

**STATE OF FLORIDA**  
**DIVISION OF ADMINISTRATIVE HEARINGS**

JACQUELINE ROGERS, THERESA  
BLACKWELL, AND WILLIAM BEECH,

Petitioners,

vs.

Case No. 20-3015GM

ESCAMBIA COUNTY, A POLITICAL  
SUBDIVISION OF THE STATE OF FLORIDA,

Respondent

and

FRANK E. WESTMARK AND ELIZABETH J.  
WESTMARK,

Intervenors.

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RECOMMENDED ORDER

A duly noticed final hearing was held in this case on November 12 and 13, 2020, and December 10, 2020, before the Hon. Francine M. Ffolkes, a duly designated Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioners:

Jacqueline A. Rogers, pro se  
Neal Road/Knollwood Neighborhood  
1420 Ridge Way  
Cantonment, Florida 32533-7991

Theresa Blackwell, pro se  
9535 Tower Ridge Road  
Pensacola, Florida 32526

William Beech, pro se  
1956 West Kingsfield Road  
Cantonment, Florida 32533

For Respondent: Charles V. Peppler, Esquire  
Kia M. Johnson, Esquire  
Office of the Escambia County Attorney  
221 Palafox Place, Suite 430  
Pensacola, Florida 32502-5837

For Intervenors: Sally B. Fox, Esquire  
Emmanuel, Sheppard & Condon, P.A.  
30 South Spring Street  
Pensacola, Florida 32502

STATEMENT OF THE ISSUES

Whether the Escambia County comprehensive plan amendments adopted by Ordinance Nos. 2020-14, 2020-15, and 2020-16 adopted on June 4, 2020, are "in compliance," as that term is used in section 163.3184(1)(b), Florida Statutes.

PRELIMINARY STATEMENT

On June 4, 2020, Escambia County (County) adopted Ordinance Nos. 2020-14, 2020-15, 2020-16, which amended its Comprehensive Plan (Comp Plan) by allowing four parcels to withdraw from the County's Mid-West Optional Sector Plan (OSP). The County also assigned each parcel with a new Mixed-Use Suburban (MU-S) future land use (FLU) designation.

On July 6, 2020, Petitioners, Jacqueline Rogers, Theresa Blackwell, and William Beech (Petitioners) filed their challenge to the Ordinances with DOAH. On July 17, 2020, Intervenors filed their motion to intervene as full parties, which was granted on the same day. The parties filed their Joint Pre-Hearing Stipulation on November 9, 2020.

At the hearing, Petitioners presented the testimony of ten witnesses, including themselves. Ann Paul was accepted as an expert in the areas of waterbird populations and management of coastal habitats for wildlife. Christian Wagley was accepted as an expert in the areas of watershed science and urban planning. Barbara Albrecht (Albrecht) was accepted as an expert in the areas of marine biology, aquatic ecology, environmental diagnostics, and bioremediation. Juan Lemos (Lemos) and Allyson Lindsay (Lindsay) are employees of the County and experts in the field of planning, zoning, and growth management in accordance with the County Land Development Code (LDC), the Comp Plan, and the OSP. Terri Malone (Malone), AICP, is the County's transportation planner. Ms. Malone holds a master's degree in urban and regional planning and has 30 years of experience in the field of urban and regional planning. Horace Jones (Jones) was presented as a fact witness, Mr. Jones is the Development Services Director of the County's Development Services Department. Petitioners' Exhibits 1 through 14, 16 through 19, 26, 27, 29 through 44, 46 through 49, 52, 54, 59 through 61, 63 through 67, 68, 69, 72, and 73 were accepted into evidence.

The County presented the testimony of three expert witnesses on cross-examination following the Petitioners' direct examination: Mr. Lemos, Ms. Lindsay, and Ms. Malone. Kenneth Metcalf (Metcalf), AICP, with a master's degree in urban and regional planning and 35 years' experience, was accepted as an expert in the areas of sector planning, urban and regional planning, growth management, administration and implementation of chapter 163, assessment of development impacts, environmental planning, and transportation planning. Mr. Metcalf was a joint expert witness for the County and Intervenors. The County's Exhibits 1 through 30 were accepted into evidence. Intervenors presented the testimony of one

expert witness, Mr. Metcalf. Intervenors' Exhibits 1 through 19 were accepted into evidence.

A three-volume Transcript of the proceeding was filed on February 8, 2021. The parties timely filed their proposed recommended orders on April 9, 2021, which have been carefully considered in the preparation of this Recommended Order.

References to the Florida Statutes are to the 2020 version unless otherwise stated.

#### FINDINGS OF FACT

The following Findings of Fact are based on the stipulations of the parties and the evidence adduced at the final hearing.

#### Parties

1. Petitioners are "affected persons" as defined in section 163.3184(1)(a) who own property in the County and timely submitted comments or objections to the County with regard to the subject plan amendments.

2. The County is a non-charter county and a political subdivision of the State of Florida. The County's principal offices are located at 221 Palafox Place, Pensacola, Florida 32502. The County is a local government that is subject to the requirements of chapter 163.

