STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH FARMS RURAL
PRESERVATION COMMITTEE, LLC,

Petitioner,

vs. Case No. 18-6308GM

PALM BEACH COUNTY, FLORIDA,

Respondent,
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on November 18, 2019, in West Palm Beach, Florida, before E. Gary Early, a designated administrative law judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Benjamin Crosby, Qualified Representative
Palm Beach Farms Rural Preservation
Committee, LLC
7425 Wilson Road
West Palm Beach, Florida 33413

Troy W Klein, Esquire
Law Office of Troy W. Klein, P.A.
Suite 1B, Barristers Building
1615 Forum Place
West Palm Beach, Florida 33401

For Respondent: Kim Phan, Esquire
Jason Tracey, Esquire
Palm Beach County Attorney's Office
Suite 359
300 North Dixie Highway
West Palm Beach, Florida 33401

STATEMENT OF THE ISSUES

Whether Palm Beach County Ordinance 2018-031 ("Ordinance") is internally inconsistent with Palm Beach County's 1989 Comprehensive Plan ("Comprehensive Plan"), and is, therefore, not "in compliance" with section 163.3177(2), Florida Statutes (2018); and whether the Ordinance fails to establish meaningful and predictable standards for the use and development of land or for the content of more detailed land development and use regulations as required by section 163.3177(1), Florida Statutes (2018).[1/]

PRELIMINARY STATEMENT

On October 31, 2018, Respondent, Palm Beach County, Florida ("County"), adopted the Ordinance, amending the Comprehensive Plan ("Plan Amendment") to revise the Future Land Use Element ("FLUE") applicable to residential future land use designations.

On November 29, 2018, Petitioner, Palm Beach Farms Rural Preservation Committee, LLC ("Petitioner"), filed a Petition for Formal Administrative Hearing with the Division of Administrative Hearings ("Division") challenging the Plan Amendment pursuant to section 163.3184. The County filed a Motion to Dismiss the Petition on December 20, 2018, which was granted, in part, on January 18, 2019, with leave to amend.

On February 1, 2019, Petitioner filed an Amended Petition for Formal Administrative Hearing ("Amended Petition") in which

it alleged that the Ordinance renders the Comprehensive Plan internally inconsistent, contrary to section 163.3177(2), and that the Ordinance fails to establish meaningful and predictable standards for the use and development of land or for the content of more detailed land development and use regulations, contrary to section 163.3177(1). The Amended Petition establishes the issues in dispute in this proceeding.

Over a period of months, the parties engaged in a vigorous motion practice, which included motions to disqualify three consecutively assigned administrative law judges. Motions filed regarding Judge Suzanne Van Wyk and Judge Francine Ffolkes were granted. A motion filed regarding the undersigned was denied.

On October 8, 2019, after three previous continuances and a short period of abeyance, and after a telephonic conference at which both parties agreed on the dates, the final hearing was scheduled for November 18 and 19, 2019.

Disposition of motions and notices filed prior to November 14, 2019, is reflected in the docket. On November 14, 2019, after being unable to cooperatively work together to prepare a joint pre-hearing stipulation as required by the January 7, 2019, Order of Pre-hearing Instructions and the October 12, 2019, Fourth Procedural Order, the parties each filed a Unilateral Pre-hearing Stipulation. Since the pre-hearing statements were unilateral, they were, by definition,

not stipulations. Therefore, the "stipulated" or "admitted" facts are not accepted.

On November 14, 2019, the County filed a Motion in Limine, which was amended on November 15, 2019 ("Motion in Limine"). The Motion in Limine sought the exclusion of Dorothy Wilkins as Petitioner's expert witness. On September 26, 2019, Judge Ffolkes entered her Order Granting [Petitioner's] Motion for Continuance of Final Hearing, which required, among other provisions, that "Petitioner shall disclose any expert witness it intends to present at the final hearing within 10 days of the date of this Order." The basis for the Motion in Limine was Petitioner's alleged failure to disclose Ms. Wilkins as an expert at any time after Judge Ffolkes's Order and prior to the filing of Petitioner's Unilateral Pre-Hearing Stipulation. The Motion in Limine also sought to exclude issues first raised in Petitioner's Unilateral Pre-hearing Stipulation Position Statement from consideration at the hearing on the basis that the issues, including the issue of whether the Ordinance was supported by appropriate data and analysis as required by section 163.3177(1)(f), were not previously pled.

The final hearing was convened on November 18, 2019, as scheduled.

At 8:10 a.m. on the morning of the final hearing, Petitioner filed a Motion for Continuance of Final Hearing. The

Motion for Continuance was taken up at the commencement of the hearing. After full consideration of the Motion for Continuance, including argument of counsel, the motion was denied for reasons that were explained on the record.

The Motion in Limine was then taken up. Petitioner acknowledged that at no time after Judge Ffolkes's September 26, 2019, Order Granting Continuance of Final Hearing did Petitioner disclose any expert witness it intended to present at the final hearing until it filed its Unilateral Pre-hearing Stipulation on November 14, 2019, one business-day before the start of the final hearing. The Motion to exclude the testimony of Dorothy Wilkins was, therefore, granted, as discussed on the record. Ruling on the other matters raised in the Motion in Limine was reserved pending the introduction of evidence going to issues other than those pled. The remaining issues raised in the Motion in Limine are now ripe for disposition.

In its Motion in Limine, the County noted that the issue of whether the Ordinance was "based upon relevant and appropriate data and an analysis" as required by section 163.3177(1)(f) was not pled in the February 1, 2019, Amended Petition for Formal Administrative Hearing or in any subsequent pleading, and was not identified by Petitioner as a potential issue until the filing of its November 14, 2019, Unilateral Pre-hearing Stipulation. Issues of pleading and notice are not suspended in

growth management cases. Moreover, there was no evidence submitted by Petitioner on the issue of the sufficiency of the data and analysis supporting the Ordinance, and the issue was not included for consideration in Petitioner's [Proposed] Final Order. Thus, the Motion in Limine as to "data and analysis" is granted, and the standard in section 163.3177(1)(f) is not at issue in this proceeding.

