STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT DAMMERS,

Petitioner,

vs. Case No. 19-1537

PASCO COUNTY AND STATE OF FLORIDA, DEPARTMENT OF ECONOMIC OPPORTUNITY,

Respondents,

and

TAMPA ELECTRIC COMPANY,

Intervenor.
_____/

FINAL ORDER

A duly noticed final hearing was held in this case on July 2 and 22, 2019, in Dade City, Florida, before Francine M. Ffolkes, an Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

Whether Ordinance 18-18 adopted on June 5, 2018, by Pasco County, is consistent with the Pasco County Comprehensive Plan.

PRELIMINARY STATEMENT

Pasco County (County) adopted Ordinance 18-18 on June 5, 2018. Ordinance 18-18 amended the County's Land Development Code (LDC) to add solar farms as a special exception use in six agricultural zoning districts, and a permitted use in three commercial/light manufacturing districts.

On January 4, 2019, Robert Dammers (Petitioner) petitioned the Florida Department of Economic Opportunity (DEO) under section 163.3213, Florida Statutes, challenging whether

Ordinance 18-18 was consistent with the Pasco County Comprehensive Plan (Comp Plan), particularly as it relates to the Northeast Pasco County Rural Area (Rural Area). DEO investigated the issue as required by section 163.3213(4). The investigation included an informal hearing at which the Petitioner and the County presented oral and written testimony. Based on its investigation, DEO determined that Ordinance 18-18 was consistent with the Comp Plan.

Under section 163.3213(5)(a), the Petitioner filed a challenge with DOAH. The challenge alleged that Ordinance 18-18 was inconsistent with the Comp Plan goals, objectives, and policies relating to the Rural Area. Tampa Electric Company (Intervenor) moved and was granted intervention in this proceeding.

At the final hearing, the Petitioner testified on his own behalf and presented the direct testimony of County employees: Denise Hernandez and Nectarios Pittos. The Petitioner also presented the expert testimony of Robert Hunter. The Petitioner's Exhibits 8, 9, 14, and 15 were admitted into evidence. The County presented the expert testimony of Frances Chandler-Marino, and County Exhibits 11, 12, and 13 were admitted into evidence. The Intervenor presented the expert testimony of Cyndi Tarapani, and Intervenor Exhibits 16, 17, and 18 were admitted into evidence. The Petitioner presented rebuttal testimony from Ms. Hernandez. Joint Exhibits 1 through 6 and 10 were admitted into evidence.

Ms. Hernandez is the zoning administrator and special projects manager for the County. Mr. Pittos is the planning and development director for the County. Mr. Hunter, Ms. Chandler-Marino, and Ms. Tarapani are private consultants with expertise in planning and land development regulations. Ms. Chandler-Marino was the primary author of the Northeast Pasco County Special Area Plan and the Comp Plan's goals, objectives, and policies adopted to implement the Northeast Pasco County Special Area Plan.

A four-volume Transcript of the hearing was filed on August 13, 2019. The parties submitted their proposed final orders and any supporting memoranda of law on August 23, 2019, which have been considered in the preparation of this Final Order.

References to the Florida Statutes are to the 2019 version, unless otherwise indicated.

FINDINGS OF FACT

Parties and Standing

1. The Petitioner resides at 15052 Dionna Way, Dade City, in Pasco County, Florida. His property is zoned Agricultural-Residential District. The property is located in the Rural Area approximately 240 feet above sea level with a view shed of rolling hills and rural landscape. Because of the property's zoning, it is impacted by Ordinance 18-18, and the Petitioner also resides in close proximity to other properties with agricultural zoning that are impacted by adoption of Ordinance 18-18.

2. The Petitioner testified that he was personally affected by the potential location of solar farms on properties in close proximity to his home. He would be able to see the solar farms from his own property and also when he drives by the areas where they could be located. The Petitioner is substantially affected by the adoption of Ordinance 18-18.

3. The County is a non-charter county and a political subdivision of the State of Florida. The County is the affected local government and is subject to the requirements of chapter 163.

4. The DEO is the state land planning agency. The DEO has the duty to review and investigate petitions submitted under section 163.3213, challenging land development regulations adopted by local governments.

