STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARTIN COUNTY LAND CO.,

Petitioner,

vs. Case No. 15-0300GM

MARTIN COUNTY,

Respondent.
_____/

RECOMMENDED ORDER

A duly-noticed final hearing was held in this matter in Stuart, Florida, on April 28 and 29, 2015, before Suzanne Van Wyk, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Gregory M. Munson, Esquire
Gunster, Yoakley and Stewart, P.A.
215 South Monroe Street, Suite 601
Tallahassee, Florida 32301

For Respondent: Linda Loomis Shelley, Esquire
Buchanan Ingersoll and Rooney, PC
Fowler, White, Boggs, P.A.
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STATEMENT OF THE ISSUE

Whether Martin County Comprehensive Plan Amendment 14-6, adopted by Ordinance No. 965 on December 16, 2014, is "in

compliance," as that term is defined in section 163.3184(1)(b), Florida Statutes (2014).[1/]

PRELIMINARY STATEMENT

On December 16, 2014, Martin County adopted Comprehensive Plan Amendment (CPA) 14-6, which revised Chapters 2, 4, 10, and 11 of the County's Comprehensive Growth Management Plan (Comprehensive Plan).

On January 15, 2015, Petitioner filed a Petition with the Division of Administrative Hearings challenging CPA 14-6 pursuant to section 163.3184.[2/] Petitioner alleges that the Plan Amendment fails to 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 section 163.3177(1); is not based on relevant and appropriate data and analysis, as required by 163.3177(1)(f); does not designate amounts of land for future uses that allow the operation of real estate markets to provide adequate choices for permanent and seasonal residents and business, as required by 163.3177(6)(a)4.; and is internally inconsistent, in violation of 163.3177(2).

Specifically, Petitioner challenges changes that delete the Expressway Oriented Transit Commercial Service Center land use designation; impose a 2,000 gallon-per-day limit on onsite sewage treatment and disposal systems (septic systems);

eliminate the use of septic systems in the urban service districts where regional wastewater treatment is available; restrict extension of regional wastewater treatment systems outside the primary Urban Service District (while prohibiting new package treatment plants); and limit new development within the primary Urban Service District to low-density residential.

The final hearing was scheduled for April 28 and 29, 2015. The parties jointly filed a pre-hearing stipulation on April 23, 2015, and the hearing commenced as scheduled.

At the final hearing, Petitioner presented the testimony of David W. Depew, accepted as an expert in comprehensive planning; Samantha Lovelady, Martin County Principal Planner; John Polley, Martin County Director of Utilities and Solid Waste; Richard Creech, accepted as an expert in water and wastewater engineering and design; Tobin Overdorf, accepted as an expert in environmental science and ecology; and Henry Fishkind, accepted as an expert in economics. Petitioner's Exhibits P2, P5 through P10, P12, P17, P25, P31, P44, P61, P70, P71, and P81 through P84, were admitted in evidence. Petitioner proffered P11, which was not admitted in evidence, but will travel with the record of this case.

Respondent presented the testimony of Catherine Riiska, Martin County Senior Planner; Charles Gauthier, accepted as an expert in comprehensive planning and Florida's growth management

laws; Samantha Lovelady; Robert Washam, former Martin County Environmental Health Director; and Maggy Hurchalla, former County Commissioner. Respondent's Exhibits R1 through R4, R6, R8, R9, R12, R17, R19 through R23, R26, R34, R41 through R43, R45 through R47, R49 through R53, R55 through R58, R60, R62, and R63, were admitted in evidence.

The three-volume Transcript of the final hearing was filed with the Division on May 26, 2015. Petitioner and Respondent both timely filed Proposed Recommended Orders which have been carefully considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

I. The Parties and Standing

1. Petitioner, Martin County Land Co. (Petitioner), owns real property and operates a business in Martin County.

2. 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.

3. On December 16, 2014, the County adopted Comprehensive Plan Amendment 14-6 (the Plan Amendment), which proposes to revise Chapters 2, 4, 10, and 11 of the County's Comprehensive Growth Management Plan (Comprehensive Plan).

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

II. Background and Existing Conditions

5. 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.

6. 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).

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

8. 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.

9. One of the signature features of the County's Comprehensive Plan is the urban service districts (USDs). The USDs were created as part of the Comprehensive Plan after 1990.

10. 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. The County refers to this approach as an "urban containment policy."

11. 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." Notably, neither package wastewater treatment plants (package plants) nor onsite wastewater treatment systems (septic systems) are included within the definition of public urban facilities.

12. Commercial, industrial, and urban-density residential development, as well as future development requiring public urban facilities, are concentrated within the primary USD. With few exceptions, development within the primary USD is required

to connect to regional wastewater systems. The existing Comprehensive Plan allows interim development on package plants only if the developer agrees to connect to regional wastewater systems when those systems become available. With very limited exceptions, septic systems are not permitted for new residential development within one-quarter mile of a regional wastewater system.

13. Rural development at one unit per two acres (one/two acres) and estate development not exceeding one unit/acre are concentrated in the secondary USD where a reduced level of public facilities are programmed to be available at appropriate levels of service. A minimum lot size of one-half acre applies to all development. Regional sewer service may be extended to serve residential properties exceeding the one-half acre minimum lot size, and where lot sizes are inappropriate for septic systems.

