STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIDBROOK 1ST REALTY CORPORATION,

Petitioner,

vs. Case Nos. 13-3397GM
14-0135GM

MARTIN COUNTY, FLORIDA,

Respondent,

and

1000 FRIENDS OF FLORIDA, INC.;
MARTIN COUNTY CONSERVATION
ALLIANCE; TREASURE COAST
ENVIRONMENTAL DEFENSE FUND,
INC., d/b/a INDIAN RIVERKEEPER;
TOWN OF JUPITER ISLAND, FLORIDA;
TOWN OF SEAWALL'S POINT, FLORIDA;
and CITY OF STUART, FLORIDA,

Intervenors.
_____/

RECOMMENDED ORDER

A duly-noticed final hearing was held in this matter in Stuart, Florida, on September 30 and October 1, 2014, before Suzanne Van Wyk, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner Midbrook 1st Realty Corp.:

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For Respondent Martin County, Florida:

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For Municipal Intervenors:

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Jones, Foster, Johnston and Stubbs, P.A.
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For Organizational Intervenors:

Howard K. Heims, Esquire
Virginia Sherlock, Esquire
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STATEMENT OF THE ISSUE

Whether Martin County Comprehensive Plan Amendment 13-5, adopted by Ordinance 938 on August 13, 2013, as amended by Ordinance 957 on July 8, 2014, is "in compliance," as that term is defined in section 163.3184(1)(b), Florida Statutes (2014).[1/]

PRELIMINARY STATEMENT

On August 13, 2013, Hendry County adopted Comprehensive Plan Amendment (CPA) 13-5 which revised Chapters 1, 2, and 4 of the County's Comprehensive Growth Management Plan (Comprehensive Plan).

On September 12, 2013, Petitioner filed a Petition with the Division of Administrative Hearings challenging CPA 13-5 pursuant to section 163.3184.[2/] The case was originally assigned to Administrative Law Judge Gary Early, and was transferred to the undersigned on January 9, 2014. On January 13, 2014, the undersigned granted Unopposed Petitions to Intervene filed by 1000 Friends of Florida, Inc.; Martin County Conservation Alliance; and Treasure Coast Environmental Defense Fund, Inc., d/b/a Indian Riverkeeper (the Organizational Intervenors). On January 27, 2014, the undersigned granted opposed Petitions to Intervene filed by the Town of Jupiter Island, the Town of Seawall's Point, and the City of Stuart (the Municipal Intervenors).

The final hearing was initially scheduled for February 13, 14, and 17 through 21, 2014, but was later rescheduled to March 31, April 1, and April 14 through 17, 2014. On March 21, 2014, the case was placed in abeyance, during which time the County adopted Ordinance 957, further amending its Comprehensive Plan and resolving challenges to CPA 13-5 brought by other

parties. The amendments adopted by Ordinance 938, as amended by Ordinance 957, are the Operative Amendments for purposes of this Recommended Order.

Petitioner filed an Amended Petition on August 7, 2014, following adoption of Ordinance 957. Petitioner alleges that the Operative Amendments are not supported by relevant and appropriate data and analysis, as required by section 163.3177(1)(f), especially with regard to population projections, housing demand, and residential capacity determinations; are internally inconsistent, in violation of section 163.3177(2); and fail to provide meaningful and predictable standards for the use and development of land and meaningful guidance for the development of land development regulations, as required by section 163.3177(1). The hearing was subsequently rescheduled to September 30 through October 3, 2014.

The parties jointly submitted a pre-hearing stipulation on September 25, 2014, and the hearing commenced as scheduled.

At the final hearing, Petitioner presented the testimony of Maggy Hurchalla, former County Commissioner; Nicki Van Vonno, Director of the County's Growth Management Department; Clyde Dulin, the County's Senior Planner; Samantha Lovelady, the County's Principal Planner; David W. Depew, accepted as an expert in land planning and comprehensive planning; Hank

Fishkind, and Kenneth Metcalf. Petitioner's Exhibits P1 through P6, P12, P14, P16, P17, P19, P20 through P24, P26, and P27 were admitted in evidence.

Respondent offered the testimony of Clyde Dulin; Samantha Lovelady; Nicki Van Vonno; Charles Pattison, accepted as an expert in comprehensive planning; and Thomas Pelham, accepted as an expert in comprehensive planning and Florida's growth management laws. Respondent's Exhibits R1 through R3, R6 through R15, R17, R19, R24 through R30, R35, R37 through R39, R58, R59, and R65, were admitted in evidence.

Intervenors offered no additional witnesses. Organizational Intervenors' Exhibits OI1 through OI11, OI22, and OI23 were accepted in evidence. Municipal Intervenors' Exhibits MI1 through MI3 were accepted in evidence.

The three-volume Transcript of the final hearing was made available to the parties on or about October 29, 2014, but was not filed with the Division until March 13, 2015. Petitioner and Respondent both timely filed a Proposed Recommended Order on November 17, 2014. Both the Organizational Intervenors and the Municipal Intervenors joined in the County's Proposed Recommended Order. The parties' Proposed Recommended Orders have been carefully considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

I. The Parties and Standing

1. Respondent, Martin County (Respondent or County), is a political subdivision of the State of Florida with the duty and responsibility to adopt and amend a comprehensive growth management plan pursuant to section 163.3167.

2. Petitioner, Midbrook 1st Realty Corp. (Petitioner), owns real property and operates a business in Martin County.

3. On August 13, 2013, the County held a public hearing and adopted Ordinance 938, amending chapters 1, 2, and 4 of the Comprehensive Plan. On July 8, 2014, the County held a public hearing and adopted Ordinance 957, further amending chapters 1, 2, and 4 of the Comprehensive Plan. The plan amendments adopted by Ordinance 938, as amended by Ordinance 957, are the subject of this challenge and are referred to herein as the "Operative Amendments."

4. Petitioner submitted written and oral comments to the County concerning the Operative Amendments during the period of time between transmittal and adoption of the Operative Amendments.

5. Intervenor, 1000 Friends of Florida (1000 Friends), is a Florida not-for-profit organization with a substantial number of members residing in Martin County who are engaged in matters

related to the use and development of land, and the impacts therefrom, as set forth in the Comprehensive Plan.

6. Participation in the County's comprehensive planning process is part of 1000 Friends' mission.

7. 1000 Friends submitted written comments to Martin County during the period of time between transmittal and adoption of the Operative Amendments.

8. Intervenor, Martin County Conservation Alliance, Inc. (MCCA), is a Florida not-for-profit organization incorporated in the State of Florida in 1997, with members who reside in, own property in, or operate businesses in Martin County.

9. Representation of its members in proceedings concerning the Comprehensive Plan is part of MCCA's mission and function, and the organization has been recognized as a party in previous administrative proceedings involving the Comprehensive Plan.

10. MCCA submitted oral and written comments to Martin County during the period of time between transmittal and adoption of the Operative Amendments.

11. Intervenor, Treasure Coast Environmental Defense Fund, Inc., d/b/a Indian Riverkeeper (Riverkeeper) is a Florida not-for-profit organization operating in Martin County which was incorporated in 1999 for the purpose of encouraging and assisting in enforcement of federal, state, and local environmental laws and regulations through lawsuits and

administrative proceedings, as well as engaging in scientific and educational programs.

12. A substantial number of Riverkeeper's members reside in, own property in, or operate businesses in Martin County.

13. Riverkeeper submitted oral comments to Martin County during the period of time between transmittal and adoption of the Operative Amendments.

14. Municipal Intervenors are local governments adjoining Martin County whose residents all reside and/or own property, or operate businesses in Martin County.

15. The Town of Jupiter Island adopted Resolution 728 on December 17, 2013, in which it found, in pertinent part, as follows:

> WHEREAS, the Town Commission finds that a successful challenge by the Petitioners resulting in the repeal of these plan amendments would produce substantial impacts on areas in the Town which have been designated for protection or special treatment; and
>
> * * *
>
> WHEREAS, the Town Commission finds that a successful challenge by the Petitioners would increase the need for publically [sic] funded infrastructure, including the beaches and roads in the Town, and the Town's operation of its utility.

16. The Town of Seawall's Point adopted Resolution 792 on December 10, 2013, in which the Town Commission found that

"successful challenge by the Petitioners . . . would increase the need for publically [sic] funded infrastructure."