The Motion in Limine also objected to consideration of the issue of whether "the creation of specific overlays for the rural enclaves are not achievable without consent of all affected property owners." That issue appears to have arisen in the context of a privately-initiated comprehensive plan amendment that was abandoned at some time prior to the subject County-initiated Plan Amendment. The only statutory requirement for landowner consent in chapter 163, though not explicitly cited in pleadings filed by either party, is section 163.3248(2), which provides, in pertinent part, that:

> Upon written request by one or more landowners of the subject lands to designate lands as a rural land stewardship area, or pursuant to a private-sector-initiated comprehensive plan amendment filed by, or with the consent of the owners of the subject lands, local governments may adopt a future land use overlay to designate all or portions of lands classified in the future land use element as predominantly agricultural, rural, open, open-rural, or a

> substantively equivalent land use, as a rural land stewardship area . . . . (emphasis added).

This case does not involve a private-sector-initiated comprehensive plan amendment. Furthermore, the issue was not included for consideration in Petitioner's [Proposed] Final Order. Thus, the Motion in Limine as to landowner consent is granted.

At the final hearing, Petitioner offered the testimony of Benjamin Crosby. Petitioner's Exhibits PBF 21A through PBF 21G were received in evidence.

The County offered testimony of Lisa Amara Van Horn, its principal planner, who was accepted as an expert in land planning; Patricia Behn, its planning director; Santhosh Samuel, its senior server manager; Joanne Keller, its director of land development; and Wendy Hernandez, its principal site planner, who was accepted as an expert in site planning. Respondent's Exhibits 1, 2, 4 through 10, 13 through 21, 23, 26, 27, 31, and 32 were received in evidence.

A two-volume Transcript of the proceedings was filed on December 9, 2019. Petitioner and Respondent timely filed Proposed Recommended Orders, which have been carefully considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties and Standing

1. Petitioner is a Florida limited liability corporation. Petitioner submitted written comments, recommendations, or objections to the County on October 30, 2018, during the period of time between the transmittal hearing and the adoption of the Plan Amendment.

2. The County is a political subdivision of the State of Florida, with the duty and responsibility to adopt and maintain a comprehensive growth management plan pursuant to section 163.3167.

3. The County exercises land use planning and zoning authority throughout unincorporated Palm Beach County.

4. The Ordinance is a countywide, County-initiated Comprehensive Plan Text Amendment that would revise the FLUE to modify provisions for residential future land use designations.

5. On July 13, 2018, the County Planning Commission conducted a properly noticed public hearing to review the proposed Plan Amendment and made recommendations to the Palm Beach County Board of County Commissioners (the "Board") pursuant to chapter 163, Part II. One member of the public spoke in support of the amendment. The staff report that contained staff analysis regarding consistency with the

Comprehensive Plan was made available to the Planning Commission prior to its deliberation.

6. On July 20, 2019, Petitioner served a letter regarding the proposed Plan Amendment on Melissa McKinlay, Mayor and member of the Board. July 20, 2019, was three days prior to the date of the transmittal hearing for the proposed Plan Amendment. There was no evidence that the comments were received by Respondent on or after the date of the transmittal hearing.

7. The July 20, 2019, letter stated that Petitioner "represents property owners located within the Palm Beach Farms plat in communities known as the Pioneer Road Neighborhood, the Gun Club Road Neighborhood, Monmouth Estates, and the Ranchette Road Neighborhood . . . . [Petitioner] has been active since early 2011 seeking to preserve the rural character of these communities." Despite the foregoing, there was no competent substantial evidence adduced at the hearing to substantiate that Petitioner represented owners of property in any neighborhood other than the Pioneer Road neighborhood.

8. On July 23, 2018, the Board conducted a public hearing to review the recommendations of the Planning Commission, and authorized transmittal of the proposed Plan Amendment to the state land planning agency and review agencies pursuant to chapter 163, Part II. The Board further directed staff to work with residents in the rural enclaves and to return with stronger

language at the adoption hearing. Ten members of the public spoke in support of the Plan Amendment. There was no evidence that Petitioner, or any other person, spoke or presented written comments at the transmittal hearing in opposition to the Plan Amendment. The staff report and analysis regarding consistency with the Comprehensive Plan was made available to the Board prior to its deliberation.

9. The state land planning agency issued a letter dated August 31, 2018, stating that the Agency "identified no comment related to important state resources and facilities within the Department's authorized scope of review that would be adversely impacted by the amendment if adopted." There were no other state agency comments received regarding the Plan Amendment.

10. Subsequent to the transmittal public hearing, County staff worked with representatives from the Pioneer Road neighborhood and revised the language of the Residential Future Land Use amendment.

11. On October 29, 2018, Petitioner sent a letter regarding the proposed Plan Amendment to Mayor McKinlay, service of which was apparently accepted by Denise Neiman, County Attorney. The evidence suggests that service was made on October 30, 2018, prior to the adoption of the Plan Amendment.

12. On October 31, 2018, the Board adopted the Ordinance. The staff report and analysis regarding consistency with the

Comprehensive Plan was made available to the Board prior to its deliberation. Five members of the public spoke in support of the Plan Amendment. There was no evidence that Petitioner, or any other person, spoke or presented written comments in opposition to the Plan Amendment, other than the October 29, 2018, letter described above.

