

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ALERTS OF PBC, INC., PATRICIA D.  
CURRY, ROBERT SCHUTZER, AND  
KAREN SCHUTZER,

Petitioners,

vs.

Case No. 14-5657GM

PALM BEACH COUNTY,

Respondent,

and

MINTO PBLH, LLC,

Intervenor.

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RECOMMENDED ORDER

The final hearing in this case was held on March 4 through 6, 2015, in West Palm Beach, Florida, before Bram D.E. Canter, Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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#### STATEMENT OF THE ISSUE

The issue to be determined in this case is whether the amendments to the Palm Beach County Comprehensive Plan ("the Comp Plan") adopted by the Board of County Commissioners of Palm Beach County by Ordinance No. 14-030 ("Proposed Amendments") are "in compliance," as that term is defined in section 163.3184(1)(b), Florida Statutes (2014).

#### PRELIMINARY STATEMENT

On October 29, 2014, Palm Beach County adopted Ordinance No. 14-030, which amended the Future Land Use Element ("FLUE"), text, and Map Series of the Comp Plan for a large tract of land in the western part of the County. Petitioners Alerts of PBC, Inc., Patricia D. Curry, Robert Schutzer, and Karen Schutzer filed a petition for hearing to challenge the Proposed Amendments. Later, they requested and were granted leave to amend their petition.

At the final hearing, Petitioners presented the testimony of Daryl Max Forgey, James Fleischmann, John Kim, and Jay Foy. Petitioners' Exhibit 1 was admitted into evidence.

Palm Beach County presented the testimony of Bryan Davis and George Webb. Palm Beach County's Exhibits 1, 3, and 7 were admitted into evidence.

Intervenor Minto PBLH, LLC ("Minto"), presented the testimony of John Carter, Donaldson Hearing, and Robert Pennock. Minto's Exhibits 1, 2, 6, 7, 11, 16, 17, 19, 21, 23, 24, and 27 were admitted into evidence.

Joint Exhibits 1, 3, 4, 5, 6, 8, 13, 21, 48, 51, and 55 were admitted into evidence.

The five-volume Transcript of the final hearing was filed with DOAH. The parties filed proposed recommended orders that were considered by the Administrative Law Judge in the preparation of this Recommended Order.

#### FINDINGS OF FACT

##### The Parties

1. Petitioner Alerts of PBC, Inc. ("Alerts"), is a Florida not-for-profit corporation doing business in Palm Beach County. Alerts made timely objections and comments to the County on the Proposed Amendments.

2. Petitioner Patricia Curry is a resident and landowner in Palm Beach County. Ms. Curry made timely objections and comments to the County on the Proposed Amendments.

3. Petitioner Robert Schutzer is a resident and landowner in Palm Beach County. Mr. Schutzer made timely objections and comments to the County on the Proposed Amendments.

4. Petitioner Karen Schutzer is a resident and landowner in Palm Beach County. Ms. Schutzer made timely objections and comments to the County on the Proposed Amendments.

5. Respondent Palm Beach County is a political subdivision of the State of Florida and has adopted the Comp Plan, which it amends from time to time pursuant to section 163.3184.

6. Intervenor Minto is a Florida limited liability company doing business in Palm Beach County. Minto is the owner of all of the 3,788.6 acres ("the Property") which are the subject of the Proposed Amendments, with the exception of two parcels totaling 40.04 acres, which are owned by the Seminole Improvement District. Minto appointed the board of supervisors of the Seminole Improvement District pursuant to state law.

#### Background

7. FLUE Objective 1.1 establishes a unique Managed Growth Tier System "to protect viable existing neighborhoods and communities and direct the location and timing of future

development." The Property is located in the County's Rural Tier and is bounded by Exurban Tier to the north and east.

8. North of the Property is a large subdivision known as the Acreage, which was described by Respondents as "antiquated" because it was developed in a manner that was common decades ago before modern community planning concepts and growth management laws. The Acreage is dominated by 1.25-acre residential lots, laid out in a grid pattern with few other uses.

