STATE OF FLORIDA
DEPARTMENT OF ECONOMIC OPPORTUNITY

ALERTS OF PBC, INC., PATRICIA D. CURRY, ROBERT SCHUTZER, AND KAREN SCHUTZER,

Petitioners,

vs.

DOAH CASE NO. 14-5657GM

PALM BEACH COUNTY.

Respondent,

and

MINTO PBLH, LLC,

Intervenor.

FINAL ORDER

This matter was considered by the Director for the Division of Community Development, within the Department of Economic Opportunity ("Department") following receipt of a Recommended Order issued by an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH").

Background

This is a proceeding to determine whether amendments to the Palm Beach County Comprehensive Plan, adopted by Ordinance No. 14-030 on October 29, 2014 (the "Plan Amendments"), are in compliance as defined in section 163.3184(1)(b), Fla. Stat.[1] The Plan Amendments amend portions of the Future Land Use Map, the Future Land Use Element, the

[1] References to the Florida Statutes are to the 2014 version of the statutes.

Transportation Element, and the Introduction and Administration portions of the Comprehensive Plan as it relates property owned by Intervenor Minto PBLH, LLC ("Minto").

Role of the Department

The Plan Amendments were adopted under the expedited state review process pursuant to section 163.3184(3), Fla. Stat., and were challenged by Alerts of PBC, Inc., Patricia D. Curry, Robert Schutzer, and Karen Schutzer ("Petitioners") in a petition timely filed with DOAH. The Department was not a party to the proceeding. The ALJ's Recommended Order recommends that the Plan Amendments be found in compliance, therefore the ALJ submitted the Recommended Order to the Department pursuant to section 163.3184(5)(e). The Department must either determine that the Plan Amendments are in compliance and enter a Final Order to that effect, or determine that the Plan Amendments are not in compliance and submit the Recommended Order to the Administration Commission for final agency action.

Standard of Review of Recommended Order

Pursuant to the Administrative Procedure Act, an agency may not reject or modify the findings of fact in a recommended order unless the agency first determines from a review of the entire record, and states with particularity in its final order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. §120.57(1)(l), Fla. Stat. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. Id.

Absent a demonstration that the underlying administrative proceeding departed from essential requirements of law, "[a]n ALJ's findings cannot be rejected unless there is no competent, substantial evidence from which the findings could reasonably be inferred." *Prysi v. Department of Health*, 823 So. 2d 823, 825 (Fla. 1st DCA 2002) (citations omitted). In determining whether

challenged findings of fact are supported by the record in accord with this standard, the agency may not reweigh the evidence or judge the credibility of witnesses, both tasks being within the sole province of the ALJ as the finder of fact. *See Heifetz v. Department of Business Regulation*, 475 So. 2d 1277, 1281-1283 (Fla. 1st DCA 1985). If the evidence presented in an administrative hearing supports two inconsistent findings, it is the ALJ's role to decide the issue one way or the other. *Heifetz* at 1281.

The Administrative Procedure Act also specifies the manner in which the agency is to address conclusions of law in a recommended order. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction. When rejecting or modifying a conclusion of law, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law and must make a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified. §120.57(1)(l), Fla. Stat. *See also, DeWitt v. School Board of Sarasota County*, 799 So. 2d 322 (Fla. 2nd DCA 2001).

The label assigned to a statement is not dispositive as to whether it is a finding of fact or a conclusion of law. *Kinney v. Dept. of State*, 501 So. 2d 129 (Fla. 5th DCA 1987); *Goin v. Comm. on Ethics*, 658 So. 2d 1131 (Fla. 1st DCA 1995). Conclusions of law labeled as findings of fact, and findings of fact labeled as conclusions of law, will be considered as a conclusion or finding based upon the statement itself and not the label assigned.

Department's Review of the Recommended Order

The Department has been provided copies of the parties' pleadings, the documentary evidence introduced at the final hearing, and a five-volume transcript of the proceedings. Petitioners timely filed exceptions to the Recommended Order on May 1, 2015. Respondent and Intervenor timely filed a Joint Response to Petitioners' Exceptions on May 8, 2015.

Ruling on Petitioners' Exceptions to the Recommended Order

A - Exception 1: Agricultural Enclaves Section 163.3164, Florida Statutes

In Exception 1, Petitioners take exception to Paragraph 25 (a finding of fact) and Paragraphs 73 and 74[2] (conclusions of law) and contend that the ALJ should have determined that the Plan Amendments were not "in compliance" with sections 163.3162 and 163.3164. Petitioners also contend that the Plan Amendments exceed the density and intensity of the limitations established in an Agricultural Enclave pursuant to section 163.3214.

1- Jurisdiction to consider compliance with sections 163.3162 and 163.3164, Florida Statutes

Petitioners take exception to the finding of fact in Paragraph 25 and the conclusion of law in Paragraph 73 because the ALJ did not make an "in compliance" determination on whether the Plan Amendments were in compliance with sections 163.3162 and 163.3164. However, as conceded by Petitioners in Exception 1 on page 4, neither sections 163.3162 nor 163.3164 are included within the definition of "in compliance" located within section 163.3184(1)(b). Specifically, "in compliance" is defined as:

> "In compliance" means consistent with the requirements of ss. 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.

Section 163.3184(1)(b), Florida Statutes.

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[2] Petitioners state in the text that they take exception to Paragraph 23 and Paragraph 70. However, in the excerpt of the Recommended Order, they reference Paragraphs 23, 73, and 74. As it relates to Paragraph 23, Petitioners instead quote Paragraph 25, including its header. Additionally, all arguments raised with respect to the finding of fact concern Paragraph 25 (consistency with section 163.3164) and not Paragraph 23 (map amendments.) Given Petitioners' arguments and references, the Department finds that Exception 1 encompasses Paragraph 25 and not Paragraph 23.