3. Intervenors are the owners of property located at 2025 West Kingsfield Road, Cantonment, Florida 32533. The Westmark Property was the subject of Ordinance No. 2020-14.

4. The instant administrative proceeding was a challenge to all three Ordinances adopted by the County on June 4, 2020. The Arnold Property

was the subject of Ordinance No. 2020-15. The Jolly Property was the subject of Ordinance No. 2020-16.

### Background

5. A sector plan is the process in which the local government engages in long-term planning for an area of at least 5,000 acres. *See* §§ 163.3164(42) and 163.3245(1), Fla. Stat. It involves two levels of planning: a) a long-term master plan, and b) a Detailed Specific Area Plan (DSAP), which implements the master plan. A DSAP is created for an area that is at least 1,000 acres and identifies the distribution, extent, and location of future uses and public facilities. *See* § 163.3245(3), Fla. Stat. While the DSAP is created by a local development order that is not subject to state compliance review, an amendment to an adopted sector plan is a plan amendment reviewed under the state coordinated review process. *See* § 163.3184(2)(c), Fla. Stat.

6. The County's OSP was one of five original sector plans adopted as part of a pilot program in the State of Florida. The County's OSP is unique from the other sector plans throughout the state because of its large number of property owners. The other four pilot sector plans contain one or two owners of large parcels. Those one or two property owners specifically requested to have a sector plan. In the County there are 1,792 parcels located in the OSP.

7. On June 3, 2010, the County adopted its Comp Plan and the Mid-West OSP through Ordinance No. 2010-16. Ordinance No. 2010-16 was challenged by the state land planning agency, the former Department of Community Affairs (DCA). Ordinance No. 2011-3 was adopted by the County as a stipulated remedial ordinance in response to the DCA challenge. Ordinance No. 2011-3 was determined to be in compliance with part II of chapter 163. The time for a challenge to Ordinance 2011-3 has expired.

8. The OSP DSAP was adopted by County Ordinance No. 2011-29 in September 2011, and the DSAPs attached to the ordinance were adopted as

well. Ordinance No. 2011-29 established two DSAPs: Muscogee DSAP and Jacks Branch DSAP. The time for a challenge to Ordinance 2011-29 has expired.

9. Chapter 7 of the County's Comp Plan contains the FLU Element that established future land use patterns as described by the FLU Element's goals, objectives, and policies. The policies include FLU categories with general descriptions of allowable uses and development standards. FLU Element categories include Agricultural, Rural Community, and MU-S.

10. Chapter 16 of the County's Comp Plan contains the OSP overlay that established a long-term master plan for buildout of the area covered by the OSP. The OSP sets forth FLU goals, objectives, and policies that generally describe types of land uses, regionally significant public facilities, and regionally significant natural resources. The policies include FLU categories related to the OSP area general principles that contain general descriptions of allowable uses and development standards. OSP FLU categories include Town Center, Village Center, Traditional/Urban Neighborhood, and Conservation Neighborhood. Until a DSAP is adopted, the property within the OSP maintains the underlying FLU Element designation.

11. The right to opt-out or withdraw from the long-term master plan with local government approval was created by the Florida Legislature when section 163.3245 was amended during the 2011 legislative session. *See* § 163.3245(8), Fla. Stat. This can be accomplished only with the approval of the local government by plan amendment adopted and subjected to state compliance review under section 163.3184. *Id.*

12. On April 16, 2015, the County repealed and replaced its entire LDC and instituted a county-wide rezoning to accomplish a consolidation of zoning districts by Ordinance No. 2015-12.

13. On March 16, 2017, the County amended its LDC through Ordinance No. 2017-14, establishing criteria for evaluation of any request by a property

owner wishing to opt-out of the Mid-West OSP. Ordinance No. 2017-14 was not challenged.

14. Once a parcel is removed from the County's OSP, the underlying County zoning becomes effective, but a new FLU category must be assigned to the property by a plan amendment.

15. Ordinance Nos. 2020-14, 2020-15, and 2020-16 were considered favorably by the County Planning Board on March 3, 2020. The three Ordinances were considered and approved by the County Commission on March 5, 2020, and June 4, 2020.

16. Notice of all public hearings was published in a newspaper of general circulation. The comprehensive plan amendments at issue were made available to the public. Members of the public could speak at the public hearings.

#### The Subject Properties

17. The subject properties are located on the southeastern perimeter boundary of the Mid-West OSP, within the Muscogee DSAP. The current underlying zoning for each parcel is Low Density Residential (LDR), with a maximum residential development allowance of four dwelling units per acre (du/ac). The existing land use derived from the DSAP Final Land Use Plan identifies that the parcels are within the Conservation Neighborhood District, with a maximum residential development allowance of three du/ac.

18. In the County there are 1,792 parcels located in the Mid-West OSP. The County's staff calculated that the total developable acreage in the entire Mid-West OSP is 8,611.80 acres. The total developable acreage of the Muscogee DSAP in the Conservation Neighborhood District is 1,289.90 acres.

