STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WEST SHORE LEGACY LLC,

Petitioner,

vs. Case No. 20-1562GM

ALACHUA COUNTY, FLORIDA,

Respondent,

and

FICKLING AND COMPANY, INC.; AND NGI ACQUISITIONS, LLC,

Intervenors.
_____/

RECOMMENDED ORDER

A duly-noticed final hearing was held in this matter via Zoom conference on July 30 and 31, and August 3, 2020, before Suzanne Van Wyk, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether the Alachua County Comprehensive Plan Amendment adopted by Ordinance No. 20-05 on February 5, 2020 (the "Plan Amendment"), is "in compliance," as that term is defined in section 163.3184(1)(b), Florida Statutes (2019).[1]

PRELIMINARY STATEMENT

On March 25, 2020, Petitioner, West Shore Legacy, LLC ("Petitioner"), 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 Alachua County Comprehensive Plan ("the Plan"), inconsistent with the North Central Florida Regional Policy Plan ("RPC Plan"), and adopted in violation of the public participation requirements of the Community Planning Act, chapter 163, part II, Florida Statutes ("the Act"). On March 31, 2020,

[1] Except as otherwise noted, all references to the Florida Statutes are to the 2019 version, which was in effect when the Plan Amendment was adopted.

Fickling and Company, Inc. ("Fickling"), and NGI Acquisitions, LLC ("NGI") (together Fickling and NGI are "Intervenors"), filed an unopposed Motion to Intervene, which was granted by the undersigned on April 2, 2020.

The case was originally scheduled for final hearing on June 24 through 26, 2020, but the undersigned subsequently granted Petitioner's Motion for Continuance, over Respondent and Intervenors' objections, and rescheduled the final hearing to July 30 and 31, and August 3, 2020.

On July 20, 2020, Petitioner filed a "Response Regarding Final Hearing Venue," requesting that the final hearing be "physically convened in Alachua County," in light of the requirement in section 163.3184(5)(c) that the final hearing shall be held "in the affected local jurisdiction[,]" but the undersigned denied the request due to the continuing effects of the COVID-19 pandemic and Division-imposed COVID-19 travel restrictions.

On July 27, 2020, Respondent and Intervenors filed a Joint Motion for Sanctions, pursuant to sections 57.105 and 163.3184(9), Florida Statutes ("Motion for Sanctions").

On July 29, 2020, the evening before the final hearing was to commence, Petitioner filed a Motion to Amend the Petition and a response to the Motion for Sanctions. The undersigned denied Petitioner's Motion to Amend its Petition. The parties also late-filed their Joint Pre-hearing Stipulation on that date, with the permission of the undersigned.

The hearing commenced as rescheduled on July 30, 2020, via Zoom conference. At the final hearing, the undersigned allowed Respondent and Intervenors to present evidence related to their Motion for Sanctions, but

ruled that Petitioner would be entitled to a full evidentiary hearing on the Motion for Sanctions, to be scheduled for a later date.

At the final hearing, the parties' Joint Exhibits 1 through 51 were admitted into evidence. Petitioner's Exhibits 9 and 109 were admitted into evidence. An excerpt from Petitioner's Exhibit 97 was also read into the record during the Final Hearing.

Petitioner offered the testimony of Lee E. Rosenthal, its corporate representative; Jeffery Hays, principal planner for Alachua County Development Services; Suzanne Wynn, director of community planning and facilities for the School Board of Alachua County; Cecelia Ward, AICP, who was accepted as an expert in land use and comprehensive planning; and John P. Kim, P.E., who was accepted as an expert in traffic engineering and transportation planning.

Respondent and Intervenors' Joint Exhibits 1 through 3, 5, 10 through 18, 21, 35, 36, 39, and 40 were admitted into evidence. Respondent offered the testimony of Jeffery Hays; and Christopher Edward Dawson, who was accepted as an expert in land use and transportation planning.

Intervenors offered the testimony of Todd Andersen, senior vice president of Novare Group; and Robert J. Cleveland, Jr., senior vice president of Fickling. Intervenors also offered the testimony of Ali Brighton, P.E., who was accepted as an expert in transportation planning and engineering; and David Depew, Ph.D., accepted as an expert in land use and comprehensive planning.

The proceedings were recorded and the three-volume Transcript of the final hearing was filed with the Division on September 11, 2020. On

September 15, 2020, Petitioner filed a Motion for Permission to Exceed Page Limitation and for Additional Time to File Proposed Recommended Order, which was granted, in part, on September 16, 2020, setting a deadline of October 12, 2020, for filing proposed recommended orders.

The parties 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 Delaware limited-liability company authorized to do business in the State of Florida. Petitioner owns and operates the Legacy at Fort Clarke, a 444-unit apartment complex located on Fort Clarke Boulevard, approximately 100 feet from the property that is the subject of the instant plan amendment challenge (the "subject property").

2. Petitioner, through its representatives, submitted oral and written comments to Alachua County ("the County") during the period of time beginning with the transmittal hearing for the Plan Amendment and ending with the adoption of the Plan Amendment.

3. The County is a political subdivision of the State of Florida, with the duty to adopt and amend its comprehensive plan in compliance with the Act. *See* § 163.3167(1), Fla. Stat.

4. Intervenor, Fickling, is a Georgia corporation authorized to do business in the State of Florida.

5. Intervenor, NGI, is a Georgia limited-liability company, and is the contract purchaser of the subject property, currently owned by The Gainesville Church, Inc. ("the Church"). James R. Borders is NGI's president. NGI registered with the Secretary of State to conduct business in Florida on July 22, 2020.

6. NGI is a wholly-owned subsidiary of NGI Investments, LLC, a Georgia limited-liability company which has been registered to conduct business in Florida since 2013.

7. On June 6, 2019, NGI Investments, LLC, and Fickling submitted a letter of intent to purchase the subject property from the Church. In the letter, NGI Investments, LLC, is identified alternatively as "Novare Group."

8. On July 19, 2019, NGI entered into a purchase and sale agreement with the Church to purchase the subject property, which is signed by Mr. Borders, as Manager of NGI. In the agreement, Fickling is identified as an entity authorized to accept notices on NGI's behalf related to the agreement. Fickling appears to operate as broker/developer of the subject property.

9. Todd Anderson is the senior vice-president of development for Novare Group ("Novare"), a residential multifamily development group founded in 1992. Mr. Anderson testified that NGI Investments and NGI are known in the development industry as Novare. Since 1992, Novare has developed over 50 multifamily projects—16,000 multifamily residential units—primarily in the southeast United States.

10. Novare began partnering with Fickling in 2017 on a joint venture program called "Lullwater." The joint venture has developed Lullwater at Blair Stone, an apartment complex in Tallahassee, Florida; Lullwater at Big Ridge, an apartment complex in Hixson, Tennessee; and Lullwater at Jennings Mill, an apartment complex in Athens, Georgia. Lullwater is an ongoing joint venture program with two pending development projects in Florida—the subject property and a site under contract in Ft. Myers.

11. NGI/Novare has a verbal general partnership agreement with Fickling, and is not a registered limited partnership. Shortly prior to closing on each property to develop a project in the Lullwater program, NGI/Novare executes a written joint venture agreement with Fickling. Up to that point, the entities share expenses related to pre-development costs, including

pursuit of comprehensive plan amendments and rezonings necessary to secure project approval. Losses on any project are also shared equally.