14. 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. Regional sewer service may not be extended outside the USDs, and package treatment plants are allowed only to serve

a limited category of commercial development titled "Expressway Oriented Commercial Service Centers."

15. The existing Comprehensive Plan does not establish a standard septic system flow rate. The County follows the state standards established in Florida Administrative Code Rule 64E-6.008, which provide for a residential rate of 10,000 gallons per day (gpd) and a rate of 5,000 gpd for non-residential uses.

III. Expressway-Oriented Transit Commercial Service Centers

16. In 1985, in anticipation of the construction of Interstate 95 (I-95) through the County, the County created an overlay land use category, Expressway-Oriented Transient Commercial Service Centers (Expressway Nodes), "to recognize the immediate and unique needs of the public traveling through the County."

17. The overlay is limited to the I-95 interchanges with County Road 714 (CR 714 or SW Martin Highway), located in the northern central area of the County; CR 76 (CR 76 or Kanner Highway), located in the western urbanized area of the County; and CR 708 (CR 708 or SE Bridge Road), located in the southwestern area of the County.

18. The overlay is not self-implementing. Future Land Use Element (FLUE) Policy 4.13.A8(5), governing Expressway Nodes, includes a number of requirements for a proposed development to qualify for the designation. Notably, an applicant for

development at one of the nodes must submit a market feasibility analysis demonstrating need by the traveling public for the proposed services, submit a Planned Unit Development (PUD) zoning application, and fully fund all urban services needed to serve the development. Further, no Expressway Node will be approved outside the primary USD unless the developer provides shared water and wastewater facilities for all subsequent development at the same interchange.

19. To qualify, the development parcel must be a minimum of five gross acres, directly accessible from a major arterial roadway, and located in whole within 1,320 feet of an access ramp and within 1,320 feet of the intersecting arterial roadway. Unless proven safe through an engineered traffic study, the access point may not be closer than 660 feet from an access ramp.

20. Of the three interchanges, only Kanner Highway, and that portion of SW Martin Highway east of the I-95 interchange, are designated major arterial roadways. Southeast Bridge Road and SW Martin Highway west of the interchange, are minor arterial roadways.

21. The County must amend its Comprehensive Plan in order to reclassify a minor arterial to a major arterial. A roadway is typically reclassified from minor to major arterial when some threshold of traffic volume (based on trip counts) is achieved.

No evidence was introduced to establish the particular threshold which distinguishes a minor from a major arterial.

22. No evidence was introduced to establish the length of time for which the segment of SW Martin Highway east of the interchange has been classified a major arterial, thus meeting a primary threshold for Expressway Node development of the eastern quadrants of the interchange.

23. Of the three interchanges, commercial services for the traveling public are located only at Kanner Highway. The interchange hosts at least three gas stations, a variety of fast-food and dine-in restaurants, and two hotels.

24. Commercial services for the traveling public are available at the I-95 interchange at Indiantown Road in Palm Beach County, 16 miles to the south of the Kanner Road interchange. Services are also available 18 miles north of Kanner Road at the I-95 interchange at Gatlin Boulevard in St. Lucie County.

25. Services for the traveling public are also available at a rest stop on I-95 in Martin County.

26. Petitioner challenges, on several grounds, the deletion of FLUE Policy 4.13.A8(5), which provides for the Expressway Nodes overlay category.

A. Data and Analysis

27. First, Petitioner argues the deletion of FLUE Policy 4.13.A8(5) is not supported by data and analysis, as required by section 163.3177(1)(f). That section requires plan amendments to "be based upon relevant and appropriate data and an analysis by the local government that may include . . . surveys, studies, community goals and vision, and other data available at the time of adoption" of the plan amendment. Id.

28. The Expressway Nodes designation pre-dates adoption of the USDs in 1990. The I-95 interchanges at SW Martin Highway and Bridge Road are located outside the USDs and the property at those intersections is designated for Agricultural land use. Thus, commercial development at those interchanges is inconsistent with the County's urban containment strategy and is an exception to the prohibition of urban uses outside the USDs.

29. Further, SE Bridge Road functions as a minor arterial roadway, a designation which has not changed in the 30 years since the Expressway Nodes category was created. As such, the interchange does not qualify for commercial development under the restrictions of the policy itself. The same is true of SW Martin Highway west of I-95.

30. While SW Martin Highway is a major arterial east of the I-95 interchange, no developer has come forward with a proposal to develop any service business at that interchange.

31. According to historic traffic counts from the I-95 interchanges at both Kanner Road and SE Bridge Road, traffic has generally increased both northbound and southbound on I-95. Between 1998 and 2013, average annual daily trips (AADT) increased by 30,000 on I-95 southbound from Kanner Highway and 14,500 southbound from SE Bridge Road. In that same period, AADT trips eastbound on Kanner Highway increased by 16,500, and eastbound on SE Bridge Road by 1,700.

32. Similar increases in trip counts occurred at the interchange ramps between 2009 and 2013. At Kanner Highway, AADT counts on the northbound off ramp increased by 2,000, southbound off ramp by 1,000, northbound on ramp by 600, and southbound on ramp by 1,800.

33. According to the Petitioner's expert, this general trend will eventually lead to congestion of the service facilities at Kanner Road, which will cause motorists to either skip the Kanner Road exit altogether, or return to I-95 in search of another exit with the needed services.

34. The data indicate similarly-increased AADTs at the I-95 interchange at Indiantown Road, the next interchange south of Kanner Road where services and facilities are available to the traveling public.

