STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WHS VISIONS OF LAKELAND, LLC, A FLORIDA LIMITED LIABILITY COMPANY; AND BS RANCH AND FARM, INC., A FLORIDA CORPORATION,

Petitioners,

vs. Case No. 17-5999GM

POLK COUNTY, A POLITICAL SUBDIVISION,

Respondent.
_____/

RECOMMENDED ORDER

A duly-noticed final hearing was held in this matter in Bartow, Florida, on December 19 and 20, 2017, before Suzanne Van Wyk, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Patrice Boyes, Esquire
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For Respondent: Edward P. de la Parte, Jr., Esquire
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STATEMENT OF THE ISSUE

Whether Polk County Comprehensive Plan Amendment 17D-08/DMS 59550, adopted by Ordinance 2017-049 on October 3, 2017 (the Plan Amendment), is "in compliance," as that term is defined in section 163.3184(1)(b), Florida Statutes (2017).[1/]

PRELIMINARY STATEMENT

On November 1, 2017, Petitioners filed a Petition with the Division of Administrative Hearings (Division) challenging the Plan Amendment as not based on relevant and appropriate data and analysis, internally inconsistent with the Polk County Comprehensive Plan (Comprehensive Plan), and not providing meaningful and predictable standards for the use and development of land and meaningful guidelines for more detailed land development regulations, in violation of the Community Planning Act, chapter 163, part II, Florida Statutes.

The case was originally assigned to Administrative Law Judge Francine M. Ffolkes, and was transferred to the undersigned on November 7, 2017. The case was originally set for final hearing on November 30 and December 1, 2017, but was continued due to a death in the family of Petitioner's counsel.

The case was rescheduled for final hearing on December 19 and 20, 2017, in Bartow, Florida, and commenced as rescheduled.

The parties' Joint Exhibits J1 through J12 were admitted in evidence.

Petitioners introduced the testimony of William H. and Brandy L. Stanton; Stuart Cullen, P.E.; and David Depew, who was accepted as an expert in comprehensive planning. Petitioners' Exhibits P1 through P5, P7 through P12, P14, and P15 were admitted in evidence.

Respondent, Polk County (the County), introduced the testimony of John Bohde; Timothy G. Townsend, accepted as an expert in solid waste management facilities and soil manufacturing facilities; and R. Adam Carnegie, AICP, accepted as an expert in comprehensive planning. Respondent's Exhibits R2 through R4, R6, R8, R9, R11, R14, R17 through R19, R25, R28, R29, R31, R34, R39, R40, R46 through R52, R54 through R61, R64, R65, R67, R68, R72 through R75, R78 through R82, R86, R90 through R92, R95 through R97, R99, and R100 were admitted in evidence.

The parties also introduced the Comprehensive Plan and Land Development Code (LDC) in evidence.

The three-volume Transcript of the final hearing was filed with the Division on December 26, 2017. The parties stipulated to filing proposed recommended orders on January 16, 2018, 21 days following filing of the Transcript.[2/]

The parties timely filed Proposed Recommended Orders on January 16, 2018, 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, WHS Visions of Lakeland, LLC (WHS Visions), is a limited liability company with its principal place of business at 2506 Longhorn Avenue in Lakeland, Florida. WHS Visions owns property in Polk County.

2. William H. and Brandy L. Stanton are the managing members of WHS Visions, and Mr. Stanton is the registered agent.

3. Petitioner, BS Ranch and Farm, Inc. (BS Ranch), is the operating company for the property owned by WHS Visions in Polk County. BS Ranch began operating a soil manufacturing facility on property owned by WHS Visions in Polk County in 2011.

4. Ms. Stanton is the President and a Director of BS Ranch, and Mr. Stanton is a Vice President and Director thereof.

5. The County has challenged Petitioners' standing to bring the instant action, alleging Petitioners did not submit oral or written comments relating to the Plan Amendment to the County during its consideration of the Plan Amendment.

6. Petitioners argue they made verbal comments concerning the Plan Amendment at both the transmittal and adoption hearings on the Plan Amendment through their agent, Stuart Cullen.

7. Stuart Cullen is a registered Professional Engineer and Vice President of Engineering for George F. Young, Inc., an

engineering consulting firm with a business address of 1905 South Main Street in Gainesville, Florida.

8. On February 5, 2014, Mr. and Mrs. Stanton executed "Property Owner Affidavits" authorizing George F. Young and Mr. Cullen to represent "William H. Stanton, Jr. and/or Brandy L. Stanton and/or BS Ranch" in connection with "Land Use Changes and/or associated development plan or permitting applications" regarding the properties owned by them as evidenced by the attached legal descriptions.