12. As of the date of the final hearing, NGI/Novare and Fickling had expended almost $500,000 in pre-acquisition costs to develop the subject property, including hiring an engineer, Jay Brown, to prepare the Plan Amendment application, and an attorney and experts to represent the Intervenors at the public hearings, as well as in this proceeding. The exact contribution from each of the partners will be "trued up" at a later date.

13. If the instant plan amendment is not approved, the Intervenors stand to lose the investment of approximately $500,000, as well as the time and effort expended on the project thus far, as well as the opportunity costs associated with having devoted time and resources to this project as opposed to others in the Lullwater program.

14. At the local planning agency public hearing on November 20, 2019, Jay Brown made a presentation regarding the Plan Amendment. He stated, "I'm here to represent a joint venture of development group that's made up of two companies, the Fickling Company and the Novare Group." When Mr. Brown made his presentation on the underlying rezoning application at the same meeting, he stated that he was "representing the Fickling Company and Novare Group[.]"

15. Again at the December 10, 2019 County Commission public hearing, Mr. Brown indicated he was representing the developers Fickling and Novare. At the February 25, 2020, adoption hearing, Mr. Brown presented on behalf of the developers. Although he did not identify them by name, he referred to the presentation he had made before that same body on December 10, 2019.

The Subject Property and Surrounding Uses

16. The subject property is 25.64 undeveloped acres located on Fort Clarke Boulevard in Gainesville, Florida.

17. It is located in the Alachua County Floridan Aquifer High Recharge Area, which, according to the Comprehensive Plan, is an "[a]rea[] where stream-to-sink surface water basins occur and [an] area[] where the Floridan Aquifer is vulnerable or highly vulnerable." The subject property is located in an area where the aquifer is highly vulnerable.

18. The subject property is designated "institutional" on the County's Future Land Use Map ("FLUM").

19. Under the institutional FLUM designation, the subject property could be developed for a public or private educational use, daycare center, nursery school, community service (e.g., fire and emergency services, law enforcement, or health facilities), public utility or other infrastructure, religious facility, or cemetery.

20. The uses surrounding the subject property are a mix of residential and institutional. Immediately to the west and south is the Eagle Point subdivision, with a FLUM designation of low-medium density residential, which allows residential density at up to four dwelling units per acre ("4 du/acre"). The subdivision is built out at 2 du/acre.

21. Two apartment communities are located across Fort Clark Boulevard from the subject property—Legacy at Fort Clarke (owned by Petitioner) and The Paddock Club Gainesville—both of which are designated medium density on the FLUM, allowing residential development at a density of up to 8 du/acre.

22. Institutional uses border the property on the north and immediate east. A County fire station is located north of the subject property, and a senior living facility is located directly across Fort Clarke Boulevard from the subject property in a "corner" adjoining both Legacy at Fort Clarke and Paddock Club apartments.

23. The subject property is located in the Urban Cluster, which is, according to the Comprehensive Plan, "[a]n area designated on the [FLUM] for urban development, which includes residential densities ranging from one

unit per acre to 24 units per acre or greater, non-residential development, and is generally served by urban services."

The Plan Amendment

24. The Plan Amendment changes the FLUM designation of the subject property from institutional to medium-high density residential, allowing development at up to 14 du/acre.

25. The Comprehensive Plan designates Fort Clarke Boulevard as an "Express Transit Corridor" and a "Rapid Transit Corridor." All new multifamily development along the corridors must be developed as a Traditional Neighborhood Development ("TND"), a compact, mixed-use development which allows for internal capture of vehicle trips and encourages walking and bicycling as the primary means of mobility. TNDs are required to develop with a village center and gridded street network emanating outward from the village center, and are entitled to a development density bonus.

26. Due to its location along the corridors, and the allowable density bonus, the subject property under the Plan Amendment can be developed at a maximum residential density of 16 du/acre.[2] Based on the acreage of the subject property, the Plan Amendment authorizes a maximum of 410 dwelling units.

27. The Comprehensive Plan requires TNDs to include non-residential uses at intensities specified in Future Land Use Element ("FLUE") Policy 1.6.5.2. Based on the acreage of the subject property, the Plan Amendment authorizes a maximum of 267,500 square feet ("s.f.") of non-residential uses.

[2] Policy 1.6.5.1 provides that a TND contiguous with a Rapid Transit or Express Transit corridor is entitled to an additional 8 du/acre in the village center and an additional 6 du/acre in the transit-supportive area outside the village center. Based on the policy, it appears the Plan Amendment authorizes the subject property to be developed at a density greater than 16 du/acre. However, the parties stipulated that the maximum development density of the subject property is 16 du/acre and that stipulation is accepted by the undersigned.

Challenges to the Plan Amendment

28. Petitioner alleges (as stipulated by the parties) that the Plan Amendment: (1) creates internal inconsistencies with the existing Comprehensive Plan, in contravention of section 163.3177(2); (2) is not "based upon relevant and appropriate data and analysis," as required by section 163.3177(1)(f); (3) is not "based upon surveys, studies, and data regarding the area, as applicable, including … the character of undeveloped land," as required by section 163.3177(6)(a)2., and not based on an "analysis of the suitability of the plan amendment for its proposed use considering the character of the undeveloped land, soils, topography, natural resources, and historic resources on site," as required by section 163.3177(6)(a)8.; and (4) is inconsistent with the RPC Plan, in violation of section 163.3184(1)(b). Petitioners further contend Respondent violated public participation requirements for adoption of the Plan Amendment.

29. The challenges generally raise concerns with the impact of the Plan Amendment on area schools, transportation facilities, the Floridan Aquifer, and compatibility with surrounding uses.

School Capacity Issues

30. Petitioner alleges the County failed to properly analyze the impact of the Plan Amendment on the County's school system, and maintains that the Plan Amendment will "overburden already overcrowded schools that serve neighborhood residents."

31. Suzanne Wynn, director of community planning for the School Board of Alachua County ("SBAC"), performed a school capacity analysis of the Plan Amendment. Ms. Wynn testified that the purpose of a school capacity analysis is to put the school board on notice of an estimated number of students anticipated to be generated from a plan amendment which increases residential density, so the school board can factor that in for future facility planning.

32. In calculating the student impact of the Plan Amendment, Ms. Wynn made a couple of errors, which are reflected in her initial Report: First, she utilized 256 as the total number of dwelling units authorized by the Plan Amendment, which does not account for the density bonus. Second, she applied a student generation multiplier of .08 students per multifamily unit, rather than the correct multiplier of .09.

33. Prior to the County's adoption of the Plan Amendment, Ms. Wynn's analysis was updated with the correct number of dwelling units. Utilizing 410 as the maximum number of dwelling units authorized by the Plan Amendment, Ms. Wynn confirmed that the estimated number of students generated from the Plan Amendment is a total of 57, allocated as follows: 33 elementary, 12 middle, and 12 high.

34. At final hearing, Ms. Wynn presented a corrected Report. Utilizing the correct student generation multiplier, the Plan Amendment is projected to generate a total of 63 students, allocated as follows: 37 elementary, 13 middle, and 13 high.