9. Although the residents of the Acreage have a strong sense of community, it is apparently a matter of aesthetics, familiarity, and social intercourse, because the Acreage is not a community in the modern planning sense of providing a mix of uses where residents can live, shop, work, and play. It is a development pattern that is now discouraged by state law and the Comp Plan, because it is inefficient with respect to the provision and use of public services.

10. The Property and the Acreage are within a 57,000-acre area known as the Central Western Communities ("CWC"). The CWC has been the subject of extensive planning efforts by the County for many years to address land use imbalances in the area. There are many residential lots, but few non-residential uses to serve the residents.

11. In 2008, the previous owner of the Property, Callery-Judge Groves ("Callery"), obtained an Agricultural Enclave (AGE)

future land use designation for essentially the same area as the Property. The Comp Plan was amended to establish an AGE future land use designation, AGE policies, a conceptual plan of development, and implementing principles ("the 2008 Amendments").

12. Under the 2008 Amendments, the site was limited to 2,996 residential units and 235,000 square feet of retail and office uses. No development has been undertaken pursuant to the 2008 Amendments.

13. In 2013, the site was sold to Minto, which submitted a Comp Plan amendment application in November 2013, and a revised application in July 2014. On October 29, 2014, the County adopted the Proposed Amendments.

14. The Proposed Amendments change the future land use designation of 53.17 acres ("the outparcels") from RR-10 to AGE, and increase residential density to 4,546 units and increase intensity to two million square feet of non-residential uses, 200,000 square feet of civic uses, a 150-room hotel and a 3,000-student college, and revise the Conceptual Plan and Implementing Principles.

15. The Proposed Amendments would also revise text in the Introduction and Administration, Future Land Use, and Transportation Elements. The Map Series would be amended to add 53.17 acres to the Limited Urban Service Area on Map LU 1.1 and Map LU 2.1, and to identify new Rural Parkways on Map TE 14.1.

### Petitioners' Challenge

16. Petitioners contend the Proposed Amendments are not "in compliance" because they fail to establish meaningful and predictable standards; do not comply with the agricultural enclave provisions of section 163.3164(4); are not based upon relevant and appropriate data and analysis; promote urban sprawl; are incompatible with adjacent communities and land uses; and create inconsistencies within the Comp Plan.

17. Many of the issues raised and the arguments made by Petitioners fail to acknowledge or distinguish the 2008 Amendments that address future development of the Property. In several respects, as discussed below, the 2008 Amendments already authorize future development of the Property in a manner which Petitioners object to. In several respects, the types of impacts that Petitioners are concerned about are actually diminished by the Proposed Amendments from what is currently allowed under the 2008 Amendments.

### Meaningful and Predictable Standards

18. Petitioners contend that proposed FLUE Policies 2.2.5-d, 2.2.5-e, and 2.2.5-f, and Maps LU 1.1 and 2.1 fail to establish meaningful and predictable standards for the use and development of land and fail to provide meaningful guidelines for the content of more detailed land development and use regulations, in violation of section 163.3177(1).

19. The Proposed Amendments add more detail to the standards that were adopted in the 2008 Amendments. The Proposed Amendments establish substantially more direction for the future development of the Property than simply a land use designation and listing of allowed uses, which is typical in comprehensive plans.

20. Petitioners contend the Proposed Amendments lack adequate standards because they refer to the use of "appropriate new urbanism concepts," which Petitioners say is vague. New urbanism refers to land use planning concepts such as clustering, mixed-use development, rural villages, and city centers. See § 163.3162(4), Fla. Stat. (2014). In land use planning parlance, new urbanism creates more "livable" and "sustainable" communities.

21. The term "appropriate new urbanism concepts" used in the Proposed Amendments is the same term used in section 163.3162(4), dealing with the development of agricultural enclaves. There are many concepts that are part of new urbanism, which can be used in combination. Which concepts are "appropriate" depends on the unique opportunities and constraints presented by the area to be developed.