19. The Westmark Property has a single-family residence on site and the approximate acreage for the parcel is 84.10 +/- acres. The parcel's 84.10 +/- acres represents 0.97% of the existing developable acreage in the Mid-West OSP. Removal of this acreage would result in a decrease of 6.52% of

available developable acres in the Muscogee DSAP in the Conservation Neighborhood District.

20. Petitioners contend that the Conservation Neighborhoods were selected for that designation because they are environmentally sensitive lowlands prone to flooding. However, an analysis of the Final Land Use Map in the DSAP reveals that the Conservation Neighborhoods are mostly high and dry like the Westmark Property.

21. The most environmentally sensitive lands with substantial wetlands and lowlands are found in and around Town Centers and Regional Employment Districts. Town Centers and Regional Employment Districts have the highest density and intensity uses in the Mid-West OSP. These and other high-density uses are exempt from the open space set asides imposed on properties in the Conservation Neighborhoods.

22. Respondents' expert, Mr. Metcalf, testified that there was a one percent chance of a flood occurring on small pockets of the Westmark Property. This was determined using the Federal Emergency Management Agency (FEMA) flood zones that are incorporated in the County's regulations. In addition, the County's regulations allow for corrective measures such as mitigation and fill, so the flood zone areas would not preclude development of any affected property.

23. The Arnold Property has a single-family residence on site and the approximate acreage of the parcel is 4.04 +/- acres. The parcel's 4.04 +/- acres represents 0.04% of the existing developable acreage in the Mid-West OSP. Removal of this 4.04 +/- acres would result in a decrease of 0.31% in available developable acres in the Muscogee DSAP under the Conservation Neighborhood District.

24. The Jolly Property has two single-family residences on site and is comprised of two adjacent parcels having a total approximate acreage of 5.99 +/- acres. The parcels' 5.99 +/- acres represents 0.07% of the existing



developable acreage in the Mid-West OSP. Removal of these 5.99 +/- acres would result in a decrease of 0.46% of available developable acres in the Muscogee DSAP under the Conservation Neighborhood District.

#### Application Review

25. In 2015, when the County received its first request to opt out of the Mid-West OSP, County staff contacted the state land planning agency, the current Department of Economic Opportunity (DEO), for advice on how to process such a request. DEO informed County staff that there was no prior data that they could provide to the County. There was no sample application or process that any other jurisdiction had created because the County was the first jurisdiction to process an opt-out request.

26. Because this was only the second time opt-out applications had been filed with the County, the County relied upon a series of meetings previously held with DEO for the purpose of seeking guidance on how to proceed. The County was instructed by DEO that the opt-out application and FLU assignment should be processed in the same manner as a FLU map (FLUM) comprehensive plan amendment and then reviewed under the state coordinated review process. DEO had also suggested criteria that should be considered when processing such an application. Those criteria were adopted as LDC section 2-7.4.

27. After the three opt-out applications were filed, the County began the process of determining whether the applications satisfied the opt-out criteria in LDC section 2-7.4 and the relevant Comp Plan requirements. At the hearing, it became clear that some of the criteria adopted by LDC section 2-7.4 were above and beyond the state compliance review necessary for plan amendments under section 163.3184. Petitioners asserted that the LDC criteria and a *strict scrutiny* standard should govern review of the opt-out applications in this proceeding. However, that approach would be contrary to

the state compliance review set forth in section 163.3184, including the *fairly debatable* standard mandated by section 163.3184(5)(c).

28. At the hearing, Mr. Metcalf testified that he prepared a 15-page expert written report based on information a professional planner would consider reliable. The report is titled "Westmark Comprehensive Plan Amendment Compliance Evaluation" and was accepted into evidence. Mr. Metcalf's expert testimony and report, along with the County's staff report, were the most credible evidence presented at the hearing to support the Westmark Property opt-out application.

29. As more fully discussed below, the preponderance of the evidence established that the Westmark Property, Arnold Property, and Jolly Property opt-out application met all applicable statutory requirements for approval of the FLUM change from Conservation Neighborhood to MU-S.

30. The requested opt-outs were debated extensively during a series of public hearings that began in March 2020. Members of the public were allowed to speak for or against the proposed opt outs. On June 4, 2020, the County voted to amend its Comp Plan by: (a) allowing the parcels to withdraw from the Mid-West OSP; (b) removing the Mid-West OSP overlay on the parcels; and (c) amending the FLUM by assigning the properties the MU-S FLU designation.

31. The Ordinances were transmitted to DEO for review under the state coordinated review process. DEO determined that each Ordinance met the requirements of chapter 163, for compliance purposes.

32. Besides DEO's review, the Department of Transportation (DOT) and the Department of Education reviewed the Ordinances for impacts on transportation and school concurrency, respectively. The Florida Fish and Wildlife Conservation Commission also reviewed the Ordinances. No comments, recommendations, or objections were sent to the County by any of these reviewing agencies.