17. The City of Stuart adopted Resolution 152-2013 on December 9, 2013, in which the City Commission found that "successful challenge . . . would increase the need for publically [sic] funded infrastructure."

II. Background

A. EAR Amendments

18. The County's original Comprehensive Plan was adopted in 1990 and was challenged by the Department of Community Affairs (DCA) as not "in compliance." Since its inception, the Comprehensive Plan has been the subject of substantial litigation, most of which has little relevance hereto.

19. At least once every seven years, local governments are required to undertake an evaluation and appraisal of their comprehensive plans. See § 163.3191(1), Fla. Stat. During this evaluation, local governments must amend their plans to reflect changes in state requirements. See § 163.3191(2). The statute also encourages local governments to comprehensively evaluate changes in local conditions, and if necessary, update their plans to reflect said changes. See § 163.3191(3).

20. Local government plan amendments made pursuant to section 163.3191 are commonly referred to as "EAR amendments."

21. The County adopted its most recent EAR amendments in 2009, following an evaluation and appraisal of the Comprehensive Plan and changes in state requirements. The 2009 EAR amendments were challenged by a number of parties as not "in compliance." Administrative challenge to the EAR amendments concluded, and the amendments became effective in 2011.

B. Operative Amendments Adoption Process[3/]

22. The Operative Amendments originated with former County Commissioner Maggy Hurchalla, who made a presentation to the County Commission at its regular meeting on November 20, 2012, during which she proposed amendments to the Comprehensive Plan.

23. On December 11, 2012, the County Commission conducted a public workshop on amendments proposed by Ms. Hurchalla. The workshop agenda included draft Comprehensive Plan amendments in legislative (strike-through/underline) format, a summary of the amendments, and a draft resolution by which the County could initiate the proposed changes as text amendments to the Comprehensive Plan. The County Commission adopted the resolution initiating the amendments on that date.

24. On February 12, 2013, the County Commission held the first of three public meetings to discuss the proposed amendments to the Comprehensive Plan. The meeting focused on proposed changes to chapter 1, the Preamble to the Comprehensive Plan. The meeting materials included Ms. Hurchalla's proposed

amendments with highlighted comments from the County's planning staff.

25. On February 26, 2013, the County Commission held a second public meeting to discuss proposed changes, this time focusing on chapter 2, the Definitions for the Comprehensive Plan. Proposed changes to chapter 2 included incorporating "Overall Goals" of the Comprehensive Plan, as well as some new and revised definitions. The meeting materials included Ms. Hurchalla's proposed changes with highlighted comments from County planning staff.

26. On March 5, 2013, the County Commission held a third public meeting to discuss proposed changes to the Comprehensive Plan, this time focused on changes to chapter 4, the Future Land Use Element (FLUE). These changes were proposed by County staff to maintain consistency among chapters 1, 2, and 4.

27. On March 21, 2013, the Martin County Local Planning Agency (LPA) held a public hearing to consider Comprehensive Plan Amendment (CPA) 13-5, the product of Ms. Hurchalla's original proposal, as developed through three discussion meetings with the County Commission and planning staff. At the LPA meeting, staff recommended approval of the changes, and included a matrix which analyzed each change by section, goal, objective, or policy number, as applicable. The agenda packet included all public comments regarding the proposed amendments

received by the County subsequent to the February 12, 2013, meeting.

28. On April 16, 2013, the County Commission held a public hearing on proposed CPA 13-5. The Commission held a second public hearing on April 26, 2013, and voted to transmit the amendments to the state reviewing agencies, pursuant to section 163.3184(3).

29. County staff provided the County Commission with all state agency comments at a meeting on June 18, 2013, wherein County staff recommended additional changes to the Plan Amendment, and the Commission voted to schedule a public hearing on adopting CPA 13-5.

30. On July 9, 2013, the County Commission conducted a public hearing on CPA 13-5, directed staff to make changes to the amendments to address certain agency comments, and continued the public hearing to August 13, 2013. The Commission adopted CPA 13-5 by Ordinance 938 at the public hearing on August 13, 2013.

31. The record supports a finding that the County complied with all public notice requirements for the LPA public hearing, and the County Commission public meetings and public hearings conducted related to CPA 13-5.

32. On July 8, 2014, the County Commission adopted CPA 14-7 by Ordinance 957, further amending chapters 1, 2, and 4 of the Comprehensive Plan.

33. The record supports a finding that the County held the required public hearings required for adoption of CPA 14-7 and complied with applicable public notice requirements for said public hearings.

C. Urban Service Districts

34. A major reason for the DCA's compliance determination on the County's 1990 Comprehensive Plan was that it did not discourage urban sprawl. The state's challenge to the Comprehensive Plan was resolved by a compliance agreement under which the County amended the Comprehensive Plan to incorporate primary and secondary urban service districts (USDs).

35. There are two locations of the USDs. The Eastern USD is located east of the Florida Turnpike, and the Indiantown USD is located in western Martin County. According to the 2009 data on which the existing Comprehensive Plan is based, 87 percent of the County's population resides east of the Florida Turnpike. The Eastern and Indiantown USDs are separated by roughly 12 miles of mainly agricultural land.

36. The purpose of the USDs is to regulate urban sprawl by directing growth to areas where urban public facilities and services are available, or programmed to be available, at

appropriate levels of service. Public urban facilities and services are defined by the Comprehensive Plan as "[r]egional 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."

37. Commercial, industrial, and urban-density residential development, as well as future development requiring public urban facilities, is concentrated within the primary USD. The boundaries of the primary USD may be expanded only when "reasonable capacity does not exist on suitable land in the existing [primary USD] for the 15-year planning period."

38. Rural and estate densities not exceeding one unit per acre (one unit/acre) are concentrated in the secondary USD where a reduced level of public facility needs are programmed to be available at appropriate levels of service. The boundaries of the secondary USD may only be expanded when "[r]easonable residential capacity does not exist on suitable land in the existing [secondary USD] for the 15-year planning period."

39. Development outside the USDs is limited to low-intensity uses, including Agricultural (not exceeding one unit/20 acres), Agricultural Ranchette (not exceeding one unit/five acres), and small-scale services necessary to support

rural and agricultural uses. Some residential estate development is allowed on the fringe of the USDs at one unit/acre.

III. Petitioner's Challenges

A. Residential Needs Analysis

40. Petitioner's first overarching challenge is with the County's methodology for determining need for future residential development. Need is determined using the basic variables of demand and supply, or capacity. Demand is, in turn, driven by projected population growth. Petitioner challenges each of the methodologies for calculating future need – population projections, residential demand analysis, and residential capacity analysis – each of which is taken in turn.

1. Population Projections

41. Section 163.3177(6)(a)4. requires that a local government FLUE "shall accommodate at least the minimum amount of land required to accommodate the medium [population] projections as published by the Office of Economic and Demographic Research for at least a 10-year planning period[.]"

42. Section 1.7.A of the Operative Amendments provides that "base data for population estimates and projections comes from the U.S. Decennial Census" and that "[i]n the years between the decennial Census, the permanent population estimates and

projections provided by BEBR [Florida's Bureau of Economic and Business Research] shall be used[.]"

43. Petitioner assails Section 1.7.A as inconsistent with the statute because it relies upon BEBR population estimates rather than Office of Economic and Demographic Research (OEDR).

44. Petitioner's argument is not persuasive. BEBR provides population estimates and projections to OEDR pursuant to a contract between the two entities. BEBR population estimates and projections are professionally-acceptable data commonly relied upon by jurisdictions in the State of Florida.

45. Section 1.7.A and Policy 4.1D.2 require County staff to annually produce a Population Technical Bulletin utilizing the BEBR medium population estimates for the County. Data from the Population Technical Bulletin are utilized in the County's residential demand analysis. The 2013 Bulletin reported a permanent population (i.e., excluding population in prisons and group homes) of 124,120 in 2010, and a projected permanent population of 136,621 for the year 2020 and 143,653 for the year 2025. Thus, the percentage increase in population is 1.10 percent for the year 2020 and 1.16 percent for the year 2025.

2. Residential Demand Methodology

46. Petitioner's next objection is with the County's methodology for determining residential housing demand, set forth in Section 1.7 and Policies 4.1D.3.[4/] Petitioner urges

that the methodology is neither professionally acceptable, nor "based upon relevant and appropriate data and analysis," pursuant to 163.3177(1)(f).