22. Use of the term "appropriate new urbanism concepts" in the Proposed Amendments adds detail to the future development



standards applicable to the Property. It does not create vagueness.

23. Petitioners contend the proposed amendments of Maps LU 1.1 and 2.1 do not provide meaningful and predictable standards and guidelines. However, the maps are only being amended to show that 53.17 acres of outparcels within the Property are being added to the existing Limited Urban Service Area. The map amendments do not diminish the meaningfulness or predictability of any standards in the Comp Plan.

24. The preponderance of the evidence shows the Proposed Amendments establish meaningful and predictable standards.

#### Agricultural Enclave

25. Petitioners contend the Proposed Amendments fail to meet the requirements for an agricultural enclave in section 163.3164. As explained in the Conclusions of Law, consistency with section 163.3164 is not a component of an "in compliance" determination.

26. Furthermore, the Property is already designated Agricultural Enclave in the Comp Plan.

#### Data and Analysis

27. Petitioners contend the amendment of the Limited Urban Service Area is not supported by relevant and appropriate data and analysis as required by section 163.3177(1)(f). The inclusion of the outparcels is logical and reasonable. It is

consistent with the Comp Plan policies applicable to Limited Urban Service Areas. It is supported by data and analysis.

28. Petitioners contend the increases in density and intensity allowed by the Proposed Amendments are not supported by data and analysis showing a need for the increases. However, the increases are supported by relevant and appropriate data and analysis, including population projections and extensive analysis of the need for non-residential uses in the CWC. Population projections establish the minimum amount of land to be designated for particular uses; not the maximum amount of land. See § 163.3177(1)(f)3., Fla. Stat (2014).

29. Petitioners make several claims related to the availability of public utilities and other services to the Property. The data and analysis show sufficient capacity for roads, transportation, schools, water supply, wastewater treatment, fire, emergency and police either already exists or is contemplated in the Comp Plan to accommodate the development authorized by the Proposed Amendments.

30. The preponderance of the evidence shows the Proposed Amendments are supported by relevant data and analysis.

#### Urban Sprawl

31. Petitioners contend the Proposed Amendments do not discourage the proliferation of urban sprawl. Urban sprawl is defined in section 163.3164(51) as "a development pattern

characterized by low density, automobile-dependent development with either a single use or multiple uses that are not functionally related, requiring the extension of public facilities and services in an inefficient manner, and failing to provide a clear separation between urban and rural uses."

32. Petitioners contend the Property does not qualify for the presumption against urban sprawl under the criteria in section 163.3162(4), but Minto did not rely on that statutory presumption.

33. Petitioners contend the Proposed Amendments create five of the 13 primary indicators of urban sprawl set forth in section 163.3177(6) (a) 9.:

Promotes, allows, or designates for development substantial areas of the jurisdiction to develop as low-intensity, low-density, or single-use development or uses.

Promotes, allows, or designates significant amounts of urban development to occur in rural areas at substantial distances from existing urban areas while not using undeveloped lands that are available and suitable for development.

Fails to maximize use of existing public facilities and services.

Allows for land use patterns or timing which disproportionately increase the cost in time, money, and energy of providing and maintaining facilities and services, including roads, potable water, sanitary sewer, stormwater management, law

enforcement, education, health care, fire and emergency response, and general government.

Fails to provide a clear separation between rural and urban uses.

34. The evidence presented on this issue by Petitioners was inconsistent with generally accepted land use planning concepts and principles. The Proposed Amendments do not promote urban sprawl. They go far to rectify existing sprawl conditions in the CWC.

35. Findings relevant to the five indicators have already been made above. Compatibility with adjacent uses is discussed below.

36. There are ample data and analysis which show the Proposed Amendments discourage urban sprawl. Respondents' characterization of the Proposed Amendments as the opposite of urban sprawl is not unreasonable.