### Internal Consistency

33. When the effect of a plan amendment creates clear conflict with other provisions of the existing Comp Plan, the plan amendment is said to create internal inconsistencies within the Comp Plan in contravention of section 163.3177(2).

34. Petitioners argued that the opt-out applications are internally inconsistent with the policies in Chapter 16 of the Comp Plan. Petitioners' convoluted argument cannot be accepted because the sector plan statute allows property owners to withdraw their parcels from the OSP area. Thus, those parcels would no longer be subject to the policies of Chapter 16 of the Comp Plan.

35. Mr. Metcalf's opinion was that an internal inconsistency could occur only if the plan amendment is so disruptive that it completely undermined the County's ability to implement the OSP in a manner consistent with the Comp Plan policies. Petitioners failed to demonstrate any internal inconsistencies that would completely undermine the County's ability to implement the OSP.

36. Because of its limited scope, Mr. Metcalf persuasively testified that withdrawing the three properties from the OSP area would not prevent the County and the OSP from carrying out its objectives and remaining internally consistent with all of its policies.

37. In addition, the three opt-outs did not create remnant areas or fragment the DSAP. A "remnant" or "fragment" would result when removal of a parcel leaves behind one or more OSP parcels that did not have any connectivity or access to the remainder of the OSP parcels within the DSAP.

38. The MU-S FLU category is compatible with adjacent, existing, and planned FLU. As shown by the maps included with the opt-out applications' amendment packages, many MU-S neighborhoods abut properties designated as Conservation Neighborhood within the OSP area. Many of

these MU-S neighborhoods are also zoned LDR. Thus, the three opt-out plan amendments are comparable to the existing land use and zoning pattern in the area.

39. The County's experts testified that when no specific development project was proposed for the three properties, all elements of the Comp Plan were reviewed for consistency with the proposed FLU category of MU-S. That review included elements such as infrastructure, mobility, and conservation. The MU-S designation for the three opt-out properties was consistent with all applicable elements of the Comp Plan.

40. Petitioners did not prove beyond fair debate that the three opt-out plan amendments were internally inconsistent or would create conflict within the County's Comp Plan.

41. It is fairly debatable that the three opt-out plan amendments were internally inconsistent with relevant provisions in the Comp Plan.

#### Relevant and Appropriate Data and Analysis

42. "To be based on data means to react to it in an appropriate way and to the extent necessary indicated by the data available on that particular subject at the time of adoption of the plan or plan amendment at issue." § 163.3177(1)(f), Fla. Stat. Data supporting an amendment must be taken from professionally accepted sources. *See* § 163.3177(1)(f)2., Fla. Stat. However, local governments are not required to collect original data. *Id.*

43. Surveys, studies, and data regarding the area form the bases for FLU plan amendments. *See* § 163.3177(6)(a)2., Fla. Stat.

44. During the application process for each of the opt-out applications, the County staff reviewed the extensive data that was collected and used to support adoption of the Mid-West OSP and the DSAPs. The data reviewed and analyzed by the County staff addressed natural resources, wetlands, historically significant sites, and impacts to the environment. The data also addressed the availability of potable water, sanitary sewer, and all other

public facilities. Specifically, County staff confirmed the location of the parcels and determined who the providers would be in order to analyze the specific level of service standards applicable to the parcels.

45. The County's experts testified that since no specific development projects were proposed for the three properties, it was reasonable to analyze the impacts of the FLUM change to MU-S within the constraints of the maximum standards for the underlying LDR zoning.

46. Although Mr. Metcalf's independent analysis and opinion was based on reviewing the maximum standards for the MU-S FLU category, he agreed that the County's approach was sensible and realistic in the context of these three opt-out applications. His analysis demonstrated that there would be sufficient infrastructure and service capacity available either way.

47. The evidence demonstrated that there was adequate data and analysis taken from professionally accepted sources, and gathered through professionally accepted methodologies, to support the three opt-out plan amendments.

48. Petitioners did not prove beyond fair debate that the three opt-out plan amendments were not based on relevant and appropriate data and an analysis by the County, as required by sections 163.3177(1)(f) and 163.3177(6)(a)2.

#### FLUM Amendment Analysis

49. Specific analyses are relevant for these FLUM amendments.  
*See* § 163.3177(6)(a)8., Fla. Stat.

*The availability of water supplies, public facilities, and services.*

50. The Westmark Property, Arnold Property, and Jolly Property are currently dependent upon on-site septic systems like other surrounding properties in the neighborhood. Septic systems are limited to a maximum of four du/ac per acre by state health department regulation. At present, this

would comport with the four du/ac maximum density allowed by LDR zoning.

51. Emerald Coast Utilities Authority (ECUA) operates a 12-inch force main sewer line at the intersection of Highway 97 and West Kingsfield Road, three quarters of a mile from the Westmark Property. Mr. Metcalf evaluated the permitted capacity for ECUA's interconnected wastewater treatment facilities and concluded there would be sufficient capacity available to service the Westmark Property if developed to the FLU MU-S maximum density of 25 du/ac.