35. In her initial Report, Ms. Wynn concluded that "[s]tudent generation by the [Plan Amendment] at the elementary, middle, and high school levels can be reasonably accommodated during the five, ten, and twenty-year planning period through planned capacity enhancement and management practices." Ms. Wynn testified that the updated student generation numbers contained in the corrected Report did not cause her to change her conclusion. The number of students generated by the maximum density allowed under the Plan Amendment can be accommodated during the school board's applicable planning periods through capacity enhancements and management practices.

36. The SBAC 2019 Annual Report on School Concurrency ("2019 Concurrency Report") notes that "significant growth [in middle school students] is anticipated in the next five years, followed by slower growth rates during the latter part of the 10-year planning period."

37. The subject property is located in the Fort Clark School Concurrency Service Area ("SCSA"), in which the middle school is operating above capacity and enrollment "is expected to exceed capacity during the ten-year planning period." The 2019 Concurrency Report notes that the deficiencies in the Fort Clarke SCSA are addressed in the SBAC 2019-2030 Strategic Plan. In other words, the SBAC has already anticipated increased enrollment at the middle school serving the subject property, and has plans to reduce overcrowding and accommodate new students through its strategic planning process.

38. Petitioner argued that the specific plans to reduce overcrowding and accommodate new growth in the Fort Clark SCSA were not introduced in evidence and Ms. Wynn's testimony was speculative. However, Petitioner introduced no evidence to refute Ms. Wynn's testimony and her conclusion that the SBAC can accommodate the new middle school students estimated to be generated by the Plan Amendment.

39. Petitioner next argues that the Plan Amendment is internally inconsistent with Public School Facilities Element ("PSFE") Policy 1.1.3, which governs the geographic basis for school capacity planning, and Policy 1.1.5, which describes the SBAC report to the County.

40. In describing the analysis of Plan Amendments to be performed by the SBAC, Policy 1.1.3 specifically provides, "[f]or purposes of this planning assessment, existing or planned capacity in adjacent SCSAs shall be not be considered." Petitioner alleges Ms. Wynn relied upon existing or planned capacity outside the Fort Clark SCSA in conducting her analysis, in violation of Policy 1.1.3.

41. It is important to note that Policy 1.1.3 requires the SBAC to assess the Plan Amendment "in terms of its impact (1) on the school system as a whole and (2) on the applicable SCSA(s)."

42. Ms. Wynn's analysis states, in pertinent part, as follows:

> The [Plan Amendment] is situated within the Fort Clark [SCSA] … [which] contains one middle school

> with a capacity of 900 seats. The current enrollment is 1,042 students representing a 116% utilization compared to an adopted LOS standard of 100%.
>
> The [Plan Amendment] petition is projected to generate 13 middle school students at buildout. Districtwide middle school capacity is well within the 100% LOS throughout the 10 year planning period. The School District is evaluating options for relieving capacity deficiencies at Fort Clark Middle.

43. Ms. Wynn's analysis does not ignore the impact of the Plan Amendment on the applicable SCSA. Implicit in Ms. Wynn's analysis is the conclusion that the Fort Clark SCSA does not have adequate capacity to accommodate the maximum number of students estimated to be generated by the Plan Amendment. Ms. Wynn's analysis also assesses the impact of the Plan Amendment districtwide, as required by the Policy, concluding that there is adequate capacity within the applicable planning periods.

44. Finally, Petitioner contends that Ms. Wynn's analysis falls short of the Policy's direction to "include its recommendations to remedy the capacity deficiency including estimated cost" if the SBAC "determines that capacity is insufficient to support the proposed land use decision."

45. Ms. Wynn's report does not conclude that a capacity deficiency exists within the district to accommodate the new middle school students estimated to be generated by the Plan Amendment. If no deficiency is determined, no recommendation to remedy a deficiency is required.

46. While the report indicates a deficiency in the Fort Clark SCSA, there is no requirement that the students be accommodated within that particular SCSA. Perhaps the SBAC plans include changing school zones to accommodate those students at a school other than Fort Clark Middle, where capacity does exist. Perhaps it plans to build a new middle school that will add capacity. Perhaps it plans to add portables at Fort Clark Middle. Whatever the plans are, Ms. Wynn's conclusion that the projected number of

students "can reasonably be accommodated during the five, ten, and twenty year planning period through planned capacity enhancement and management practices" was unrebutted.[3]

Transportation Issues

47. Petitioner contends that the analysis of the transportation impact from the Plan Amendment is flawed because: (1) it was not based on the maximum buildout allowed by the Plan Amendment; and (2) failed to meet the requirements of Policy 1.1.6.11 of the Transportation Mobility Element ("TME").

48. Based on the maximum development potential of 410 multifamily dwelling units and 267,500 s.f. of non-residential development, the County determined the Plan Amendment will generate approximately 9,364 new daily vehicular trips to Fort Clark Boulevard.

49. Petitioner asserts that this analysis is erroneous because the methodology employed by the developer allocated the 267,500 s.f. of non-residential development evenly between retail and office. Petitioner asserts that, because the County's land development code allows the non-residential square footage to be developed at up to 75 percent retail, the project should have been analyzed based on a 75/25 retail-to-office split. Petitioner argues that failure to analyze the traffic generation in that way undercounts the vehicular trips to be generated by the Plan Amendment at its maximum development potential.

50. Petitioner introduced the testimony of John P. Kim, who was accepted as an expert in transportation planning and engineering. Mr. Kim offered no testimony regarding the use of the 75/25 retail-to-office split versus the

[3] Petitioner complained that Ms. Wynn's testimony lacked specificity and found fault with Respondent for not introducing the SBAC Strategic Plan into evidence to support its position that the anticipated students can be accommodated with planned capacity improvements. However, Petitioner, not Respondent, carries the burden of proof in this case to demonstrate that the "planned capacity enhancement and management practices" are insufficient to accommodate those students.

50/50 retail-to-office split for non-residential uses allowed under the Plan Amendment.

51. Petitioner introduced no evidence that the methodology utilizing the 50/50 retail-to-office split was not a professionally-acceptable methodology for calculating trip generation based on the maximum development potential of the subject property under the Plan Amendment.

52. Next, Petitioner argues that the Plan Amendment is not supported by a roadway-capacity analysis for any of the major roadways that will serve the subject property. Petitioner maintains that the applicants for the Plan Amendment were required to submit a study demonstrating that adopted Level of Service ("LOS") guidelines on those roadways can be achieved given the projected traffic generation from the Plan Amendment. To that end, Petitioner alleges the Plan Amendment is inconsistent with TME Policy 1.1.6.11, which provides as follows:

> Large scale comprehensive plan amendments to the [FLUE] or Map that result in a greater transportation impact shall require the entity requesting the amendment to demonstrate that the adopted LOS guidelines for the affected Urban Transportation Mobility District are achieved and that additional required infrastructure is fully funded. Applicants may only include projects that are fully funded and scheduled to commence construction within one (1) year of approval of the Comprehensive Plan Amendment.

53. Petitioner's expert, Mr. Kim, expressed his opinion that the policy requires the applicant to demonstrate that the LOS guidelines can be achieved under the Plan Amendment, and that the additional infrastructure required to achieve the guidelines is "fully funded and scheduled to commence construction within one (1) year of approval of the Plan Amendment."