37. The preponderance of the evidence shows the Proposed Amendments discourage the proliferation of urban sprawl.

#### Compatibility

38. Petitioners contend the Proposed Amendments are "incompatible with the lifestyle of the existing and surrounding communities and adjacent agricultural and other land uses."

39. Protection of Petitioners' lifestyle cannot mean that surrounding areas must remain undeveloped or must be developed in a similar suburban sprawl pattern. Land use imbalances in the

CWC are rectified by the Proposed Amendments while providing large buffers and a transition of land uses on the Property to protect adjacent land uses.

40. The Acreage is more accurately characterized as suburban rather than rural. Moreover, the Proposed Amendments include a conceptual plan and development guidelines designed to create a clear separation between urban uses on the Property and less dense and intense external uses. Residential densities near the perimeter of the Property would correspond to the density in the Acreage.

41. The proposed distribution of land uses and large open space buffers would not establish merely an adequate transition. They would provide substantial protection to adjacent neighborhoods. A person at the periphery of the Property would likely see only open space, parks, and low-density residential uses.

42. The distribution of land uses and natural buffers in the Proposed Amendments provide more protection for external land uses than the 2008 Amendments.

43. The more persuasive evidence presented indicates that Petitioners and other persons living near the Property would be beneficiaries of the Proposed Amendments because they could use and be served by the office, commercial, government, and recreational uses that will be available nearby.

44. The preponderance of the evidence shows the Proposed Amendments are compatible with adjacent land uses.

Internal Consistency

45. The Comp Plan's Introduction and Administration Element and FLUE contain statements of intent. They are not objectives or policies. Petitioners contend the Proposed Amendments are inconsistent with some of the statements.

46. Petitioners contend the Proposed Amendments are inconsistent with the Introduction and Administration Element statements discouraging growth to the west where services are not adequate, do not provide for orderly growth or the provision of facilities and services to maintain the existing quality of life in an economical manner, and do not recognize countywide growth management strategies or maintain the diversity of lifestyles. Findings that refute this contention have been made above.

47. Petitioners contend the Proposed Amendments are inconsistent with several general statements in FLUE Sections I A, I B, and I C. regarding respect for the character of the area, protection of quality of life and integrity of neighborhoods, prevention of "piecemeal" development, and efficient provision of public services. Findings that refute this contention have been made above.

48. Petitioners contend FLUE Policy 2.2.5-d allows land uses which are inconsistent with the policies applicable to the

Rural Tier in which the Property is located. In the proposed policy, the County exempts the Project from any conflicting Rural Tier policies that would otherwise apply.

49. Under the County's Managed Growth Tier System, the tiers are the "first level" land use consideration in the FLUE. Therefore, it would have been helpful to amend the Rural Tier section of the FLUE to indicate the exceptions to Rural Tier policies for agricultural enclaves, in general, or for the Property, in particular. Instead, the Proposed Amendments place the new wording about exceptions in the section of the FLUE dealing with agricultural land uses. However, as stated in the Conclusions of Law, where the exception is located in the comprehensive plan is not a consistency issue.

50. The County has shown there are unique considerations involved with the CWC that justify the exceptions. It also demonstrated that the Proposed Amendments would accomplish numerous objectives and policies of the Comp Plan that could not be accomplished without creating exceptions to some Rural Tier policies.

51. Petitioners contend the Proposed Amendments are inconsistent with FLUE Objective 1.1-3 because they encourage the proliferation of urban sprawl. That contention has been rejected above.

52. Petitioners contend the Proposed Amendments are inconsistent with FLUE Objective 1.1-6 because they do not protect agricultural land and equestrian uses. The evidence shows that agricultural and equestrian uses are enhanced by the Proposed Amendments over the existing provisions of the Comp Plan.