9. Petitioners' Exhibit 12 is a copy of the executed Property Owner Affidavits attached to a development review application dated November 6, 2014, for conditional use approval for the soil manufacturing facility. Mr. Stanton testified that the Property Owner Affidavit was created by him, was a generic form for use by the Stantons, and was submitted with several different applications for land use approvals and permits from the County.

10. In 2015, BS Ranch engaged George F. Young, Inc., on an hourly basis for services related to expansion of the soil manufacturing facility. Mr. Cullen was listed as the contact for George F. Young, Inc., on the contract with BS Ranch, and Mr. Cullen executed the contract on behalf of George F. Young, Inc. The scope of services for the contract included "design,

engineering, permitting, meetings" among other services "as necessary for expanding the facility's operations."

11. George F. Young, Inc., and Mr. Cullen's representation has not been limited to permit approvals for BS Ranch operations. Mr. Cullen represented BS Ranch in an application for an amendment to the LDC in 2015 to allow soil manufacturing facilities in Industrial (IND) land use districts.

12. All appearances by Mr. Cullen before the County Commission beginning in 2014 through the date of the final hearing have been on behalf of Mr. and Mrs. Stanton and BS Ranch.[3/]

13. The County considered the subject Plan Amendment, CPA 17D-08, concurrently with an amendment to the LDC, LDC 17T-10.

14. On August 22, 2017, the County conducted the transmittal hearing on the Plan Amendment. The County opened a public hearing on the Plan Amendment together with the LDC amendment.

15. Mr. Cullen appeared, introduced himself, and gave his business address in Gainesville. Mr. Cullen did not state whether he was speaking on behalf of any person or entity at the public hearing.

16. Mr. Cullen testified that Mr. and Mrs. Stanton requested him to speak on their behalf and, that, given his

numerous appearances in front of the County Commission on behalf of these same clients, it was "well known" that he was speaking on behalf of BS Ranch. Mr. Cullen explained that his representation of BS Ranch "was essentially the only reason I would have been talking."

17. Mr. Cullen's comments were limited to the LDC amendment, rather than the Plan Amendment. The substance of his comments was a request to restore a previous version of the LDC which allowed Solid Waste Management facilities to be sited in IND land use districts. His concern was clearly with the effect of the LDC amendment on Petitioners' existing operation. Mr. Cullen explained to the Commission, "So, in effect, you are taking a [use] that exists in an available land use category that is available for somebody to develop . . . and telling them, no, you can't do it anymore because of your land use category."

18. On October 3, 2017, the County Commission opened a public hearing on the Plan Amendment together with the LDC amendment. Mr. Cullen appeared, introduced himself, and gave his business address. Mr. Cullen did not identify whether he was speaking on behalf of any person or entity. Mr. Cullen was the only speaker during the public hearing.

19. Mr. Cullen addressed both the Plan Amendment and the LDC amendment. His comment on the Plan Amendment was limited to

a procedural issue. His comments regarding the LDC amendment mirrored the comments he made at the transmittal hearing.

II. Soil Manufacturing Facility

20. The Comprehensive Plan contains the following definition of Soil Manufacturing, adopted in 2016:

> A facility that makes soil and soil-related products using natural products as the primary ingredients. The manufacturing process utilizes various waste product streams including, but not limited to, yard waste, tree trimmings, other plant materials, pre-consumer food waste, post-consumer food waste, septage, bio-solids, and sludge. These materials are then treated and processed using the natural aerobic and anaerobic decomposition process to create a soil product that is sold and removed from the facility.

III. The Plan Amendment

21. The Plan Amendment makes the following pertinent changes to Division 4.400, Glossary, of the Comprehensive Plan:

> MATERIALS RECOVERY FACILITY: A solid waste management facility that provides for the extraction from solid waste of recyclable materials, materials suitable for re-use, repurposing, use as a fuel or soil amendment, or any combination of such materials including without limitation a Soil Manufacturing facility ~~but shall not include soil manufacturing~~.
>
> * * *
>
> SOLID WASTE MANAGEMENT FACILITY: Any solid waste disposal facility, solid waste transfer station, materials recovery facility, volume reduction facility, other facility, or combination thereof, the

> purpose of which is resource recovery of the disposal, recycling, processing or storage of solid waste. Salvage Yards, Construction Aggregate Processing, and Construction Aggregate Storage ~~and Soil Manufacturing~~ are excluded from this definition, but may by [sic] accessory uses to a solid waste management facility.