35. Petitioner's expert likewise concluded that services at the Indiantown interchange are "pretty much maxed-out" and would likely also become congested in the future.

36. AADT trip counts are data which were readily available to the County from the Department of Transportation (DOT) when the Plan Amendment was adopted.

37. Petitioner argues that the Plan Amendment ignores this readily-available data by deleting the Expressway Nodes category.

38. Petitioner's argument assumes a couple of factors. First, it assumes the County has an obligation to provide services to the public traveling through the County. Neither the Comprehensive Plan, nor the Community Planning Act, requires the County to provide said services.

39. Second, it assumes that increased traffic counts through the interchanges directly correlate with increased demand on the services located there. Petitioner introduced no evidence to support this assumption. Increased trips through the interchange could be attributed to increased employment in the urbanized area of the County from residents in Palm Beach or St. Lucie Counties, or from rural areas within Martin County.

40. The County's witnesses agreed that I-95 traffic counts would be relevant to the County's determination to delete the Expressway Nodes designation. However, the evidence does not

support a finding that retaining the Expressway Nodes overlay is the only appropriate reaction to that data.

41. Assuming Martin County was required to provide services to the traveling public, Petitioner did not establish the capacity of said services needed to serve the public, thus requiring the County to maintain the overlay. With the exception of hotel services, Petitioner introduced no evidence regarding a level of service or the utilization rate of the services provided at either the Kanner Road or Indiantown interchanges.

42. With regard to hotels, Petitioner introduced hotel occupancy rates published by Smith Travel Data, a hospitality-industry source of statistics on occupancy and vacancy rates. In March 2015, excluding the beach hotels, the County hotels had an aggregate occupancy rate of 92 percent. The average annual occupancy rate of County hotels is in excess of 72 percent.

43. Elimination of the Expressway Nodes overlay is supported by the County's urban containment strategy, as well as its history relative to package treatment plants.

44. The SW Martin Highway and SE Bridge Road interchanges are outside the primary USD where regional sewer service is available. As long as they remain outside the primary USD, the option for wastewater treatment at those locations is limited to package treatment plants.

45. The County has a clear policy prohibiting new package treatment plants. Existing FLUE Policy 4.7A.4 prohibits all package treatment plants outside the USDs except to serve development at the Expressway Nodes. Development at the Expressway Nodes is the only exception to the prohibition. The Plan Amendment deletes FLUE Policy 4.7A.4, thus eliminating the exception to the prohibition on package treatment plants, which prohibition is preserved elsewhere.

46. In 1984, when John Polley, now Director of Utilities and Solid Waste, began working for the County, there were 89 private package treatment plants. In 1990, the County began a campaign to eliminate package treatment plants. Fifty-three package treatment plants were eliminated after being identified as threats to the Indian River Lagoon, pursuant to the Indian River Lagoon Act. Another 17 were eliminated because they did not comply with Department of Environmental Protection (DEP) standards, or had become mechanically obsolete and prone to failure. The County has focused on extending sewer service in the primary USD in order to reduce the need for new package treatment plants to serve development.

47. By 2006, the County had eliminated 70 package treatment plants. There are only 19 package treatment plants in the County, and few, if any, have been approved and permitted in the County since 1990.

48. Existing FLUE Policy 4.7C.2 is titled "Evaluation of urban uses near I-95 interchanges," and requires the County to "have completed an evaluation of potential urban uses in the vicinity of the I-95 interchanges with CR 708 and CR 714" by 2012-2013, and requires that "[t]he results of these studies shall be incorporated into the [Comprehensive Plan] via Plan Amendment." The Plan Amendment deletes FLUE Policy 4.7C.2.

49. Martin County Principal Planner, Samantha Lovelady, produced a memorandum on Expressway Nodes in support of the Plan Amendment. The memorandum does not state that it was prepared to implement FLUE Policy 4.7C.2, nor did Ms. Lovelady testify that she prepared it pursuant to that policy.

50. To the extent that the memorandum "evaluates potential urban uses" at the specified intersections, it concludes that the services at Kanner Highway, the rest area on I-95, and services available along I-95 just north in St. Lucie County and just south in Palm Beach County, all of which developed since the policy was adopted in 1985, have rendered the designation unnecessary. The memorandum concludes that the "original goal of this policy [to provide services to the public traveling through the County on I-95] has been achieved."

51. FLUE Section 4.2.A(9)(b) of the Comprehensive Plan finds that based on an evaluation of the Future Land Use Map (FLUM) in 2009, the "raw data appear to show a significant

deficit of commercial land necessary to accommodate economic needs." Further, the section provides, "[a]ny 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."

52. Petitioner argues the County deleted the Expressway Nodes overlay despite this data showing a deficit of available commercial property.

53. The lands within the Expressway Nodes overlay have a FLUM designation of Agriculture, not Commercial. Further, there are several preconditions necessary for any of the property at those interchanges to be developed for commercial use, including a market demand study, PUD rezoning approval, and in the case of SE Bridge Road and SW Martin Highway west of the interchange, a required plan amendment to reclassify those roadways as major arterials. The evidence does not support a finding that elimination of the Expressway Nodes overlay would remove property from the County's commercial land use inventory.

54. Furthermore, this section speaks to providing necessary services to "population centers." Neither of the I-95 interchanges at SE Bridge Road or SW Martin Highway is a population center.