53. Petitioners contend the Proposed Amendments are inconsistent with FLUE Policy 1.1-b, which addresses criteria re-designating a tier. This policy is not applicable because the Proposed Amendments do not re-designate a tier.

54. Petitioners contend the Proposed Amendments are inconsistent with FLUE Policy 1.1-c, which requires the review of the tier system as part of each Evaluation and Appraisal review. Evaluation and Appraisal Reviews are no longer required by state law.

55. Petitioners contend the Proposed Amendments are inconsistent with FLUE Policy 1.1-d, which states a tier shall not be re-designated if it would cause urban sprawl. This policy is not applicable because the Proposed Amendments do not re-designate a tier.

56. Petitioners contend the Proposed Amendments are inconsistent with FLUE Policy 1.4-a, which requires the County to protect and maintain the rural residential, equestrian, and agricultural areas within the Rural Tier. The Proposed



Amendments and Conceptual Plan increase the level of protection for these uses over what is currently in the Comp Plan.

57. Petitioners contend the Proposed Amendments are inconsistent with FLUE Policy 1.4-d, which generally prohibits subdividing parcels of land within the Rural Tier unless certain conditions are met. The Proposed Amendments do not subdivide any parcels.

58. Petitioners contend the Proposed Amendments are inconsistent with FLUE Policy 1.4-k, which addresses the designation of "sending areas" for Transfer of Development Rights ("TDR"). This policy only applies to parcels with a RR20 future land use designation and there are no such parcels existing or that would be created by the Proposed Amendments.

59. Petitioners contend the Proposed Amendments are inconsistent with FLUE Policy 1.4-l, which requires the County to provide rural zoning regulations for areas designated Rural Residential. The Property does not have any Rural Residential designations.

60. Petitioners contend the Proposed Amendments are inconsistent with FLUE Policy 2.4-b, which provides that the TDR program is the required method for increasing density within the County. The County applies this policy only to density increases in urban areas, because they are the only areas authorized to receive TDRs.

61. Petitioners contend the Proposed Amendments are inconsistent with FLUE Objective 2.1 and some related policies, which promote balanced growth. The preponderance of the evidence shows the Proposed Amendments will further this objective and its policies because they correct the current imbalance of land uses in the CWC and provide for a balanced mix of residential, agricultural, commercial, light industrial, office, recreation, and civic uses.

62. Petitioners presented no evidence to support their claim that Proposed Amendments would exceed the natural or manmade constraints of the area.

63. Petitioners presented no credible evidence that transportation infrastructure and other public services could not be efficiently provided to the Property. The data and analysis and other evidence presented show otherwise.

64. Petitioners contend there is no justification for the increased density and intensity authorized by the Proposed Amendments. There was ample justification presented to show the increases were needed to create a sustainable community where people can live, work, shop, and play.

65. Petitioners contend the Proposed Amendments are inconsistent with FLUE Objective 2.2 and some related policies, which require development to be consistent with land use designations in the Comp Plan. Petitioners' evidence failed to

show any inconsistencies. The Proposed Amendments are compatible with and benefit adjacent land uses, as found above.

66. Petitioners contend the Proposed Amendments fail to include "new urbanism" concepts as required by section 163.3164(4) and Policy 2.2.5-i. The evidence presented by Respondents proved otherwise.

67. Petitioners contend the Proposed Amendments are inconsistent with FLUE Objective 3 and some related policies, which address the provision of utilities and other public services. Petitioners presented no credible evidence to support this claim. The data and analysis and other evidence presented show that public services are available or planned and can be efficiently provided to the Property.

68. Petitioners argued the Proposed Amendments were inconsistent with several other FLUE policies generally related to compatibility with adjacent land uses and the provision of public services, all of which Petitioners failed to prove as explained above.

69. The preponderance of the evidence shows the Proposed Amendments would not create internal inconsistency in the Comp Plan.

## CONCLUSIONS OF LAW

### Standing

70. To have standing to challenge a comprehensive plan amendment, a person must be an "affected person" as defined in section 163.3184(1)(a). Petitioners are affected persons and have standing to challenge the Proposed Amendments.