Existing Conditions

13. The Pioneer Road neighborhood is approximately 550 acres of mostly Rural Residential property, interspersed with properties used for non-intensive commercial uses, such as plant nurseries and landscaping services. The Pioneer Road neighborhood contains between 175 and 220 developed home sites, many of which engage in light-scale personal agricultural uses (e.g., fruit trees, gardens, chickens, etc.). The neighborhood is served by private potable water wells and septic tanks.

14. The Pioneer Road Area includes the Pioneer Road neighborhood, the Gun Club Road neighborhood, and surrounding low density Rural Residential enclave neighborhoods, and is but one of several neighborhood areas potentially affected by the Plan Amendment. Other rural neighborhood areas affected by the Ordinance include the State Road 7/Lantana Road Area and the Hyopluxo Road Area, each of which include a number of rural enclaves.

The Plan Amendment

15. The Plan Amendment is intended to revise the FLUE to modify provisions for the Future Residential Land Use designations. The Amendment, as described in the staff Final Report, is designed to:

- Recognize that there are Rural Residential areas within the Urban Suburban Tier that provide a valuable contribution to the housing diversity and lifestyle choices in the County.
- Establish that Agricultural Residential zoning is consistent with the urban residential future land use designations in the County.
- Recognize and support agricultural operations within residential future land use designations, including supporting the cultivation of agriculture and keeping of livestock.
- Provide additional specificity on the non-residential use location requirements in residential land use designations to ensure protection of residential neighborhoods.
- Allow Residential Multifamily Zoning on parcels with Medium Residential, 5 units per acre, future land use for properties using the Transfer of Development Rights or Workforce Housing Programs.

16. The Plan Amendment applies countywide, and not to any specific neighborhood or property. Current neighborhood plans are considered when there are site-specific amendments.

17. As related to Rural Residential enclaves, the Plan Amendment “will establish policy statements to direct growth away from those areas, or towards their edges,” and “will

establish that the AR Zoning district is consistent with the urban residential zoning districts." The Plan Amendment is also designed to "[r]ecognize and support agricultural operations within residential future land use designations, . . . including in the Urban Suburban Tier," and restrict commercial vehicle activity and more intensive non-residential uses in residentially zoned areas except along major thoroughfares.

Petitioner's Challenge

18. In its Amended Petition, Petitioner stated that the following amendments to the Comprehensive Plan "appear to recognize the existence and offer protection for the continuation of these Rural Residential Enclaves":

> **REVISE Policy 2.2.1-p: Rural Enclaves in Urban Service Area ~~Application of Rural Standards~~.** The County recognizes that there are long established rural residential enclave communities and homesteads in locations within the Urban/Suburban Tier that have Low Residential future land use designation. The County supports the continuation of those rural areas in order to encourage a high quality of life and lifestyle choices for County residents. In addition, within these areas ~~In the Urban/Suburban Tier~~, the County may apply the ULDC standards for rural residential development as follows:
>
> 1. in low density areas in Urban Residential future land use categories;

2. on parcels presently used for agricultural purposes; or

3. on parcels with a Special Agricultural future land use category.

NEW Policy 2.2.1-w: The County shall adopt specific overlays in the Comprehensive Plan and/or Unified Land Development Code to protect the character of rural enclaves identified though the neighborhood planning process.[2/]

19. Comprehensive Plan Policy 2.2.1-j, which is unchanged by the Plan Amendment, provides that:

> Table 2.2.1-j.1 establishes the consistent residential zoning and planned development district for the Residential Future Land Use Designations. In addition, within the Urban/Suburban Tier of the Glades Tier, the Agricultural Residential and Agricultural Production zoning districts are consistent with all residential future land use designations.

20. As amended, Table 2.2.1-j.1 provides as follows:

Table 2.2.1-j.1

Residential Future Land Use - Zoning Consistency[1]

Future Land Use Designation	**Consistent Zoning Zoning District Planned Development**	
Agricultural Reserve	AGR	AGR-PUD
Rural Residential	AR[4], RE[5]	RR-PUD, MHPD, RVPD
Western Communities Residential	AR	PUD
Low Residential	AR[4], RE, RT, RTS, RS	PUD, TND, MHPD

Medium Residential	AR[4], RE, RT, RS, RTU, RM/RH[2]	PUD, TND, MHPD
High Residential	AR[4], RE, RT, RS, RM, RH	PUD, TND, MHPD
Congregate Living Residential[3]	RM	PUD, ~~TND, TMD,~~ MUPD, MXPD[3]

21. The disputes raised in the Amended Petition were in "[t]he footnotes and caveats" to Table 2.2.1-j.1, which "will permit significant increases in future density, intensity and designs in a manner that will permanently and negatively alter the historic rural and unique character of these neighborhoods." As pled, "the following three provisions completely undermine any effort to preserve the Rural Residential Enclaves":

> **REVISE Table 2.2.1-j.1 Residential Future Land Use – Zoning Consistency: Note No. 2 (RM District)**: The RM district is consistent with the MR-5 designation only for those ~~areas~~ properties that were zoned RM or RH prior to the Plan's August 31, 1989 adoption or are 3+ acres utilizing the Transfer of Development Rights and/or Workforce Housing Program.
>
> **REVISE Table 2.2.1-j.1 Residential Future Land Use – Zoning Consistency: Note No. 4 (AR Zoning)** A lot with AR that was legally subdivided shall be considered a conforming lot. Properties with AR zoning with a residential future land use designation in the Urban/Suburban Tier are not required to rezone when subdividing for a residential use provided that the newly subdivided density is a maximum of 1 unit per acre, or when

developing a non-residential use that is allowed in AR.

Policy 2.2.1-n Non-Residential Uses Criteria. NEW Subsection (5). More intense non-residential uses may be allowed in residential zoning districts along major thoroughfares and roadways that are not residential streets.