Furthermore, Petitioners' citation to Paragraph 70 appears to be in error in that Paragraph 70 concluded that Petitioners were affected persons with standing to challenge. Given Petitioners' argument, their excerpt of the Recommended Order showing Paragraphs 73 and 74, and the unlikelihood that they would be challenging their own standing, the Department finds that Exception 1 encompasses Paragraphs 73 and 74.

Consideration of sections 163.3162 and 163.3164 are not part of an "in compliance" determination by section 163.3184(1)(b)'s explicit terms, and are therefore not a proper part of a plan amendment challenge. *See e.g. Dibbs v. Hillsborough County*, 2013 Fla. Div. Adm. Hear. 2013 WL 6699969 (DEO F. O. No. DEO-13-071-C issued December 10, 2013) (finding that statutes not listed within section 163.3184(1)(b) are beyond the scope of an "in compliance" determination); *Cemex Construction Materials Florida, LLC et. al. v. Lee County*, 2012 Fla. Div. Adm. Hear. 2012 WL 605891 (DEO F.O. No. DEO-12-029 issued March 30, 2012) (finding that inconsistency with sections 337.0261(3) or 1613.161(10) could not form the basis for a compliance determination because section 163.3184(1)(b) does not include those statutes in the definition of "in compliance.")

Petitioners have not demonstrated that the finding of fact in Paragraph 25 is not supported by competent substantial evidence in the record and, furthermore, there is competent substantial evidence in the record to support the ALJ's finding of fact in Paragraph 25.

Petitioners' exception to the finding of fact in Paragraph 25 is DENIED.

As explained above, the Department agrees with the ALJ's conclusion of law that section 163.3184(1)(b) does not contain either section 163.3162 or 163.3164, so that consistency with those statutes as it relates to an "in compliance" determination in the hearing was not relevant. A substituted conclusion of law would not be as or more reasonable than the ALJ's conclusion of law in Paragraph 73 of the Recommended Order.

Petitioners' exception to the conclusion of law in Paragraph 73 is DENIED.

2 - Whether the Plan Amendments exceed the limitations on an Agricultural Enclave

Petitioners also take exception to Paragraph 74 and reargue that the Plan Amendments do not comply with the requirements of sections 163.3162 and 163.3164 as they relate to the

Agricultural Enclave designation. As the ALJ sets forth in Paragraph 11, the Agricultural Enclave designation for the Property has been in effect since 2008. The ALJ is also clear in pointing out in Paragraph 17 that:

> Many of the issues raised and the arguments made by Petitioners fail to acknowledge or distinguish the 2008 Amendments that address future development of the Property. In several respects, as discussed below, the 2008 Amendments already authorize future development of the Property in a manner which Petitioners object to....

Even more clearly, the ALJ sets forth in Paragraph 26 that the Property is already designated an Agricultural Enclave in the Comprehensive Plan. Petitioners take no exception to these findings of fact, of which there is substantial competent evidence in the record, which support the conclusion of law reached in Paragraph 74.

In addition to the findings of fact noted above, Petitioners did not take exception to the conclusion of law in Paragraph 75, which plainly states that:

> The 2008 Amendments are part of the existing Comp Plan and are not subject to review or challenge in this proceeding. See §163.3184(9)(a), Fla. Stat. (2007) (providing third parties 21 days following publication of a notice of intent to find in compliance to challenge plan amendments.

In support of Exception 1 as it relates to the Agricultural Enclave designation, Petitioners rely on expert testimony as the basis to overturn the ALJ's determination. It can be inferred that the ALJ considered Petitioners' experts' testimony, but did not assign the weight that Petitioners believe should be given to the testimony.

Where there is competent substantial evidence in the record to support the ALJ's findings of fact, of which there is here, the Department is unable to reweigh evidence or judge the credibility of witnesses, both tasks being within the sole province of the ALJ as the finder of fact. *See Heifetz,* 475 So. 2d at 1281-1283. Further, based on the supporting findings of fact and the conclusion of law reached in Paragraph 75, there is not a conclusion the Department could reach that would be

as or more reasonable than the ALJ's conclusion of law in Paragraph 74 of the Recommended Order.

Petitioners' exception to the conclusion of law in Paragraph 74 is DENIED.

B – Exception 2: The term "appropriate new urbanism concepts" lacks meaningful and predictable standards, vests unbridled discretion and is void for vagueness

In Exception 2, Petitioners take exception to Paragraphs 20-22 (findings of fact) and Paragraph 80 (a conclusion of law) and contend that the term "appropriate new urbanism concepts" as used in the Plan Amendments lacks meaningful and predictable standards, is void for vagueness, or unconstitutionally vests unbridled discretion to approve developments without meaningful and predictable standards.

In support of Exception 2, Petitioners only rely on their expert planner's testimony concerning the term "appropriate new urbanism concepts." Based on the Recommended Order, it can be inferred that the ALJ considered Petitioners' expert testimony, but did not assign it the weight that Petitioners believe it should have had. Furthermore, Petitioners have not demonstrated that the findings of fact are not supported by competent substantial evidence in the record.

To be clear, where there is competent substantial evidence in the record to support the ALJ's findings of fact for Paragraphs 20, 21, and 22. (T. 351-362, 470-471, 477-478, 557-558 just as an example), the Department is unable to reweigh evidence or judge the credibility of witnesses, both tasks being within the sole province of the ALJ as the finder of fact. *See Heifetz,* 475 So. 2d at 1281-1283.

Petitioners' exceptions to the findings of fact in Paragraphs 20, 21, and 22 are DENIED.