5. The Intervenor is an electric utility company that obtained a special exception approval from the County for a solar farm project, which is located in the Rural Area.[1/]

Ordinance 18-18

6. Ordinance 18-18 amended Appendix A of the County's LDC to add the following definition of solar farm:

> A type of electric power collection facility that includes solar photovoltaic (PV) systems mounted on the ground (which may include battery storage) that are utilized in the collection/storage of solar electric power as the primary or principal use of the property and whereby the power being collected/stored

> is being sold to an electric utility provider or being collected/stored directly by an electric utility provider.

7. Ordinance 18-18 added solar farms to the County's LDC as a special exception use within six agricultural zoning districts, and as a permitted principal use within three commercial/light manufacturing districts. Specifically, Ordinance 18-18 amended sections 503.5, 504.5, 505.5, 506.5, 507.5, 508.5, and 527.3 of the County's LDC. In each of the zoning districts, solar farms with capacity equal to or greater than 75 megawatts (MW) are limited by location to within the Public/Semi-Public, Planned Development, Industrial-Light, or Industrial-Heavy Future Land Use (FLU) classifications.

Consistency with Comp Plan

8. Policy FLU 3.2.2 of the Comp Plan provides that "private electric public utilities needed to support growth may be permitted in all land use designations" subject to the proviso that "[a]ll new power plants and transmission lines shall be subject to applicable State and Federal siting regulations and shall be consistent with the Goals, Objectives, and Policies of this Comprehensive Plan." Policy FLU 3.2.2 is the only Comp Plan policy that specifically addresses the siting of private electric public utilities. There was no dispute that solar farms are private electric public utilities.

9. The rules of interpretation of the Comp Plan are set forth in its administration element. The administration element provides that in the event of a conflict, the more specific policies in the Comp Plan prevail over the more general policies. Policy FLU 3.2.2 is specific to the siting of private electric public utilities and prevails over general policies in the Comp Plan. Policy FLU 3.2.2 is definitive that private electric public utilities may be permitted in all land use designations.[2/]

10. All special exception use applications undergo a compatibility review in accordance with Policy FLU 1.10.1 of the Comp Plan. Compatibility review factors include an evaluation of existing uses of land, including existing and potential densities and intensities; consideration of existing development patterns and approved development in the area; consideration of cultural features; and availability of adequate public facilities and services.

11. Policy FLU 1.10.2 provides for mitigation of potential incompatibilities by encouraging certain design standards. These design standards include use of undisturbed, undeveloped or landscaped buffers, use of screening with increased size and opacity, increased setbacks, limiting building heights, use of innovative site designs and appropriate building designs, limiting duration or operation of uses, use of noise attenuation

techniques, setting limits on density and/or intensity, and gradually transitioning the density and intensity of a use.

12. Appendix FLU Section A-2 of the Comp Plan places the burden of proving Comp Plan consistency on the landowner-applicant for the special exception use. The landowner-applicant must also show that the special exception use complies with all procedural requirements of the LDC.

13. Policies FLU 3.2.2, 1.10.1, and 1.10.2 and Appendix FLU Section A-2 together provide that private electric public utilities, which include solar farms, were intended under the Comp Plan to be allowed throughout the County, including in agricultural and rural areas, subject to the heightened review requirements for special exception uses.

14. The heightened review process for special exception uses set forth in the Comp Plan is further implemented by the County's LDC. The LDC states that each proposed special exception use must undergo an individual review of location, design, configuration, operation, and the public need for the particular use at the particular location proposed.

15. In addition, the LDC provides that each special exception may require the imposition of individualized conditions to ensure that the use is appropriate at a particular location. Each proposed special exception must meet a set of enumerated standards in the LDC. These standards include requirements that

the site has screening and buffering sufficient to prevent interference with the enjoyment of surrounding properties, that proposed signs or lighting will not create adverse glare or adversely affect economic value or cause other significant problems on adjoining or surrounding properties, and that there is adequate open space to serve the property on which the special exception use will be maintained.