47. Policy 4.1D.3 provides the methodology for calculating residential housing demand, and reads as follows:

> 4.1D.3 *Future residential housing demand.* Future housing demand projections shall be based on all of the following:
>
> (1) The demand for future residential housing units in the unincorporated area shall be based on the percentage increase in permanent population projected by the Population Technical Bulletin.
>
> (2) Occupied housing units (HO) are classified by the Census as those residential units in use by permanent population. Vacant seasonal housing units (HS) are classified by the Census as those residential housing units that are seasonally occupied by residents who spend less than 6 months of the year in Martin County.
>
> (3) Permanent and seasonal population in residential housing is served by housing units in actual use (HU).
>
> Housing units in actual use (HU) equals the occupied housing units (HO) plus vacant seasonal housing units (HS).
> HU = HO + HS
>
> (4) Vacant housing not in seasonal use shall not be used in calculating housing unit demand, but shall be used in calculating supply. Hotel/motel units shall not be used in calculating residential housing demand.

> (5) The projected demand for housing units in the future shall be determined by dividing the projected, permanent population (housing), as defined in Chapter 2, by the permanent population (housing) identified in the last decennial Census.
>
> Projected permanent population (housing) / Permanent population (housing) in the last decennial Census = percentage increase in demand.
>
> (6) This percentage increase in demand multiplied by the housing units in actual use (HU) in the most recent census year equals the projected residential housing unit need in the future period.
>
> Percentage increase in demand x HU = projected housing unit demand.

48. Petitioner contends that the methodology is flawed because it excludes unoccupied housing units other than seasonal units, such as vacant rental units and residential units for sale. As such, Petitioner argues the methodology is not professionally acceptable.

49. The 2010 Census counted 5,228 vacant non-seasonal residential units in Martin County. Because the County's demand methodology ignores those units in calculating residential demand, Petitioner argues the methodology is not based on relevant and appropriate data.

50. To the contrary, vacant non-seasonal housing is a variable relative to residential housing supply, rather than housing demand. The appropriate methodology for calculating

housing demand is occupied permanent and occupied seasonal housing units multiplied by the percentage increase in population over the planning period. The County's methodology is professionally acceptable and does not ignore data available at the time the Operative Amendments were adopted.

51. The County previously used this same methodology for projecting residential housing demand, but it was not adopted as part of the Comprehensive Plan.

3. Residential Demand Calculations

52. In August 2013 the County produced a Residential Demand Analysis implementing the methodology adopted by the Operative Amendments.

53. In accordance with Policy 4.1D.3(1), the demand for future residential housing in the unincorporated area of the County is based on the percentage increase in permanent population projected in the Population Technical Bulletin.

54. Using the 2010 data supplied by the U.S. Census for the unincorporated area, the formula yields 54,709 occupied units, plus vacant seasonal housing units of 6,203, for a total yield of 60,912 housing units in use in the unincorporated area of Martin County.

55. Applying the percentage increase in projected population of 1.10 for the planning period to 2020, and 1.16 for

the planning period to 2025, yields a demand for 6,091 residential units for 2020, and 9,746 units for 2025.

56. Petitioner alleges that the County failed to follow its methodology adopted in Policy 4.1D.3 because it utilized 2010 Census data, rather than data from "the most recent census year" as stated in subsection (6) for calculation of the housing units in actual use (HU).

57. Petitioner's expert, Kenneth Metcalf, testified that the "most recent census data would have been 2012, rather than 2010." Thus, Petitioner argues that the Policy is likewise flawed because it is not based on the best available data.

58. The issue boils down to one of semantics – whether the term "most recent census year" in subsection (6) has a different meaning than the term "Census" used in subsection (2) to define the data source for the number of occupied housing units (HO) and the number of vacant seasonal housing units (HS). Petitioner points to the use of the term "last decennial Census" used in subsection (5) as the data source for permanent population numbers. Petitioner concludes that the County knew that "last decennial Census" had a different meaning than "most recent census year" and intended for the updated census information provided between the decennial Censuses to be utilized as the data set for projecting housing unit demand.

59. Petitioner's argument ignores that the variable HU, utilized in the residential demand formula in subsection (6), is defined in subsection (3) as the sum of factors derived from Census data: HU = HO + HS, where HO is occupied housing units classified by the Census as those residential housing units in use by permanent population, and HS is vacant seasonal housing units classified by the Census as those residential housing units that are seasonally occupied.

60. If one ascribes a different meaning to the term "most recent census" than the term "Census," the formula itself would be useless. HU is derived in subparagraph (2) from census data with a capital "C," meaning the decennial Census. That same variable cannot be input in paragraph (6) as derived from a different source.

61. Petitioner's theory likewise ignores that the Operative Amendments specify that, between decennial Census years, BEBR data shall be used in projections of demand for future residential housing units. See §§ 1.7.A and 4.2.A(8). Thus, if the County intended to use data more recent than the last Census, it would have specified BEBR data.

62. Moreover, the definition of "vacant seasonal housing units," is "[t]he decennial Census count for residential housing units that are occupied, but for less than six months of the year." See § 2.4(186).

63. Petitioner also assails the residential demand analysis as flawed because it is based exclusively on permanent population estimates in violation of section 163.3177(1)(f)3.

64. The operative statutory section provides, "[t]he comprehensive plan shall be based upon permanent and seasonal population estimates and projections[.]" § 163.3177(1)(f)3, Fla. Stat.

65. Contrary to Petitioner's assertion, the demand methodology includes seasonal population projections. Under Policy 4.1D.3, one factor in projecting housing unit needs is the housing units in actual use (HU), which is based on both permanent and seasonal population in residential housing.

66. Petitioner further contends that Policy 4.1D.3 conflicts with Section 1.7, which states, "appropriate resident and seasonal population figures are critical to the local government in assessing future needs for housing units," rendering the Comprehensive Plan internally inconsistent, in violation of section 163.3177(2).

67. In light of the finding that Policy 4.1D.3 does not exclude seasonal population in calculating residential demand, Petitioner's allegation has no merit.

4. Residential Capacity Analysis

68. Petitioner next contends that the residential capacity analysis (RCA) methodology is not "based upon relevant and

appropriate data and analysis," pursuant to 163.3177(1)(f); is "limited solely by the projected population," in violation of 163.3177(1)(f)3.; is internally inconsistent with other provisions of the Comprehensive Plan, in violation of 163.3177(2); and, as such, does not "establish meaningful and predictable standards for the use and development of land," pursuant to 163.3177(1).

69. In essence, Petitioner argues that the RCA overestimates the supply of land needed to meet residential housing demand in the 10- and 15-year planning periods.

70. Petitioner's argument relies, in part, upon a comparison of the results of the RCA methodology under the Operative Amendments to the results from applying the RCA adopted in 2009. The numbers are curious, indeed.

71. Utilizing the 2009 RCA, the County determined a total capacity of 16,025 residential units in the primary and secondary USDs. Utilizing the 2013 methodology, the County determined a total capacity of 26,446 residential units in the primary and secondary USDs.

72. Obviously, the total numbers are not dispositive of the issue. An examination of the methodology is required.

73. Policy 4.1D.5 provides the RCA methodology, and reads as follows:[5/]

Policy 4.1D.5 Residential capacity analysis. Martin County shall produce a residential capacity analysis every five years. Residential capacity defines the available residential development options within the Primary and Secondary Urban Service Districts that can meet the demand for population growth consistent with the Future Land Use Map. Residential supply shall consist of:

(1) Vacant property that allows residential uses according to the Future Land Use Map. The maximum allowable density shall be used in calculating the number of available units on vacant acreage. For the purpose of this calculation, the maximum allowable density for wetlands shall be one-half the density of a given future land use designation.

(2) Subdivided single family and duplex lots. The following lot types shall be included in the residential capacity calculation:

    (a) Vacant single family or duplex lots of record as of 1982 developed prior to the County's tracking of development approvals.

    (b) Vacant single family or duplex lots of record platted after 1982.

(3) Potential for residential development in Mixed Use overlays.

(4) Multifamily residential site plans with final approval shall be counted as vacant property under (1) above until such time as Certificates of Occupancy are issued. Where Certificates of Occupancy are issued for a portion or phase of a final site plan, appropriate acreage shall be removed from the vacant land inventory. Appropriate acreage shall be the same percentage of

the project acreage as the number of units with Certificates of Occupancy is to the total number of units for the final site plan.