52. With regard to potable water, the subject properties are located in the Farm Hill Utilities, Inc. (FHU), service area, which has a 20-year consumptive use permit (CUP), valid through 2033. Notably, the CUP application was based on the Bureau of Economic and Business Research high population projection series for this area.

53. The CUP authorizes an average daily withdrawal of 0.68 million gallons per day (MGD) for three active wells. The 2019 average daily withdrawal for the three wells totaled 0.49 MGD as reported in the 2019 annual report submitted to the Northwest Florida Water Management District (NFWFMD). The NFWFMD 2018 Water Assessment Report forecasts demand through 2030 of 0.618 MGD. The largest of the subject properties, the 84.10 +/- acre Westmark Property, would generate a demand for 0.078 MGD at the maximum zoning density based on the adopted level-of-service standard set forth in Infrastructure (INF) Policy 4.1.7 of the Comp Plan. As such, sufficient capacity is currently available and is projected to be available through 2030 to serve even the 84.10 +/- acre property if developed based on the zoning density.

54. Mr. Metcalf concluded that if FHU was unable to provide MU-S FLU category maximum density service, ECUA could and would provide the service. The ECUA service area is adjacent to FHU's service area. ECUA could

simply extend to the west to service the Westmark Property in a maximum density development scenario. ECUA operates as an enterprise fund, meaning it would charge users as it expands the system. So, to the extent that the current or any future owner of the Westmark Property wanted to develop to 25 du/ac, they would be required to pay for that expansion.

55. The County has no public stormwater treatment facilities in the area to serve the subject properties. Stormwater retention and treatment would be accomplished by a required on-site system capable of handling the maximum 25 du/ac or mixed-use development scenarios as well as the LDR zoning scenario. The opt-out plan amendments would not affect stormwater management.

56. To the extent stormwater ultimately discharges to an Outstanding Florida Water such as the Perdido River, higher levels of stormwater management are required, and additional measures would protect sensitive wetlands.

57. With respect to solid waste disposal, the Perdido Landfill is used to accommodate the municipal solid waste disposal needs of the County. The County's six pounds per capita per day level of service standard is based on population projections for calculating demand, which has already been established by the County independent of the Comp Plan. If future development projects were to be proposed for the three subject properties, the current buildout for the Perdido Landfill has solid waste disposal capacity until the year 2045.

58. The County does not require a recreational level of service standard. The County has made a policy decision not to implement concurrency requirements for recreation.

59. Petitioners argued that the open space requirement of 50% under the Conservation Neighborhood land use is an important level of protection that would be lost if the subject properties are allowed to withdraw from the OSP.

The Conservation Neighborhood open space requirements do not include any direction as to where the open space must be located and preserved on a site.

60. Permitted uses of the open space allowed by section 3.03 of the DSAP include recreation that allows accessory buildings and improvements such as golf courses, tennis and basketball courts, athletic fields, clubhouses with swimming pools, and other such improved recreational facilities, plus up to one-half of the open space can be used for enhanced stormwater retention ponds, provided they are designated as subdivision amenities.

61. Mr. Metcalf determined that the allowable uses of open space in the OSP Conservation Neighborhood designation generally comport with the open space uses as defined in Chapter 3 of the Comp Plan. The Petitioners' own expert, Mr. Albrecht, did not dispute that the Recreation and Open Space Element contained in Chapter 13 of the Comp Plan applies to private developments and would be applicable to these properties if they are allowed to withdraw from the OSP.

62. Although the County has not adopted school concurrency, or school impact fees, Mr. Metcalf testified that a reasonable estimate for long-term planning purposes may be derived from existing census and school enrollment data. Mr. Metcalf estimated the potential number of elementary, middle, and high school students if the Westmark Property was developed at the maximum density with mid-story, multifamily units. He also conducted an estimate using the same methodology if it was developed at the maximum zoning density.

63. The school district budgets for growth and capital over five and ten-year periods utilizing its own data and analysis including enrollment growth of individual schools that fluctuate partly because the County has freedom of choice for enrollments. In Mr. Metcalf's expert opinion, the County school district's 2019-2020 Five Year Work Program confirmed that sufficient capacity was available within the school district to serve the Westmark



Property, whether developed at the maximum zoning density or the maximum MU-S FLU density.

64. Notwithstanding the fact that school concurrency has been removed from both the state statute and the County's Comp Plan, Mr. Jones testified that the County reviews what public schools are in the vicinity of a proposed project to determine if there is capacity or if the school board needs to be advised regarding further development of the public school system.

65. The County's expert, Ms. Lindsay, confirmed that granting these opt-out requests would have no immediate impact on public school facilities. She also testified that the County would review potential impacts on public school facilities during any site plan review of a proposed project.

66. Despite the fact that the County has no level of service standard or concurrency for transportation, Mr. Metcalf explained that the statutory FLUM amendment evaluation requires an analysis and a demonstration of adequate planning to coordinate land use and transportation. However, there was no binding development standard that had to be achieved in order to demonstrate availability of adequate capacity.

