STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE SEMINOLE TRIBE OF FLORIDA,

Petitioner,

v. Case No. 14-1441GM

HENDRY COUNTY, FLORIDA,

Respondent.
_____/

RECOMMENDED ORDER

A duly-noticed final hearing was held in this matter in LaBelle, Florida, on May 29 and 30, 2014, before Suzanne Van Wyk, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Andrew J. Baumann, Esquire
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For Respondent: Mark F. Lapp, Esquire
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STATEMENT OF THE ISSUE

Whether the amendments to the Hendry County Comprehensive Plan adopted on February 25, 2014, by County Ordinance No. 2014-

03, are "in compliance," as that term is defined in section 163.3184(1)(b), Florida Statutes (2013).[1/]

PRELIMINARY STATEMENT

On February 25, 2014, Hendry County adopted Ordinance 2014-03 (the Plan Amendment) which permits various commercial and industrial developments in all Hendry County future land use categories on the Future Land Use Map except for Agriculture/Conservation, Residential - Pre-Existing Rural Estates, and Felda Estates.

On March 27, 2014, Petitioner filed a Petition with the Division of Administrative Hearings challenging the Plan Amendment pursuant to section 163.3184.

The parties jointly submitted a pre-hearing stipulation on May 27, 2014, and a formal administrative hearing was held on May 29 and 30, 2014, in LaBelle, Florida.

At the final hearing, Petitioner presented the testimony of Sarah Catala, Hendry County Associate Planner, and Dr. Robert Pennock, expert in land use and comprehensive planning. Respondent offered the testimony of Gregg Gillman, Executive Director of the Hendry County Economic Development Council; Sarah Catala; and Robert Mulhere, expert in land use and comprehensive planning.

The parties' Joint Exhibits J-1 through J-15, were admitted into evidence. Respondent's Exhibits R-1, R-2, R-5, and R-9

were also admitted into evidence. The undersigned also took official recognition of the Hendry County Comprehensive Plan (J-3) and excerpts from the Hendry County Land Development Code (R-16).

At the conclusion of the hearing, the parties requested, and the undersigned granted, an extension until July 31, 2014, to file proposed recommended orders. The two-volume Transcript of the final hearing was filed on June 17, 2014. On July 21, 2014, the parties jointly requested an extension of time until August 7, 2014, to file proposed recommended orders, which request was granted. The parties timely filed Proposed Recommended Orders, which were considered in the preparation of this Recommended Order. Respondent also filed a "Closing Argument and Memorandum of Law" which, together with Respondent's Proposed Recommended Order, does not exceed 40 pages, and was considered in preparation of this Recommended Order.

FINDINGS OF FACT

The Parties and Standing

1. Respondent, Hendry County (Respondent or County), is a political subdivision of the State of Florida with the duty and responsibility to adopt and amend a comprehensive growth management plan pursuant to section 163.3167.

2. Petitioner, the Seminole Tribe of Florida (Petitioner or Seminole Tribe), owns real property consisting of the Big Cypress Seminole Indian Reservation and adjacent non-reservation lands located in the County. The address of the main tribal office is 31000 Josie Billie Highway, Clewiston, Florida 33440.

3. On February 25, 2014, the Board of County Commissioners held a public hearing and adopted the Plan Amendment.

4. The Seminole Tribe submitted written and oral comments to the County concerning the Plan Amendment through their counsel and several Tribal members at the adoption public hearing.

Existing Land Uses and Future Designations

5. Hendry County is approximately 1,190 square miles in size. The County is predominantly an agriculturally-based community with roughly 55 percent of the total land area in agricultural production and another 12 percent designated as preserve.

6. Approximately 71 percent of the land area in the County is designated Agriculture on the Future Land Use Map (FLUM).[2/] Lands within the Agriculture Future Land Use Category (Ag FLU), some 529,936 acres, predominantly comprise the central, southern and eastern portion of the County.