(5) Excess vacant housing not in use by permanent or seasonal residents. Excess vacant housing is a vacancy rate higher than 3% of the number of housing units in actual use.

74. To calculate the residential supply of dwelling units that can be developed on existing vacant lands, Policy 4.1D.5 directs that the calculation begin by determining the maximum residential 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.

75. Development is generally prohibited in wetlands. However, landowners whose lands contain wetlands can transfer half the "lost" density associated with the wetland acreage to the uplands. Thus, in calculating the acreage of vacant lands available for residential development, the RCA subtracts half the acreage of wetlands.

76. Other than wetlands, the RCA incorporates no limiting factors that prevent the attainment of theoretical maximum density on vacant acreage.

77. The RCA methodology under the Operative Amendment differs from the 2009 RCA methodology which took effect in 2011.

78. There are four major differences between the 2009 and the 2013 methodologies.

79. First, the 2009 methodology included a deduction from vacant residential acreage of 8.5 percent to account for the loss of developable acreage due to presence of road rights-of-way and utility easements within which development is prohibited. Under the Operative Amendments, the RCA does not reduce available residential acreage to account for said infrastructure.

80. The County offered no explanation for this change in the RCA methodology.

81. Second, the 2013 RCA includes, as vacant residential acreage, subdivided but vacant lots in single family and duplex subdivisions. The County's 2009 RCA did not include vacant lots in these "older" subdivisions as capacity. Including these units in the 2013 analysis accounted for approximately 3,300 residential units which were not counted as capacity in 2009.

82. Samantha Lovelady is a Principal Planner for the County. She has a master's degree in Urban and Regional Planning and is certified by the American Institute of Certified Planners. Ms. Lovelady testified that including the vacant lots is a more accurate reflection of residential capacity than that utilized in 2009.

83. Third, the 2013 methodology counts as capacity vacant acreage within approved multifamily residential projects.

84. Approved but unbuilt units in multifamily projects were counted as capacity in the 2009 RCA. The County tracks approved unbuilt projects through its Active Residential Development Program, or ARDP. In 2009, ARDP units were removed from the County's vacant residential acreage analysis and counted as capacity in addition to vacant acreage.

85. By contrast, the 2013 approach is based on acreage, rather than number of units. The 2013 approach first determines the percentage of total approved residential units to the number of units with certificates of occupancy. Then, the formula applies that same percentage to total project acreage to derive the "vacant acreage" of the multifamily project.

86. Policy 4.1D.5(1) requires the County to utilize the theoretical maximum density of the underlying land use category to calculate the potential residential units on the vacant acreage in the multifamily projects, regardless of whether the overall project was approved for maximum density or some lesser density.

87. The County's main response to this allegation is that the total number of units derived from this part of the RCA was small, only 382, and that those units were counted under the former methodology, but outside the vacant acreage analysis.

88. The County's response misses the mark. The issue is not whether the methodology substantially increased the County's capacity figures, but whether it is a professionally-acceptable method for gathering the data.

89. Ms. Lovelady has been employed by the County for six years, and conducts statistical analysis, especially with regard to population projections, for the Planning Department and Metropolitan Planning Organization. Ms. Lovelady prepared both the 2009 and the 2013 Population Technical Bulletins. She also prepared both the 2013 Residential Demand Analysis and the 2013 Residential Capacity and Vacant Land Analysis based on the methodologies in the Operative Amendments.

90. Ms. Lovelady testified that she would have calculated density on the vacant acreage at the same density as the built acreage within those developments. Ms. Lovelady further testified that she was not familiar with a methodology that calculated unbuilt acreage within a multifamily project at a density greater than the built acreage, either through professional planning literature or examples from any other communities. Ms. Lovelady's testimony is accepted as competent and reliable.[6/]

91. Petitioner's comprehensive planning expert, Dr. David Depew, also testified that the County's methodology is not professionally acceptable because it ignores the development

rights already assigned to the "vacant" property within approved multifamily projects.

92. Based on the record evidence, the RCA methodology used to calculate the capacity of vacant acreage in approved multifamily developments is not professionally acceptable.

93. Fourth, the formula includes as capacity "excess vacant housing" not in use by permanent or seasonal residents. For purposes of this calculation, the Operative Amendments define "excess vacant housing" as a vacancy rate in excess of three percent of the number of housing units in actual use. The variable allows for some vacancy rate in a "normal market," but provides that excess vacancy is actually available to serve the projected population through the 10- and 15-year planning timeframes.

94. The 2009 methodology did not include built, vacant housing in calculating residential capacity. Neither party presented any evidence on whether including vacant built housing in the RCA was professionally acceptable. Instead, the parties focused on the definition of excess as exceeding a three percent vacancy rate.

95. Petitioner assails the three percent vacancy rate as neither appropriate nor professionally acceptable for the Martin County housing market. Yet, Petitioner introduced no evidence

of a different vacancy rate which would be appropriate under normal market conditions.

96. A three percent vacancy rate under normal market conditions in Florida is supported by the "Planner's Estimating Guide, Projecting Land-Use and Facility Needs," Arthur C. Nelson, FAICP, Planners Press, American Planning Association (2004).[7/]

97. Petitioner's allegation with regard to use of the three percent vacancy rate in calculating residential supply was not proven beyond fair debate.

5. Merging Eastern and Indiantown USDs

98. Petitioner argues that the 2013 RCA methodology exacerbates the distortion of residential capacity by considering together, or "merging," the Eastern and Indiantown USDs in determining available capacity.

99. The 2009 methodology treated the Eastern and Indiantown USDs separately for purposes of calculating residential demand and supply and arrived at separate housing needs determinations for the two USDs.

100. Under the 2009 needs analysis, the County identified a shortfall of 616 units in the Eastern USD to meet demand for the 15-year planning period, and an oversupply of 6,260 units in the Indiantown USD for that same period.

101. By comparison, the 2013 needs analysis yielded an oversupply of 20,768 units in the combined USDs to meet demand for the 10-year planning period, and an oversupply of 17,361 for the 15-year planning period.

102. The 2009 methodology was based on population data showing that 87 percent of the County population resided east of the Florida Turnpike and an assumption that the trend would continue. The 2009 data showed an "imbalance" between the vacant land capacity in the Eastern and Indiantown USDs, and that, based on population projections for the Indiantown area, the imbalance was likely to continue. Having determined that separation of the USDs was appropriate for the County's population trends, the County proceeded to calculate demand for the two areas separately.

103. The County introduced no evidence of changed population data or trends to support aggregating the two USDs for purposes of calculating residential housing demand and supply in 2013.

104. In fact, the data and analysis in the County's 2013 Population Technical Bulletin revealed that 99.68 percent of the certificates of occupancy (COs) issued in the 2008-2012 timeframe were issued in areas east of the Florida Turnpike.[8/] The County's population projections by planning area, forecast 71.68 percent of the permanent population living east of the

Florida Turnpike by the year 2020, and 86 percent by the year 2025.[9/] The statistics are higher for the peak population during the same planning timeframes.[10/]

105. The County's decision to combine the Eastern and Indiantown USDs in the 2013 methodology is not supported by relevant data and analysis available at the time the Operative Amendments were adopted.

106. The County offers two explanations for the change, neither of which is persuasive. First, County staff testified that the County has always had only one primary and one secondary USD. County staff cited Policy 4.7A.7 as data supporting combining the Eastern and Indiantown USDs.

107. Policy 4.7A.7, as renumbered by the Operative Amendments, sets forth the criteria for expanding the primary urban service district boundary. The policy does not mention either the Eastern or Indiantown USD. Ms. Lovelady did not explain how this policy relates to the issue of combining the Eastern and Indiantown USDs for purposes of calculating housing needs in the County.[11/]

108. Second, County staff argued that the Eastern and Indiantown USDs were only considered separately for the first time in the 2009 methodology, and that was in error.

109. Separation of the two USDs for purposes of calculating housing demand and supply, as well as distributing

housing capacity, was adopted in the 2009 EAR amendment, which was found "in compliance" in 2011. The undersigned cannot assume the 2009 methodology was flawed. This methodology was supported by data and analysis regarding the population distribution within the County.

110. Further, County staff admitted that the housing demand has been, historically, lower in the Indiantown USD than in the Eastern USD. Ms. Lovelady offered her professional opinion that the difference in growth rate between the east and west areas is data supporting evaluating the housing needs separately.