67. Notwithstanding the fact that transportation concurrency has been removed from both the state statute and the County's Comp Plan, the County would be reviewing the traffic capacity and the ability of the roads adjoining any proposed project to handle any new traffic generated by the project. The County's transportation expert, Ms. Malone, confirmed that such a review would entail a trip generation study to determine the potential for an increase in number of trips and number of pedestrians. The review would also entail an analysis of whether an intersection or turn lane would be necessary for any proposed development.

68. The County has an active project to realign and extend West Kingsfield Road from Highway 97 west to the first 90-degree curve, as well as

construct a new two-lane roadway further west to connect to the eventual Beulah Interchange Connector Project. The County is currently nearing 60% design and is in the right-of-way phase. The construction phase will follow the design and right-of-way phases once the necessary funding has been identified. The new extension roadway will run east to west through the Westmark Property.

69. During her review of the opt-out proposals, Ms. Malone determined that this portion of West Kingsfield Road is functioning within its allowable capacity. Ms. Malone found no reason to believe that approving these opt-outs would have any immediate impact on the capacity of the existing transportation infrastructure.

70. Mr. Metcalf conducted a worst-case scenario analysis of the impact on West Kingsfield Road by assuming a maximum development potential for the Westmark Property. He analyzed three different development scenarios. One development scenario was based on the maximum density at 25 du/ac allowed by the MU-S FLU category. The second development scenario was based on the trip generation resulting from the MU-S density if the property was developed for either residential or commercial purposes. The third development scenario was based on the trip generation resulting from the LDR zoning at four du/ac.

71. For each of the three scenarios, Mr. Metcalf compared the amount of daily trip generation to the capacity of West Kingsfield Road as it has been planned, and then he calculated the resulting level of service. He confirmed that West Kingsfield Road would operate at an acceptable level of service in all scenarios.

72. Petitioners did not prove beyond fair debate that the three opt-out FLUM plan amendments were not based on an analysis of the availability of facilities and services, as required under section 163.3177(6)(a)8.

*The character of undeveloped land.*

73. The County considered the suitability of the proposed FLU MU-S category in light of the existing character of the three opt-out properties including the soils, the topography, the natural resources, and the historic resources.

74. The County staff reviewed the extensive data that was collected and used to support adoption of the Mid-West OSP and the DSAPs. The data reviewed and analyzed by the County staff addressed natural resources, wetlands, historically significant sites, and impacts to the environment.

75. There was no dispute that relevant elements of the Comp Plan would continue to apply to these three properties if they are withdrawn from the OSP. Those elements include the Conservation Element that contains policies addressing wetland protection, wildlife habitat protection, and protection of listed species. Also, the Recreation and Open Space Element contained in Chapter 13 of the Comp Plan applies to private developments and would be applicable to these properties if they are withdrawn from the OSP.

76. There was no dispute that allowing these properties to withdraw from the OSP would have no immediate impact on the wildlife, ecology, or biology of the County.

77. Petitioners contended that the Conservation Neighborhoods were selected for that designation because they are environmentally sensitive lowlands prone to flooding. However, an analysis of the Final Land Use Map in the Muscogee DSAP revealed that the Conservation Neighborhoods are mostly high and dry, like the Westmark Property.

78. The most environmentally sensitive lands with substantial wetlands and lowlands are found in and around Town Centers and Regional Employment Districts. Town Centers and Regional Employment Districts have the highest density and intensity uses in the Mid-West OSP. These and

other high-density uses are exempt from the open space set asides imposed on properties in the Conservation Neighborhoods.

79. Petitioners did not prove beyond fair debate that the proposed FLU MU-S category was not suitable in light of the existing character of the three opt-out properties including the soils, the topography, the natural resources, and the historic resources.

#### Meaningful and Predictable Standards

80. Section 163.3177(1) provides that a comprehensive plan "shall establish meaningful and predictable standards for the use and development of land and provide meaningful guidelines for the content of more detailed land development and use regulations."

81. Petitioners argued that the opt-out plan amendments are inconsistent with section 163.3177(1) because they fail to establish meaningful and predictable standards for removal of property from the DSAP and renders the OSP meaningless.

82. The more persuasive evidence established that withdrawing the three properties from the OSP area would not prevent the County and the OSP from carrying out its objectives and remaining internally consistent with all of its policies. In addition, the three opt-outs did not create remnant areas or fragment the DSAP.

83. The County's experts testified that all elements of the Comp Plan were reviewed for consistency with the proposed FLU category of MU-S. That review included elements such as infrastructure, mobility, and conservation. The MU-S designation for the three opt-out properties was consistent with all applicable elements of the Comp Plan.

84. Petitioners did not prove beyond fair debate that the three opt-out plan amendments rendered the OSP meaningless and the Comp Plan lacking meaningful and predictable standards for the use and development of land.