7. The Ag FLU designates those lands which "will continue in a rural and/or agricultural state through the planning horizon of 2040."

8. The County has limited property designated for future industrial and commercial use. Less than one-half percent of the land area on the FLUM is designated as Industrial. Less than two-tenths percent is designated as Commercial.

9. Other future land use categories which allow Industrial development include Agriculture, Public, Multi-Use Development, and land within the Rodina sector plan, which authorizes a maximum of 1,900,000 square feet of Office, Civic, and Industrial uses.

10. Industrial uses allowed within the Agriculture land use category include processing of agricultural products as Level One uses allowed as permitted uses, special exceptions, or accessory uses under the Land Development Code. A number of other uses, such as utilities, bio-fuel plants, mining, and solid waste recovery, are allowed as Level Two uses which require rezoning of the property to a Planned Unit Development, with significant review by County staff and approval by the Board of County Commissioners.

11. Less than one percent of the land area is designated for Public Use.

12. The Public land use category designates areas which are publicly-owned, semi-public, or private lands authorized for public purposes, such as utilities and solid waste facilities.

13. The largest industrial site in the County is the AirGlades industrial complex, which is designated as a Public land use on the FLUM. The site is approximately 2,400 acres in size, but only roughly 200 acres is in industrial use. The complex cannot be fully developed due to inadequate County wastewater facilities serving the site, Federal Aviation Authority restrictions (e.g., height limitations) on development in proximity to the Airglades airport, and lack of opportunity for fee ownership of property owned by the County.[3/]

14. Roughly one-half percent of the land area is designated Multi-Use. Designated lands are generally located adjacent to the primary transportation system and existing or programmed utilities. The purpose of this land use category is to promote new development and redevelopment of the properties located within the category. The Floor Area Ratio (FAR) for Industrial development in the Multi-Use category is limited to 0.75.

15. As with industrial uses, commercial uses are allowed in land use categories other than Commercial. The Agriculture category allows commercial uses such as ornamental horticulture

and nurseries. Non-residential intensity is generally limited to an FAR of .40.

16. Commercial development is allowed within both the Medium-Density and High-Density Residential FLU Categories; however, development is limited to residential-serving commercial, must be approved through the PUD rezoning process, and is limited to 15 percent of the uses within the PUD.

17. Less than one percent of the County is designated as Rural Special Density, and, under the existing Plan, this designation cannot be expanded. The Residential Special Density category allows commercial and retail on no more than 10 percent of the designated area and with a total cap of 200 square feet at buildout.

18. Commercial development is also allowed within the Multi-Use category, but is limited to an FAR of .25 for retail commercial, .50 for mixed-use buildings (maximum of 25 percent retail), and .30 FAR for mixed-use buildings with commercial on the first floor.

19. The County is sparsely populated with concentrations surrounding the cities of Clewiston and LaBelle, including Port LaBelle, as well as the unincorporated areas known as Felda and Harlem. The cities of LaBelle and Clewiston and the unincorporated populated areas are located at the northernmost end of the County along State Road 80 (SR 80). The Felda

Community is located in the northwestern portion of the County, south of the City of LaBelle.

20. Most of the development in the County since 1999 has occurred in and surrounding the incorporated areas of LaBelle and Clewiston, primarily adjacent to the City of LaBelle and along SR 80 from LaBelle to the Lee County line.

21. The vast majority of land in the County is not served by centralized public utilities, such as sewer and water. Existing public utilities, including centralized water and sewer, are limited to the northernmost areas of the County surrounding the cities of LaBelle and Clewiston, and along SR 80.

22. South of LaBelle and Clewiston, there are only three north/south and two east/west principle arterial or collector roads in the County. All of these are two-lane roads, and only SR 29 south of LaBelle is planned to be widened to four lanes under either alternative in the County's 2040 long-range transportation plan.