22. In addition to the foregoing, Petitioner alleged that the following deletion renders the Ordinance inconsistent with the Comprehensive Plan, and inconsistent with the Plan Amendment:

4. DELETE Language from FLUA Regulation Section

~~**Land Development Regulations in the Urban Service Area, Urban/Suburban Tier.** The County may apply the ULDC standards for rural residential areas in the Urban/Suburban Tier in low density areas in the Residential future land use designations which are used for agricultural purposes, or on parcels with a Special Agricultural (SA) land use category.~~

~~Areas within the Urban Service Area/Suburban Tier may be suitable for agricultural use throughout the implementation period of the Plan. It is not the intent of the Plan to encourage premature urbanization of these areas; however, agricultural uses are expected to convert to other uses consistent with the Plan when those agricultural uses are no longer economically viable. Agricultural uses permitted in the residential land use designation must be~~

~~compatible with the protection of the residential lifestyle and quality of life.~~

a. Table 2.2.1-j.1, footnote 2

23. In its Amended Petition, Petitioner alleged that revised Table 2.2.1-j.l, footnote 2, is inconsistent with new Policies 2.2.1-w and 2.2.1-p of the Plan Amendment. However, in his testimony, Mr. Crosby focused exclusively on the alleged inconsistency with Policy 2.2.1-w, not mentioning or otherwise offering evidence regarding inconsistency with Policy 2.2.1-p.

24. As amended, revised Table 2.2.1-j.l, footnote 2, applies only to "RM/RH" zoning districts, and provides that "[t]he RM district is consistent with the MR-5 [Medium Residential/5 units per acre] designation only for those properties that were zoned RM [Residential Multifamily] or RH [Multifamily Residential High Density] prior to the Plan's August 31, 1989 adoption, or when properties of 3 or more acres in size within an MR-5 designation qualify for a higher density through the Transfer of Development Rights and/or Workforce Housing Program density bonus programs." The plain language of revised Table 2.2.1-j.l, footnote 2, establishes that it applies only to the MR-5 future land use designation, and only to properties that were either zoned as RM or RH before August 31, 1989, or that qualify for the listed density bonus programs.

25. The three-acre threshold was established to prevent single lots in established MR-5 neighborhoods from increasing density out of character with the neighborhood. Prior to the amendment of footnote 2, if a property owner proposed new development on property with an MR-5 land-use designation and more than three acres of land and proposed to utilize Transfer of Development Rights or the Workforce Housing Program for a density increase, the property owner was limited to a Planned Unit Development (PUD). The amendment allows the application of the density bonus in an RM zoning district. Revised Table 2.2.1-j.l, footnote 2, is designed to foster infill development on MR-5 designated parcels that may be too small to be developed as a PUD. Furthermore, footnote 2 does not bypass the requirements of the Land Development Code Article 5 Density Bonus Programs, and applicants are still required to comply with those application review and approval processes.

26. Finally, Petitioner's expressed concern is the effect of the Plan Amendment on AR designated rural enclave communities such as the Pioneer Road neighborhood. Amended footnote 2 does not apply to AR zoning districts.

27. Petitioner failed to prove, beyond fair debate, that revised Table 2.2.1-j.l, footnote 2, is inconsistent with the Comprehensive Plan, including new Policy 2.2.l-w, or that it improperly increases density. Furthermore, Petitioner, having

failed to offer any evidence as to revised Table 2.2.1-j.l, footnote 2's, inconsistency with revised Table 2.2.1-p, failed to meet its burden with regard to that element of its Amended Petition.

b. Table 2.2.1-j.1, footnote 4

28. In its Amended Petition, Petitioner alleged that revised Table 2.2.1-j.l, footnote 4, is inconsistent with new Policies 2.2.1-w and 2.2.1-p of the Plan Amendment. However, in his testimony, Mr. Crosby focused exclusively on the alleged inconsistency with Policy 2.2.1-w, not mentioning or otherwise offering evidence regarding inconsistency with Policy 2.2.1-p.

29. Petitioner argues that the footnote allows property owners to immediately subdivide their property to one unit per acre without review, rezoning, or going through the typical process if they are in the AR zoning district.

30. As to the alleged inconsistency with new Policy 2.2.1-w, neither footnote 4, nor any other provision of the Plan Amendment, creates a specific overlay that can be compared for consistency with the authority for, but not the implementation of, the creation of future overlays. Petitioner failed to demonstrate, through competent, substantial evidence, that revised Table 2.2.1-j.l, footnote 4, is inconsistent with new Policy 2.2.1-w of the Plan Amendment.

31. As to the alleged inconsistency between revised Table 2.2.1-j.l, footnote 4, and new Policy 2.2.1-p, the evidence demonstrated that the County implemented the Managed Growth Tier System to protect viable existing neighborhoods and communities, and to direct the location and timing of future development within five geographically specific Tiers -- Urban/Suburban, Exurban, Rural, Agricultural Reserve, and the Glades.

32. Table 2.2.1-g.l of the FLUE establishes maximum density for Residential Future Land Use Designations.

33. The lowest density designation in the Urban/Suburban Tier is Low Residential, one unit per acre (LR-1) designation, which allows up to one unit per acre.

34. According to existing Table 2.2.1-j.l, the AR zoning district is not currently consistent with Low Residential (LR), Medium Residential (MR), and High Residential (HR) Future Land Use Designations.

35. As set forth in Table III.C, LR, MR, and HR Future Land Use Designations are allowed within the Urban/Suburban and Glades Tiers.

36. Through a review of County records, it was determined that there were thousands of acres of land currently zoned AR in the Urban/Suburban Tier. Thus, under the existing tiered land use designations, those AR zoned parcels were inconsistent with the Comprehensive Plan.