54. Mr. Kim prepared an analysis to demonstrate that the Plan Amendment will prevent achievement of the applicable LOS guidelines, as the basis for his opinion that the Plan Amendment is not supported by adequate data and analysis, and inconsistent with TME Policy 1.1.6.11.

55. Mr. Kim analyzed the project's impact on the specific segment of Fort Clark Boulevard immediately adjacent to the subject property, utilizing roadway capacity data from the 2018 Multimodal Level of Service ("MMLOS") Report published by the Metropolitan Planning Organization for the Gainesville Urbanized Area. According to the report, that segment of Fort Clark Boulevard has an adopted LOS of "D" and a maximum service volume of 13,985 vehicles per day. The report indicates the particular segment has available capacity for only 1,319 daily vehicles. Mr. Kim concluded that the capacity for 1,319 daily vehicles will easily be exceeded by the 9,364 trips projected to be generated from development allowed under the Plan Amendment. Mr. Kim also looked at the capacity of the two roadways at which Fort Clark Boulevard terminates—Northwest 23rd Avenue to the north, and Newberry Road to the south—and found that they are both operating at above their capacity, according to the report. In Mr. Kim's opinion, the traffic projected to be generated by development anticipated under the Plan Amendment will further deteriorate the LOS on those roadways.

56. The 2018 MMLOS Report shows the segment of Fort Clark Boulevard and Northwest 23rd Avenue, which were analyzed by Mr. Kim, as located within a Transportation Concurrency Exception Area ("TCEA"). The Florida Legislature repealed the statewide requirement for traffic concurrency in 2011. *See* ch. 2011-139, § 15, Laws of Fla. In 2019, the County rescinded transportation concurrency as a part of its Evaluation and Appraisal of its comprehensive plan. *See* § 163.3191(1), Fla. Stat. ("At least once every 7 years, each local government shall evaluate its comprehensive plan to determine if plan amendments are necessary to reflect changes in state

requirements in this part since the last update of the comprehensive plan[.]"). The County also changed its areawide LOS standards to "guidelines." These changes are reflected in the County's 2040 Comprehensive Plan, adopted December 13, 2019, and against which this Plan Amendment is compared for internal consistency.

57. Mr. Kim has never conducted transportation analysis in Alachua County prior to the case. Likewise, Mr. Kim has not performed transportation analyses in any local government which has repealed transportation concurrency.

58. Mr. Kim testified that he understood the County's transportation mobility system utilizes an area-wide capacity analysis, as opposed to individual roadway capacity. Mr. Kim's analysis was wholly irrelevant to the County's area-wide capacity analysis.

59. Under the County's system, the County is divided into three transportation mobility districts: Northwest, Southwest, and East. The Plan Amendment is located in the Northwest District.

60. The County's expert in land use and transportation, Chris Dawson, is the County's transportation planning manager. Mr. Dawson analyzed the Plan Amendment for transportation impacts.

61. Mr. Dawson determined that sufficient capacity exists in the Northwest Mobility District for the additional 9,364 new daily trips generated from the Plan Amendment under the maximum development potential. For his analysis, Mr. Dawson utilized the data and analysis compiled for the County's 2019 Evaluation and Appraisal of the Comprehensive Plan. That data showed a maximum service volume of 408,655 trips in the Northwest District, and an average annual daily trip volume of 265,237. In other words, available capacity exists in the district for an additional 143,418 trips, well below the projected generation of 9,364 trips. Mr. Dawson opined that the Plan Amendment will not prevent the Northwest District LOS guidelines from being achieved.

62. Petitioner criticized Mr. Dawson's analysis as based on incorrect data because the transportation mobility district level of service analysis contained in the Evaluation and Appraisal Report ("EAR") was based on the County's 2017 data. Petitioner opined that Mr. Dawson should have updated those trip counts to account for development approved since 2017 in the Northwest District.

63. Ms. Brighton conducted the traffic generation analysis for Intervenors. She testified that, given the available land in the Northwest District, it is unrealistic to assume that the growth in the last three years would have consumed all the roadway capacity in the District. In fact, she testified that, even if the County collected new raw data of actual trips, the capacity may be even higher than it was in 2017, because growth is not realized in every year; some years are even marked by negative growth.

64. Petitioner did not introduce any readily-available data which was more recent than that relied upon in the County's 2019 EAR update.

65. Petitioner's overarching concern is that Fort Clark Boulevard is a two-lane road, operating at either near or over capacity, unable to handle the new trips anticipated to be generated by development allowed under the Plan Amendment; that the County has no plans to widen the roadway to improve capacity; and that, even if the County is relying on total capacity in the District, rather than a summation of the capacity of each individual roadway in the District, it failed to update the 2017 data to determine actual capacity at the time the Plan Amendment was adopted.

66. The County's multi-modal approach to transportation planning anticipates congestion along certain corridors, and encourages compact, higher-density development in the Urban Cluster to support transit use. *See* TME Policy 1.1.3 ("The intent of the [mobility districts] are … [t]o recognize that certain roadway corridors will be congested and that congestion will be addressed by means other than solely adding capacity for motor vehicles and maintaining roadway level of service on those corridors."). Congestion would

actually serve the County's goal of increasing demand for transit options and bicycle and pedestrian use in lieu of creating road capacity by traditional means, such as road-widening, adding lanes, and creating or extending turn lanes. *See* TME Policy 1.1.5 ("Over the time horizon of the Comprehensive Plan, as the densities and intensities within the Urban Cluster necessary to support transit are realized, the County shall transition from providing new capital infrastructure for a multi-modal transportation network to providing frequent transit service along rapid transit corridors.")

67. In the Comprehensive Plan, Capital Improvements Element ("CIE"), the County has planned two dedicated transit lanes on Fort Clark Boulevard, between Newberry Road and Northwest 23rd Avenue, the segment immediately adjacent to the subject property. This improvement is planned to implement the County's designation of Fort Clark Boulevard as a rapid transit corridor.

68. Development projects in the Urban Cluster are charged a multi-modal transportation mobility fee ("fee") in satisfaction of their obligation to mitigate transportation impacts within the applicable district. Intervenors are expected to pay a fee of approximately $1 million to the County in mitigation. Petitioner elicited testimony from the transportation experts that the County is not required to spend the fee on Fort Clark Boulevard. It is true that the County can spend the fee on improvements anywhere within the District; however, given the structure of the Comprehensive Plan, it is most likely the funds will be spent to further planned improvements adopted in the CIE. *See* TME Policy 1.1.6 ("The Multi-Modal Infrastructure Projects in the [CIE] are identified to meet the adopted level of service guidelines and proactively address projected transportation needs from new development and redevelopment within the Urban Cluster by 2040").

<u>Compatibility</u>

69. Petitioner alleges the maximum density and intensity of development allowed under the Plan Amendment is incompatible with surrounding uses,

especially the low-density residential neighborhood to the west and south of the subject property.

70. Petitioner introduced the testimony of Cecelia Ward, who was accepted as an expert in land use and comprehensive planning. Ms. Ward opined that residential density of up to 16 du/acre is incompatible with low-density residential and community institutional land uses in the area. Further, she opined that the scale and intensity of the non-residential uses allowed by the TND were inconsistent with the character of the existing neighborhood.