For the reasons expressed in the Department's ruling related to findings of fact 20, 21, and 22, a substituted conclusion of law would not be as or more reasonable than the ALJ's conclusion of law in Paragraph 80 of the Recommended Order.

Petitioners' exception as it relates to conclusion of law 80 is DENIED.

C – Exception 3: Finding of Fact Paragraph 40

In Exception 3, Petitioners take exception to Paragraph 40 (a finding of fact) and contend that the Acreage, a subdivision north of the property at issue in the Plan Amendments, is rural in character rather than suburban, and that the residential densities surrounding the perimeter of the property do not correspond with the density of the Acreage.

In support of Exception 3, Petitioners only rely on citations to the Comprehensive Plan and again on their expert's testimony concerning the character of the Acreage and the surrounding residential density. Based on the Recommended Order, it can be inferred that the ALJ considered Petitioners' expert testimony, but did not assign it the weight that Petitioners believe it should have had.

Additionally, in Paragraph 17 (to which Petitioners do not take exception), the ALJ found that:

> Many of the issues raised and the arguments made by Petitioners fail to acknowledge or distinguish the 2008 Amendments that address future development of the Property. In several respects, as discussed below, the 2008 Amendments already authorize future development of the Property in a manner which Petitioners object to. In several respects, the types of impacts that Petitioners are concerned about are actually diminished by the Proposed Amendments from what is currently allowed under the 2008 Amendments.

Finally, Petitioners have not demonstrated that the finding of fact in Paragraph 40 is not supported by competent substantial evidence in the record.

Where there is competent substantial evidence in the record to support the ALJ's finding of fact for Paragraph 40 (T. 464-478, 488, 491-494, 563-564, and 557-58, as an example), the Department is unable to reweigh evidence or judge the credibility of witnesses, both tasks being within the sole province of the ALJ as the finder of fact. *See Heifetz*, 475 So. 2d at 1281-1283.

Petitioners' exception to the finding of fact in Paragraph 40 is DENIED.

D – Exception 4: Transportation Improvements

In Exception 4, Petitioners take exception to Paragraph 29 (a finding of fact) and Paragraphs 81 and 82 (conclusions of law) and contend that the roadway and transportation improvements needed to serve the increased density and intensity of the Property do not exist and are not contemplated by the Comprehensive Plan.

In support of Exception 4, Petitioners rely on the language of section 163.3177 and, yet again, expert testimony as the basis to overturn the ALJ's finding of fact in Paragraph 29. As was the case previously, it can be inferred that the ALJ considered Petitioners' experts' testimony, but did not assign the weight that Petitioners believe should be given to the testimony.

Petitioners have not demonstrated that the finding of fact in Paragraph 29 is not supported by competent substantial evidence in the record.

Where there is competent substantial evidence in the record to support the ALJ's findings of fact for Paragraph 29 (T.306-09, 316-329, 371, 420-430, 464-478, 488, 491-494, 501-504, 553-561, and 563-564, for example), the Department is unable to reweigh evidence or judge the credibility of witnesses, both tasks being within the sole province of the ALJ as the finder of fact. *See Heifetz,* 475 So. 2d at 1281-1283.

Petitioners' exception to the finding of fact in Paragraph 29 is DENIED.

Paragraph 81 is a conclusion of law, and more specifically is a recitation of the requirements of Section 163.3177(1)(f), Florida Statutes. There is no substituted conclusion of law that would be as or more reasonable than the recitation of the statute in the conclusion of law in Paragraph 81.

Petitioners' exception to the conclusion of law in Paragraph 81 is DENIED.

For the reasons expressed in the Department's ruling related to the finding of fact in Paragraph 29, a substituted conclusion of law would not be as or more reasonable than the ALJ's conclusion of law in Paragraph 82 of the Recommended Order.

Petitioners' exception as it relates to conclusion of law 82 is DENIED.

E – Exception 5: Blanket Exemption from Rural Tier Policies

In Exception 5, Petitioners take exception to Paragraphs 48-50 (findings of fact) and Paragraphs 80[3] and 85 (conclusions of law) and contend that the Plan Amendments create a blanket exemption for the Property from other portions of the Comprehensive Plan, making the Comprehensive Plan internally inconsistent, and creating a lack of meaning and predictable standards.

In support, Petitioners simply cite to provisions of the Comprehensive Plan and the Plan Amendments. They do not demonstrate that the findings of fact in the Recommended Order are not supported by competent substantial evidence, or give any citations to the record to support their contentions. Furthermore, the exception is yet another invitation to have the Department reweigh evidence. Where there is competent substantial evidence in the record to support the ALJ's findings of fact for Paragraphs 48, 49, and 50, which there is here, the Department is unable to reweigh evidence or judge the credibility of witnesses, both tasks being within the sole province of the ALJ as the finder of fact. *See Heifetz,* 475 So. 2d at 1281-1283.

Petitioners' exception to the finding of fact in Paragraphs 48, 49, and 50 are DENIED.

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[3] Petitioners state in the text that they take exception to Paragraph 81, which they previously took exception to in Exception 4. However, in the excerpt of the Recommended Order they reference Paragraph 83 but quote Paragraph 80 and its header. Given that Petitioners' argument is based on the language of Paragraph 80 (concerning meaningful and predictable standards), make no further arguments relating to the subject matter of Paragraph 81 (concerning data and analysis), and the excerpted language is from Paragraph 80, the Department finds that Exception 5 encompasses Paragraphs 48-50, 80, and 85 and that the internally inconsistent references to Paragraphs 81 and 83 were in error.