111. Neither the 2013 demand methodology nor the 2013 RCA is supported by data and analysis regarding population projections and trends in the County. Combining the Eastern and Indiantown USDs is not an appropriate reaction to data showing a disparity in growth rates between the two USDs.

112. Petitioner proved, beyond fair debate, that neither Policy 4.1D.3 nor Policy 4.1D.5 is a professionally-acceptable method of collecting the applicable data.

6. Maximum Theoretical Density

113. Although not a change between the 2009 and 2011 RCA, Petitioner also challenged the 2013 RCA as not based on data and analysis because it does not account for development

restrictions which prevent a landowner from attaining maximum theoretical density.

114. Petitioner's expert, Dr. Depew, testified that the methodology ignores the fact that certain types of vacant land which may be designated for residential use cannot be developed at maximum capacity. Petitioner cited as examples, Policy 4.1F.2 (the County's "tiered development" policy), as well as unspecified setback and buffering requirements, and the County's former 8.5 percent reduction in vacant residential acreage to account for infrastructure needs.

115. Policy 4.1F.2 prohibits approval of maximum density for projects located adjacent to lands approved for "lower density" uses. Application of the policy is project-specific and dependent on the location and uses of the surrounding properties.

116. Required setbacks and buffers between land uses may be found in either the Comprehensive Plan or the County's land development regulations. Setbacks and buffers are very dependent on location of the project and the characteristics of surrounding uses.

117. For the reasons discussed in the Conclusions of Law, Petitioner did not prove beyond fair debate that the RCA is flawed because it does not account for limitations preventing attainment of maximum theoretical density.

B. Real Estate Markets

118. Section 163.3177(6)(a)4. requires that "the amount of land designated [by the local government] for future land uses should allow the operation of real estate markets to provide adequate choices for permanent and seasonal residents[.]" Petitioner alleges the Operative Amendments contravene this provision by combining the Eastern and Indiantown USDs for purposes of residential housing capacity.

119. Applying the 2009 methodology, the County concluded it could accommodate 94 percent of the residential need within the Eastern USD for the 15-year planning period, and 1,569 percent of the residential need for the Indiantown USD for that same period (an overcapacity of 6,260 units).

120. Applying the 2013 methodology, combining the Eastern and Indiantown USDs, the County concluded that it can accommodate 466 percent of the residential housing need for the 10-year planning period and 291 percent for the 15-year planning period.

121. Dr. Henry Fishkind is an economist with significant experience in analyzing real estate markets, as well as developing property for clients throughout Florida. He testified, credibly, that the residential housing market in the eastern part of the County is unique and distinct from the Indiantown market. The eastern market is characterized by high-

value coastal property, including golf course communities and master-planned developments. By contrast, the "market in and around Indiantown is relatively affordable housing for people who either work in the agricultural industries thereabouts, or travel south into West Palm Beach and Broward. There is very little seasonal or high-end housing.[12/] Dr. Fishkind concluded that the County's methodology interferes with operation of the housing market, limits choices, limits supply, and increases prices.

122. In response to Dr. Fishkind's testimony, the County offered the testimony of Charles Pattison, Policy Director for 1000 Friends, who was qualified as an expert in comprehensive planning. Mr. Pattison's testimony on the issue was conclusory in nature. He expressed the opinion that the Operative Amendment "does not violate that standard" and that, under the Amendment, when there is a shortfall in residential capacity, the County could "potentially expand the urban service area boundary or just [] provide additional capacity inside the urban boundary."

123. Mr. Pattison professed no expertise in, or familiarity with, the housing markets in the Indiantown and Eastern USDs or relate his testimony to the economic impact of merging the two USDs for purposes of calculating residential

capacity. Dr. Fishkind's testimony is accepted as more persuasive on the issue.

124. The County argues that the Operative Amendments are not contrary to section 163.3177(6)(a)4., because they do not change the amount of land designated for any future land use category.

125. The County is correct that the Operative Amendments do not include any change to the Future Land Use Map (FLUM). However, under the Operative Amendments, there is a direct, fundamental relationship between the RCA and the County's ability to accommodate future urban residential demand within the primary and secondary USDs. Policy 4.1D.6 provides,

> The residential capacity analysis will determine if the future demand for residential units exceeds the supply for residential units as provided in the residential capacity analysis. When the undeveloped residential acreage within either the Primary Urban Service District or the Secondary Urban Service District no longer provides for projected population growth for the fifteen year planning period, planning for expansion of residential capacity shall commence. When the undeveloped acreage within either the Primary Urban Service District or the Secondary Urban Service District provides for no more than 10 years of projected population growth, the County is required to expand capacity.

126. By spreading the capacity to meet housing demand across both the Indiantown and Eastern USDs, the Operative

Amendments effectively increase the threshold which triggers expansion of, or a density increase within, the USDs. It is illogical, and perhaps contrary to the intent of the statute, to require an affected person to wait for a FLUM amendment changing the amount of land designated for urban uses, to challenge the methodology by which that decision was made. Especially when the challenge relies upon an argument that the methodology is designed to prevent, or at least delay, said FLUM amendment.

C. Commercial and Industrial Lands

127. Petitioner asserts that Policy 2.4C.3 limits the extent of commercial and industrial land uses to population growth, and is thus not based upon relevant and appropriate data and analysis as required by section 163.3177(1)(f).[13/]

128. Policy 2.4C.3 reads as follows:

> Policy 2.4C.3. The county shall limit commercial and industrial land use amendments to that needed for the projected population growth for the next 15 years. The determination of need shall include consideration of the increase in developed commercial and industrial acreage in relation to population increases over the preceding ten years, the existing inventory of vacant commercial and industrial land, and the goals, objectives, and policies of the [Comprehensive Plan], including the Economic Element. The County shall update this analysis at least every two years.

129. While the first sentence appears to limit commercial and industrial land uses based solely on population growth, the

remainder of the policy includes other variables, such as existing vacant commercial and industrial land and policies within the Economic Element. This fact was confirmed by Mr. Pattison's testimony.

130. Petitioner did not demonstrate beyond fair debate that the Policy 2.4C.3 is not based on data and analysis.

D. The "Stricter Rule"

131. Among the contested provisions in Chapter 1, is language providing that where two or more policies conflict, the stricter policy will govern. The applicable provisions read, as follows:

> Section 1.1 – Purpose
>
> * * *
>
> In furtherance of these purposes the more restrictive requirements of this chapter and of the overall goals, objectives and policies of Chapter 2 shall supersede other parts of the Plan when there is conflict.
>
> * * *
>
> Section 1.4. – Comprehensive Basis
>
> * * *
>
> Where one or more policies diverge, the stricter requirement shall apply. Where a subject is addressed by two or more provisions of the Comprehensive Plan, all provisions apply, and the stricter provision shall prevail to the extent of conflict. Plan policies addressing the same issue shall be considered consistent when it is possible to apply the requirements of both

> policies with the stricter requirements governing.

132. Petitioner first argues that this "stricter rule" both acknowledges and enables internal conflict within the Comprehensive Plan contrary to section 163.3177(2), which requires the several elements of the comprehensive plan "shall be consistent."

133. Rules of interpretation, such as the stricter rule, are commonly found in local government comprehensive plans. The fact that the County included the stricter rule of interpretation is not evidence, in and of itself, that inconsistencies exist within the Comprehensive Plan.

134. Petitioner cited a single example[14/] of an internal inconsistency: Objective 2.2A and Policies 2.2A.1 and 2.2A.2.[15/]

135. Objective 2.2A expresses the County's objective to preserve "all wetlands regardless of size unless prohibited by state law." Policy 2.2A.1 provides, "[a]ll wetlands shall be preserved except is [sic] set out in the exceptions listed below." Policy 2.2A.2 provides three exceptions to the requirement that all wetlands be preserved.

136. Dr. Depew testified that the statements are contradictory and it is not clear which one is stricter. Dr. Depew's testimony, as to this issue, is not accepted as either credible or persuasive.

137. The cited objective and policies set out a general rule with a series of exceptions, not an uncommon legislative construction. The provisions are not in conflict. Thus, the stricter rule does not apply.

138. Petitioner's cited example is insufficient evidence on which to base a finding that the stricter rule acknowledges any internal inconsistencies.