Economic Conditions

23. It is undisputed that the economic condition of the County is dire. The County ranks high in many negative economic indicators, including a 30 percent poverty rate (compared to 17 percent statewide), the highest unemployment rate in the state for 34 of the most recent 36 months, and an annual wage

$10,000 lower than the state average. Roughly 80 percent of County school children qualify for a free or reduced-price lunch, and a high percentage of the County population are Medicaid recipients.

24. The County's ability to raise revenue through taxation is limited by the extent of property exempt from ad valorem taxation (e.g., government-owned property), and the extent classified as Agricultural and assessed at less than just value. Slightly more than half of the just value of property in the County is subject to an Agricultural classification. Another 21 percent of the just value of property in the County is government-owned, thus exempt from ad valorem taxation.

25. More than half of the parcels in the County are taxed as vacant residential, and less than two percent are taxable commercial properties.

26. On May 24, 2011, the Board of County Commissioners conducted a workshop on proposed new Mission, Vision, and Core Values statements for the County.

27. On September 13, 2011, the Board adopted the following Vision statement: "To be an outstanding rural community in which to live, work, raise a family and enjoy life by creating an economic environment where people can prosper."

The Plan Amendment

28. The Plan Amendment was adopted in an effort to attract large-scale commercial and industrial businesses to locate in, and bring jobs to, the County.

29. Under the Plan Amendment, a new development project that is designated as an Economic Engine Project (EEP), and "large-scale commercial and/or industrial" developments, are expressly permitted in any and all FLU categories throughout the County with the exception of Agricultural Conservation, Residential - Pre-Existing Rural Estates, and Felda Estates.

30. The Plan Amendment is designed to spur economic development by "streamlining" the permitting process to give the County a competitive advantage in attracting new business. By permitting EEPs and large-scale commercial and industrial uses in nearly every future land use category, the Plan Amendment is intended to eliminate the costs (in both time and money) of processing comprehensive plan amendments for future development projects.

31. The amount of land eligible for siting either an EEP or a large-scale commercial and/or industrial development under the Plan Amendment is approximately 580,000 acres.[4/] The majority of that land area, 529,936.49 acres, is located within the Agriculture FLU category.

32. The Plan Amendment significantly rewrites the Economic Development Element of the County's Plan, and adds new policies to Chapter 1, Goal 2 of the Future Land Use Element (FLUE), related to "Innovative Planning and Development Strategies."

33. The Plan Amendment rewrites Goal 2 as follows:[5/]

> ~~In order to protect water resources, protect the environment and wildlife habitat, build a more sustainable tax base, encourage economic development, promote energy efficiency, and to permit job creation for the citizens and residents of Hendry County, the following innovative land use planning techniques should be encouraged:~~
> In order to build a sustainable tax base, encourage economic development, promote job creation, and support vibrant rural and urban communities, the following flexible development strategies are encouraged:
>
> ~~Innovative and flexible planning and development strategies list in Section 163.3168, Florida Statutes.~~
>
> Innovative and creative planning tools. ~~Innovative~~ Flexible and strategic land use techniques listed and defined in this comprehensive plan.

34. The Plan Amendment adds the following new Objective and Policies to FLUE Goal 2:

> Objective 2.1: Recognize the substantial advantages of innovative approaches to economic development to meet the needs of the existing and future urban, suburban and rural areas.
>
> Policy 2.1.1: A qualifying County economic development and job creation project (Economic Engine Project) is a project that complies with Policy 10.1.7. of the Economic

Development Element, Hendry County's compatibility requirements, Policy 2.1.2, and which will have adequate infrastructure. These projects shall be allowed in any category listed in the Future Land Use Element except those lands designated as Agriculture Conservation, Residential/Pre-Existing Rural Estates, and Felda Estates residential areas, consistent with the goals, objectives, and policies of the Economic Development Element. Additionally, Economic Engine Projects shall be allowed in adopted sector plans only if they advance or further the goals, objectives and policies of respective lands pursuant to 163.3245, F.S. and the sector plan. Densities and Intensities shall not exceed the values that are established for commercial and industrial uses in the respective land use categories. In the residential land use categories, an Economic Engine Project shall not exceed an Intensity of 0.25 FAR.