As it relates to the conclusions of law in paragraphs 80 and 85, specific comprehensive plan policies that limit the applicability of more general policies within identified areas create exceptions to the general policies, not inconsistencies. *See Floyd v. Bentley,* 496 SO. 2d 862, 864 (Fla. 2d DCA 1986) ("A special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in more general terms; in such a situation the more narrowly-drawn statute operates as an exception to or qualification of the general terms of the more comprehensive statute.")

For the reasons above and also expressed in the Department's ruling related to the findings of fact 48, 49, and 50, substituted conclusions of law would not be as or more reasonable than the ALJ's conclusions of law in Paragraphs 80 and 85 of the Recommended Order.

Petitioners' exception to the conclusions of law in Paragraphs 80 and 85 are DENIED.

Agency Modification to Conclusion of Law

As previously stated, an agency may modify a conclusion of law over which it has substantive jurisdiction, but it must state with particularity its reasons for modifying the conclusion of law and must make a finding that its substituted conclusion of law is as or more reasonable than that which was modified. §120.57(1)(l), Fla. Stat. *See also, DeWitt v. School Board of Sarasota County*, 799 So. 2d 322 (Fla. 2nd DCA 2001).

Conclusions of law labeled as findings of fact, and findings of fact labeled as conclusions of law, will be considered as a conclusion or finding based upon the statement itself and not the label assigned. *Kinney v. Dept. of State*, 501 So. 2d 129 (Fla. 5th DCA 1987), and *Goin v. Comm. on Ethics*, 658 So. 2d 1131 (Fla. 1st DCA 1995).

Although labeled as a finding of fact, Paragraph 54 is more appropriately treated as a mixed finding of fact and conclusion of law. The ALJ first determined that the Plan Amendments were

not inconsistent with FLUE Policy 1.1-c of the County Comprehensive Plan, a finding of fact, then stated a conclusion of law that Evaluation and Appraisal Reviews are no longer required by state law.

The finding of fact is supported by competent substantial evidence. The conclusion of law, however, must be modified. The Department is the agency with substantive jurisdiction over Chapter 163 of the Florida Statutes, and more particularly section 163.3191. Although Evaluation and Appraisal Reviews are no longer specifically mandatory, section 163.3191 does require that local governments determine whether or not "plan amendments are necessary to reflect changes in state requirements in this part since the last update of the comprehensive plan, and notify the state land planning agency as to its determination." However, any determination as to whether or not plan amendments are necessary after such a review is left up to the local government. The Plan Amendments are not inconsistent with FLUE Policy 1.1-c because during any review by the County pursuant to section 163.3191, it is still within their authority to determine whether an Evaluation and Appraisal Review is "necessary to reflect changes in state requirements in this part since the last update of the comprehensive plan." This conclusion of law is as or more reasonable than the conclusion reached by the ALJ.

ORDER

Based on the foregoing, the Department adopts the ALJ's Recommended Order in its entirety (a copy of which is attached as Exhibit A and incorporated herein), subject to the modification for Paragraph 54, as the Department's Final Order and finds that the Plan Amendments adopted by Palm Beach County Ordinance No. 14-030 on October 29, 2014, are in compliance as defined in section 163.3184(1)(b), Florida Statutes.

William B. Killingsworth, Director
Division of Community Development
Department of Economic Opportunity

NOTICE OF RIGHT TO APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION UNDER CHAPTER 120, FLORIDA STATUTES. A PARTY WHO IS ADVERSELY AFFECTED BY FINAL AGENCY ACTION IS ENTITLED TO JUDICIAL REVIEW IN ACCORDANCE WITH SECTION 120.68, FLORIDA STATUTES, AND FLORIDA RULES OF APPELLATE PROCEDURE 9.030(B)(1)(c) AND 9.110.

TO INITIATE AN APPEAL OF THIS FINAL AGENCY ACTION, A NOTICE OF APPEAL MUST BE FILED WITH THE DEPARTMENT'S AGENCY CLERK, 107 EAST MADISON STREET, CALDWELL BUILDING, MSC 110, TALLAHASSEE, FLORIDA 32399-4128, WITHIN THIRTY CALENDAR (30) DAYS AFTER THE DATE THIS FINAL AGENCY ACTION IS FILED WITH THE AGENCY CLERK, AS INDICATED BELOW. A DOCUMENT IS FILED WHEN IT IS RECEIVED BY THE AGENCY CLERK. THE NOTICE OF APPEAL MUST BE SUBSTANTIALLY IN THE FORM PRESCRIBED BY FLORIDA RULE OF APPELLATE PROCEDURE 9.900(a). A COPY OF THE NOTICE OF APPEAL MUST ALSO BE FILED WITH THE DISTRICT COURT OF APPEAL AND MUST BE ACCOMPANIED BY THE FILING FEE SPECIFIED IN SECTION 35.22(3), FLORIDA STATUTES.

AN ADVERSELY AFFECTED PARTY WAIVES THE RIGHT TO JUDICIAL REVIEW IF THE NOTICE OF APPEAL IS NOT TIMELY FILED WITH BOTH THE DEPARTMENT'S AGENCY CLERK AND THE APPROPRIATE DISTRICT COURT OF APPEAL.

NOTICE OF FILING AND SERVICE

I HEREBY CERTIFY that the above Final Order was filed with the Department's undersigned designated Agency Clerk and that true and correct copies were furnished to the persons listed below in the manner described on the 7th day of July, 2015.