B. Internal Consistency

55. Petitioner further challenges elimination of the Expressway Nodes as contrary to section 163.3177(2), which requires all elements of a comprehensive plan to be consistent with each other.

56. Petitioner alleges that the Plan Amendment creates an inconsistency with FLUE Goal 4.2 "[T]o alleviate the negative impacts of inadequate public facilities and services and substandard structures for affected areas in the County." Petitioner's expert testified that removal of the Expressway Nodes designation will result in a lack of facilities to meet the needs of future travelers "as demand begins to evolve."

57. The objectives and policies implementing FLUE Goal 4.2 speak directly to areas in need of redevelopment, including creation of Community Redevelopment Areas. There is no evidence to support a finding that the SW Martin Highway and SE Bridge Road interchanges are areas in need of redevelopment.

58. Next, Petitioner contends the Plan Amendment is inconsistent with FLUE Policy 4.7A.5, which provides, in pertinent part:

> Policy 4.7A.5. Development options outside urban service districts. Martin County shall provide reasonable and equitable options for development outside the urban service districts, including agriculture and small-scale service establishments necessary to support rural and agricultural uses.

> A small-scale service establishment shall be defined as a small, compact, low intensity development within a rural area containing uses and activities which are supportive of, and have a functional relationship with the social, economic and institutional needs of the surrounding rural areas.

Petitioner's expert provided only conclusory testimony that the removal of the Expressway Nodes designation is inconsistent with this policy.

59. FLUE Policy 4.7A.5 requires the County to allow some opportunity for development outside the USDs. There is no evidence on which to base a finding that the Expressway Nodes designation is the only allowance for development outside the USDs, thus removal of the designation does not conflict with this policy.

60. Further, the Expressway Nodes designation, by its plain language, was created to serve the needs of the public traveling through the County. Deletion thereof does not conflict with a policy requiring some development to serve the needs of rural residents and businesses.

61. FLUE Goal 4.8 requires of the County, as follows:

> To encourage energy conservation and promote energy-efficient land use and development that implements sustainable development and green building principles.

62. Petitioner contends the Plan Amendment is inconsistent with this goal because travelers faced with congested facilities

will travel further into the County along the intersecting roadways to find the desired services, thus increasing traffic and travel times, as well as use of hydrocarbons.

63. The expert's testimony on this issue conflicts with his opinion that travelers faced with congested interchanges will either skip the interchange altogether, or re-enter I-95 to look for services at another interchange. On this issue, the expert's opinion is not accepted as credible.

64. It is unreasonable to assume that a traveler would exit I-95 at an interchange which advertises no services and travel some distance on the crossroad in search of said services.

65. Further, Goal 4.8 is implemented by objectives and policies which provide guidance for the County's land development regulations and which encourage green building standards and renewable energy resources. Petitioner appears to be taking the goal out of context.

66. Finally, Petitioner cites FLUE Goal 4.10 and Policy 4.10B.2 as inconsistent with the Plan Amendment. The provisions read as follows:

> Goal 4.10. To provide for adequate and appropriate sites for commercial land uses to serve the needs of the County's anticipated residents and visitors.
>
> * * *

> Policy 4.10B.2. Criteria for siting commercial development. Commercial development shall be strategically directed to areas best able to accommodate its specific requirements of land area, site, public facilities and market location. The aim is to promote efficient traffic flow along thoroughfares, achieve orderly development and minimize adverse impacts on residential quality.

67. Members of the public traveling through the County to other destinations are neither anticipated residents of, nor anticipated visitors to, the County.

68. The Expressway Nodes designation was created to serve the "immediate and unique needs of the public traveling through the County."

69. At hearing, Petitioner argued that the Plan Amendment was also inconsistent with provisions of the Economic Development Element of the County's plan. Inasmuch as Petitioner did not plead that issue in its Petition for Formal Administrative Hearing, the undersigned does not make any findings relevant thereto.[3/]

C. Balance of Uses

70. Section 163.3177(1) provides, in pertinent part, as follows:

> (1) The comprehensive plan shall 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.

71. This section applies to the County's Comprehensive Plan as a whole. No evidence was introduced to support a finding that the Comprehensive Plan, as a whole, fails to provide principles, guidelines, standards, and strategies for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the County.

72. Section 163.3177(6)(a)4. provides as follows:

> The amount of land designated for future planned uses shall provide a balance of uses that foster vibrant, viable communities and economic development opportunities and address outdated development patterns, such as antiquated subdivisions. The amount of land designated for future land uses should allow the operation of real estate markets to provide adequate choices for permanent and seasonal residents and business and may not be limited solely by the projected population.

73. The Plan Amendment does not change the amount of land designated for any particular FLUM category. The Plan Amendment makes no change to the FLUM.

74. Assuming, arguendo, that elimination of the Expressway Nodes overlay changes the amount of land designated for commercial use, that single change does not render the Comprehensive Plan out of balance or unable to foster vibrant, viable communities.

75. The public traveling through Martin County to other destinations are neither permanent nor seasonal residents or businesses.

IV. Wastewater Treatment Options

76. The Plan Amendment makes a number of changes in the wastewater treatment options available to serve development in the County.

77. Within the primary USD, FLUE Policy 10.1A.2 requires all new subdivisions of less than one acre to be served by regional sewer. Under the existing Comprehensive Plan, only new subdivisions within the primary USD exceeding two units/acre must connect to regional sewer systems.