Policy 2.1.2: Large-scale commercial and/or industrial developments will be allowed in any Future Land Use category, except those lands designated as Agriculture Conservation, Residential/Pre-Existing Rural Estates, and Felda Estates residential areas if they meet the requirements below. In addition, large-scale commercial and/or industrial developments will be allowed in adopted sector plans only if they advance or further the goals, objectives and policies of respective lands pursuant to 163.3245, F.S., the sector plan, and meet the requirements below. Policy 2.1.2 does not apply to industrial development located in the industrial land use category nor commercial development located in the commercial land use category.

a. The development is approved as a PUD as provided in the Land Development Code;

b. The development is consistent with siting proposals developed by County staff

and approved by the Board of County Commissioners;

c. The project has direct access to principal arterials and collectors or access to the principal arterials and collectors via local roads with adequate capacity which can be readily provided by the development;

d. The project has access to, will upgrade/extend existing utilities, or construct on-site utilities; or a public or private provider will extend and/or expand the utilities (including an upgrade if necessary) or has the extension of utilities in the utility's financially feasible plan. The project must have access to all existing or planned necessary utilities, such as water, sewer, electricity, natural gas, cable, broadband, or telephone;

e. The project has access to and can provide on-site rail facilities, when appropriate;

f. The project will provide sufficient open space, buffers, and screening from exterior boundaries where warranted to address all compatibility issues.

g. Large-scale Commercial and/or Industrial development must be a minimum of eighty (80) acres. The County reserves the right to require the project area to be larger if the County finds that a project with more land is necessary to address the impacts of the development on the surrounding area, or if the County concludes that a larger site is necessary to provide a viable project.

h. The project must demonstrate that it will produce at least fifty (50) new jobs within three years after the project is initiated.

i. The development must contribute positively to the County's economy.

j. If the project requires that the County expend funds not already provided for in the County Capital Improvement Program, the developer shall cooperate with the County in obtaining the funds. This

provision includes requiring the County to accelerate a programmed project.

k. If necessary, the owner/developer of the project will work with the appropriate educational facilities to create the necessary education and training programs that will enable Hendry County residents to be employed with the Large-scale Commercial and/or Industrial development.

l. Intensities shall not exceed the Floor Area Ratio for Commercial and/or Industrial uses that are established in their respective land use categories. In the residential land use categories, an Economic Engine Project shall not exceed an Intensity of 0.25 FAR.

m. Densities shall not exceed the Floor Area Ratio for Commercial uses that are established in their respective land use categories.

35. Additionally, the Plan Amendment adds the following definitions to the Plan:

"Economic Engine Project" means a qualifying County economic development and job creation project which complies with Policy 10.1.7. of the Economic Development Element and means the proposed development, redevelopment or expansion of a target industry.

"Target Industry" means an industry that contributes to County or regional economic diversification and competitiveness. Targeted industries that are eligible to qualify as a County-approved Economic Engine Project include, but are not limited to:

1. The targeted industries and strategic areas of emphasis listed with Enterprise Florida

2. The targeted industries of Florida's Heartland Regional Economic Development Initiative

3. Projects aligned with efforts of Visit Florida
4. Projects that promote tourism
5. Marine Industries; and
6. Agricultural Industries

36. New Economic Development Element Policy 10.1.7, reads as follows:

> The County Administrator has the authority to designate a project as a County-approved Economic Engine Project provided it meets the definition of an Economic Engine Project, the criterion in future land use element Objective 2.1, and policies 2.1.1-2.1.2.

Petitioner's Challenge

37. Petitioner challenges the Plan Amendment as not "in compliance" with chapter 163. Specifically, Petitioner alleges that the Plan Amendment fails to appropriately plan for orderly future growth by providing measurable and predictable standards to guide and control the future growth and distribution of large-scale commercial and industrial developments and Economic Engine Projects throughout the County; is not based on relevant and appropriate data and analysis; is internally inconsistent with other goals, objectives, and policies in the Plan; and fails to discourage urban sprawl.