37. Accordingly, the Plan Amendment revised Table 2.2.1-j.l to add AR zoning districts as being allowable in LR, MR, and HR Future Land Use Designations, thus making AR zoning districts consistent in the Urban/Suburban Tier.

38. Revised Table 2.2.1-j.l, footnote 4, applies to AR zoning districts within the Rural Residential (existing), and the LR, MR, and HR Future Land Use Designations (added).

39. The requirement for AR zoned properties to rezone with a maximum LR-1 density of one unit/acre is eliminated because such properties, with the proposed Plan Amendment, will be consistent with LR, MR, and HR Future Land Use Designations within the Urban/Suburban Tier and, thereby, maintain their agricultural residential uses.

40. Proposed Policy 2.2.1-p recognizes that there are established rural residential enclaves within the Urban/Suburban Tier that have an LR Future Land Use Designation, and affirms the County's support of the continuation of those rural areas. Allowing properties with LR Future Land Use Designations to subdivide up to one unit/acre does not increase density, as the LR Future Land Use Designation currently allows up to one unit/acre without the Plan Amendment. Policy 2.2.1-p is unchanged in establishing that the County may apply its Uniform Land Development Code ("ULDC") standards for rural residential

development in low density and agricultural future land use categories.

41. Petitioner failed to prove, beyond fair debate, that revised Table 2.2.1-j.l, footnote 4, is inconsistent with the Comprehensive Plan, including new Policy 2.2.l-w, that it improperly increases density, or that any existing County subdivision regulations would not apply. Furthermore, Petitioner, having failed to offer any evidence as to revised Table 2.2.1-j.l, footnote 4's, inconsistency with revised Table 2.2.1-p, failed to meet its burden with regard to that element of its Amended Petition.

c. Policy 2.2.1-n.5.

42. Revised Policy 2.2.1-n.5. is designed to direct more intense non-residential uses allowed in residential areas to properties "along major thoroughfares and roadways" and away from residential streets.

43. In its Amended Petition and Mr. Crosby's testimony, Petitioner alleged that revised Policy 2.2.1-n.5. is inconsistent with new policy 2.2.1-w regarding the adoption of specific overlays to protect "the character of individual rural enclaves identified through the neighborhood planning process."

44. As indicated previously, the Plan Amendment did not create a specific overlay to compare for consistency with the

authority for, but not the implementation of, the creation of future overlays.

45. Revised Policy 2.2.1-n.5. is designed to direct allowable non-residential uses to the periphery of residential communities “along” the major thoroughfares, which is not the same as “in proximity” to major thoroughfares. Pursuant to proposed Policy 2.2.1-n.5., local residential streets are not to be subject to commercial vehicle activity (other than home businesses), and more intense non-residential uses in residentially-zoned areas will be limited to those with access to major thoroughfares. The more restrictive language is intended to protect residential neighborhoods in any Managed Growth Tier.

46. Revised Policy 2.2.1-n.5. cannot be read in isolation from other provisions of Policy 2.2.1-n, including the existing requirements that non-residential uses, when being permitted, be consistent with the Comprehensive Plan, and that their density and intensity be comparable and compatible with the adjoining residential area, and revised Policy 2.2.1-n.6., which requires conditions of approval of the non-residential uses “to ensure compatibility with surrounding residences.”

47. Petitioner failed to prove, beyond fair debate, that revised Policy 2.2.1-n.5. is inconsistent with the Comprehensive Plan, including new Policy 2.2.l-w.

d. Deleted Language

48. Petitioner failed to offer any evidence as to the language deleted from the FLUA Regulation Section to demonstrate that it rendered the Plan Amendment inconsistent with the Comprehensive Plan. Petitioner therefore failed to meet its burden with regard to that element of its Amended Petition.

County's Evidence

49. The County introduced competent, substantial testimonial and documentary evidence that the Plan Amendment is consistent with the Comprehensive Plan FLUE, Section I.C. "County Directions," paragraphs 1, 2, 4, 5, and 15. The Plan Amendment promotes the protection of established neighborhoods, fosters agriculture uses, establishes that existing rural neighborhoods within the Urban/Suburban Tier cannot be replaced, and will manage growth in a manner to protect these areas. The County demonstrated that the Plan Amendment is designed and intended to direct growth towards activity nodes and centers and along major thoroughfares, and promote redevelopment and urban infill in appropriate areas of the County.

50. The County introduced competent, substantial testimonial and documentary evidence that the proposed Plan Amendment is consistent with the Comprehensive Plan FLUE, Section II., Objective 1.1 "Managed Growth Tier System" by maintaining a variety of housing and lifestyle choices,

enhancing existing communities, protecting land for agriculture, and providing opportunities for agriculture.

51. The County introduced competent, substantial testimonial and documentary evidence that the proposed Plan Amendment is consistent with the Comprehensive Plan FLUE, Section II., Objective 1.2 “Urban/Suburban Tier - Urban Service Area,” Policy 1.2-a by protecting the character of rural enclaves through the promotion of agriculture and home-based commercial uses that are compatible with the neighborhoods, while directing increased density away from the center of rural neighborhoods.

CONCLUSIONS OF LAW

52. The Division has jurisdiction over the subject matter and parties hereto pursuant to sections 120.569, 120.57(1), and 163.3184(5), Florida Statutes (2019).

Standing

53. 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).

54. An “affected person” includes “persons owning property, residing, or owning or operating a business within the boundaries of the local government whose plan is the subject of the review; [and] owners of real property abutting real property

that is the subject of a proposed change to a future land use map."