Katie Zimmer, Agency Clerk
Department of Economic Opportunity
107 East Madison Street, MSC 110
Tallahassee, FL 32399-4128

By US MAIL

The Honorable Bram D. E. Canter Administrative Law Judge Division of Administrative Hearings The DeSoto Building 1230 Apalachee Parkway Tallahassee, FL 32399-6847	Ralf G. Brookes, Esq. 1217 East Coral Parkway Suite 107 Cape Coral, Florida 33904
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALERTS OF PBC, INC., PATRICIA D. CURRY, ROBERT SCHUTZER, AND KAREN SCHUTZER,

Petitioners,

vs. Case No. 14-5657GM

PALM BEACH COUNTY,

Respondent,

and

MINTO PBLH, LLC,

Intervenor.
_____/

RECOMMENDED ORDER

The final hearing in this case was held on March 4 through 6, 2015, in West Palm Beach, Florida, before Bram D.E. Canter, Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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STATEMENT OF THE ISSUE

The issue to be determined in this case is whether the amendments to the Palm Beach County Comprehensive Plan ("the Comp Plan") adopted by the Board of County Commissioners of Palm Beach County by Ordinance No. 14-030 ("Proposed Amendments") are "in compliance," as that term is defined in section 163.3184(1)(b), Florida Statutes (2014).

PRELIMINARY STATEMENT

On October 29, 2014, Palm Beach County adopted Ordinance No. 14-030, which amended the Future Land Use Element ("FLUE"), text, and Map Series of the Comp Plan for a large tract of land in the western part of the County. Petitioners Alerts of PBC, Inc., Patricia D. Curry, Robert Schutzer, and Karen Schutzer filed a petition for hearing to challenge the Proposed Amendments. Later, they requested and were granted leave to amend their petition.

At the final hearing, Petitioners presented the testimony of Daryl Max Forgey, James Fleischmann, John Kim, and Jay Foy. Petitioners' Exhibit 1 was admitted into evidence.

Palm Beach County presented the testimony of Bryan Davis and George Webb. Palm Beach County's Exhibits 1, 3, and 7 were admitted into evidence.

Intervenor Minto PBLH, LLC ("Minto"), presented the testimony of John Carter, Donaldson Hearing, and Robert Pennock. Minto's Exhibits 1, 2, 6, 7, 11, 16, 17, 19, 21, 23, 24, and 27 were admitted into evidence.

Joint Exhibits 1, 3, 4, 5, 6, 8, 13, 21, 48, 51, and 55 were admitted into evidence.

The five-volume Transcript of the final hearing was filed with DOAH. The parties filed proposed recommended orders that were considered by the Administrative Law Judge in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. Petitioner Alerts of PBC, Inc. ("Alerts"), is a Florida not-for-profit corporation doing business in Palm Beach County. Alerts made timely objections and comments to the County on the Proposed Amendments.

2. Petitioner Patricia Curry is a resident and landowner in Palm Beach County. Ms. Curry made timely objections and comments to the County on the Proposed Amendments.

3. Petitioner Robert Schutzer is a resident and landowner in Palm Beach County. Mr. Schutzer made timely objections and comments to the County on the Proposed Amendments.

4. Petitioner Karen Schutzer is a resident and landowner in Palm Beach County. Ms. Schutzer made timely objections and comments to the County on the Proposed Amendments.

5. Respondent Palm Beach County is a political subdivision of the State of Florida and has adopted the Comp Plan, which it amends from time to time pursuant to section 163.3184.

6. Intervenor Minto is a Florida limited liability company doing business in Palm Beach County. Minto is the owner of all of the 3,788.6 acres ("the Property") which are the subject of the Proposed Amendments, with the exception of two parcels totaling 40.04 acres, which are owned by the Seminole Improvement District. Minto appointed the board of supervisors of the Seminole Improvement District pursuant to state law.

Background

7. FLUE Objective 1.1 establishes a unique Managed Growth Tier System "to protect viable existing neighborhoods and communities and direct the location and timing of future

development." The Property is located in the County's Rural Tier and is bounded by Exurban Tier to the north and east.

8. North of the Property is a large subdivision known as the Acreage, which was described by Respondents as "antiquated" because it was developed in a manner that was common decades ago before modern community planning concepts and growth management laws. The Acreage is dominated by 1.25-acre residential lots, laid out in a grid pattern with few other uses.

9. Although the residents of the Acreage have a strong sense of community, it is apparently a matter of aesthetics, familiarity, and social intercourse, because the Acreage is not a community in the modern planning sense of providing a mix of uses where residents can live, shop, work, and play. It is a development pattern that is now discouraged by state law and the Comp Plan, because it is inefficient with respect to the provision and use of public services.

10. The Property and the Acreage are within a 57,000-acre area known as the Central Western Communities ("CWC"). The CWC has been the subject of extensive planning efforts by the County for many years to address land use imbalances in the area. There are many residential lots, but few non-residential uses to serve the residents.

11. In 2008, the previous owner of the Property, Callery-Judge Groves ("Callery"), obtained an Agricultural Enclave (AGE)

future land use designation for essentially the same area as the Property. The Comp Plan was amended to establish an AGE future land use designation, AGE policies, a conceptual plan of development, and implementing principles ("the 2008 Amendments").

12. Under the 2008 Amendments, the site was limited to 2,996 residential units and 235,000 square feet of retail and office uses. No development has been undertaken pursuant to the 2008 Amendments.

13. In 2013, the site was sold to Minto, which submitted a Comp Plan amendment application in November 2013, and a revised application in July 2014. On October 29, 2014, the County adopted the Proposed Amendments.

14. The Proposed Amendments change the future land use designation of 53.17 acres ("the outparcels") from RR-10 to AGE, and increase residential density to 4,546 units and increase intensity to two million square feet of non-residential uses, 200,000 square feet of civic uses, a 150-room hotel and a 3,000-student college, and revise the Conceptual Plan and Implementing Principles.