Meaningful and Predictable Standards

38. Section 163.3177(1) provides, "The [local government 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."

39. Section 163.3177(6)(a) requires the local government to designate, through the FLUE, the "proposed future general distribution, location, and extent of the uses of land for" commercial and industrial categories of use. Further, this section requires the local government to include the "approximate acreage and the general range of density or intensity of use . . . for the gross land area in each existing land use category."

40. Subparagraph 163.3177(6)(a)1. requires local governments to define each future land use category "in terms of uses included" and to include "standards to be followed in the control and distribution of population densities and building and structure intensities."

A. Designated Economic Engine Projects

41. The Plan Amendment does not define an EEP in a manner sufficient to put property owners on notice as to what use might be approved within the approximately 580,000 acres affected by the Plan Amendment.

42. The Plan Amendment defines an EEP as a "proposed development, redevelopment or expansion of a target industry." "Target industry" is further defined by the Plan Amendment as "an industry that contributes to County or regional economic

diversification and competitiveness." The definition continues, as follows:

> Targeted industries that are eligible to qualify as a County-approved Economic Engine Project include, but are not limited to:
>
> (1) The targeted industries and strategic areas of emphasis listed with Enterprise Florida
> (2) The targeted industries of Florida's Heartland Regional Economic Development Initiative
> (3) Projects aligned with efforts of Visit Florida
> (4) Projects that promote tourism
> (5) Marine Industries
> (6) Agricultural Industries

43. Under Policy 2.1.1, a project that meets the definitions above may be designated as an EEP by the County Administrator, pursuant to Policy 10.1.7, if it meets the criterion in Policy 2.1.2, and if it "complies with the County's compatibility requirements and [has] adequate infrastructure."

44. As adopted, the Plan Amendment provides no meaningful standard for the use or development of land for an EEP. The definition of an industry that "contributes to County or regional economic diversification and competitiveness" is essentially open-ended, defining an EEP only in the sense that it must be different from the existing predominate County industry -- Agriculture. Yet, even that distinction is eliminated by the inclusion of "Agricultural Industries" on the

list of target industries "that are eligible to qualify as a County-approved" EEP.

45. The list of industries defined as "eligible to qualify as a County-approved" EEP provides no meaningful standard because it incorporates by reference industries listed by, targeted by, or "aligned with," private and quasi-government entities such as Enterprise Florida, Visit Florida, and Florida's Heartland Regional Economic Development Initiative. The definition does not even fix to a specific date the list of targeted industries designated by those business development entities, thus rendering the Amendment "self-amending," without any meaningful list of qualifying uses.

46. Moreover, the definition of "target industry" incorporates these third-party lists with the qualification "including but not limited to." Thus, determination of an EEP is at the sole discretion of the County Administrator.

47. Sarah Catala, Hendry County associate planner, is the author of the Plan Amendment. Ms. Catala testified that an EEP could encompass a wide variety of uses, including ecotourism (e.g., bird-watching tours), manufacturing, and large-scale commercial development such as a Super Walmart.

48. The Plan Amendment is essentially circular. The definition of an EEP refers to compliance with Policy 10.1.7, but Policy 10.1.7 refers back to the definition and the criteria

in Policies 2.1.1 and 2.1.2. Policy 2.1.1 requires an EEP to comply with Policy 10.1.7, as well as Policy 2.1.2.

49. Objective 2.1 and Policies 2.1.1 and 2.1.2 lack meaningful and predictable standards for the use and development of EEPs.

50. Policy 2.1.1, as previously referenced, refers the reader to Policy 2.1.2 and further states that EEPs must "comply with Hendry County's compatibility requirements" and must have "adequate infrastructure." The Plan Amendment does not define either "compatibility requirements" or "adequate infrastructure." Nor does the Plan Amendment cross-reference any specific compatibility or infrastructure requirement in either the Plan or the County's Land Development Regulations.