139. As to Petitioner's contention that the stricter rule enables unspecified inconsistencies to continue indefinitely, no credible evidence was presented. County staff acknowledged that conflicting provisions in the Comprehensive Plan have been discovered in the past, usually when reviewing a specific application for development order. Nicki Van Vonno, the County's Director of Growth Management, described the process by which conflicting policies have been reconciled by staff.

140. No evidence was introduced on which to base a finding that once the County discovered conflicting provisions, the County failed to correct said conflicting provisions. The undersigned cannot infer that fact from the evidence.

141. Petitioner next contends the stricter rule lacks meaningful guidance in determining which policy or provision would apply in the event of conflict. Ergo, Petitioner argues, the provisions render the Comprehensive Plan lacking in

"meaningful and predictable standards for the use and development of land" as required by section 163.3177(1).

142. In support of its argument, Petitioner highlights that the Comprehensive Plan does not define the term "stricter," leaving staff without guidance in determining which unspecified conflicting provision would apply in a particular development scenario.

143. Section 2.4.10 of the Comprehensive Plan provides that where a term is undefined, it shall be given its customary, or ordinary, meaning.

144. The plain and ordinary meaning of strict is "stringent in requirement or control." Merriam Webster 2d www.merriam-webster.com/dictionary.

145. Clyde Dulin was the County's Senior Planner responsible for preparation of agenda items and packages for the County Commission on the Operative Amendments.

146. Mr. Dulin is currently a principal planner with the County. In his experience interpreting the County's Comprehensive Plan, he has been called on to reconcile conflicting provisions, especially with regard to conflict between the plan and the County's land development regulations. Mr. Dulin acknowledged that County staff may be likewise required to reconcile any conflict if the Operative Amendments become effective.

147. Nicki Van Vonno has served as Director of the County's Growth Management Department since 1999, and has previously served the County in the Growth Management Department in various professional planning roles since 1983. Ms. Van Vonno obtained her planning certification from the American Institute of Certified Planners in 1991.

148. Ms. Van Vonno explained that, when conflicting provisions arise, it is usually in the context of reviewing a proposed Comprehensive Plan amendment, or applying the Comprehensive Plan to a specific development proposal.

149. In such cases, staff discusses the issue and consults with other County department staff who may have expertise in the issue area.

150. Both Ms. Van Vonno and Mr. Dulin were credible witnesses, and their testimony is determined by the undersigned to be reliable. County staff are capable, in most instances, of determining, between conflicting provisions, which is the more stringent requirement or control.

151. Despite staff's acknowledged experience interpreting and applying the Comprehensive Plan, Petitioner emphasized Mr. Dulin's and Ms. Van Vonno's testimony that there may be development scenarios in which staff could not determine which provision was more stringent. In such cases, the County Commission itself may be called upon to make the final decision.

152. The fact that the County Commission may be called upon to interpret its own legislative provisions does not necessitate a finding that the stricter rule lacks meaningful guidance for County staff. Nor does that fact support a finding that the County Commission will make said decisions arbitrarily, thus unpredictably, as pronounced by Petitioner's expert.[16/]

153. Petitioner further contends that Section 1.1(5) and 1.4 are in conflict with one another, thus both creating an internal inconsistency and failing to provide meaningful guidance for application of the Comprehensive Plan. This contention is without merit.

154. The Comprehensive Plan contains 17 chapters. Section 1.1(5) states that where conflict exists, the more restrictive provisions of Chapter 1 and 2 supersede provisions in other chapters. Section 4.1 provides that, in the event of a conflict, the more restrictive provisions of the plan, generally, prevails. Granted, the language is inartfully drafted. However, inartful drafting does not render the statements in conflict. Read together the language provides that, in the event of conflict, Chapters 1 and 2 prevail if provisions therein are more restrictive than provisions in other chapters. If the conflict is between chapters other than Chapters 1 or 2, the more restrictive provision of the remaining chapters applies.

155. Next, Petitioner argues that the stricter rule is not supported by data and analysis which is required by section 163.3177(1)(f).

156. Sections 1.1 and 1.4 are rules for interpreting and applying the Comprehensive Plan. The various experts disagreed about whether these sections are substantive, thus required to be supported by data and analysis, or procedural, thus not required to be supported by data and analysis.

157. The issue of whether Sections 1.1 and 1.4 are substantive, rather than procedural, thus subject to data and analysis requirements, is at least the subject of fair debate.

E. Balanced Development

158. Section 163.3177(1) requires a local government comprehensive plan to "provide the principles, guidelines, standards, and strategies for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the area that reflects community commitments to implement the plan and its elements."

159. Section 163.3177(6)(a)4. provides "the amount of land designated for future planned uses shall provide a balance of uses that foster vibrant, viable communities and economic development opportunities[.]"

160. Petitioner contends the Operative Amendments do not balance future economic development with environmental concerns

or provide a balance of uses to foster economic development opportunities. Petitioner advances several bases for this allegation.

161. First, Petitioner complains that the County conducted no analysis of the economic impact of the Operative Amendments.

162. The County was not required to prepare an economic analysis of the Operative Amendments prior to their adoption.

163. Next, Petitioner argues that the Operative Amendments exalt environmental concerns over other development considerations, in part because the Operative Amendments were drafted by Ms. Hurchalla, who has an admitted "environmentalist policy bent."

164. The Comprehensive Plan does demonstrate a commitment by the County to protecting the environment. However, a plan that contains stringent environmental protections is not necessarily out of balance as a whole.

165. Petitioner cites Sections 1.1 and 1.5 in support of its argument, urging those sections make environmental issues paramount and everything else, including economic development, subservient.

166. The plain language of Section 1.1 does not support Petitioner's contention. Section 1.1 cites "protect and restore natural and manmade resources" as one of many purposes of the Comprehensive Plan, along with "achieve and maintain

conservative prudent fiscal management" and "maintain the character, stability and quality of life for present and future County residents." No one purpose is afforded more weight than the others.[17/]

167. Further, under the Operative Amendments, "quality of life" includes both environmental and business concerns, as well as fiscal prudence.

168. Section 1.5 provides that a principle goal of the County is to promote balanced, orderly, sustainable economic growth by creating an economic environment "consistent with section 1.1" to enhance prosperity in the community. This section recognizes both the environment and quality of life as foundations of the County's economy. According to Tom Pelham, one of the Respondent's experts who has been professionally involved with the Martin County plan for a number of years, the County has demonstrated a strong commitment to implementing its plan through the USDs in the last 30 years.

169. Petitioner's expert also opined that the Operative Amendments fail to balance environmental and economic development issues by allowing, through Section 1.4, Chapters 1 and 2 to "trump" other chapters of the Comprehensive Plan.

170. Chapter 2 provides the overall goals and objectives of the Comprehensive Plan, but is not limited to environmental goals. Chapter 2 includes measures relating to providing public

facilities concurrent with needs of development, and measures for "prudent fiscal management," among others. As previously found, section 1.4 provides a method for reconciling competing provisions in the event they are discovered.

171. Petitioner also contends the Operative Amendments fail to designate sufficient land for commercial use, yet another basis for Petitioner's contention that the plan is out of balance. Petitioner's argument relies heavily on the assertion that the Operative Amendments limit commercial land use designations to permanent population growth. Having already rejected this interpretation of Policy 2.4C.3, the undersigned will not rely on that policy to support a finding that the Operative Amendments do not balance environmental and economic development issues.

172. Petitioner is correct that the data available to the County in 2009 demonstrated a deficit of commercial land necessary to accommodate future economic needs. That finding remains in the Operative Amendments at Section 4.2A(12).

173. The applicable Section of the Comprehensive Plan reads, as follows:

> The raw data appear to show a significant deficit of commercial land necessary to accommodate economic needs. Any attempt to remedy the deficits should be based on geographic area in order to reflect sustainability principles and provide population centers with necessary services

> in an orderly and timely fashion. Further analysis is planned to continue refining the inventory and consider whether population demands for retail/commercial services should be applied to the vacant land.

174. The Operative Amendments do not designate any new land for commercial use.

175. Prior to adopting the Operative Amendments, the County began updating its vacant commercial and industrial sites inventory. The County's strategy is to identify existing sites with infrastructure available to serve commercial and industrial needs, and designate those sites for expedited permitting. The strategy includes identifying parcels with outdated zoning inconsistent with the Comprehensive Plan as candidates for rezoning to effectuate use for commercial or industrial purposes, combining adjacent parcels in common ownership, and identifying undeveloped sites with approved site plans for remarketing. This approach is consistent with the County's urban containment strategy which it has sustained since the 1990 Plan.