22. Generally, the change brings a soil manufacturing facility within the definition of a Solid Waste Management Facility. The full impact of the change is not apparent from the face of the Plan Amendment alone. The Plan Amendment must be analyzed in conjunction with the LDC amendment.[4/]

23. LDC 17T-10 deletes Soil Manufacturing from Table 2.1, the LDC "Use Table for Standard Land Use Districts," and deletes Soil Manufacturing as a conditional use subject to regulations of Chapter 3. This change effectively eliminates soil manufacturing facilities as an allowable, albeit conditional, use in IND land use districts.

24. LDC 17T-10 further deletes in its entirety the stand-alone criteria for conditional use approval of soil manufacturing facilities, instead regulating those facilities as follows:

> Section 303 Criteria for Conditional Uses
>
> Manufacturing, Soil
>
> 1. All Soil Manufacturing facilities shall be regulated by the Solid Waste Management Facilities standards set forth in this LDC

> Section 303 and the Comprehensive Plan except as provided in subsection 2, below.
>
> 2. Any Soil Manufacturing facilities with a valid level 4 review approval issued under the LDC as of the effective date of LDC 17T-10 may continue to develop in accordance with the approval in place as of the effective date of LDC 17T-10. Any such previously approved facility shall continue to be governed the Soil Manufacturing regulations adopted by Ordinance 16-040. Any such previously approved facility may be modified or expanded pursuant to Section 120 without becoming subject to the Solid Waste Management Facility standards set forth in this LDC Section 303 and the Comprehensive Plan.

25. This change brings soil manufacturing facilities under the County's regulatory scheme for Solid Waste Management facilities.

26. Both the existing Comprehensive Plan (Future Land Use Policy 2.125-O1) and the LDC restrict location of Solid Waste Management Facilities to Institutional land use districts.

27. Together the Plan Amendment and the LDC amendment restrict soil manufacturing facilities to Institutional land use districts.

28. Petitioners' property and soil manufacturing operation is located in the IND land use category. Thus, together the Plan Amendment and the LDC amendment render Petitioners' use non-conforming.[5/]

IV. Solid Waste Siting Ordinance

29. The LDC Amendment changes the development review process and criteria for siting, operating, and expanding a soil manufacturing facility, by bringing them under the purview of the Solid Waste Siting Ordinance (Siting Ordinance).

30. The Siting Ordinance requires a Level 4 site plan review and consideration of the following:

> The haul routes from the nearest arterial roadway, and proposed points of access to the property;
>
> The proposed date the construction will commence;
>
> The volume of waste to be received;
>
> An explanation of the types of wastes to be received;
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> A statement specifying the hours of operation;
>
> The source of the solid waste to be received;
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> The levels of odor, dust, and noise anticipated to be generated by the facility and proposed mitigation thereof;
>
> Proposed buffering, which may include more landscape buffering than required by the code; and
>
> The height of all structures and other improvements.

31. The Siting Ordinance prohibits direct access to a paved local commercial, collector, or arterial roadway, or to a

local residential road. It also sets mandatory setbacks for Landfills, Incinerators, and Materials Recovery facilities. The setbacks applicable to Materials Recovery facilities are 100 feet on all sides, and 500 feet "when adjacent to residentially used or designated property."

V. The 2016 Amendment

32. In 2016, upon application by BS Ranch, the County amended the Comprehensive Plan and LDC to create "Soil Manufacturing Facility" as stand-alone use, and created a "carve out" from the Siting Ordinance for soil manufacturing facilities.

33. Under existing LDC section 303, soil manufacturing facilities are subject to a minimum size of 100 acres, located a minimum of one-half mile from residential uses and any school or hospital, 200 feet from any natural waterbody, and 1,500 feet from any wellhead supplying a public water system. The restrictions include a minimum setback of 300 feet from residential districts and a requirement to sequester all processed liquids on site either with a liner or other physical barrier.

34. Under the existing regulations, a soil manufacturing facility must submit a Facility Operating Plan (Operating Plan) including the following:

> General explanation of the types of wastes to be received;
>
> Identification of the general sources of the waste to be received;
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> Regulatory permits required to operate all phases of the proposed facility;
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> Vehicle circulation on and off site;
>
> Methods for mitigation of all odor, dust, and noise anticipated to be generated by the facility to include: best management practices to address potential odor sources; the monitoring of odors at the project perimeter; the identification of potential off-site odor receptors; and a response protocol for complaints and the resolution of substantial complaints;
>
> Description of the treatment process in map and narrative form;
>
> Description and mitigation plan to address the facility's interaction with environmentally sensitive areas, any structures, and the safety of residents.