16. As part of this heightened review process, section 402.4 of the LDC requires that the proposed special exception use be consistent with the goals, objectives, and policies of the Comp Plan.

17. Solar farms join a list of uses currently allowed in the County's agricultural zoning districts. The list includes, but is not limited to: commercial farming and agricultural activities (permitted), utility substations (special exception), storage and repair facilities for essential public services (special exception), wastewater treatment plants (special exception), a variety of waste-related uses (conditional), a variety of large-scale outdoor recreation (some conditional, some as special exceptions), and mining (conditional). This list suggests that solar farms can be a compatible use in the County's agricultural zoning districts.

18. In the County's commercial/light manufacturing zoning district (C-3), permitted uses include but are not limited to:

manufacturing and assembly, warehousing and distribution, welding and machine shops, office uses, and commercial uses.

19. It is fairly debatable that the scale, intensity, and type of uses currently permitted in the County's agricultural and commercial/light manufacturing districts are similar in scale, intensity, and type to a solar farm.

Northeast Pasco Rural Area

20. The Rural Area is unique in the County and in Florida, consisting of scenic rolling hills, undeveloped rural landscapes, unique vistas, ridges, valleys, and naturally occurring berms and hillsides reaching up to 245 feet above sea level.

21. Goal FLU 2 of the Comp Plan is entitled "Protection of Rural Areas." The stated goal is to "[i]mplement and enforce policies and programs designed to preserve and reinforce the positive qualities of the rural lifestyle and protect rural communities and agricultural areas."

22. Objective FLU 2.1 of the Comp Plan is "[t]o protect the existing rural character of the Northeast Pasco County Rural Area as defined in Map 2-13, Rural Areas, of the Future Land Use Map Series and, thereby, ensure the rural lifestyle is preserved for existing residents and remains available to future residents."

23. Policy FLU 2.1.1 of the Comp Plan provides:

> Pasco County shall recognize through land use policies and land development regulations the Northeast Pasco County Rural Area (as defined

> in Map 2-13, Rural Areas) as an area with specific rural character. It shall be the policy of the County that rural areas require approaches to land use intensities and densities, rural roadway corridor protection, the provision of services and facilities, environmental protection, and Land Development Code enforcement consistent with the rural character of such areas.

24. Policy FLU 2.1.4 provides that "Pasco County shall develop a long-term vision by December 2008 for the Northeast Pasco Rural Area for a planning horizon of at least fifty (50) years that establishes a planning vision, strategy, and framework that establishes a 'buildout' vision for these areas."

25. Policy FLU 2.1.5 provides:

> Pasco County shall amend the Land Development Code by December 2008 to include standards that would limit topographic alterations within eastern Pasco County, including Northeast Pasco County Rural Area, and particularly along the Northeast Pasco County Rural Area Boundary; areas along the Brooksville Ridge; and areas along the Polk Ridge, in order to maintain and protect the integrity of the natural rolling vistas and scenic view sheds within the Northeast Pasco County Rural Area. The intent of these standards is to provide limitations for topographic alterations that would remove the unique vistas of the area's naturally occurring berms or hillsides that provide unique vistas of the area or function as buffers.

26. Additionally, Policy FLU 2.1.8 provides that:

> Pasco County shall amend the Land Development Code by December 2008 to adopt design standards for nonresidential development in Northeast Pasco Rural Area, for the purpose of

> maintaining the rural character in this area. Nonresidential development shall mean office uses, commercial uses, and any other use that is nonresidential in character as that term may be defined in the implementing ordinance.

27. The County has not adopted design standards for nonresidential development in the Rural Area.

Petitioner's Objections

28. The Petitioner alleged in the petition that Ordinance 18-18 is inconsistent with Goal FLU 2, Objectives FLU 2.1 and 2.3, and Policies FLU 2.1.1 through 2.1.18, 2.3.1, and 2.3.2. However, the Petitioner presented expert testimony that only addressed Goal FLU 2, Objective FLU 2.1, and Policies FLU 2.1.1, 2.1.4, 2.1.5, 2.1.7, and 2.1.8.