71. The Comprehensive Plan does not define "compatibility." The Act defines "compatibility" as "a condition in which land uses or conditions can coexist in relative proximity to each other in a stable fashion over time such that no use or condition is unduly negatively impacted directly or indirectly by another use or condition." § 163.3164(9), Fla. Stat.

72. Both the Intervenors' land use planning expert, David Depew, and the County's principal planner for development services, Jeffrey Hays, agreed that merely locating high-density residential development adjacent to low-density residential development is an insufficient basis on which to determine an unduly negative influence over time. All five higher-density TNDs in the County are located adjacent to existing lower-density residential development. No evidence was introduced to suggest that the proximity of TNDs to those neighborhoods has destabilized the low-density residential neighborhoods.

73. Moreover, the Comprehensive Plan specifically addresses compatibility between TNDs and single-family developments. FLUE Policy 1.2.1 provides that "appropriately scaled and designed non-residential land uses are compatible with single family or multi-family residential development" in mixed-use TNDs. Despite Ms. Ward's opinion that the Plan Amendment would allow non-residential development out of scale with

surrounding neighborhoods, she admitted that the specific site-design policies for TNDs would apply to the Plan Amendment.

74. Further, the Comprehensive Plan policies governing neighborhood design and site standards will also apply to the development allowed under the Plan Amendment. Those policies provide that "[u]rban development shall incorporate design techniques to promote integration with adjacent neighborhoods." FLUE Policy 1.4.1.4. Design techniques include "transitional intensity (types of uses), stepped density, buffering, boundaries, landscaping and natural open space." FLUE Policy 1.4.1.4(a). The Plan provides that "[s]pecial attention shall be provided to the design of development and neighborhood edges, which shall be designed to be integrated into the surrounding community." FLUE Policy 1.4.1.4(c).

75. Ms. Ward opined that the existing institutional designation provides for greater compatibility between development proposed on the subject property and the adjoining neighborhood. FLUE Policy 5.2.1 lists the threshold criteria which must be met to establish an institutional use. Ms. Ward specifically identified the following two criteria: (1) "Compatibility of the scale and intensity of the use in relationship to surrounding uses, taking into account impacts such as noise, lighting, visual effect, traffic generation, [and] odors"; and (2) "Preservation and strengthening of community and neighborhood character through design." Ms. Ward expressed the opinion that removing the subject property from the institutional designation removes these protections for the adjacent low-density neighborhood.

76. However, the TND-specific design policies likewise require establishment of compatibility through project design, scaling, and integration with the adjacent neighborhoods. Just because the TND policies do not specifically cite "noise, lighting, [and] visual effect," does not mean the County will not consider those development aspects in approving the specific site design for the subject property. The nature of institutional uses makes it

more likely that off-site impacts will be incompatible with residential, hence the need for enhanced analysis of those specific types of impacts. For example, emergency fire and law enforcement uses are more likely to generate offsite noise impacts than an adjoining residential or mixed use; and public utility uses are more likely to generate offsite lighting impacts, due to security lighting needs.

77. The Plan Amendment does not jeopardize the stability of the adjacent single-family neighborhood by "removing protections" provided under the institutional land use category, as suggested by Ms. Ward.

Data on Suitability

78. Petitioner alleges the Plan Amendment is not supported by relevant data and analysis concerning the suitability of the subject property for the density and intensity of development allowed.

79. County staff performed a suitability analysis related to the Plan Amendment application as part of its review. The suitability analysis included consideration of significant habitat areas, location in flood zones, impact on aquifer recharge, appropriateness for the level of density, and the availability of water and sewer, emergency services, solid waste, and other public utilities to serve the allowable development.

80. At hearing, Petitioner focused on the location of the subject property in the high aquifer recharge area, alleging the County did not analyze data to determine if the TND development was suitable for this site. Mr. Hays testified that the staff review included consideration of the location of the subject property within that sensitive area. Mr. Hays explained that the County has adopted special storm-water treatment criteria for development within the high aquifer recharge area.

81. In formulating her opinion that the site is not suitable for the density and intensity of development allowed under the Plan Amendment, due to its location in the high aquifer recharge area, Ms. Ward did not consider the

County's development regulations for karst-sensitive lands that comprise much of western Alachua County.

82. Further, the impact on the aquifer as a regional resource was evaluated by the North Central Florida Regional Planning Council ("RPC") during its review of the Plan Amendment. The RPC found that "significant adverse impacts [to the Floridan Aquifer] are not anticipated as the County Comprehensive Plan contains goals and policies to mitigate impacts to the [aquifer]."

83. Petitioner did not prove the Plan Amendment is not supported by data and analysis regarding the suitability of the subject property for the development allowed thereunder.

Consideration of Alternatives

84. Petitioner alleges the Plan Amendment is inconsistent with FLUE Policy 7.1.24, which provides, as follows:

> Prior to amending this Element, every consideration shall first be given to alternatives to detailed map changes. Such alternatives might include clarifying text amendments and additional policy statements.

85. Ultimately, Petitioner's argument is that the subject property is more appropriate for low-density or medium-density, rather than the medium-high density category applicable under the Plan Amendment. Petitioner sought to prove that the County did not consider a lower-density on the subject property as an alternative.

86. However, the policy requires the County to consider alternatives *to* detailed map changes; not alternative *types of* map changes.

87. The alternatives contemplated by the policy are "clarifying text amendments" and "additional policy statements."

88. Ms. Ward suggested three alternatives that could have, and perhaps should have, been considered by the County: (1) a change to low-density or medium-density category; (2) a text amendment to allow TNDs within

institutional parcels along the Fort Clark Boulevard (as an express transit corridor); and (3) additional policy statements that would allow residential use while providing "compatibility provisions" to ensure "protection in terms of compatibility and intensity and density."

89. Ms. Ward's first suggestion is a different type of map amendment, which, as addressed above, is not the type of alternative contemplated by the policy. Ms. Ward's second suggestion is hardly a "clarifying" text amendment. It takes the form of an overlay amendment authorizing a new use (TNDs) on a limited number of properties (institutional) in a specified location (along Fort Clark Boulevard). Further, this suggestion does not address the heart of the issue—what density of residential development would be allowed on the subject property. TNDs only provide for density bonuses; the base density is established by the underlying land use category, which, in this case, is institutional, and which provides for no residential density. Ms. Ward's third suggestion was not fully fleshed-out at the final hearing. It appears she was suggesting an amendment to allow residential uses in the institutional land use category, which would include specific provisions to protect those residential uses from the inevitable incompatibility with existing institutional uses already developed on those sites. At any rate, the suggestion is again, more than a mere "clarifying text amendment."

90. Mr. Hays testified that the only alternative text amendment he could envision that would accomplish the applicant's goal of developing the property for residential, would be an amendment to allow residential development in the institutional category. Mr. Hays testified that such a change would have unintended, and potentially negative, consequences when applied to all the institutionally-designated properties in the County. Moreover, Mr. Hays testified that there is no alternative that he, as a professional planner, would recommend to the Board of County Commissioners.