35. If a soil manufacturing facility is the "substantiated source of objectionable off-site odors," the LDC requires the operator to "immediately take steps to resolve the odor event or curtail operations until the necessary course of action has been identified and implemented."

36. Lastly, the LDC deems any modification to the facility Operating Plan to be a major modification subject to Level 4 review.

37. The Plan Amendment essentially reverses the 2016 amendment, restricting the location of soil manufacturing facilities to Institutional land use districts and subjecting them to regulation as a solid waste management facility pursuant to the Siting Ordinance.

VI. Challenges to the Plan Amendment

A. Data and Analysis

38. The overarching basis on which Petitioners challenge the Plan Amendment is a lack of supporting data and analysis.

39. Section 163.3177(1)(f) requires all plan amendments to be "based on relevant and appropriate data and an analysis by the local government that may include, but not be limited to, surveys, studies, community goals and vision, and other data available on that particular subject at the time of adoption of the . . . plan amendment."

40. The County suggests the Plan Amendment is supported by three categories of data.

Survey Data

41. First, the County points to the data from a survey undertaken in 2016 during review of the BS Ranch application to treat soil manufacturing facilities as a stand-alone use.

42. In 2016, staff undertook a survey of 11 local government jurisdictions to evaluate the use classifications given to soil manufacturing facilities, land use districts in

which they were allowed, the process by which they could be sited (e.g., use by right, conditional, special exception), required setbacks, and whether an operation plan was required. County staff surveyed the two adjoining jurisdictions, Highlands and Hardee Counties, and nine jurisdictions with "similar land use characteristics," industries, and access to the I-4 corridor.

43. County staff found, "[i]n the 11 counties, the proposed Soil Manufacturing use . . . is mostly considered a solid waste management facility and often limited to the same places that landfills are placed." Of the 11 counties, six classified the facilities as solid waste management facilities or solid waste composting facilities, and a seventh as a landfill.

44. Staff continued, "[h]owever, nine out of the 11 counties direct private landfills to industrial districts . . . . This supports the applicant's request to locate these facilities in IND districts."

45. In 2016, staff analyzed the then-current regulating scheme which categorized soil manufacturing within a broad umbrella of Solid Waste Management facilities. In the staff report on the 2016 plan amendment, staff found that some uses under that umbrella "have manufacturing characteristics such as

dust and noise . . . and the manufacturing of soil or soil amendments as described in the Materials Recovery facility."

46. In the report, staff concluded as follows:

> The applicant's use has a significant manufacturing component and has more off site impacts than a typical Institutional Future Land Use designation which typically includes a school or fire station. Furthermore, Institutional Future Land Use designations are located throughout the County where manufacturing impacts would be significant to neighboring property owners. Therefore, this amendment better aligns a manufacturing component with the most appropriate land use which helps protect the environment and quality of life.

47. In the 2016 staff report for the accompanying LDC amendment, staff concluded, "The IND district is the most appropriate location for this proposed use." Staff made a finding that the 2016 amendment was internally consistent with Policy 2.113-A1 of the Comprehensive Plan governing the uses and activities allowed in the IND district.

48. Based on this data and analysis, staff recommended allowing soil manufacturing facilities as a conditional use in IND districts requiring Level 3 review (Planning Commission approval). The County adopted soil manufacturing facilities as a conditional use in IND districts requiring Level 4 review (County Commission approval).

49. With regard to off-site impacts, staff found as follows:

> Whenever solid and liquid wastes are brought onto a property, the immediate response is to be concerned about neighboring property values, particularly that of permanent residents. The best form of protection from the impacts associated with wastes (smell primarily) is separation. Staff reviewed the 11 counties surveyed for their setback requirements between residential properties and proposed salvage yards, solid waste facilities, and any uses that process septage waste. The majority of the setback distances exceeded 150 feet. The ones that were less required conditional use approval for which the setback could be established based on location.

50. The County adopted a requirement to site soil manufacturing facilities a minimum of one-half mile from residential uses and require a minimum 300-foot setback from residential districts.

51. Finally, staff addressed the risk of environmental effects. In the staff report, staff stated:

> As a condition of approval in the amendment, it is recommended that soil manufacturing processes have an operation plan. Such a plan not only assesses risk and provides for contingencies, but also demonstrates the applicant's competency in running the facility. In the survey staff conducted, four of the 11 jurisdictions required this for their soil manufacturing equivalents. Key to all of the required operation plans are reporting of the type of waste coming in, the process and byproducts, as well as the environmental analysis and waste containment assurances.