85. It is fairly debatable that the three opt-out plan amendments fail to establish meaningful and predictable standards for the use and development of land.

### CONCLUSIONS OF LAW

#### Standing and Scope of Review

86. To have standing to challenge a comprehensive plan amendment, a person must be an "affected person" as defined in section 163.3184(1)(a). The record evidence established that Petitioners are affected persons and had standing to challenge the Ordinances.

87. An affected person challenging a plan amendment must show that the amendment is not "in compliance" as defined in section 163.3184(1)(b). "In compliance" means consistent with the requirements of sections 163.3177, 163.3178, 163.3180, 163.3191, 163.3245, and 163.3248.

88. Chapter 163, part II, and the case law developed pursuant thereto, are the applicable law in this proceeding. *See Amelia Tree Conservancy, Inc. v. City of Fernandina Beach*, Case No. 19-2515GM (Fla. DOAH Sept. 16, 2019; Fla. DEO Oct. 16, 2019). A hearing on a plan amendment is a de novo proceeding. *Id.*

89. Section 163.3245(3) provides as follows with respect to sector planning:

Sector planning encompasses two levels: adoption pursuant to s. 163.3184 of a long-term master plan for the entire planning area as part of the comprehensive plan, and adoption by local development order of two or more detailed specific area plans that implement the long-term master plan and within which s. 380.06 is waived.

90. Section 163.3245(8) provides as follows with respect to withdrawal of parcels from a sector plan:

Any owner of property within the planning area of a proposed long-term master plan may withdraw his or her consent to the master plan at any time prior to local government adoption, and the local government shall exclude such parcels from the adopted master plan. Thereafter, the long-term master plan, any detailed specific area plan, and the exemption from development-of-regional-impact review under this section do not apply to the subject parcels. *After adoption of a long-term master plan, an owner may withdraw his or her property from the master plan only with the approval of the local government by plan amendment adopted and reviewed pursuant to s. 163.3184.* (Emphasis added).

91. Moreover, plan amendments that propose an amendment to an adopted sector plan are statutorily mandated to follow the state coordinated review process set forth in section 163.3184(4). *See* § 163.3184(2)(c), Fla. Stat. These statutory requirements are clear and unambiguous.

92. Contrary to the plain language of the controlling statutes, Petitioners argued that the OSP and DSAP development standards should remain on the subject properties unless the DSAP is amended through a quasi-judicial process. This argument is illogical. If the subject properties are not allowed to withdraw completely from the OSP and the DSAP by a FLUM plan amendment in compliance with section 163.3184, then section 163.3245(8) is rendered meaningless.

93. In addition, the language of section 163.3245(8) makes clear that with respect to parcels excluded from the OSP, "the long-term master plan, any detailed specific area plan, and the exemption from development-of-regional-impact review under this section do not apply to the subject parcels." *See* § 163.3245(8), Fla. Stat.

### Burden and Standard of Proof

94. As the parties challenging the Ordinances, Petitioners have the burden of proof.

95. The County's determination that the Ordinances are "in compliance" is presumed to be correct and must be sustained if the County's determinations of compliance are fairly debatable. *See* § 163.3184(5)(c), Fla. Stat.; *Coastal Dev. of N. Fla. Inc., v. City of Jacksonville Beach*, 788 So. 2d 204, 210 (Fla. 2001).

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

97. Moreover, "a compliance determination is not a determination of whether a comprehensive plan amendment is the best approach available to the local government for achieving its purpose." *Martin Cty. Land Co. v. Martin Cty.*, Case No. 15-0300GM at ¶ 149 (Fla. DOAH Sept. 1, 2015; Fla. DEO Dec. 30, 2015).

98. The standard of proof for findings of fact is a preponderance of the evidence. *See* § 120.57(1)(j), Fla. Stat.

### Internal Consistency

99. Section 163.3177(2) requires the several elements of the

comprehensive plan to be consistent. A plan amendment creates an internal inconsistency when it conflicts with an existing provision of the comprehensive plan.

100. Internal consistency does not require a comprehensive plan amendment to further every goal, objective, and policy in the comprehensive plan. It is enough if a plan provision is "compatible with," i.e., does not conflict with other goals, objectives, and policies in the plan. If the compared provisions do not conflict, they are coordinated, related, and consistent. *See Melzer, et al. v. Martin Cty.*, Case Nos. 02-1014GM and 02-1015GM, RO ¶¶ 194-195 (Fla. DOAH July 1, 2003; Fla. DCA Oct. 24, 2003).

101. Petitioners raised claims regarding potential rezoning, which were not cognizable in this type of proceeding. *See Horton v. City of Jacksonville*, Case No. 10-5965GM, RO ¶ 23 (Fla. DOAH Jan. 11, 2011; Fla. DCA Feb. 21, 2011)(recognizing that a plan amendment compliance determination does not turn on zoning issues).