55. The extent to which an organization is an "affected person" was analyzed by Judge Donald R. Alexander as follows:

> In Florida Wildlife Federation, Inc. et al. v. Department of Community Affairs et al., DOAH Case No. 03-2164GM (DOAH March 30, 2004; DCA July 16, 2004), 2004 Fla. ENV LEXIS 239, the Department concluded that "the definition of 'affected person' makes no distinction between different classifications of businesses," and that an affected person need not "have the trappings of 'traditional' business activities." Id. at *6. Therefore, the lack of traditional business amenities such as a telephone number, occupational license, or office is not necessary to establish standing. It went on to hold that activities such as "participation in local government activities in furtherance of [the entity's] declared corporate purpose" and "involvement by the [affected person] in the local planning process" were sufficient to satisfy the statute. Id. at *8. Using these liberal standards, it is concluded that while [Petitioner] does not operate a business in the classic sense, and its declared corporate purpose is unknown, it is occasionally involved in the local planning process. Therefore, it is arguably an affected person within the meaning of the statute.

Payne v. City of Miami, DOAH Case No. 04-2754GM (Fla. DOAH May 16, 2006; Fla. DCA June 22, 2006).

56. Petitioner has alleged standing as an association acting on behalf of the interests of its members. In its Amended Petition, Petitioner asserted that it:

> was established in 2011 for the purpose of conducting business and representing the interests of its members, including those who own certain real property within The Pioneer Road Neighborhood. Both operating as an incorporated entity business, and acting on behalf of its members, Petitioner has participated in growth management, land use, and zoning issues impacting The Pioneer Road Neighborhood since 2011, including participation in hearings on comprehensive plan and land use amendments affecting The Pioneer Road Neighborhood, including interests in infrastructure, recreation, natural resources and other interests protected by the existing Comprehensive Plan and Section 163.3177, Florida Statutes, which are at issue in this case as set forth below. Petitioner brings this action on behalf of itself as a business and on behalf of its members, who own real property in The Pioneer Road Neighborhood near and proximate to areas subjected by the Plan Amendments. Petitioner seeks to protect the integrity of Palm Beach County's environmental resources and quality of life for Palm Beach County residents, including the interest of its members in protecting resources and managing growth in Palm Beach County in and around The Pioneer Road Neighborhood.

57. At the final hearing, Petitioner failed to introduce any evidence of its corporate existence, or the purposes for which it was allegedly created. There were no articles or bylaws offered. There was nothing from the Division of Corporations. Even under the liberal standard espoused by Judge Alexander, there was little in the way of an evidentiary basis upon which to find that Petitioner is a "person" under the law, or that that it operated a business in Palm Beach County.

Nonetheless, a review of the docket, which was made subject to official recognition at the hearing, reveals enough information upon which Petitioner's corporate existence may be inferred. For example, the June 17, 2019, request for Mr. Crosby to serve as Petitioner's Qualified Representative included a resolution adopted by Petitioner's Board of Directors, which included information regarding its establishment and purpose. Similarly, Petitioner's motions to disqualify presiding administrative law judges filed on September 20, 2019, and October 11, 2019, included affidavits from a managing member of the corporate entity. Mr. Crosby's testimony included information substantiating Petitioner's corporate formation and purposes. Finally, Respondent, in its Proposed Recommended Order, stated that "Petitioner Palm Beach Farms Rural Preservation is a limited liability company in Florida."

58. There was evidence, primarily as identified above, to substantiate the allegations of Petitioner's membership vis-à-vis the Pioneer Road neighborhood. At least three members, Mr. Crosby, Joseph R. Byrne, and Caroljean C. Cushman, were identified by name in various pleadings and testimony. The evidence adduced at the hearing is sufficient to demonstrate Petitioner's associational standing under Florida Home Builders Association v. Department of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982), and its progeny.

59. A written comment, bearing Petitioner's name on the printed letterhead and the signature of Mr. Byrne, its chairman, was submitted in opposition to the proposed Plan Amendment on or about October 30, 2019, the day prior to the adoption hearing. Thus, Petitioner met that element of the definition of "affected person" within the meaning of the statute.

Standards

60. Section 163.3184 governs the process for adoption of comprehensive plan amendments.

61. "In compliance" means "consistent with the requirements of sections 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.

62. Section 163.3177(1) provides, in pertinent part, that "[t]he [comprehensive] plan shall establish meaningful and predictable standards for the use and development of land and provide meaningful guidelines for the content of more detailed land development and use regulations."

63. Section 163.3177(2) provides, in pertinent part, that "[t]he several elements of the comprehensive plan shall be consistent."

64. The County's determination that the Plan Amendment is "in compliance" is presumed correct and must be sustained if the determination of compliance is "fairly debatable." See § 163.3184(5)(c), Fla. Stat. Petitioner bears the burden of proving beyond fair debate that the challenged Plan Amendment is not in compliance.

65. The term "fairly debatable" is not defined in chapter 163, but the Florida Supreme Court held in Martin County v. Yusem, 690 So. 2d 1288 (Fla. 1997), that "[t]he fairly debatable standard is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety." Id. at 1295. Where "there is evidence in support of both sides of a comprehensive plan amendment, it is difficult to determine that the [local government's] decision was anything but 'fairly debatable.'" Martin Cnty. v. Section 28 P'ship, Ltd., 772 So. 2d 616, 621 (Fla. 4th DCA 2000).

66. Despite the foregoing, it is equally clear that the mere existence of contravening evidence is not sufficient to establish that a land planning decision is "fairly debatable." It is firmly established that:

> [E]ven though there was expert testimony adduced in support of the City's case, that in and of itself does not mean the issue is fairly debatable. If it did, every zoning case would be fairly debatable and the City would prevail simply by submitting an expert who testified favorably to the City's

> position. Of course that is not the case. The trial judge still must determine the weight and credibility factors to be attributed to the experts. Here the final judgment shows that the judge did not assign much weight or credibility to the City's witnesses.