52. The County implemented staff's recommendation by requiring the above-summarized Operating Plan.

53. The County argues that the 2016 survey is relevant and appropriate data to support the Plan Amendment because the survey found that most jurisdictions classified soil manufacturing facilities as a solid waste management facility and often limited those uses to the same land use categories in which landfills are located.

54. Staff did not testify at the final hearing. No evidence was introduced to counter staff's 2016 findings that Institutional land use districts are located "throughout the County where manufacturing impacts would be significant to neighboring property owners"; that IND designations comprise less than .6 percent of the unincorporated land area; and staff's opinion that "[t]he IND district is the most appropriate location for" soil manufacturing facilities.

55. In support of the Plan Amendment, which regulates soil manufacturing facilities as solid waste management facilities, the County introduced expert witness opinions that soil manufacturing facilities exhibit many of the same characteristics as solid waste management facilities, and are, in fact, solid waste management facilities.

56. For example, the waste streams accepted at a soil manufacturing facility are the same types of waste processed at a solid waste management facility; the soil manufacturing facility employs the same treatment operations as a solid waste

management facility; the two types of facilities pose many of the same environmental, human health, and nuisance risks; and soil manufacturing facilities are subject to Department of Environmental Protection (DEP) permitting as solid waste management facilities.

57. The expert witness testimony was persuasive: soil manufacturing facilities have many of the same characteristics as waste management facilities; thus regulation of those facilities as solid waste management facilities is entirely appropriate.

DEP Enforcement Data

58. The County's conclusion that a soil manufacturing facility is practically identical to a solid waste management facility, and thus should be regulated the same, was based largely in part on DEP permitting and enforcement records the County deems to be data and analysis supporting the Plan Amendment.

59. BS Ranch has obtained several permits from DEP. BS Ranch received a Source Separated Organics Processing Facility Registration in 2010, which was renewed annually through 2013. DEP issued an Environmental Resource Permit (ERP) for construction of certain facilities at the site on February 26, 2016. On March 25, 2016, DEP issued BS Ranch both an Industrial Wastewater Permit (IWP) and an Organic Recycling

Facility permit. DEP conducted a wetlands jurisdictional determination on the property and issued a wetland delineation determination on May 3, 2016.

60. As new data supporting the Plan Amendment, the County introduced documentation of DEP enforcement actions taken against BS Ranch's Organic Recycling Facilities permit. The documents include an October 2014 Warning Letter which culminated in denial of BS Ranch's Organic Recycling Facility permit, entry of a Consent Order on February 3, 2015, and a Consent Order with Corrective Action Plan on November 25, 2015.

61. The County also introduced a Warning Letter and other correspondence from 2017 relating to alleged violations of BS Ranch's IWP and ERP. Among the issues addressed in the Warning Letter are off-site odor mitigation and the unauthorized location of septage and biosolids on the property.

Code Enforcement Data

62. The last category of data relied upon by the County to support the Plan Amendment is the County's own code enforcement actions against Petitioners' operation.

63. The County issued its conditional use approval of Petitioners' operation, including its Operation Plan, on December 6, 2016.

64. On March 24, 2017, the County issued notices of violation[6/] citing WHS Visions with violating various LDC

provisions based largely on Petitioners' operation as "the reported source of objectionable off-site odors." The notices both require WHS Visions to seek additional approvals of the facility and impose a deadline of April 5, 2017, for WHS Visions to correct the violations.

65. The County also issued a "Cease and Desist Illegal Activity" letter to WHS Visions. The letter refers to "numerous instances of fugitive objectionable odor emissions severely impacting a large number of offsite residents, employees of nearby businesses, and Polk Parkway employees." In the letter, the County required WHS Visions to "immediately cease and desist" operations, particularly receipt of "putrescible wastes such as vegetative wastes, food scraps, animal by-products, animal manure, wastewater treatment facility effluent, biosolids, septage, and organic sludges" until all levels of approval are completed.

66. Petitioners argue these enforcement documents are not the type of data contemplated in section 163.3177(1)(f), which includes "surveys, studies, community goals and vision, and other data available at the time of adoption" to support the Plan Amendment.

67. Petitioners are correct that the enforcement actions are neither quantitative nor qualitative data regarding the

off-site impacts associated with soil manufacturing facilities. The documents are data, however anecdotal, regarding the experience of this one facility and its related permits. They are not categorically excluded from data contemplated by 163.3177(1)(f).