78. FLUE Policies 4.7B.1 and 10.1A.2 prohibit the extension of regional sewer service into the secondary USD. Thus, new development in the secondary USD is limited to septic service (because package treatment plants are eliminated in another section of the Plan Amendment).

79. FLUE Policy 10.2A.7 increases the threshold size of lots within new subdivisions which may be developed on septic systems. Where the existing Comprehensive Plan allows new subdivisions of half-acre lots to develop on septic, the Plan Amendment requires a minimum one-acre lot. Further, new development qualifies only if it is more than one-quarter mile from regional sewer system collection or transmission lines.

80. Within the primary USD, approximately 100 undeveloped lots are located more than one-quarter mile from a connection point to the County's regional sewer service.

81. FLUE Section 10.2.B prohibits development within the USDs on septic systems where regional sewer systems are available (i.e., within one-quarter mile of a regional service line). The same policy limits development on septic systems outside the USDs to "low density residential as permitted by the underlying future land use designation and small scale service establishments necessary to support rural and agricultural uses."

82. FLUE Policy 10.1C.4 prohibits approval of development orders "where adequate water and sewer facilities cannot be provided." Similarly, FLUE Policy 10.1A.10 provides that development "shall not be approved where adequate regional water and sewage facilities cannot be provided, unless the development can meet the requirements for a [septic] system found in Policy 10.2A.7."

83. Finally, FLUE Policy 10.2A.8 limits the maximum flow of septic systems to 2,000 gpd per lot.

84. Taken together, the changes generally limit the type and density of future development allowed in the County.

85. Within the primary USD, the Plan Amendment requires more dense development to connect to regional sewer systems

while limiting use of septic systems to the lowest density development. Overall, the Plan Amendment encourages higher density future development and prioritizes regional service. These changes are consistent with the County's existing "urban containment policy" concentrating urban development within the primary USD.

86. In the secondary USD, the Plan Amendment restricts future development to low density (one-acre lots) where regional service is not available within one-quarter mile, and requires all future development within one-quarter mile to connect. These changes have little practical effect because most of the secondary USD is slated for future development at a rural density of one unit/two acres, with some estate densities at one unit/acre.

87. Outside the USDs, the Plan Amendment limits future development to low density residential, and limited commercial development to serve rural and agricultural needs, on septic systems.

88. Petitioner's challenge focuses primarily on, and the majority of evidence introduced related to, the 2,000 gpd limit on septic tank flow. Petitioner challenges FLUE Policy 10.2A.8 and Section 10.2.B.2 on a number of grounds, each of which is taken in turn.

A. Data and Analysis

89. Section 163.3177 requires plan amendments to "be based upon relevant and appropriate data and an analysis by the local government." The statute provides, "[t]o 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 at issue. Id.

90. Further, "data must be taken from professionally accepted sources." § 163.3177(1)(f)2. The statute does not require original data collection by local governments.

91. A septic system flow rate is the liquid flow rate of non-solid wastes (effluent) coming out of the residential or non-residential septic system after initial treatment. Septic systems are typically sized based on the flow rate.

92. When the Comprehensive Plan was first adopted in 1982, the County adopted a maximum flow rate of 2,000 gpd.

93. The 2,000 gpd standard was also the standard for the State of Florida at the time it was adopted by Martin County.

94. In 1993, the Legislature amended the state standard to allow maximum flows of 10,000 gpd for all uses. See ch. 93-151 § 1, Fla. Laws. In 1998, the state standard for commercial facilities was reduced to 5,000 gpd, where it remains today. See ch. 98-151, § 7, Fla. Laws.

95. Martin County did not adopt the state standard when it changed in either 1993 or 1998. The County maintained its lower maximum rate based on experience with septic system failures associated with poor maintenance, particularly of larger systems and commercial establishments, such as restaurants.

96. The state standard was adopted by the County in its 2009 EAR amendments, which became effective in January 2011. Thus, the 2,000 gpd standard governed development in Martin County for almost 30 years.

97. Despite the lengthy history of the 2,000 gpd standard in Martin County, the undersigned must find that the 2009 change to the higher state standards were supported by data and analysis since that change was found "in compliance" in 2011. Thus, the 2015 change back to the 2,000 gpd standard must likewise be based on data and analysis.

98. The County identified protection of its ground and surface water bodies from contaminants associated with septic system effluent as the main reason for the change.

99. In response to the Clean Water Act and the Florida Watershed Restoration Act, DEP implemented the Total Maximum Daily Load (TMDL) program. The program identifies water bodies which are "impaired" for a particular pollutant (i.e., exceeds the water body's capacity to absorb the given pollutant and still function for its designated use), and requires development

of Basin Management Action Plans (BMAPs) to restore impaired waters.

100. There are 32 impaired water bodies in Martin County. Among them are the St. Lucie Estuary and the Indian River Lagoon, which is part of the estuary. Both the estuary and the lagoon are impaired for nitrogen, among other contaminants.

101. The lagoon is a brackish-water environment in which phosphorus occurs in high levels. The growth of algae and other microorganisms is limited in that environment by the availability of nitrogen in the ecosystem. Nitrogen is a "limiting factor." When too much nitrogen is present, algae and other microorganisms become overgrown. An overgrowth of algae consumes excessive amounts of oxygen and dissolved oxygen in the marine environment, a primary indicator of water quality.