176. Subsequent to the 2009 EAR amendments, the County adopted a FLUM amendment, known as Ag-Tec, which added substantial amounts of commercial and industrial land to the County's inventory. Dr. Fishkind opined that despite that addition, the County does not have adequate commercially-designated land to serve future needs. Dr. Fishkind's analysis

was criticized for excluding the Ag-Tec property because he relied upon the Property Appraiser's use designations, rather than the County's land use designations.

177. The issue of whether the Comprehensive Plan, under the Operative Amendments, designates adequate lands for commercial use to serve future needs is at least fairly debatable.

178. Petitioner also cited Objective 2.4C and Policy 2.4C.1 in support of its argument that the Operative Amendments do not balance economic concerns.

179. Petitioner did not identify Objective 2.4C and Policy 2.4C.1 as compliance issues in its Amended Petition for Formal Administrative Hearing. Neither that Objective nor those policies were identified in the parties' prehearing stipulation. Although testimony regarding those provisions was offered at the final hearing, that evidence has been disregarded and does not form the basis of any finding of fact herein.[18/]

180. Finally, Petitioner argues the Operative Amendments do not balance environmental and economic issues because they do not allow the operation of real estate markets to provide adequate choices for residents.

181. While Petitioner proved its allegation that the RCA does not allow the operation of real estate markets to provide adequate choices for residential housing, that finding does not

support a finding that the Operative Amendments do not balance economic and environmental concerns. In fact, the undersigned's determination that the Operative Amendments interfere with the normal operation of the housing market is dependent on the merging of the Indiantown and Eastern USDs for purposes of calculating residential demand and capacity, and is in no way dependent on environmental factors.

182. Thus, the matter of whether the Operative Amendments balance environmental and economic concerns is at least a matter of fair debate.

F. Supermajority Vote

183. Next, Petitioner challenges Section 1.11.D(6) of the Operative Amendments, which require "four votes for transmittal and for adoption" of plan amendments involving a number of critical issues specified therein.

184. Petitioner argues that the supermajority vote requirement is a substantive requirement of the Comprehensive Plan unsupported by data and analysis. The County maintains the supermajority vote requirement is a simple procedural issue requiring neither data nor analysis in support.

185. Petitioner concludes the requirement is substantive because it controls how the County Commission sets development policy by making it more difficult to amend the Comprehensive Plan in the future based on changed conditions. Petitioner's

expert, Dr. Depew, reasoned the vote requirement must be based on some data identifying a problem which necessitates the supermajority vote.

186. Petitioner's arguments are not persuasive. Regardless of the supermajority vote requirement, future amendments affecting identified critical issues (e.g., changes to the USD boundaries) must be supported by data and analysis, which may include changed conditions. The fact that the County Commission may have to adopt those changes by four votes rather than three, does not relieve the County Commission from supporting its legislative changes with appropriate data.

187. The supermajority vote issue is largely a legal question, rather than one to be discerned based on expert planning opinion. For the reasons discussed in the Conclusions of Law, Petitioner did not prove beyond fair debate that the supermajority vote is not supported by data and analysis.

G. Miscellaneous Issues

188. In its Amended Petition, Petitioner raised the following additional allegations: Neither the 15-year planning timeframe nor the density allocations in Objective 4.1F were supported by data and analysis; and, the RCA is inconsistent with section 163.3177(6)(f)(minimum requirements for the housing element). Petitioner did not present any evidence on these

issues. Thus, Petitioner did not prove these allegations beyond fair debate.

CONCLUSIONS OF LAW

189. The Division of Administrative Hearings has jurisdiction over the subject matter and parties hereto pursuant to sections 120.569, 120.57(1), and 163.3184(5), Florida Statutes.

190. To have standing to challenge or support a plan amendment, a person must be an affected person as defined in section 163.3184(1)(a). Petitioner is an affected person within the meaning of the statute.

191. The Organizational Intervenors and the Municipal Intervenors are affected persons with standing to intervene in this proceeding pursuant to 163.3184(1)(a).

192. "In compliance" means "consistent with the requirements of §§ 163.3177, 163.3178, 163.3180, 163.3191, 163.3245, and 163.3248, with the appropriate strategic regional policy plan, and with the principles for guiding development in designated areas of critical state concern and with part III of chapter 369, where applicable." § 163.3184(1)(b), Fla. Stat.

193. The "fairly debatable" standard, which provides deference to the local government's disputed decision, applies to any challenge filed by an affected person. Therefore, Petitioner bears the burden of proving beyond fair debate that

the challenged Operative Amendments are not in compliance. This means that "if reasonable persons could differ as to its propriety," a plan amendment must be upheld. Martin Cnty. v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997).

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

Public Participation

195. Section 163.3181 expresses the Legislature's intent that the public participate to the fullest extent possible in the comprehensive planning process. Petitioner did not prove beyond fair debate that the public was unable to participate in the process for adoption of the Operative Amendments, nor that Petitioner was prejudiced by the County's adoption of amendments which were originated by Ms. Hurchalla.

Meaningful and Predictable Standards

196. Section 163.3177(1) requires the Comprehensive Plan to "guide future decisions in a consistent manner," and "establish meaningful and predictable standards for the use and development of land[.]" Petitioner did not prove beyond fair debate that the "stricter rule" fails to establish meaningful standards for implementing the Comprehensive Plan, despite the fact that the term "stricter" is undefined therein, and that

sometimes the County Commission may be called upon to reconcile conflicting provisions if staff is unable to do so.

Internal Consistency

197. Section 163.3177(2) requires that "coordination of the several elements of the comprehensive plan shall be consistent," and that "[w]here data is relevant to several elements, consistent data shall be used, including population estimates and projections."

198. Petitioner did not prove beyond fair debate that the Operative Amendments create inconsistencies within the Comprehensive Plan, or acknowledge inconsistencies through adoption of the "stricter rule." Nor did Petitioner establish that Policy 4.1D.3 excludes seasonal population from the calculation of residential housing demand, thus creating an internal conflict with Section 1.7.

Data and Analysis

199. Section 163.3177(1)(f) requires plan amendments to be "based upon relevant and appropriate data and analysis" by the local government, and includes "surveys, studies, community goals and vision, and other data available at the time of adoption." Data must be taken from professionally-accepted sources. § 163.3177(1)f.2., Fla. Stat. A local government is not required to collect original data, but may do so if the methodologies are professionally accepted. Id.

200. To be based on data "means to react to it in an appropriate way and to the extent necessary indicated by the data available on that particular subject at the time of adoption of the plan amendment." § 163.3177(1)(f), Fla. Stat.

201. Based upon the foregoing Findings of Fact, the Operative Amendments do not react to the readily-available data regarding the County's population projections and trends by separating out the Eastern and Indiantown USDs for purposes of calculating both residential demand and residential capacity. The methodologies in Sections 1.7.B and 1.7.C, as well as Policies 4.1D.3 and 4.1D.5, are thus, not based on data and analysis.

202. Likewise, Petitioner proved beyond fair debate that Policy 4.1D.5(4) is not based on data and analysis because it is not a professionally acceptable methodology for obtaining data on residential capacity within approved multifamily developments.

203. The supermajority vote requirement in Policy 1.11.D is a purely procedural issue. Section 163.3184 provides that a local government decision to amend its plan "shall be by affirmative vote of not less than a majority of the members of the governing body present at the hearing." § 163.3184(11)(a), Fla. Stat. (emphasis supplied). The procedural requirements of section 163.3184 are not compliance issues. § 163.3184(1)(b),

Fla. Stat. Only the substantive elements of a local government comprehensive plan must be supported by data and analysis, pursuant to section 163.3177(1)(f). Thus, Petitioner did not prove beyond fair debate that Policy 1.11.D(6) is not based upon data and analysis.

204. Policy 2.4C.3 was challenged by Petitioner as limiting commercial and industrial land uses solely based on future population projections. As found herein, Petitioner did not prove that allegation. Thus, Petitioner failed to prove beyond fair debate that Policy 2.4C.3 is not based on data and analysis.

205. Petitioner also challenged the RCA as not based on relevant and appropriate data because it does not account for limitations affecting a landowner's ability to achieve maximum residential capacity.