Appropriate Reaction to the Data

68. The statute requires the local government's reaction to the data be "appropriate" and "to the extent necessary indicated by the data." § 163.3177(1)(f), Fla. Stat.

69. The DEP enforcement and code enforcement data arguably support the County's decision to subject soil manufacturing facilities to a different regulatory scheme. Expert witnesses testified that the Siting Ordinance was superior to the existing regulations for the spatial location of waste streams on site, as well as the length of time wastes could remain on site.[7/] The Siting Ordinance also contains a stop-work order enforcement tool.

70. However, the Plan Amendment is not an appropriate reaction to anecdotal data regarding the off-site odor and environmental impacts of one soil manufacturing facility by allowing those facilities in land use districts which are more dispersed throughout the County.

71. The enforcement actions do not overcome the County's 2016 analysis and findings that the use "has more off site

impacts than a typical Institutional Future Land Use designation," that "Institutional Future Land Use designations are located throughout the County where manufacturing impacts would be significant to neighboring property owners," and its conclusion that, for Polk County, "the IND district is the most appropriate location for this proposed use."

72. None of the expert planning witnesses had evaluated the proximity of Institutionally-designated properties to residential properties in the County or offered opinions regarding the appropriate placement of soil manufacturing facilities within the County.

73. There is no record evidence that the County has fewer Institutional land use designations than it did in 2016, that those locations are less dispersed, or that fewer properties with those designations are located adjacent to residentially-designated properties.

74. Armed with new data documenting fugitive air emissions from the existing facility, as well as potential for human health risks, the County made a decision to site similar facilities in the future in land use districts closer in proximity to residential properties. That decision was not an appropriate reaction to the data.

B. Internal Inconsistency

75. In the Petition for Administrative Hearing, Petitioners alleged the Plan Amendment "has created internal inconsistencies . . . by relying on the same data and analysis" relied upon in support of the 2016 amendments.

76. Petitioners did not identify any specific Comprehensive Plan element, policy, or map with which the Plan Amendment is alleged to be inconsistent. Instead, Petitioners' expert testified generally that the Plan Amendment created internal inconsistencies because the data on which it was based, namely the 2016 survey of jurisdictions, was likewise the basis for the County's 2016 amendment establishing IND as the appropriate land use category in which to site soil manufacturing facilities.

77. Petitioners' evidence was insufficient to support a finding that the Plan Amendment creates an inconsistency with any element, policy, or map of the existing Comprehensive Plan.

C. Meaningful and Predictable Standards

78. Finally, Petitioners challenge the Plan Amendment as contrary to section 163.3177(1), which requires comprehensive plans to "guide future decisions in a consistent manner" and establish "meaningful and predictable standards for the use and development of land and provide meaningful guidelines for the content of more detailed land development regulations."

79. Petitioners' expert testimony on this issue was conclusory and the logic somewhat circular. The underlying criticism was, again, the inconsistency of using the same data to reach diametrically-opposed conclusions regarding the appropriate land use district to site soil manufacturing facilities. Further, the expert testified that because the Plan Amendment rendered Petitioners' property non-conforming (both in its use and applicable development standards), it created "uncertainty . . . for any property owner wanting a reasonable and consistent development plan" for his or her property, and "uncertainty and inconsistency of standards for controlling the distribution of land uses" because it "changes the standards by which uses are classified as Industrial."

80. On the contrary, the Plan Amendment does not create uncertainty for siting soil manufacturing facilities in the future. Under the Plan Amendment those facilities are clearly limited to Institutional land use categories, subject to the Siting Ordinance and Level 4 development review. While the Plan Amendment renders Petitioners' property non-conforming, that is not a sufficient basis on which to find that the Plan Amendment renders the entire Comprehensive Plan without "meaningful and predictable standards for the use and development of land" generally.

D. Other Issues

81. Petitioners included in the joint pre-hearing stipulation as disputed issues, whether the Plan Amendment was "vague" and permitted the County "to arbitrarily and capriciously approve or deny plan amendments or development approvals, thereby subjecting landowners to financial burdens and creating internal inconsistencies in the [Comprehensive Plan]." Respondent objected to these issues as outside the scope of this proceeding.

82. The issue in this case is whether the Plan Amendment is "in compliance," as that term is defined in 163.3184(1)(b). The governing statute does not include "vagueness," "arbitrariness," or "capriciousness" as a standard for compliance determinations, and Petitioners cited no authority supporting such a reading of the statute.

83. Petitioners' arguments on this point appear to recast the data and analysis argument in hopes of getting a second bite at the apple.