102. DEP adopted the TMDL for total nitrogen demand for the estuary in March 2009. The BMAP developed for the estuary includes both construction of stormwater management projects and conversion of particularly-identified developments from septic systems to regional wastewater service.

103. In March 2013, the County identified first priority stormwater projects at a cost of $15,790,000, and second priority projects at a cost of $17,990,000. The County also identified ten subdivisions to prioritize for conversion from septic to sewer service at a cost of $88,140,000. Together with

identified flood control projects, in 2013, Martin County estimated a grand total of $142,445,000 in projects to implement the BMAP.

104. The County has extended sewer service to approximately 1,800 properties, converting approximately eight developments from septic to sewer service.

105. Effluent from septic systems is only one source of nitrogen pollution to surface water bodies. Agriculture (from both fertilizer and animal waste), residential fertilizer, pet waste, and "atmospheric" nitrogen, are other sources of nitrogen pollution. A 2009 study by the Department of Health concluded that management of nitrogen sources, including septic systems, "is of paramount concern for the protection of the environment."[4/]

106. Initial treatment of raw wastewater occurs in the septic tank chamber, where solids settle to the bottom and liquids are separated from the solids. In this anaerobic (absent oxygen) state, the wastes are converted mainly to ammonia and ammonium (inorganic nitrogen). Septic tank effluent is then discharged to a drain field where nitrification occurs in an aerobic environment. Nitrification converts ammonium to nitrates in oxygen-rich unsaturated soils. Soils do not absorb nitrates, and much of the nitrates migrate to ground and surface waters causing contamination.

107. If nitrogen remains in the oxygen-rich soil, it can be converted to nitrogen gas and eliminated through the atmosphere through the denitrification process. Carbon and other minerals must be present in the soil for denitrification to occur. Denitrification is also a slow process that occurs only in the vata zone, the oxygen-rich soil between the bottom of the drainfield and the top of the water table.

108. The data and analysis, as well as the testimony presented at the final hearing, conflicted on the issue of how much nitrogen is removed from septic tank effluent through denitrification in Southeast Florida, where soils are well-drained, but the water table fluctuates seasonally.

109. In September 2013, a study prepared for DEP estimated the amount of nitrogen load from removed septic systems to surface water bodies in Martin County, as well as the cities of Stuart and Port St. Lucie. The study "shows that the load estimates are strongly correlated with nitrogen concentrations in surface water quality data, suggesting that septic load is a significant factor for water quality deterioration."[5/] In Martin County, where septic system removal was small scale, the study traced a majority of the removed nitrogen to specific water bodies.[6/]

110. The study found that the amount of nitrogen load is controlled by three factors: (1) length of flow path; (2) flow

velocity; and (3) drainage conditions. The following excerpt is instructive:

> Figure ES-4 shows that the load estimate decreases with the mean length of flow paths; the two largest loads per septic system are for North River Shores and Seagate Harbor [in Martin County] where the flow paths are the shortest. . . . This is reasonable because longer flow paths result in more denitrification and thus smaller load estimate. In line with this, larger flow velocity corresponds to shorter travel time and thus smaller amount of denitrification and larger amount of load. . . . Figures . . . indicate that the setback distance should be determined not only by the distance between septic systems to surface water bodies but also by groundwater flow conditions (the distance probably plays a more important role here). The groundwater flow conditions are closely related to soil drainage conditions at the modeling sites.

111. An October 2013 paper by Kevin Henderson, P.E., reviewed four studies between 1993 and 2011, and concluded that "[n]one of the studies are specific enough to [Southeast Florida] soils/groundwater aquifer to be definitive as regards nitrate nitrogen's fate once it becomes part of groundwater below a drainfield."[7/] Henderson maintains that the Southeast Florida groundwater aquifer is low-flux. Henderson further reported that studies have shown that anticipated nitrogen and total nitrogen groundwater contamination "is consistently absent at distances of more than 40 feet from drainfields."[8/]

112. The County's soil and water expert, Catherine Riiska, disagreed, maintaining the Southeast Florida water table is seasonally-dependent, and fluctuates greatly between the wet and dry seasons. During the wet season, Ms. Riiska explained the drainage system is insufficient to keep the water table low during the rainy season. When the water table is high, there is little opportunity for denitrification and nitrates can be pulled directly into the water flow.

113. While the experts disagreed as to how much nitrogen may be removed from septic tank effluent in Southeast Florida, the experts agreed that limiting the amount of potential flow from septic tanks will limit the amount of potential discharge, especially in the event of a failure of the system.

114. Petitioner contends that the 2,000 gpd standard does not react appropriately to the data and analysis because it does not take into account factors other than effluent volume that contribute to total nitrogen loading from septic systems, such as distance to surface water bodies and size of area served by the septic system.

115. The 2,000 gpd standard applies equally throughout the County regardless of location in proximity to surface water bodies.

116. Septic systems can be regulated based on either flow or loading. Loading would be expressed in gallons per measure

of property, such as gallons per acre per day. The County's Director of Utilities and Solid Waste, John Polley, agreed that, in terms of environmental impact, loading is a superior measure to flow rate.

117. The County is not required to adopt the superior measure for environmental protection, but to adopt a measure which is supported by data and analysis.

118. Finally, Petitioner contends that the 2,000 gpd standard is not based on data and analysis because it was chosen arbitrarily, without considering some less restrictive flow limit such as 3,000 gpd or 4,000 gpd.

