, there is no longer a dispute to be resolved. To insist upon a compliance agreement when the local government is willing to unilaterally rescind the disputed amendment is to champion form over substance.

139. MCCA's argument that the actions of the County and the Department violated the "safe harbor" provision of Section 163.3184(16)(f)1. is without merit. The statute provides that, if the Department and a local government resolve their disputes through a compliance agreement, the case does not go away, the intervenors are realigned as petitioners, and the new petitioners can raise additional issues aimed at any new plan amendments created as a result of the compliance agreement.

140. In DOAH Case No. 10-0913GM, the parties were realigned following the Department's voluntary dismissal. The realignment of the parties preserved the intent and accomplished the purposes of Section 163.3184(16)(f)1. Every issue that

MCCA, Melzer, Ackerly, and the Groves raised with respect to the remaining amendments adopted by Ordinance No. 845 was preserved. There were no new amendments created by a compliance agreement to challenge. The "safe harbor" was unaffected by the County's adoption of Ordinance No. 857 and the Department's voluntary dismissal.

State Comprehensive Plan

141. MCCA failed to go forward with evidence and argument to prove that the Plan Amendments are inconsistent with the State Comprehensive Plan.

Summary

142. In summary, MCCA and the Groves failed to prove beyond fair debate that the Plan Amendments are not in compliance, with the exception of Policies 4.1D.4 and 4.9H.2.

RECOMMENDATION

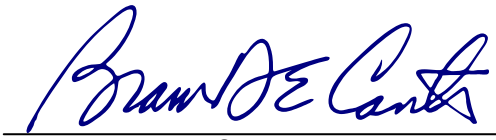
Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Community Affairs enter a final order determining that Plan Amendments are "in compliance," except for the following policies adopted by Martin County Ordinance No. 845, which the Department should determine are not "in compliance":

1. FLUE Policy 4.1D.4; and

2. FLUE Policy 4.9H.2.

DONE AND ENTERED this 7th day of September, 2010, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of September, 2010.

ENDNOTES

[1/] All references to the Florida Statutes are to the 2009 codification.

[2/] Plan amendments do not take effect until the conclusion of any challenges brought pursuant to Section 163.3184, Florida Statutes. See § 163.3189(2)(a), Fla. Stat.

[3/] The term "small-scale service establishments" is not defined in the CGMP and the evidence presented at the final hearing showed that there is a wide disparity of opinion among planners about the meaning of the term.

[4/] Policy 4.5F.2 allows for residential PUDs and a County employee testified that a residential PUD requires a residential land use designation. If so, then changing an agricultural land use designation to a residential land use designation would be necessary for a residential PUD.

[5/] The Groves contend that the RCA makes it less likely that Martin County will expand the USDs to accommodate a future need. Expanding the USDs is not the only way to meet a future need for

additional dwelling units. Higher densities could be allowed on lands within the USDs to increase the supply of dwelling units.

[6/] The Department's issuance of an amended Notice of Intent was unnecessary. It might also have conflicted with Section 120.569(2)(a), Florida Statutes, which prohibits an agency from taking further action with respect to a matter in a DOAH proceeding except as a party litigant.

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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.