71. Minto also qualifies as an affected person and has standing to intervene in this proceeding.

### Scope of Review

72. An affected person challenging a plan amendment must show that the amendment is not "in compliance" as defined in section 163.3184(1)(b):

"In compliance" means consistent with the requirements of ss. 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.

73. The statutes listed in section 163.3184(1)(b) do not include section 163.3162 or section 163.3164, which address agricultural enclaves. Therefore, consistency with these statutes is not relevant to an "in compliance" determination.

74. Petitioners were allowed to proffer evidence in support of their claim that the Proposed Amendments do not comply with

sections 163.3162 and 163.3164 for purposes of appeal. Their evidence did not demonstrate non-compliance.

75. The 2008 Amendments are part of the existing Comp Plan and are not subject to review or challenge in this proceeding. See § 163.3184(9)(a), Fla. Stat. (2007) (providing third parties 21 days following publication of a notice of intent to find in compliance to challenge plan amendments).

#### Burden and Standard of Proof

76. As the parties challenging the Proposed Amendments, Petitioners have the burden of proof.

77. Palm Beach County's determination that the Proposed Amendments are in compliance is presumed to be correct and must be sustained if the County's determination of compliance is fairly debatable. See § 163.3184(5)(c)1., Fla. Stat. (2014).

78. The term "fairly debatable" is not defined in chapter 163. In Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997), the Supreme Court of Florida explained "[t]he fairly debatable standard is a highly deferential standard requiring approval of a planning action if a reasonable person could differ as to its propriety."

79. The standard of proof for findings of fact is preponderance of the evidence. § 120.57(1)(j), Fla. Stat. (2014).

### Meaningful and Predictable Standards

80. Comprehensive plans must provide "meaningful and predictable standards for the use and development of land and provide meaningful guidelines for the content of more detailed land development and use regulations." § 163.3177(1), Fla. Stat. (2014). Petitioners failed to prove the Proposed Amendments violate this requirement.

### Data and Analysis

81. Section 163.3177(1)(f) requires that all plan amendments be based on relevant and appropriate data and an analysis by the local government. The statute explains: "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 or plan amendment at issue." § 163.3177(1)(f), Fla. Stat. (2014).

82. Petitioners failed to prove the Proposed Amendments violate this requirement.

### Urban Sprawl

83. Section 163.3177(6)(a)9. requires comprehensive plan amendments to "discourage the proliferation of urban sprawl" and sets forth 13 primary indicators of urban sprawl to be considered. Petitioners failed to prove the Proposed Amendments violate this requirement.

### Internal Consistency

84. Section 163.3177(2) requires the elements of a comprehensive plan to be internally consistent.

85. It is not uncommon for laws, whether in the form of statutes, rules, or policies of a comprehensive plan, to identify circumstances which are excepted from the application of the law. Creating an exception does not mean the law is in conflict with itself. The exceptions from some Rural Tier policies created by the Proposed Amendments for future development within an agricultural enclave do not create an internal inconsistency. The location of the exceptions in the section of the FLUE dealing with agricultural land uses does not change this conclusion because the Comp Plan must be considered and applied as a whole.

86. The Legislature has expressed its recognition of the need for innovative planning and development strategies to promote a diverse economy and vibrant rural and urban communities. See § 163.3168(1), Fla. Stat. (2014). The Proposed Amendments would effectively address this need.

### Summary

87. Palm Beach County's determination that the Proposed Amendments are in compliance is fairly debatable.

RECOMMENDATION

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

RECOMMENDED that the Department of Economic Opportunity issue a final order determining the Proposed Amendments adopted by Palm Beach County Ordinance No. 2014-030 are in compliance.

DONE AND ENTERED this 17th day of April, 2015, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the  
Division of Administrative Hearings  
this 17th day of April, 2015.

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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.