119. The 2011 change from the 2,000 gpd flow limitation to the higher maximum state standard was not supported by the Martin County Health Department.

120. Robert Washam, a retired Environmental Administrator for the Martin County Health Department with more than 30 years' experience permitting and regulating septic systems in Martin County, testified and submitted in writing to the County as to his support for the change to 2,000 gpd. He iterated several reasons for his support, including the serious public health and environmental issues that can result from the failure of large septic systems; the documented failures of large systems inside the primary USD resulting in raw sewage flowing into wetlands, ditches, and eventually rivers; and the unsuitable soils and

water table conditions for large septic systems in rural areas of the County.[9/]

121. Section 381.0065(4)(e) provides as follows:

> (e) Onsite sewage treatment and disposal systems must not be placed closer than:
>
> 1. Seventy-five feet from a private potable well.
>
> 2. Two hundred feet from a public potable well serving a residential or nonresidential establishment having a total sewage flow of greater than 2,000 gallons per day.
>
> 3. One hundred feet from a public potable well serving a residential or nonresidential establishment having a total sewage flow of less than or equal to 2,000 gallons per day.
>
> 4. Fifty feet from any nonpotable well.

122. Petitioner's wastewater expert, Richard Creech, acknowledged in his testimony that these thresholds reflect that there is an opportunity for contamination of the public water wells by the larger septic systems.

123. Mr. Creech also agreed that, if a septic system is not properly maintained, functioning, designed, and sited, it may present a problem to surface waters.

124. Petitioner did not prove that the 2,000 gpd standard would not protect ground and surface waters from nitrogen loading. That issue is clearly a subject of fair debate.

B. Balance of Uses/Operation of Real Estate Markets

125. Section 163.3177(1), provides, in pertinent part:

> The comprehensive plan shall 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.

126. This section applies to the County's Comprehensive Plan as a whole. No evidence was introduced to support a finding that the Comprehensive Plan, as a whole, fails to provide principles, guidelines, standards, and strategies for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the County.

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

128. Petitioner contends the County failed to consider the economic impact of reducing the septic system flow rate to 2,000 gpd. Petitioner introduced no evidence regarding the effect of the 2,000 gpd limit on the future economic development of the County, only that the County failed to conduct economic analysis thereof.

129. While the County conducted no formal economic analysis of the change, the County clearly considered the effect of that limit on type and size of future development in the County.

130. The 2,000 gpd flow limitation was not a significant development constraint during the nearly 30 years that it was in effect.

131. Septic system size determinations are governed by Florida Administrative Code Rule 64E-6.008. The rule associates a specific gpd rate for each type of commercial, industrial, and residential establishment, based on factors such as the number of seats or patrons, number of employees, and number of bedrooms.

132. A four-bedroom home up to 3,300 square feet can be developed on a septic system with a 400 gpd flow rate, well within the 2,000 gpd flow established under the Plan Amendment. A 2,000 gpd flow rate will accommodate a 650-seat church without regular meal service (or 580 seats with weekly meal preparation), a 200-room hotel, and a 13,000 square foot office building.

133. The substantial expansion of the County's regional wastewater system inside the primary USD has reduced the prospective amount of future development on septic systems. Approximately 100 acres designated for non-residential use are

beyond one-quarter mile from sewer availability from Martin County. All other future non-residential development in the primary USD will be unaffected by the septic system flow limitation.

134. The flow limitation does not prohibit more intensive non-residential development in the primary USD. Rather, it encourages developers to expend funds to connect to the regional system so that increased intensity may be obtained.

135. The flow limitation will have limited, if any, impact on the balance of allowable uses in the secondary USD. The low densities and the lack of any approved commercial uses in that District make higher septic flows unnecessary.

136. The same is true for areas outside the USDs, where future development is limited to agricultural, very low density residential (one unit/20 acres), and some minor commercial land uses. Higher flow septic systems are also unnecessary in that area.

137. Based on concerns expressed by agricultural interests during the adoption process, the Plan Amendment allows agricultural uses to exclude consideration of a septic system associated with a residence on the same site. Thus, the County considered the impact of the flow limitation on the predominant industry in the County.

C. Miscellaneous Issues

138. In its Petition, Petitioner also raised the issue of whether the deletion of FLUE Policy 4.13.A8 is inconsistent with the Future Land Use Map which retains the overlay designation. Petitioner did not present any evidence on this issue. Thus, Petitioner did not prove the allegation beyond fair debate.

CONCLUSIONS OF LAW

139. 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).

140. 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.

141. "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.

142. 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 Plan Amendment is 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).

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

144. 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.

145. 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.

146. With regard to elimination of the Expressway Nodes overlay, Petitioner did not prove beyond fair debate that the change was not supported by data and analysis. Removing the potential for commercial development in areas outside of the USDs is supported by the County's "urban containment" policy and

consistent with the County's decision to limit the use of package plants for treatment of wastewater. The undersigned cannot conclude that the County has an obligation to provide services to the traveling public, as that issue is at least a subject of fair debate. Although Petitioner proved increases in the AADT through the affected interchanges, that data does not support a finding that additional services are required.

147. As to the 2,000 gpd septic flow limit, Petitioner did not prove, beyond fair debate, that the reduction in allowable flow will not achieve the County's goal of protecting its ground and surface waters from nitrogen loading. Petitioner did demonstrate regulating septic size in relation to the location of proximity to a surface water body may be a less restrictive means of accomplishing that goal. However, the County is not under an obligation to impose the least restrictive means of regulation.