102. The Ordinances are not development orders or development permits. The Ordinances did not authorize development or any development activities. *See Strand v. Escambia Cty.*, Case No. 03-2980GM, RO ¶ 24 (Fla. DOAH Dec. 23, 2003; Fla. DCA Jan. 28, 2004)("The Plan Amendment, as a future land use designation on the FLUM is not a development order. The Plan Amendment does not authorize development on or of the parcel, which includes any wetlands on the parcel.").

103. In addition, consistency of the Ordinances with the County's LDRs was not an issue of fact or law to be determined in this proceeding. *See Amelia Tree Conservancy, Inc. v. City of Fernandina Beach*, Case No. 19-2515GM (Fla. DOAH Sept. 16, 2019; Fla. DEO Oct. 16, 2019); *see also Rohan v. City of Panama City*, Case No. 19-4486GM (Fla. DOAH Feb. 4, 2020; Fla. DEO Mar. 5, 2020).

104. Based on the foregoing Findings of Fact, Petitioners did not prove



beyond fair debate that the Ordinances were internally inconsistent with the County's Comp Plan.

Relevant and Appropriate Data and Analysis

105. Section 163.3177(1)(f) requires that all plan amendments be "based on relevant and appropriate data and an analysis by the local government." § 163.3177(1)(f)2., Fla. Stat. "The statute explains that to be based on data 'means to react to it in an appropriate way and to the extent necessary indicated by the data available on that particular subject at the time of adoption of the . . . plan amendment at issue.'" *222 Lakeview LLC v. City of West Palm Beach*, Case Nos. 18-4743GM and 18-4773GM, RO ¶ 84 (Fla. DOAH Dec. 26, 2018), *aff'd per curiam*, 295 So.3d 1185 (Fla. 4th DCA 2020).

106. All data available to the local government and in existence at the time of adoption of the plan amendment may be presented. *See Zemel v. Lee Cty.*, Case No. 90-7793GM, (Fla. DOAH Dec. 16, 1992; Fla. Dep't of Cmty. Aff. 1993), *aff'd sub. nom.*, *Zemel v. Dep't of Cmty. Aff.*, 642 So. 2d 1367 (Fla. 1st DCA 1994).

107. Relevant analyses of data need not have been in existence at the time of adoption of a plan amendment. Data existing at the time of adoption may be analyzed through the time of the administrative hearing. *See 222 Lakeview LLC*, RO at ¶ 86.

108. Data supporting an amendment must be taken from professionally accepted sources. *See* § 163.3177(1)(f)2., Fla. Stat. However, local governments are not required to collect original data. *Id.*

109. Based upon the foregoing Findings of Fact, Petitioners did not prove that the data on which the County relied to adopt the Ordinances was not "taken from professionally accepted sources and gathered through professionally accepted methodologies." *Amelia Tree Conservancy, Inc.*, RO at ¶ 152.

110. The evidence demonstrated that there was adequate data and

analysis, taken from professionally accepted sources, and gathered through professionally accepted methodologies, to support the Ordinances.

111. Based upon the foregoing Findings of Fact, Petitioners did not prove beyond fair debate that the Ordinances were not based on relevant and appropriate data and an analysis by the County, as required by sections 163.3177(1)(f) and 163.3177(6)(a)2.

#### FLUM Amendment Analysis

112. Specific analyses are relevant for these FLUM amendments. *See* § 163.3177(6)(a)8., Fla. Stat.

113. Based on the foregoing Findings of Fact, Petitioners did not prove beyond fair debate that the three opt-out FLUM plan amendments were not based on an analysis of the availability of facilities and services, as required by section 163.3177(6)(a)8.

114. Based on the foregoing Findings of Fact, Petitioners did not prove beyond fair debate that the proposed FLU MU-S category was not suitable in light of the existing character of the three opt-out properties, including soils, topography, natural resources, and historic resources.

#### Meaningful and Predictable Standards

115. Section 163.3177(1) provides that a comprehensive plan "shall establish meaningful and predictable standards for the use and development of land and provide meaningful guidelines for the content of more detailed land development and use regulations."

116. Petitioners argued that the opt-out plan amendments are inconsistent with section 163.3177(1) because they fail to establish meaningful and predictable standards for removal of property from the DSAP and renders the OSP meaningless.

117. Based on the foregoing Findings of Fact, Petitioners did not prove beyond fair debate that the three opt-out plan amendments rendered the

OSP meaningless and the Comp Plan lacking meaningful and predictable standards for the use and development of land.

Summary

118. For the reasons stated above, the County's determinations that the Ordinances are "in compliance" were fairly debatable.

119. For the reasons stated above, Petitioners did not prove beyond fair debate that the Ordinances were not "in compliance," as that term is defined in section 163.3184(1)(b).

120. Jurisdiction is reserved by the undersigned to address any appropriate request for attorney's fees, costs, and sanctions.

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 finding Ordinance Nos. 2020-14, 2020-15, and 2020-16, adopted on June 4, 2020, by Escambia County, to be "in compliance," as defined by section 163.3184(1)(b).

DONE AND ENTERED this 7th day of May, 2021, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the  
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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.