91. On this issue, Mr. Hays' testimony is accepted as more persuasive than Ms. Ward's.

Other Alleged Internal Inconsistencies

92. Petitioner alleges that adoption of the Plan Amendment creates internal inconsistencies in the Comprehensive Plan, specifically between the Plan Amendment and the FLUE Goal and Principles, which read as follows:

> Goal
>
> Encourage the Orderly, Harmonious, and Judicious Use of Land, Consistent with the Following Guiding Principles.
>
> Principle 1
>
> Promote sustainable land development that provides for a balance of economic opportunity, social equity including environmental justice, and protection of the natural environment.
>
> Principle 2
>
> Base new development upon the provision of necessary services and infrastructure, focus on urban development in a clearly defined area and strengthen the separation of rural and urban uses.
>
> Principle 3
>
> Recognize residential neighborhoods as a collective asset for all residents of the county.
>
> Principle 4
>
> Create and promote cohesive communities that provide for a full-range and mix of land uses.

93. The Goal and Principles at issue are aspirational in that they do not specifically mandate any action that can be objectively or quantitatively

measured for consistency. Rather, the Goal and Principles express a community vision. In short, they are not self-enforcing.

94. The policies contained within the Comprehensive Plan establish the means by which the County intends to achieve its Goal, consistent with the Principles established in each element. It is to the policies that one must look to be informed about how the Comprehensive Plan will be applied to a particular property or situation.

95. When determining internal consistency, it is necessary to consider the Comprehensive Plan as a whole and goals must not be taken out of context as Petitioner has done in this case. For example, Petitioner's expert planner, Ms. Ward, objected to siting the density and intensity represented by the requirement of this Plan Amendment to build out as a TND because it would be in conflict with the FLUE Goal of "orderly and harmonious" development. Ms. Ward confined her analysis to the limited context of the FLUE Goal and Principles and did not consider the implementing FLUE general strategies or policies. Had she examined the policies, the County's express intent to increase density within the Urban Cluster for myriad reasons would have been evident.

96. Petitioner did not prove that the Plan Amendment renders the Comprehensive Plan internally inconsistent with the cited Goal and Principles.

Public Participation

97. Petitioner contends that the County failed to comply with public participation requirements of both the Act and the Comprehensive Plan in adopting the Plan Amendment.

98. FLUE Policy 7.1.25 provides that "[a]ll amendments to the Comprehensive Plan shall meet the requirements of Chapter [sic] 163.3181, Florida Statutes for public participation in the comprehensive planning process."

99. The County requires the applicant for a large-scale plan amendment to hold a noticed neighborhood workshop prior to the public hearings on the plan amendment. Intervenors' agent conducted the required neighborhood workshop on August 22, 2019, and Petitioner's representative, Lisa Allgood, attended that workshop.

100. During the County's review of the Plan Amendment application, Petitioner submitted written comments, through its agent, Steven Tilbrook, to the County through email communications with County staff and commissioners.

101. The County held three separate, properly-noticed, public hearings; one before the local planning agency, and two before the full County Commission. Petitioner participated in all three public hearings through its representative, Mr. Tilbrook.

102. Nevertheless, Petitioner alleges that its rights were violated because the applicant was given more time to make its presentation at the public hearings than Petitioner was to make its comments.

103. It is difficult to determine exactly how much time Petitioner was afforded at the public hearings based on the transcripts. At the local planning agency public hearing, Petitioner's presentation continued for several pages of transcript, and at one point, the chair extended Petitioner an additional ten minutes.

104. At the first County Commission public hearing, Petitioner was given ten minutes, but gave an uninterrupted presentation of an unknown length, followed by a presentation by Petitioner's expert transportation planner. Following the presentation, one of the commissioner's engaged Mr. Tilbrook in a question and answer session.

105. At the second County Commission public hearing, Petitioner's transportation expert addressed the commissioners, as well as Petitioner's corporate representative, Ms. Allgood, and attorney, Mr. Tilbrook.

106. Following adoption of the Plan Amendment, Petitioner timely filed a Petition challenging the Plan Amendment, which gave rise to the instant proceeding.

Regional Policy Plan

107. Petitioner further alleges that the Plan Amendment is not in compliance because it is inconsistent with the RPC Plan, specifically Goals 5.1 and 2.14.

108. Regional Goal 5.1 states the regional goal to "[m]itigate the impacts of development to the Regional Road Network as well as adverse extrajurisdictional impacts while encouraging development within urban areas." Goal 5.1 is implemented by Policies 5.1.1 through 5.1.4, which describe how the RPC determines mitigation of local government plan amendment impacts to regional resources.

109. Policy 5.1.1. provides that "within … urban development areas where the local government comprehensive plan includes goals and policies which implement Transportation Planning Best Practices, adverse impact to the Regional Road Network are adequately [mitigated]." In other words, where a plan amendment is located in an urban development area, and the local government comprehensive plan contains transportation planning best practices, the RPC Plan deems the impacts from a local government plan amendment on the regional roadway network "mitigated."

110. The Plan Amendment is located in the Urban Cluster, an area of the County designated for urban development. Fort Clark Boulevard, also known as State Road 26 ("S.R. 26"), is part of the regional road network.

111. Section 163.3184(3)(b)2. requires the regional planning agency to review a local government plan amendment and comment specifically on "important state resources and facilities that will be adversely impacted by the amendment if adopted."

112. The RPC reviewed the Plan Amendment and determined that "the County Comprehensive Plan Transportation Element contains policies

consistent with Best Transportation Planning Practices contained in the [RPC Plan]." The RPC concluded, consistent with Goal 5.1 and Policy 5.1.1., that adverse transportation impacts of the Plan Amendment to the regional road network "are adequately mitigated."

113. Nevertheless, Ms. Ward testified that, based on Mr. Kim's transportation impact analysis, "there was nothing to rely on as transportation best planning practices in the review of this amendment application."

114. Petitioner introduced no evidence to refute the RPC's determination that the County's Comprehensive Plan contains policies "consistent with Best Transportation Planning Practices contained in the [RPC Plan]."

115. Regional Goal 2.14 establishes the RPC's intent to "[e]nsure future growth and development decisions maintain a balance between sustaining the region's environment and enhancing the region's economy and quality of life." Goal 2.14 is implemented by Policies 2.14.1 and 2.14.2, which establish the desire of the RPC to "[c]reate and sustain vibrant, healthy communities that attract workers, businesses, residents, and visitors to the region"; and "Promote and incentivize local government in the development of vibrant city centers," respectively.

116. Petitioner presented no evidence that the Plan Amendment would not create a community that would attract workers, businesses, residents, and visitors to the region. Petitioner presented no evidence that the Plan Amendment would not develop as a vibrant city center.

117. Instead, Ms. Ward opined that the Plan Amendment violates the "balance" required by Goal 2.14 because the density and intensity of development on the subject property will negatively affect surrounding communities. This is a restatement of Petitioner's compatibility argument. Petitioner did not prove the Plan Amendment is incompatible with the adjacent low-density residential development.

118. Petitioner did not prove the Plan Amendment is inconsistent with the RPC Plan.

CONCLUSIONS OF LAW

119. 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.

120. To have standing to challenge a plan amendment, a person must be an "affected person," as defined in section 163.3184(1)(a).

121. Petitioner is an "affected person" with standing to bring this action pursuant to section 163.3184(1)(a).

122. "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.

123. The 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.

124. "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)).

125. 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).

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

Standing

127. Petitioner alleges that Intervenors do not have standing to intervene in this proceeding because neither Intervenor is an "affected person," as that term is defined in the Act.