15. The Proposed Amendments would also revise text in the Introduction and Administration, Future Land Use, and Transportation Elements. The Map Series would be amended to add 53.17 acres to the Limited Urban Service Area on Map LU 1.1 and Map LU 2.1, and to identify new Rural Parkways on Map TE 14.1.

Petitioners' Challenge

16. Petitioners contend the Proposed Amendments are not "in compliance" because they fail to establish meaningful and predictable standards; do not comply with the agricultural enclave provisions of section 163.3164(4); are not based upon relevant and appropriate data and analysis; promote urban sprawl; are incompatible with adjacent communities and land uses; and create inconsistencies within the Comp Plan.

17. Many of the issues raised and the arguments made by Petitioners fail to acknowledge or distinguish the 2008 Amendments that address future development of the Property. In several respects, as discussed below, the 2008 Amendments already authorize future development of the Property in a manner which Petitioners object to. In several respects, the types of impacts that Petitioners are concerned about are actually diminished by the Proposed Amendments from what is currently allowed under the 2008 Amendments.

Meaningful and Predictable Standards

18. Petitioners contend that proposed FLUE Policies 2.2.5-d, 2.2.5-e, and 2.2.5-f, and Maps LU 1.1 and 2.1 fail to establish meaningful and predictable standards for the use and development of land and fail to provide meaningful guidelines for the content of more detailed land development and use regulations, in violation of section 163.3177(1).

19. The Proposed Amendments add more detail to the standards that were adopted in the 2008 Amendments. The Proposed Amendments establish substantially more direction for the future development of the Property than simply a land use designation and listing of allowed uses, which is typical in comprehensive plans.

20. Petitioners contend the Proposed Amendments lack adequate standards because they refer to the use of "appropriate new urbanism concepts," which Petitioners say is vague. New urbanism refers to land use planning concepts such as clustering, mixed-use development, rural villages, and city centers. See § 163.3162(4), Fla. Stat. (2014). In land use planning parlance, new urbanism creates more "livable" and "sustainable" communities.

21. The term "appropriate new urbanism concepts" used in the Proposed Amendments is the same term used in section 163.3162(4), dealing with the development of agricultural enclaves. There are many concepts that are part of new urbanism, which can be used in combination. Which concepts are "appropriate" depends on the unique opportunities and constraints presented by the area to be developed.

22. Use of the term "appropriate new urbanism concepts" in the Proposed Amendments adds detail to the future development

standards applicable to the Property. It does not create vagueness.

23. Petitioners contend the proposed amendments of Maps LU 1.1 and 2.1 do not provide meaningful and predictable standards and guidelines. However, the maps are only being amended to show that 53.17 acres of outparcels within the Property are being added to the existing Limited Urban Service Area. The map amendments do not diminish the meaningfulness or predictability of any standards in the Comp Plan.

24. The preponderance of the evidence shows the Proposed Amendments establish meaningful and predictable standards.

Agricultural Enclave

25. Petitioners contend the Proposed Amendments fail to meet the requirements for an agricultural enclave in section 163.3164. As explained in the Conclusions of Law, consistency with section 163.3164 is not a component of an "in compliance" determination.

26. Furthermore, the Property is already designated Agricultural Enclave in the Comp Plan.

Data and Analysis

27. Petitioners contend the amendment of the Limited Urban Service Area is not supported by relevant and appropriate data and analysis as required by section 163.3177(1)(f). The inclusion of the outparcels is logical and reasonable. It is

consistent with the Comp Plan policies applicable to Limited Urban Service Areas. It is supported by data and analysis.

28. Petitioners contend the increases in density and intensity allowed by the Proposed Amendments are not supported by data and analysis showing a need for the increases. However, the increases are supported by relevant and appropriate data and analysis, including population projections and extensive analysis of the need for non-residential uses in the CWC. Population projections establish the minimum amount of land to be designated for particular uses; not the maximum amount of land. See § 163.3177(1)(f)3., Fla. Stat (2014).

29. Petitioners make several claims related to the availability of public utilities and other services to the Property. The data and analysis show sufficient capacity for roads, transportation, schools, water supply, wastewater treatment, fire, emergency and police either already exists or is contemplated in the Comp Plan to accommodate the development authorized by the Proposed Amendments.

30. The preponderance of the evidence shows the Proposed Amendments are supported by relevant data and analysis.

Urban Sprawl

31. Petitioners contend the Proposed Amendments do not discourage the proliferation of urban sprawl. Urban sprawl is defined in section 163.3164(51) as "a development pattern

characterized by low density, automobile-dependent development with either a single use or multiple uses that are not functionally related, requiring the extension of public facilities and services in an inefficient manner, and failing to provide a clear separation between urban and rural uses."

32. Petitioners contend the Property does not qualify for the presumption against urban sprawl under the criteria in section 163.3162(4), but Minto did not rely on that statutory presumption.

33. Petitioners contend the Proposed Amendments create five of the 13 primary indicators of urban sprawl set forth in section 163.3177(6)(a)9.:

> Promotes, allows, or designates for development substantial areas of the jurisdiction to develop as low-intensity, low-density, or single-use development or uses.
>
> Promotes, allows, or designates significant amounts of urban development to occur in rural areas at substantial distances from existing urban areas while not using undeveloped lands that are available and suitable for development.
>
> Fails to maximize use of existing public facilities and services.
>
> Allows for land use patterns or timing which disproportionately increase the cost in time, money, and energy of providing and maintaining facilities and services, including roads, potable water, sanitary sewer, stormwater management, law

enforcement, education, health care, fire and emergency response, and general government.

Fails to provide a clear separation between rural and urban uses.

34. The evidence presented on this issue by Petitioners was inconsistent with generally accepted land use planning concepts and principles. The Proposed Amendments do not promote urban sprawl. They go far to rectify existing sprawl conditions in the CWC.