148. Petitioner also introduced evidence that a septic system loading approach, rather than a septic system flow approach, would be a superior method for environmental protection.

149. However, a compliance determination is not a determination of whether a comprehensive plan amendment is the best approach available to the local government for achieving its purpose. See Pacetta v. Town of Ponce Inlet, Case

No. 09-1231 (Fla. DOAH Mar. 20, 2012; DEO June 19, 2012)(plan amendment prohibiting dry dock storage in specified area is "in compliance" even though dry dock storage is superior to wet dock storage for protecting marine life); Volusia Cnty. v. Dep't of Comm. Aff., Case No. 07-5107 (Fla. DOAH Sept. 22, 2009; DCA July 12, 2010)(plan amendment "in compliance" although the traffic impact studies used a land use code from the DOT trip generation manual which was less statistically-reliable than the one preferred by DOT, but was still professionally-acceptable); Manasota-88 v. Dep't of Comm. Aff., Case No. 02-3897 (Fla. DOAH May 14, 2004; DCA Aug. 13, 2004)(plan amendment "in compliance" although the local government designated wildlife greenway could have been larger to accommodate more species); McSherry v. Alachua Cnty., Case No. 02-2676 (Fla. DOAH Oct. 18, 2004; DCA May 22, 2005), aff'd, 903 So. 2d 194 (Fla. 1st DCA 2005)(while the County would have been better served to refine its definition of "strategic ecosystem" to include standards set forth elsewhere in the plan, the failure to do so does not invalidate the definition under the "fairly debatable" standard); and Geraci v. Dep't of Comm. Aff., Case No. 95-0259 (Fla. DOAH Oct. 14, 1998; DCA Jan. 13, 1999), aff'd, 754 So. 2d 35 (Fla. 1st DCA 1999) (plan amendment "in compliance" although Petitioner presented data and analysis that supported a different land use classification for his property than the one

chosen by the County). As well stated by Administrative Law Judge Stevenson in Geraci, "Petitioner's burden was not to show that [Petitioner's preferred land use classification] was better, but that [the assigned land use classification] was non-compliant to the exclusion of fair debate."

150. Petitioner did not prove beyond fair debate that the 2,000 gpd limit was not based on data and analysis.

151. Petitioner failed to prove beyond fair debate that either the elimination of the Expressway Nodes overlay or imposition of the 2,000 gpd flow standard was violative of section 163.3177(1), which requires the Comprehensive Plan as a whole to provide for "the orderly and balanced future economic, social, physical, environmental, and fiscal development" of the County.

152. Petitioner did not prove beyond fair debate that the Plan Amendment violated section 163.3177(6)(a)4., requiring a balance of uses to foster vibrant, viable communities and economic development opportunities. Petitioner established that the County performed no economic analysis of the impact of the proposed changes, but has cited no authority requiring said analysis. In the case of the 2,000 gpd flow standard, the evidence showed that the County specifically considered the economic impact on the agricultural sector of the economy.

153. Finally, Petitioner did not prove beyond fair debate that the Plan Amendment created any internal inconsistencies with other parts of the Comprehensive Plan. Most of the provisions cited by Petitioner with which the Plan Amendment were allegedly in conflict were taken out of context, or otherwise inapplicable.

Conclusion

154. For the reasons stated in the Findings of Fact, the Petitioner has not proven beyond fair debate that the Plan Amendment is 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 Department of Economic Opportunity enter a final order determining that Plan Amendment CPA 14-6, adopted by Martin County on December 16, 2014, is "in compliance," as that term is defined by section 163.3184(1)(b).

DONE AND ENTERED this 1st day of September, 2015, in Tallahassee, Leon County, Florida.

SUZANNE VAN WYK
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of September, 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 965 was adopted.

[2/] A number of other Petitioners, including Turner Groves, LP; Tesoro Groves, LP; Kai-Kai, LLC d/b/a Kai Kai Farms; Seminole Land Co.; Agri-Gators, Inc.; Long Land Co., Inc.; Bull Hammock Ranch, Ltd.; Turnpike Dairy, Inc.; Hobe Sugar, LLC; and Star Farms Corp., also challenged the Plan Amendment. The cases were subsequently consolidated under Case No. 15-0229GM. The other Petitioners' challenges were subsequently settled and dismissed. For purposes of this Recommended Order, Martin County Land Co. is the sole Petitioner.

[3/] 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 Apr. 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

findings 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).

[4/] Florida Onsite Sewage Nitrogen Reduction Strategies Study, Final Report, Hazen and Sawyer (October 2009).

[5/] Estimation of Nitrogen Loading from Removed Septic Systems to Surface Water Bodies in the City of Port St. Lucie, the City of Stuart, and Martin County, Ming Ye and Huaiwei Sun (Department of Scientific Computing, Florida State University, September 2013), p. iv.

[6/] Id.

[7/] "Septic systems total nitrogen loading and potential groundwater pollution related to nutrient enrichment of SE Florida Coastal Estuaries [Draft]," Evergreen Engineering, Inc., Kevin Henderson, P.E. (October 2013).

[8/] Id.

[9/] Petitioner's planning expert agreed that information provided by a citizen with significant expertise in an area may constitute data and analysis upon which a plan amendment is based and, depending upon the citizen's expertise and credentials, would be considered a professionally acceptable source.

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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.