29. The County's expert witness was the primary author of the Northeast Pasco County Special Area Plan and the Comp Plan's goals, objectives, and policies adopted to implement the Northeast Pasco County Special Area Plan. She testified that adoption of Objective FLU 2.1 and its implementing policies regarding the Rural Area was not intended to eliminate a landowner's right to seek any of the conditional and special exception uses allowed in the County's agricultural zoning districts.

30. Ordinance 18-18 simply establishes that solar farms can be considered in rural/agricultural areas through the special exception process in section 402.4 of the LDC and the compatibility requirements in Policies FLU 1.10.1 and 1.10.2.

Goal FLU 2 and Objective FLU 2.1 do not prohibit solar farms or any other land use in rural/agricultural areas. Therefore, Ordinance 18-18 is consistent and compatible with Goal FLU 2 and Objective FLU 2.1.

31. The County adopted land use policies and land development regulations for the Rural Area in section 604 of the LDC. Ordinance 18-18 does not amend section 604 of the LDC or exempt any use from complying with section 604 of the LDC. While section 604 of the LDC does not specifically apply to nonresidential uses, the standards in section 604 of the LDC are specific enough to guide the County regarding the extent of protections needed for the Rural Area. These protections can be enforced through the special exception process. Therefore, Ordinance 18-18 is consistent and compatible with Policy FLU 2.1.1.

32. Policy FLU 2.1.4, entitled "Development of a Long-Term Planning Vision," requires the County to develop a long-term "build-out" vision for the Rural Area and contains required elements for this vision. The text of Policy FLU 2.1.4 does not require or address land development regulations or solar farms, and Ordinance 18-18 did not address or alter the requirements of Policy FLU 2.1.4. Policy FLU 2.1.4 is not relevant to Ordinance 18-18 and is therefore consistent and compatible with Ordinance 18-18.

33. With regard to Policy FLU 2.1.5, the Petitioner presented a substantial amount of evidence and testimony relating to the "rolling vistas" and "scenic view sheds" in the Rural Area. The County's expert witness testified that Policy FLU 2.1.5 is the only Comp Plan policy that contains any protections for these "rolling vistas" and "scenic view sheds" in the Rural Area.

34. Specifically, Policy FLU 2.1.5 requires the County to amend the LDC to "provide limitations for topographic alterations that would remove the unique vistas of the area's naturally occurring berms or hillsides that provide unique vistas of the area or function as buffers." The County amended its LDC to provide such limitations in section 604.5.B. Ordinance 18-18 does not amend section 604.5.B. of the LDC or exempt any use from complying with section 604.5.B. of the LDC.

35. While section 604.5.B. of the LDC does not specifically apply to nonresidential uses, the standards in section 604.5.B. are specific enough to guide the County regarding the extent of topographic alterations allowed in the Rural Area. Protections against such topographic alterations can be enforced through the special exception process. Therefore, Ordinance 18-18 is consistent and compatible with Policy FLU 2.1.5.

36. The Petitioner's expert witness testified that a more expansive interpretation of topographic alterations should be adopted for solar farms, which includes alterations of the "visual

topography" and installation of footing for the solar panels. This expansive interpretation would be significantly more stringent than the topographic alteration standard the County already adopted for residential uses in section 604.5.B. of the LDC.

37. In addition, the County's expert witness persuasively testified that this expansive interpretation of topographic alterations would effectively prohibit all new development in the Rural Area. She further testified that it would be inconsistent with the original intent of Policy FLU 2.1.5 and be inconsistent with Objective FLU 1.9 regarding protection of private property rights.

38. Policy FLU 2.1.7 is entitled "Standards for Review of Rezoning Requests: Rural Neighborhoods." Ordinance 18-18 was not a rezoning request and did not create any processes or standards for rezoning requests in the Rural Area. Policy FLU 2.1.7 is not relevant to Ordinance 18-18 and is therefore consistent and compatible with Ordinance 18-18.