35. Findings relevant to the five indicators have already been made above. Compatibility with adjacent uses is discussed below.

36. There are ample data and analysis which show the Proposed Amendments discourage urban sprawl. Respondents' characterization of the Proposed Amendments as the opposite of urban sprawl is not unreasonable.

37. The preponderance of the evidence shows the Proposed Amendments discourage the proliferation of urban sprawl.

Compatibility

38. Petitioners contend the Proposed Amendments are "incompatible with the lifestyle of the existing and surrounding communities and adjacent agricultural and other land uses."

39. Protection of Petitioners' lifestyle cannot mean that surrounding areas must remain undeveloped or must be developed in a similar suburban sprawl pattern. Land use imbalances in the

CWC are rectified by the Proposed Amendments while providing large buffers and a transition of land uses on the Property to protect adjacent land uses.

40. The Acreage is more accurately characterized as suburban rather than rural. Moreover, the Proposed Amendments include a conceptual plan and development guidelines designed to create a clear separation between urban uses on the Property and less dense and intense external uses. Residential densities near the perimeter of the Property would correspond to the density in the Acreage.

41. The proposed distribution of land uses and large open space buffers would not establish merely an adequate transition. They would provide substantial protection to adjacent neighborhoods. A person at the periphery of the Property would likely see only open space, parks, and low-density residential uses.

42. The distribution of land uses and natural buffers in the Proposed Amendments provide more protection for external land uses than the 2008 Amendments.

43. The more persuasive evidence presented indicates that Petitioners and other persons living near the Property would be beneficiaries of the Proposed Amendments because they could use and be served by the office, commercial, government, and recreational uses that will be available nearby.

44. The preponderance of the evidence shows the Proposed Amendments are compatible with adjacent land uses.

Internal Consistency

45. The Comp Plan's Introduction and Administration Element and FLUE contain statements of intent. They are not objectives or policies. Petitioners contend the Proposed Amendments are inconsistent with some of the statements.

46. Petitioners contend the Proposed Amendments are inconsistent with the Introduction and Administration Element statements discouraging growth to the west where services are not adequate, do not provide for orderly growth or the provision of facilities and services to maintain the existing quality of life in an economical manner, and do not recognize countywide growth management strategies or maintain the diversity of lifestyles. Findings that refute this contention have been made above.

47. Petitioners contend the Proposed Amendments are inconsistent with several general statements in FLUE Sections I A, I B, and I C. regarding respect for the character of the area, protection of quality of life and integrity of neighborhoods, prevention of "piecemeal" development, and efficient provision of public services. Findings that refute this contention have been made above.

48. Petitioners contend FLUE Policy 2.2.5-d allows land uses which are inconsistent with the policies applicable to the

Rural Tier in which the Property is located. In the proposed policy, the County exempts the Project from any conflicting Rural Tier policies that would otherwise apply.

49. Under the County's Managed Growth Tier System, the tiers are the "first level" land use consideration in the FLUE. Therefore, it would have been helpful to amend the Rural Tier section of the FLUE to indicate the exceptions to Rural Tier policies for agricultural enclaves, in general, or for the Property, in particular. Instead, the Proposed Amendments place the new wording about exceptions in the section of the FLUE dealing with agricultural land uses. However, as stated in the Conclusions of Law, where the exception is located in the comprehensive plan is not a consistency issue.

50. The County has shown there are unique considerations involved with the CWC that justify the exceptions. It also demonstrated that the Proposed Amendments would accomplish numerous objectives and policies of the Comp Plan that could not be accomplished without creating exceptions to some Rural Tier policies.

51. Petitioners contend the Proposed Amendments are inconsistent with FLUE Objective 1.1-3 because they encourage the proliferation of urban sprawl. That contention has been rejected above.

52. Petitioners contend the Proposed Amendments are inconsistent with FLUE Objective 1.1-6 because they do not protect agricultural land and equestrian uses. The evidence shows that agricultural and equestrian uses are enhanced by the Proposed Amendments over the existing provisions of the Comp Plan.

53. Petitioners contend the Proposed Amendments are inconsistent with FLUE Policy 1.1-b, which addresses criteria re-designating a tier. This policy is not applicable because the Proposed Amendments do not re-designate a tier.

54. Petitioners contend the Proposed Amendments are inconsistent with FLUE Policy 1.1-c, which requires the review of the tier system as part of each Evaluation and Appraisal review. Evaluation and Appraisal Reviews are no longer required by state law.

55. Petitioners contend the Proposed Amendments are inconsistent with FLUE Policy 1.1-d, which states a tier shall not be re-designated if it would cause urban sprawl. This policy is not applicable because the Proposed Amendments do not re-designate a tier.

56. Petitioners contend the Proposed Amendments are inconsistent with FLUE Policy 1.4-a, which requires the County to protect and maintain the rural residential, equestrian, and agricultural areas within the Rural Tier. The Proposed

Amendments and Conceptual Plan increase the level of protection for these uses over what is currently in the Comp Plan.

57. Petitioners contend the Proposed Amendments are inconsistent with FLUE Policy 1.4-d, which generally prohibits subdividing parcels of land within the Rural Tier unless certain conditions are met. The Proposed Amendments do not subdivide any parcels.

58. Petitioners contend the Proposed Amendments are inconsistent with FLUE Policy 1.4-k, which addresses the designation of "sending areas" for Transfer of Development Rights ("TDR"). This policy only applies to parcels with a RR20 future land use designation and there are no such parcels existing or that would be created by the Proposed Amendments.

59. Petitioners contend the Proposed Amendments are inconsistent with FLUE Policy 1.4-l, which requires the County to provide rural zoning regulations for areas designated Rural Residential. The Property does not have any Rural Residential designations.