Boca Raton v. Boca Villas Corp., 371 So. 2d 154, 159 (Fla. 4th DCA 1979).

67. The Comprehensive Plan and its amendments are legislative decisions. Coastal Dev. of N. Fla. v. City of Jacksonville, 788 So. 2d 204, 208-209 (Fla. 2001). It is well-established that all provisions of a comprehensive plan be read in pari materia and harmonized so that each provision is given effect. § 163.3187(5)(d), Fla. Stat.; Katherine's Bay, LLC v. Fagan, 52 So. 3d 19, 28 (Fla. 1st DCA 2010).

68. "A compliance determination is not a determination of whether a comprehensive amendment is the best approach available to a local government for achieving its purposes." Furthermore, "[i]n a compliance determination, the motives of the local government are not relevant." Pacetta, LLC v. Town of Ponce Inlet, DOAH Case No. 09-1231GM, R.O. ¶¶ 65-66 (Fla. DOAH Mar. 20, 2012; Fla. OEO June 19, 2012).

69. As to the weight to be given testimony in this case, the County offered substantial and credible testimony of experts in land planning and site planning, along with that of other County employees. Petitioner offered the testimony of

Mr. Crosby, an educated and informed, but lay, witness. As established by the First District Court of Appeal:

> Lay witnesses may offer their views in land use cases about matters not requiring expert testimony. Metro. Dade County v. Blumenthal, 675 So. 2d 598, 601 (Fla. 3d DCA 1995). For example, lay witnesses may testify about the natural beauty of an area because this is not an issue requiring expertise. Blumenthal, 675 So. 2d at 601. Lay witnesses' speculation about potential "traffic problems, light and noise pollution," and general unfavorable impacts of a proposed land use are not, however, considered competent, substantial evidence. Pollard v. Palm Beach County, 560 So. 2d 1358, 1359-60 (Fla. 4th DCA 1990). Similarly, lay witnesses' opinions that a proposed land use will devalue homes in the area are insufficient to support a finding that such devaluation will occur. See City of Apopka v. Orange County, 299 So. 2d 657, 659-60 (Fla. 4th DCA 1974) (citation omitted). There must be evidence other than the lay witnesses' opinions to support such claims. See BML Invs. v. City of Casselberry, 476 So. 2d 713, 715 (Fla. 5th DCA 1985); City of Apopka, 299 So. 2d at 660.

Katherine's Bay, LLC v. Fagan, 52 So. 3d at 30.

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

Compliance with the Community Planning Act

71. Petitioner disputed that the Plan Amendment was in compliance with the Community Planning Act as follows:

> a. Whether the Plan Amendments render the County's Comprehensive Plan internally inconsistent with the duly adopted 1989 Comprehensive Plan, as amended, and is, therefore, not "in compliance" with Section 163.3177(2), Fla. Stat.
>
> b. Whether the Plan Amendments establish meaningful and predictable standards for the use and development of land and provides meaningful guidelines for the content of more detailed land use and development regulations as required by Section 163.3177(1), Fla. Stat.

a. Internally Inconsistent

72. As set forth in the Findings of Fact herein, Petitioner did not prove beyond fair debate that the Plan Amendment created any internal inconsistencies with the cited provisions of the Comprehensive Plan.

73. A plan amendment creates an internal inconsistency when it conflicts with an existing provision of the Comprehensive Plan. Petitioner not only failed to prove beyond fair debate that the Plan Amendment is internally inconsistent with the Comprehensive Plan, but also failed to prove beyond fair debate that it is internally inconsistent with any other new or revised provision of the Plan Amendment.

74. The County presented competent, substantial, and persuasive evidence that the Plan Amendment promotes and is consistent with the County's directions, goals, objectives, and policies.

b. Meaningful and Predictable Standards

75. As set forth in the Findings of Fact herein, Petitioner did not prove, beyond fair debate, that the Comprehensive Plan Amendment failed to establish meaningful and predictable standards for the use and development of land and provide meaningful guidelines for the content of more detailed land development and use regulations.

76. Petitioner failed to prove, beyond fair debate, that revised Table 2.2.1-j.1, footnote 2, serves to increase density, or is otherwise inconsistent with new Policy 2.2.1-w, or with any other provision of the Comprehensive Plan. Revised Table 2.2.1-j.l does not change any existing future land use designations. Moreover, there is no specific overlay created in new Policy 2.2.1-w to support a finding of inconsistency. In addition, Petitioner failed to demonstrate that revised Table 2.2.1-j.1, footnote 2, applies to the Pioneer Road neighborhood, the effect of which forms the basis of Petitioner’s concerns, and the evidence demonstrates that it will not.

77. Petitioner failed to prove, beyond fair debate, that revised Table 2.2.1-j.1, footnote 4, is inconsistent with new policy 2.2.1-w, or with any other provision of the Comprehensive Plan. There is no specific overlay created in new Policy 2.2.1-w to form a basis for a determination of inconsistency. There was competent, substantial evidence that the subdivision process

regulations must be met before any subdivision can be implemented, and that rezoning does not affect density.

78. Petitioner failed to prove, beyond fair debate, that revised Policy 2.2.1-n.5. is inconsistent with new Policy 2.2.1-w., or with any other provision of the Comprehensive Plan. There is no specific overlay created in new Policy 2.2.1-w to form a basis for a determination of inconsistency. Furthermore, Policy 2.2.1-n, as revised, includes six criteria that must be met before non-residential uses are permitted in residential areas, including that they may only be located along major thoroughfares and roadways, and must be consistent and compatible with surrounding residences.