206. Provisions in a local comprehensive plan which will prevent the achievement of a maximum residential density should be taken into account when calculating residential supply. See Martin Cnty. Conser. Alliance, Inc. v. Martin Cnty., Case No. DCA11-GM-001 (DCA Jan. 3, 2011). To that end, the RCA allocates only one-half the density afforded to underlying wetland areas, to reflect the Comprehensive Plan policy prohibiting development in wetlands, but allowing the landowner to transfer half the density to the upland area.

207. However, provisions which may or may not cause a density reduction, such as the County's "tiered-development" policy, should not be taken into account. See Id. at 14. To the extent Petitioner's argument is based on limitations located outside the Comprehensive Plan, the County is not required to account for those in calculating residential supply. See Id. at 8-9.

208. Petitioner did not prove beyond fair debate that the RCA is not based on data and analysis for failure to account for limitations affecting a property owner's ability to achieve maximum theoretical density.

Real Estate Markets

209. Section 163.3177(6)(a)4. requires that the amount of land designated by the local government for future land uses "should allow the operation of real estate markets to provide adequate choices for permanent and seasonal residents and may not be limited solely by the projected population."

210. Petitioner proved beyond fair debate that the County's methodology for calculating housing demand and supply does not take into account the separate and distinct housing markets in the Eastern and Indiantown USDs, thus interfering with the operation of the normal market, effectively limiting choices for residential consumers.

211. Petitioner proved beyond fair debate that the Plan Amendment is inconsistent with section 163.3177(2).

Balance of Uses

212. Petitioner failed to prove beyond fair debate that the Operative Amendments fail to achieve a balance of uses to foster a vibrant, viable community and economic development opportunities, as required by 163.3177(6)(a)4., or provide principles, guidelines, standards, and strategies for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the County, as required by 163.3177(1).

Conclusion

213. For the reasons stated in the Findings of Fact, the Petitioner has proven beyond fair debate that the Operative Amendments are not in compliance with the specified provisions of chapter 163.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Administration Commission enter a Final Order determining that the Plan Amendment is not "in compliance."

DONE AND ENTERED this 2nd day of June, 2015, in Tallahassee, Leon County, Florida.

SUZANNE VAN WYK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of June, 2015.

ENDNOTES

[1/] Except as otherwise provided herein, all references to the Florida Statutes are to the 2014 version, which was in effect when Ordinance 957 was adopted. Although the 2013 statutes were in effect when Ordinance 938 was adopted, there was no substantive change to the applicable 2014 statutes relevant to the issues raised herein.

[2/] A number of other Petitioners, including Consolidated Citrus, LP; Running with Citrus, LP; Tesoro Groves; Becker Holding Corporation; Lake Point Phase I, LLC; and Lake Point Phase II, LLC; also challenged the Plan Amendment. The cases were subsequently consolidated under Case No. 13-3393GM. The other Petitioners' challenges were subsequently settled and dismissed. For purposes of this Recommended Order, Midbrook 1st Realty Corp. is the sole Petitioner.

[3/] On January 23, 2014, the undersigned entered an Order on Respondent's Motion in Limine, or in the Alternative, Motion to Strike (Order) specific allegations from the Petition as outside the scope of this proceeding. With regard to Petitioner's allegations that the Operative Amendments violate statutory public participation requirements, the undersigned ruled Petitioner was entitled to make a record to demonstrate

prejudice from the alleged irregularities. The undersigned includes findings of fact under this subheading consistent with that Order.

[4/] Policy 4.1D.3 restates the demand methodology in Section 1.7.B. Petitioner's challenge applies to both provisions.

[5/] Policy 4.1D.5 restates the capacity methodology in Section 1.7.C. Petitioner's challenge applies to both provisions.

[6/] Petitioner's counsel objected to opinion testimony from Ms. Lovelady during her direct examination by Respondent's counsel because Ms. Lovelady was not identified in the prehearing stipulation as an expert witness. However, Ms. Lovelady was deposed by Petitioner and the undersigned finds, from the record as a whole, that these particular opinions expressed by Ms. Lovelady during the final hearing were also revealed during her deposition. To the extent Petitioner had an objection to Ms. Lovelady's opinion, that objection was waived when Petitioner's counsel elicited the opinions from her on counsel's direct examination.

[7/] Two other exhibits were introduced in support of the three percent vacancy rate: a needs analysis compiled by Miami Economic Associates, Inc., in support of proposed 2011 amendment to the Comprehensive Plan for the Hobe Grove development, and Petitioner's Exhibit 14, a series of electronic mail communications between Ms. Hurchalla and C. Scott Dempwolf, citing census data on owner-occupied housing and rental housing vacancy rates. The undersigned does not rely on either of those documents in finding that the three percent vacancy rate is professionally acceptable.

[8/] Martin County Exhibit 37, p. 11.

[9/] Id. at 13, Table 5.

[10/] Id. at 13, Table 6.

[11/] Ms. Lovelady's testimony was conclusory in nature. She stated, "that's the analysis we did to show that you really needed to combine them because the policy talks about one urban service district, one primary and one secondary." [T.113:8-11]. No other witness referred to Policy 4.7A.7.

[12/] T.276:2-6.

[13/] Petitioner may have withdrawn this allegation at the final hearing, but the record is not entirely clear. In an abundance of caution, the undersigned included findings relative thereto.

[14/] Despite Petitioner's contention in its Proposed Recommended Order that its experts provided multiple examples.

[15/] Petitioner's expert gave a second example to illustrate the point that the stricter rule does not provide meaningful guidance to staff. The example concerned a speculative scenario in which the County adopted a policy of encouraging affordable housing and determined that a residential density of twenty dwelling units per acre (20 du/acre) was necessary to accomplish that goal, but had a previously-existing 15 du/acre limitation. The expert opined that the County would have to decide which policy was more restrictive, the existing 15 du/acre limitation or the affordable housing goal. Rather than presenting an example of conflict applying the Comprehensive Plan to a particular development application, the scenario presents the question of whether "to adopt a policy allowing twenty units per acre" [T.249:19-20]. Thus, the scenario involves the formulation of policy by amending the Comprehensive Plan. A decision to amend the Comprehensive Plan to increase the residential density from 15 to 20 du/acre would set the policy guiding future application of the Comprehensive Plan.

[16/] T.248:1-5; T.249:4-8.

[17/] Additionally, Section 1.1 as amended by the Operative Amendments, is not substantially different from the prior version, which read, "The purpose of planning is to protect natural and manmade resources and maintain, through orderly growth and development, the character, stability and quality of life for present and future Martin County residents."

[18/] A petitioner is limited to issues that are timely raised and is bound by allegations in its petition. See Sunset Dr. Holdings, Inc. v. City of Lake Worth, Case No. 10-1973GM, *21 n.4 (Fla. DOAH Mar. 24, 2011; Fla. DCA April 28, 2011) (Petitioner's allegation that City violated specified sections of Florida Administrative Code Rule 9J-11, which were not raised in Petitioner's third amended petition or by stipulation of the parties, were untimely); Burgess v. Dep't. of Cmty. Aff., Case No. ACC-10-008 (Fla. ACC Feb. 24, 2011)(ALJ not required to make finding of fact about Petitioner's allegation regarding the planning period of the Coastal Management Element where Petitioner did not identify that issue in either the amended

petition or the joint prehearing stipulation); St. George Plantation Owners' Ass'n v. Franklin Cnty., Case No. 96-5124GM (Fla. DOAH Feb. 13, 1997; Fla. ACC Mar. 25, 1997)(Petitioner's argument on internal inconsistency of the comprehensive plan raised for the first time at the hearing was untimely and was disregarded by the ALJ); Heartland Envtl. Council, Inc. v. Dep't. of Cmty. Aff., Case No. 94-2095GM (Fla. DOAH Nov. 16, 1996; Fla. DCA Nov. 25, 1996)(Petitioner is limited to the specific plan elements cited in the Petition, as narrowed by the Prehearing Stipulation, as evidence to support its broad allegation that the amended plan did not "meet minimum criteria and State requirements for protection of identified biological communities, cultural resources and groundwater from contamination"); cf. Heston v. City of Jacksonville, Case No. 03-4283 (Fla. DOAH Mar. 5, 2004; Fla. ACC Sept. 22, 2004) (Respondent's contention that specified policies of the challenged plan raised for the first time in a post-hearing filing is untimely).

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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.