60. Petitioners contend the Proposed Amendments are inconsistent with FLUE Policy 2.4-b, which provides that the TDR program is the required method for increasing density within the County. The County applies this policy only to density increases in urban areas, because they are the only areas authorized to receive TDRs.

61. Petitioners contend the Proposed Amendments are inconsistent with FLUE Objective 2.1 and some related policies, which promote balanced growth. The preponderance of the evidence shows the Proposed Amendments will further this objective and its policies because they correct the current imbalance of land uses in the CWC and provide for a balanced mix of residential, agricultural, commercial, light industrial, office, recreation, and civic uses.

62. Petitioners presented no evidence to support their claim that Proposed Amendments would exceed the natural or manmade constraints of the area.

63. Petitioners presented no credible evidence that transportation infrastructure and other public services could not be efficiently provided to the Property. The data and analysis and other evidence presented show otherwise.

64. Petitioners contend there is no justification for the increased density and intensity authorized by the Proposed Amendments. There was ample justification presented to show the increases were needed to create a sustainable community where people can live, work, shop, and play.

65. Petitioners contend the Proposed Amendments are inconsistent with FLUE Objective 2.2 and some related policies, which require development to be consistent with land use designations in the Comp Plan. Petitioners' evidence failed to

show any inconsistencies. The Proposed Amendments are compatible with and benefit adjacent land uses, as found above.

66. Petitioners contend the Proposed Amendments fail to include "new urbanism" concepts as required by section 163.3164(4) and Policy 2.2.5-i. The evidence presented by Respondents proved otherwise.

67. Petitioners contend the Proposed Amendments are inconsistent with FLUE Objective 3 and some related policies, which address the provision of utilities and other public services. Petitioners presented no credible evidence to support this claim. The data and analysis and other evidence presented show that public services are available or planned and can be efficiently provided to the Property.

68. Petitioners argued the Proposed Amendments were inconsistent with several other FLUE policies generally related to compatibility with adjacent land uses and the provision of public services, all of which Petitioners failed to prove as explained above.

69. The preponderance of the evidence shows the Proposed Amendments would not create internal inconsistency in the Comp Plan.

CONCLUSIONS OF LAW

Standing

70. To have standing to challenge a comprehensive plan amendment, a person must be an "affected person" as defined in section 163.3184(1)(a). Petitioners are affected persons and have standing to challenge the Proposed Amendments.

71. Minto also qualifies as an affected person and has standing to intervene in this proceeding.

Scope of Review

72. 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 ss. 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.

73. The statutes listed in section 163.3184(1)(b) do not include section 163.3162 or section 163.3164, which address agricultural enclaves. Therefore, consistency with these statutes is not relevant to an "in compliance" determination.

74. Petitioners were allowed to proffer evidence in support of their claim that the Proposed Amendments do not comply with

sections 163.3162 and 163.3164 for purposes of appeal. Their evidence did not demonstrate non-compliance.

75. The 2008 Amendments are part of the existing Comp Plan and are not subject to review or challenge in this proceeding. See § 163.3184(9)(a), Fla. Stat. (2007) (providing third parties 21 days following publication of a notice of intent to find in compliance to challenge plan amendments).

Burden and Standard of Proof

76. As the parties challenging the Proposed Amendments, Petitioners have the burden of proof.

77. Palm Beach County's determination that the Proposed Amendments are 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)1., Fla. Stat. (2014).

78. The term "fairly debatable" is not defined in chapter 163. In Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997), the Supreme Court of Florida explained "[t]he fairly debatable standard is a highly deferential standard requiring approval of a planning action if a reasonable person could differ as to its propriety."

79. The standard of proof for findings of fact is preponderance of the evidence. § 120.57(1)(j), Fla. Stat. (2014).

Meaningful and Predictable Standards

80. Comprehensive plans must provide "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." § 163.3177(1), Fla. Stat. (2014). Petitioners failed to prove the Proposed Amendments violate this requirement.

Data and Analysis

81. Section 163.3177(1)(f) requires that all plan amendments be based on relevant and appropriate data and an analysis by the local government. The statute explains: "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. (2014).

82. Petitioners failed to prove the Proposed Amendments violate this requirement.

Urban Sprawl

83. Section 163.3177(6)(a)9. requires comprehensive plan amendments to "discourage the proliferation of urban sprawl" and sets forth 13 primary indicators of urban sprawl to be considered. Petitioners failed to prove the Proposed Amendments violate this requirement.

Internal Consistency

84. Section 163.3177(2) requires the elements of a comprehensive plan to be internally consistent.

85. It is not uncommon for laws, whether in the form of statutes, rules, or policies of a comprehensive plan, to identify circumstances which are excepted from the application of the law. Creating an exception does not mean the law is in conflict with itself. The exceptions from some Rural Tier policies created by the Proposed Amendments for future development within an agricultural enclave do not create an internal inconsistency. The location of the exceptions in the section of the FLUE dealing with agricultural land uses does not change this conclusion because the Comp Plan must be considered and applied as a whole.

86. The Legislature has expressed its recognition of the need for innovative planning and development strategies to promote a diverse economy and vibrant rural and urban communities. See § 163.3168(1), Fla. Stat. (2014). The Proposed Amendments would effectively address this need.

Summary

87. Palm Beach County's determination that the Proposed Amendments are in compliance is fairly debatable.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Economic Opportunity issue a final order determining the Proposed Amendments adopted by Palm Beach County Ordinance No. 2014-030 are in compliance.

DONE AND ENTERED this 17th day of April, 2015, in Tallahassee, Leon County, Florida.

BRAM D. E. CANTER
Administrative Law Judge
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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.