84. Assuming, arguendo, the Plan Amendment could be invalidated on the basis of vagueness, arbitrariness, or capriciousness, Petitioners did not introduce any credible evidence to support a finding that the Plan Amendment is either vague, arbitrary, or capricious.

CONCLUSIONS OF LAW

85. 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.

86. 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).

87. The parties stipulated that WHS Visions owns property in the County and that BS Ranch operates a business in the County. Petitioners' standing turns on whether they "submitted oral or written comments, recommendations, or objections to" the County during its consideration of the Plan Amendment. Id.

88. The County alleges Mr. Cullen's comments during the transmittal and adoption hearings cannot be attributed to Petitioners because Mr. Cullen did not identify himself as speaking on their behalf.

89. The County's contention is contradicted by precedent. "There is no express language in section 163.3184 that would deny a corporation standing as an affected person if the corporation's representative makes timely comments, but does not identify the name of the corporation at the time the comments are made." Gulf Trust Dev., LLC v. Manatee Cnty., Case No. 11-4502 (Fla. DOAH Mar. 2, 2012; Fla. DEO Mar. 30, 2012); and see

also Hussey v. Brown, Case No. 02-3795 (Fla. DOAH Apr. 29, 2003; Fla. DCA July 22, 2003) (finding representatives' comments fairly attributable to a single landowner where one representative identified himself as representing a coalition of "landowners who own property" within the area subject to the plan amendment, and a second representative commented, "I represent the 15,000 coalition and literally thousands of individuals," even though the list of individual owners was not placed in evidence.).

90. An individual may be found to represent a particular entity when the individual regularly appears before the local government representing the entity, is well-known to appear in that capacity, and is authorized by the entity to appear in that capacity. See Mildred Falk and Miami Bch. Homeowners Ass'n. v. City of Miami Bch., Case No. 89-6803 (Fla. DOAH Aug. 13, 1990; Fla. DCA Sept. 12, 1990).

91. Next, the County argues that Mr. Cullen's comments did not relate to the Plan Amendment, but rather the LDC amendment being considered by the County concurrently therewith. The County cites Starr v. Department of Community Affairs, Case No. 98-0449 (Fla. DOAH Feb. 11, 2000; Fla. DCA May 16, 2000), for the proposition that "there must be some connectivity between the comments, recommendations or objections made, the

specific . . . plan amendment under consideration, and the local government's transmittal, review and adoption process of said . . . plan amendment."

92. In light of the Findings of Fact regarding the relationship between the Plan Amendment and the LDC amendment, Mr. Cullen's comments connected directly to the heart of the matter--the impact of prohibiting soil manufacturing facilities in the IND land use district.

93. Both WHS Visions and BS Ranch are "affected persons" with standing to bring this action pursuant to 163.3184(1)(a).

94. "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.

95. Polk County's determination that the Plan Amendment is "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), Fla. Stat.

96. 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 explained:

> The fairly debatable standard is a highly deferential standard requiring approval of a planning action if a reasonable person could differ as to its propriety. In other words, an ordinance may be said to be fairly debatable when for any reason that is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity.

97. "The 'fairly debatable' rule is a rule of reasonableness; it answers the question of whether, upon the evidence presented to the [government] body, the [government's] action was reasonably-based." Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship, 619 So. 2d 996, 1002 (Fla. 2d DCA 1993)(citing Town of Indialantic v. Nance, 400 So. 2d 37, 39 (Fla. 5th DCA 1981)).

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

Data and Analysis

99. 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."

100. 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.

101. Based upon the foregoing Findings of Fact, Petitioners proved beyond fair debate that the Plan Amendment does not react appropriately to the County's 2016 survey data and extensive analysis sustaining its decision that "the IND district is the most appropriate location for the [soil manufacturing] use." The County's land use planning decision to restrict soil manufacturing facilities to Institutional districts is not open to dispute on grounds that make sense or point to a logical deduction.

102. The Plan Amendment both regulates and sites soil manufacturing facilities as solid waste treatment facilities. The County's evidence of appropriate locations to site the use, from a land use perspective, was uncontroverted. Faced with that evidence, the County's decision to change the appropriate land use district going forward was not reasonable. Evidence of the DEP and local code enforcement actions may constitute evidence of a need for a different regulatory structure, but were insufficient to support the land use change.

Petitioners' Remaining Grounds

103. Petitioners did not prove beyond fair debate that the Plan Amendment rendered the County's comprehensive plan internally inconsistent, devoid of meaningful and predictable

standards for the use and development of land, and meaningful guidelines for more detailed land development regulations, or otherwise inconsistent with statutory requirements.