128. This proceeding was initiated pursuant to section 163.3184(5)(a), which does not address intervention by any party in a challenge to a comprehensive plan amendment brought by an "affected person," such as Petitioner. By contrast, section 163.3184(5)(b), which governs challenges to a comprehensive plan amendment brought by the state land planning agency, specifically addresses intervention, providing that the parties to the proceeding are limited to the state land planning agency, the affected local government, "and any affected person who intervenes." Unlike the statutory section governing challenges brought by the land planning agency, the statutory section governing Petitioner's challenge is silent as to intervenors.

129. Petitioner relies upon the decision in *St. Joe Paper Company v. Florida Department of Community Affairs*, 657 So. 2d 27 (Fla. 1st DCA 1995), for the proposition that intervenors must satisfy the affected person standing requirements. The challenge to the comprehensive plan amendment that is the subject of *St. Joe Paper* was brought pursuant to section 163.3184(10), Florida Statutes (1990), governing challenges initiated by the state land planning agency's determination that the plan amendment was not "in

compliance." The statute has been significantly rewritten since the 1990 version.[4] The decision in *St. Joe Paper* is not binding precedent in the instant proceeding, which was brought pursuant to an entirely different statutory section under a completely different process for state review of local comprehensive plan amendments.

130. Assuming, *arguendo*, Petitioner is correct that Intervenors must qualify as "affected persons," Petitioner did not prove that Intervenors fell short of that standard.

131. An "affected person" is defined in the Act to include "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[.]" § 163.3184(1)(a), Fla. Stat. In addition to this geographical requirement, the statute requires an "affected person," to have "also submitted oral or written comments, recommendations, or objections to the local government" during its consideration of the plan amendment. *Id*. Petitioner alleges Intervenors do not meet either the geographical requirement or the participation requirement.

132. Petitioner argues that neither NGI nor Fickling owned property, resided in, or owned or operated a business within the County during the time the Plan Amendment was either being considered for adoption or was adopted.

133. It is correct that neither NGI nor Fickling owned the subject property, or any other property in the County, by which they could attain "affected person" status. However, based on the Findings of Fact, both NGI/Novare and Fickling were conducting, and continue to conduct, business within the County in pursuit of developing the subject property. It is a

[4] However, it is notable that even in the 1990 version, the Growth Management Act (the former version of the Community Planning Act) was silent as to intervention in a challenge brought by an affected person following the state land planning agency's determination that the subject plan amendment was "in compliance."

business venture on which the entities have expended at least $500,000, which they stand to lose if the Plan Amendment is not approved.

134. Petitioner next maintains that neither Fickling nor NGI made comments regarding the Plan Amendment during the time in which the Plan Amendment was being considered by the County. Petitioner argues that comments during the public hearings were made solely on behalf of Novare and there is no record of comments made by, or on behalf of, either NGI or Fickling.

135. Petitioner's contention is baseless. Mr. Brown clearly stated that he was representing Fickling when he appeared before both the local planning agency and the County Commission. Mr. Brown also appeared on behalf of NGI/Novare, although he only mentioned Novare by name.

136. Furthermore, contrary to Petitioner's position, Intervenors were not required to be specifically identified by their representatives. "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 Cty.*, Case No. 11-4502 (Fla. DOAH Mar. 2, 2012; Fla. DEO Mar. 30, 2012).

137. Both Fickling and NGI have standing to intervene in this proceeding.

<u>School Capacity Issues</u>

138. Petitioner contends that the Plan Amendment is not supported by data and analysis regarding the impact of the Plan Amendment on area schools, contrary to section 163.3177.

139. The statute provides, in pertinent part, that "plan amendments shall be based upon relevant and appropriate data and an analysis by the local government," which analysis may include "surveys, studies, community goals and vision, and other data available at the time of adoption of the … plan amendment." § 163.3177(1)(f), Fla. Stat. Further, the statute provides that "[t]o be based on data means to react to it in an appropriate way and to the

extent necessary indicated by the data available on that particular subject at the time of adoption of the plan or plan amendment at issue." *Id*.

140. Petitioner alleges the County relied upon Ms. Wynn's flawed analysis of the Plan Amendment's impact on area schools, and that the Plan Amendment was not an appropriate reaction to the data on overcrowding of the Fort Clark Middle School.

141. However, this is a *de novo* hearing, not a review of action taken by the County in adopting the Plan Amendment. *See* § 120.57(1)(k), Fla. Stat. The undersigned is not limited to only the data and analysis which was before the County during its consideration of the Plan Amendment. If the data was available at the time the County adopted the Plan Amendment, the undersigned may consider new analysis of that data at the final hearing. *See* § 163.3177(1)(f), Fla. Stat. ("plan amendments shall be based upon relevant and appropriate data … available at the time of adoption of the … plan amendment.").

142. Ms. Wynn's corrected analysis, introduced at the final hearing, supports the Plan Amendment, even though the analysis was erroneous at the time it was presented to the County at the time of adoption.

143. Petitioner contends that Ms. Wynn's school capacity analysis was flawed because it considered capacity "districtwide" to serve the students anticipated to be generated from development allowed under the Plan Amendment, rather than the capacity within the particular SCSA. Petitioner relies upon PSFE Policy 1.1.3, which states that for purposes of evaluating the impact of a Plan Amendment on school capacity, "existing or planned capacity in adjacent SCSAs shall not be considered." As discussed in the Findings of Fact, Ms. Wynn's analysis correctly evaluated the impact of the Plan Amendment on both the particular SCSA and the district as a whole. Her conclusion that there is capacity districtwide to serve the middle school students anticipated by the Plan Amendment was inherent in her evaluation of the impact on the system as a whole.

144. The Plan Amendment is not an inappropriate reaction to data showing that Fort Clark Middle School is overcapacity. The purpose of the capacity analysis is not to prohibit new development in the County, but rather to provide the SBAC with data projections to be considered for future planning. Ms. Wynn's conclusion that the students estimated to be generated under the Plan Amendment "can reasonably be accommodated during the five, ten, and twenty-year planning period through planned capacity enhancement and management practices" was unrefuted.

145. Petitioner did not prove the Plan Amendment was not supported by appropriate data, and an analysis thereof, related to school capacity.

146. Nor did Petitioner prove that the Plan Amendment creates an internal inconsistency with PSFE Policies 1.1.2, 1.1.3, and 1.1.5.

Transportation Issues

147. Petitioner's contention that the Plan Amendment is not supported by data and analysis related to transportation impacts is likewise unpersuasive. First, Petitioner's contention that the traffic generation analysis was flawed because it utilized a 50/50 split for retail and office uses in the TND was wholly unproven. No evidence was introduced to support a finding that the 50/50 split was not a professionally-acceptable methodology for analyzing traffic impacts from a TND.

148. Second, while Petitioner lamented that the County relied upon 2017 data regarding roadway capacity within the Northwest District, the evidence showed that the data was the best available data on district capacity. That data was relied upon by the County in its recent 2019 EAR process.

149. Petitioner argued that the County should have factored in the new trips generated by development approved since 2017 to get a more accurate assessment of capacity. That argument is contrary to the plain language of section 163.3177 that "[o]riginal data collection by local governments is not required." § 163.3177(1)(f)2., Fla. Stat. The 2017 data was relevant and

appropriate data, and the best data available on that particular subject at the time of adoption of the plan amendment.