39. Policy FLU 2.1.8 is entitled "Nonresidential Design Standards." While the County has not yet adopted design standards for nonresidential development in the Rural Area, it is fairly debatable that Policy FLU 2.1.8 may only require the County to adopt such standards for office uses and commercial uses, unless the County elects to include other nonresidential uses in the

ordinance that implements the nonresidential design standards. A solar farm is a utility use that would not be subject to the mandatory design standard requirements of Policy FLU 2.1.8, unless the County elects to include solar farms in the ordinance that implements the nonresidential design standards. Ordinance 18-18 does not prevent the County from adopting the nonresidential design standards required by Policy FLU 2.1.8. Therefore, Ordinance 18-18 is consistent and compatible with Policy FLU 2.1.8.

40. Although not directly relevant to determining the consistency of Ordinance 18-18 with the Comp Plan, the Petitioner's expert opined, both in his report and in oral testimony, that the County was required to adopt design standards for solar farms in conjunction with Ordinance 18-18. This is because he believes the County's existing special exception use standards lack specific, objective, and measurable criteria. However, the Petitioner's expert was unable to identify any specific law or generally accepted planning document that requires the County to adopt criteria for special exception uses in addition to or instead of the heightened review process that already exists.

Summary

41. The Petitioner did not prove beyond fair debate that Ordinance 18-18 is inconsistent or incompatible with the objectives, policies, and goal applicable to the Rural Area.

42. The Petitioner did not prove beyond fair debate that Ordinance 18-18 is inconsistent with the Comp Plan.

CONCLUSIONS OF LAW

43. DOAH has jurisdiction over the subject matter of this proceeding under sections 120.569, 120.57(1), and 163.3213, Florida Statutes.

44. The Petitioner is a "substantially affected person" and has standing to maintain this proceeding challenging the adoption of Ordinance 18-18 under section 163.3213(2).

45. Section 163.3201 regulates the relationship of a local government's comprehensive plan to its exercise of land development regulatory authority and requires that a land development regulation "be based on, be related to, and be a means of implementation for an adopted comprehensive plan."

46. Section 163.3194(1)(b) requires that all land development regulations "shall be consistent with the adopted comprehensive plan." Section 163.3194(3)(a) provides that a "land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development permitted by such . . . regulation are compatible

with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government."

47. The adoption of a land development regulation by a local government is legislative in nature and shall not be found to be inconsistent with the local plan if it is fairly debatable that it is consistent with the plan. See § 163.3213(5)(a), Fla. Stat.

48. The term "fairly debatable" is not defined in chapter 163, but in Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997), the Florida Supreme Court explained:

> [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. In other words, an ordinance may be said to be fairly debatable when for any reason it 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. (Internal citations omitted).

49. "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 Cty. 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)).

50. The "fairly debatable" standard, which provides deference to the local government's disputed decision, applies to

any challenge filed by an affected person. Therefore, the Petitioner bears the burden of proving beyond fair debate that the challenged land development regulation is not consistent with the adopted comprehensive plan. This means that "if reasonable persons could differ as to its propriety," a land development regulation must be found consistent. Yusem, 690 So. 2d at 1295.

51. It is fairly debatable that Ordinance 18-18 is consistent with the Comp Plan.

52. The Petitioner did not prove beyond fair debate that Ordinance 18-18 is inconsistent with the Comp Plan.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Pasco County Ordinance 18-18 is consistent with the Pasco County Comprehensive Plan.

DONE AND ORDERED this 11th day of September, 2019, in Tallahassee, Leon County, Florida.

FRANCINE M. FFOLKES
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of September, 2019.

ENDNOTES

[1/] The County approved the Intervenor's solar farm project in April 2018. The project is called Mountain View Solar and its proposed location is near the Petitioner's home in the Rural Area. Contrary to the Petitioner's arguments, the development order for that project is not an appropriate subject of this section 163.3213 consistency challenge.

[2/] The County's decision to limit 75 MW and greater solar farms to certain land use classifications does not affect the applicability of Policy FLU 3.2.2. See Bd. of Cty. Comm'rs v. Snyder, 627 So. 2d 469, 475 (Fla. 1993)("[A] comprehensive plan only establishes a long-range maximum limit on the possible intensity of land use; a plan does not simultaneously establish an immediate minimum limit on the possible intensity of land use. The present use of land may, by zoning ordinance, continue to be more limited than the future use contemplated by the comprehensive plan.").

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.