Conclusion

104. For the reasons stated above, the Petitioners have proven beyond fair debate that the Plan Amendment is not in compliance with the specified provisions of chapter 163, Florida Statutes.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Administration Commission enter a final order determining Polk County Comprehensive Plan Amendment 17D-08/DMS 59550, adopted by Ordinance 2017-049 on October 3, 2017, is not "in compliance," as that term is defined in section 163.3184(1)(b), Florida Statutes.

DONE AND ENTERED this 14th day of March, 2018, in Tallahassee, Leon County, Florida.

Suzanne Van Wyk

SUZANNE VAN WYK
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of March, 2018.

ENDNOTES

[1/] All references to the Florida Statutes are to the 2017 version.

[2/] By agreeing to a deadline for filing post-hearing submissions more than 10 days after the date on which the Transcript was filed, the parties waived the requirement that the undersigned issue this Recommended Order within 30 days after the date on which the Transcript was received. See Fla. Admin. Code R. 28-106.216(2).

[3/] Respondent attempted to prove that it was not well-known that Mr. Cullen would be representing Petitioners at the transmittal and adoption hearings because Mr. Cullen had represented other clients in permitting and development approval processes in the County and introduced himself as representing those clients at related public hearings. The evidence proved that any appearances by Mr. Cullen on behalf of other clients during the relevant time period were made before staff and members of the Planning Commission or other body subordinate to the County Commission.

[4/] In fact, the Development Review Committee (DRC) staff report on LDC 17T-10 plainly states that the Plan Amendment was purposefully crafted to render the LDC amendment consistent with the Comprehensive Plan.

[5/] Whether Petitioners' operation is a "grandfathered" non-conforming use, pursuant to LDC 17T-10, is a matter in dispute and the subject of a separate legal action between the parties.

[6/] Separate notices were required for each of Petitioners' four parcels, which together constitute the entire operation. Each notice alleges the same violations.

[7/] In making this finding, the undersigned has deferred to the expert witness opinions that the Siting Ordinance is superior to the existing regulations for soil manufacturing facilities, especially with regard to regulating off-site impacts. The County argued that the enforcement actions first alerted it to requirement for DEP permits and the potential for off-site

odor impacts from soil manufacturing facilities, leading it to the conclusion that these facilities should be subject to the Siting Ordinance. That argument is simply not credible. The County clearly contemplated off-site odor and environmental impacts when it adopted the 2016 plan amendment. In the required Operating Plan, the facility must include:

> Methods for mitigation of all odor, dust, and noise anticipated to be generated by the facility to include:
>
> Best management practices to address potential odor sources; the monitoring of odors at the project perimeter; the identification of potential off-site odor receptors; and a response protocol for complaints and the resolution of substantial complaints.
>
> * * *
>
> Regulatory permits required to operate all phases of the proposed facility; and
>
> * * *
>
> Description and mitigation plan to address the facility's interaction with environmentally sensitive areas, any structures, and the safety of residents.

(emphasis added).

Further, the 2016 LDC requires the operator to, in the event the facility is the substantiated source of objectionable off-site odors, "immediately take steps to resolve the odor event or curtail operations until the necessary course of action has been identified and implemented." By contrast, the Siting Ordinance merely requires an applicant to include "[t]he levels of odor, dust, and noise anticipated to be generated by the facility and proposed mitigation thereof." The Siting Ordinance does no more, and, arguably, less than the existing regulations, to address off-site odor impacts than the existing requirement for an Operation Plan. The Siting Ordinance does not address environmental impacts at all or require disclosure of the permits required from other entities. According to Table 2.1 of the LDC, both soil manufacturing facilities and solid waste

management facilities are conditional uses requiring Level 4 site plan review. The Plan Amendment does not subject soil manufacturing facilities to a more rigorous approval process. There is some difference between the setbacks required for soil manufacturing facilities and those required by the Siting Ordinance. Under the existing regulations, soil manufacturing facilities must be located a minimum of one-half mile from residential uses and any school or hospital, 200 feet from any natural waterbody, and 1,500 feet from any wellhead supplying a public water system. The restrictions include a minimum setback of 300 feet from residential districts. By contrast, the Siting Ordinance requires an overall setback of 100 feet on all sides, and a 500-foot setback adjacent to "residentially used or designated property." Although the Siting Ordinance contains a larger setback than the existing regulations (500 feet compared with 300 feet), the Siting Ordinance does not include a minimum distance from residential uses.

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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.