150. Finally, Petitioner's argument that the Plan Amendment is not supported by adequate data because the County did not require the applicant to submit a capacity analysis specified in TME Policy 1.1.6.11 is likewise unpersuasive. The County staff's determination—that more than adequate capacity was available in the Northwest District to accommodate the new trips anticipated to be generated from the Plan Amendment—was unrefuted.

151. Petitioner did not prove the Plan Amendment is not supported by appropriate data, and analysis thereof, related to transportation impacts.

152. Petitioner did not prove the Plan Amendment is internally inconsistent with FLUE Principle 2 ("[b]ase new development upon the provision of necessary services and infrastructure. Focus development in a clearly defined area and strengthen the separation of rural and urban uses.").

Compatibility and Suitability

153. Based on the foregoing Findings of Fact, Petitioner did not prove the Plan Amendment was incompatible with surrounding uses, particularly the adjacent low-density residential neighborhood.

154. Petitioner did not prove the Plan Amendment created an internal inconsistency with FLUE Principle 3 ("[r]ecognize residential neighborhoods as a collective asset for all residents of the County"), or Principle 4 ("[c]reate and promote cohesive communities that provide for a full range and mix of land uses").

155. Petitioner did not prove the Plan Amendment was not supported by data regarding the character of the undeveloped land, available services and facilities, as required by section 163.3177(6)(a)2. As recited in the Findings of Fact, County staff analyzed the suitability of the subject property for development as well as the availability of public services and utilities to serve the anticipated development. While Petitioner would have preferred the County to perform additional, though unspecified, analysis of potential

contamination to the Floridan Aquifer, Petitioner did not prove that additional data was available to be analyzed. Nor did Petitioner carry its burden by introducing any data or an analysis to contradict the RPC's conclusion that no significant impacts to the Floridan Aquifer were anticipated from the development allowed under the Plan Amendment.

156. Petitioner did not prove the Plan Amendment creates an internal inconsistency with FLUE Principle 1 ("[p]romote sustainable land development that provides for a balance of economic opportunity, social equity including environmental justice, and protection of natural resources.").

Alternatives

157. Petitioner's allegation that the Plan Amendment is inconsistent with FLUE Policy 7.1.24, because the County did not consider alternatives to the map amendment, is likewise unpersuasive. Whether the County considered other alternatives or not, no reasonable alternative was identified at final hearing that would accomplish the purpose of allowing residential uses on the subject property short of a map amendment.

Public Participation

158. Section 163.3181 governs the public participation requirements for development and adoption of local government comprehensive plan amendments. The County has adopted procedures in its Comprehensive Plan and land development code to implement the statutory requirement that the "public participate in the comprehensive planning process to the fullest extent possible."

159. Petitioner does not allege that the County failed to comply with the notice and public hearing procedures required by either the applicable statutes or the County's regulations.[5]

[5] Even if Petitioner's allegation was that the County failed to comply with required notices and public hearings, that failure would not be a sufficient basis on which to find a comprehensive plan amendment not "in compliance." *See* § 163.3184(1)(b), Fla. Stat. ("'In compliance' means consistent with the requirements of ss. 163.3177, 163.3178, 163.3180, 163.3191, 163.3245, and 163.3248[.]"). Section 163.3181 is not included in that definition.

160. Instead, Petitioner singularly complains that it was not given adequate time at the public hearings to make its presentations to the governing bodies. Decisions regarding comprehensive plan amendments are legislative in nature. *See Martin Cty. v. Yusem*, 690 So. 2d 1288 (Fla. 1997). In a legislative decision-making process, Petitioner posits that members of the public must be given equal time to comment on the proposed action. Petitioner argues that, in hearings related to the Plan Amendment, the County imposed the public participation requirements of a quasi-judicial hearing, allowing the applicant to take additional time for a presentation and limiting all other speakers to an abbreviated comment period.

161. Petitioner alleges it was denied due process which is a constitutional question beyond the scope of the undersigned's authority. Circuit courts have the power, in all circumstances, to consider constitutional issues. *See Gulf Pines Mem'l Park, Inc. v. Oakland Mem'l Park, Inc.*, 361 So. 2d 695 (Fla. 1978). However, where, as here, Petitioner alleges a constitutional deficiency in the administrative process, administrative remedies must be exhausted to ensure that the County has "had a full opportunity to reach a sensitive, mature, and considered decision upon a complete record appropriate to the issue." *Key Haven Assoc. Enter. v. Bd. of Trs.*, 400 So. 2d 66 (Fla. 1st DCA 1981). The appropriate course of action, which was followed here, was for Petitioner to make a record of the alleged unconstitutional deficiency during the administrative hearing. Then, the district court is the "proper forum to resolve this type of constitutional challenge because those courts have the power to declare the agency action improper and to require modifications in the administrative decision-making process." *Key Haven Assoc. Enter., Inc. v. Bd. of Trs. of the Int. Imp. Trust Fund,* 427 So.2d 153 (Fla. 1982).

162. In light of those decisions, the undersigned has made Findings of Fact relative to Petitioner's constitutional challenge, which may be considered by the appellate court, should Petitioner appeal the Final Order resulting from this Recommended Order.

163. Assuming, *arguendo*, Petitioner was alleging the County failed to follow applicable public notice and hearing procedures within the framework of the Act, Petitioner has an opportunity to make a record to demonstrate how it was prejudiced by the alleged failures. *See Emerald Lakes Residents' Ass'n, Inc. v. Collier Cty.*, Case No. 02-3090 (Fla. DOAH Feb. 10, 2003; Fla. DCA May 8, 2003). The undersigned concludes, based on the record and the Findings of Fact herein, that Petitioner suffered no prejudice from alleged inadequate presentation time at the public hearings. Petitioner participated in all three public hearings, made lengthy presentations (although not as long as the applicants' presentations), presented information from its experts, and answered questions from the commissioners who engaged directly with its representatives.

Other Internal Inconsistencies

164. Petitioner did not prove that the Plan Amendment creates internal inconsistencies with the FLUE Goal and Principles 1 through 4.

Regional Policy Plan

165. Section 163.3184(1)(b) defines "in compliance" to include consistency with the applicable strategic regional policy plan.

166. Petitioner did not prove its allegation that the Plan Amendment is inconsistent with Goals 5.1 and 2.14 of the RPC Plan.

Other Issues

167. Petitioner failed to prove any other bases for challenging the Plan Amendment raised in this proceeding.

Conclusion

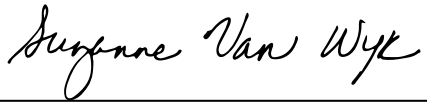
168. For the reasons stated above, Petitioner has not proven beyond fair debate that the Plan Amendment is not "in compliance," as that term is defined in section 163.3184(1)(a).

169. The undersigned reserves jurisdiction in this case to rule on Respondent and Intervenors' Joint Motion for Sanctions following an evidentiary hearing to be scheduled in the near future.

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 Comprehensive Plan Amendment adopted by Ordinance No. 20-05 on February 5, 2020, is "in compliance," as that term is defined in section 163.3184(1)(b).

DONE AND ENTERED this 1st day of December, 2020, in Tallahassee, Leon County, Florida.



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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.