79. The County presented competent, substantial, and persuasive evidence that the Plan Amendment establishes meaningful and predictable standards for the use and development of land and provides meaningful guidelines for the content of more detailed land development and use regulations to promote the County's directions, goals, objectives, and policies.

ATTORNEY'S FEES

80. On December 19, 2019, Respondent filed a Motion for Attorney's Fees, Expenses and Costs ("Motion") against Petitioner under the authority of sections 120.569(2)(e) and 120.595(1), Florida Statutes. On December 30, 2019, Petitioner filed a Response to the Motion.

81. This case took well over a year from start to finish, though less than a year from the date of the Amended Petition. Petitioner's counsel withdrew, and the case was held in abeyance for several months. Each party was a movant for the disqualification of a presiding officer. The time for disposition of this case, though lengthy, is not supportive of the merits of the Motion.

Section 120.569(2)(e)

82. Section 120.569(2)(e), provides that:

> (e) All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

83. Respondent has identified no specific pleading, motion, or paper that was interposed for an improper purpose. Rather, Respondent's Motion is based on its assertion that the proceeding as a whole was brought for an improper purpose.

84. A frivolous claim is not merely one that is likely to be unsuccessful. Rather, it must be so clearly devoid of merit that there is little, if any, prospect of success. French v. Dep't of Child. & Fams., 920 So. 2d 671, 679 (Fla. 5th DCA 2006). "[A] finding of improper purpose could not stand 'if a reasonably clear legal justification can be shown for the filing of the paper.'" Procacci Commer. Realty v. Dep't of HRS, 690 So. 2d 603, 608 (Fla. 1st DCA 1997), citing Mercedes Lighting & Electrical Supply v. State, Dep't of Gen. Servs., 560 So. 2d 272, 278 (Fla. 1st DCA 1990). To determine whether a proceeding was initiated for an improper purpose, the trier of fact must use an objective standard to determine if the filing was based on reasonably clear legal justification. Procacci, 690 So. 2d at 608 n.9.

85. Based upon a full review and consideration of the record in this proceeding, and applying an objective standard regarding pertinent facts and applicable law, the undersigned finds that the allegations of fact in this case, and the application of the law as asserted by Petitioner, though ultimately lacking in proof, were not so devoid of merit as to infer an improper purpose under section 120.569(2)(e).

Section 120.595(1)

86. Section 120.595(1), provides, in pertinent part, that:

> (1) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.57(1).—
>
> * * *
>
> (b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.
>
> (c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection. In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.
>
> (d) In any proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall so designate and shall determine the award of costs and attorney's fees.

> (e) For the purpose of this subsection:
>
> 1. “Improper purpose” means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.

87. Petitioner has not, as acknowledged in the Motion, participated in two or more proceedings involving Respondent and the same project as an adverse party.

88. For the reasons set forth in the analysis of section 120.569(2)(e), and based upon a full review and consideration of the record in this proceeding, the undersigned finds that the facts of this case, and the application of the law as asserted by Petitioner, though ultimately lacking in proof, were not made for an improper purpose as defined in section 120.595(1)(e)1.

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 the Plan Amendment adopted by Palm Beach County as Ordinance 2018-031, on October 31, 2018, is “in compliance,” as that term is defined by section 163.3184(1)(b), Florida Statutes; and that Petitioner’s challenge was not brought for an improper purpose as defined in section 120.569(2)(e), Florida Statutes, or section 120.595(1), Florida Statutes.

DONE AND ENTERED this 8th day of January, 2020, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of January, 2020.

ENDNOTES

[1/] Except as otherwise provided herein, all references to the Florida Statutes are to the 2018 version, which was in effect when the Plan Amendment was adopted.

[2/] The Plan Amendment did not create a specific overlay, and the policy established in (unchallenged) Policy 2.2.1-w does not form a basis for a determination of inconsistency. The Palm Beach County Unified Land Development Code defines an "overlay zoning district" as "a set of zoning regulations for a defined area, which are required either in addition to the standard zoning district's regulations or in lieu of those regulations. Overlay zoning is used to protect the character of an area of special concern or to encourage new development subject to additional controls." Overlays are created through a separate Plan Amendment. Neither Policy 2.2.1-j nor Policy 2.2.1-w supersede the separate overlay adoption process. Policy 2.2.1-j and Table 2.2.1-j.1 are not inconsistent with Policy 2.2.1-w or any other identified provision of the Comprehensive Plan.

COPIES FURNISHED:

Denise Neiman, Esquire
Palm Beach County
Suite 601
301 North Olive Avenue
West Palm Beach, Florida 33401

Kim Phan, Esquire
Palm Beach County Attorney's Office
Suite 359
300 North Dixie Highway
West Palm Beach, Florida 33401
(eServed)

Benjamin Crosby
Palm Beach Farms
Rural Preservation Committee, LLC
7425 Wilson Road
West Palm Beach, Florida 33413
(eServed)

Troy W. Klein, Esquire
Law Office of Troy W. Klein, P.A.
Suite 1B, Barristers Building
1615 Forum Place
West Palm Beach, Florida 33401
(eServed)

Jason Tracey, Assistant County Attorney
Palm Beach County Attorney's Office
Suite 359
300 North Dixie Highway
West Palm Beach, Florida 33401
(eServed)

William Chorba, General Counsel
Department of Economic Opportunity
Caldwell Building, MSC 110
107 East Madison Street
Tallahassee, Florida 32399-4128
(eServed)

Ken Lawson, Executive Director
Department of Economic Opportunity
Caldwell Building
107 East Madison Street
Tallahassee, Florida 32399-4128
(eServed)

Taya Orozco, Agency Clerk
Department of Economic Opportunity
Caldwell Building
107 East Madison Street
Tallahassee, Florida 32399-4128
(eServed)

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.