51. The County highlights Policy 2.1.2 as the measurable criterion that directs the location, timing and extent of development of both EEPs and large-scale commercial and industrial developments throughout the County. However, as discussed below, Policy 2.1.2 does not resolve the Plan Amendment's failure to provide meaningful and predictable standards directing the location, amount and timing of the development of EEPs or large-scale commercial and industrial in the County.

B. Large-scale Commercial and Industrial Developments

52. Policy 2.1.2 adds "large-scale commercial and industrial developments" as an allowable use in every FLU category in the County with the exception of the same three categories from which EEPs are excluded: Agriculture Conservation, Residential/Pre-Existing Rural Estates, and Felda Estates.

53. Large-scale commercial and industrial developments must meet the requirements listed in paragraphs (a) through (n) of Policy 2.1.2.[6/]

54. Policy 2.1.2(a) requires EEPs and large-scale commercial and industrial developments allowed by the Plan Amendment to undergo a rezoning to Planned Unit Development (PUD) during which time various site-specific criteria found in the land development regulations will be applied to development of a particular project. The PUD rezoning criterion in the County's LDRs govern the location of a particular use on a specific property. The PUD requirements do not relate in any way to the appropriate location of either an economic project or large-scale commercial or industrial development within the approximately 580,000 acres open for those developments under the Plan Amendment. Thus, this criterion is not a meaningful standard that provides for the general distribution, location,

and extent of land for EEPs or large-scale commercial or industrial use.

55. Policy 2.1.2(b) requires EEPs and large-scale commercial and industrial developments allowed by the Plan Amendment to be "consistent with siting proposals developed by County staff and approved by the Board of County Commissioners." It is undisputed that the said siting proposals have yet to be developed by staff. Ms. Catala anticipates developing a locational matrix that will "match up locations in the County with the needs of a business." As such, the siting proposals will provide locational standards for future EEPs and large-scale commercial and industrial developments. As written and adopted, though, the Plan Amendment contains no such standards.

56. Policy 2.1.2(c) requires EEPs and large-scale commercial and industrial developments to have "direct access to principal arterials and collectors or access to the principal arterials and collectors via local roads with adequate capacity which can be readily provided by the development." This criterion simply requires EEPs and large-scale commercial and industrial developments to have access to a roadway of some sort. It does not guide developments to locate within proximity to a roadway, or require direct access to a particular class of roadway. The criterion does not preclude the developer from building a road from the project to an existing local roadway.

57. Furthermore, the Plan Amendment neither defines the term "adequate capacity" nor cross-references an existing definition of that term elsewhere in the Plan. Without a definition, the reader is left to speculate whether a particular project site is appropriate in proximity to any particular roadway.

58. As written, Policy 2.1.2(c) does not provide meaningful standards for the location, distribution, or extent of either EEPs or large-scale commercial or industrial projects within the approximately 580,000 acres designated eligible for these uses under the Plan Amendment.

59. Policy 2.1.2(d) relates to the provision of utilities to serve an EEP or large-scale commercial or industrial project. The Policy reads as follows:

> The project has access to, will upgrade/extend, or construct on-site utilities; or a public or private provider will extend and/or expand the utilities (including an upgrade if necessary) or has the extension of utilities in the utility's financially feasible plan. The project must have access to all existing or planned necessary utilities, such as water, sewer, electricity, natural gas, cable, broadband, or telephone.

60. This criterion provides so many alternatives, it is essentially meaningless. Boiled down, the provision requires only that the project have utilities, which is essential to any development. The criterion does not direct the location of one

of these projects to areas where utilities exist or are planned, but rather allows them anywhere within the approximately 580,000 acres as long as the developer provides needed utilities, somehow, some way.

61. Policy 2.1.2(e) requires "[t]he project [to have] access to and . . . provide on-site rail facilities, when appropriate[.]" This criterion provides locational criterion to the extent that a development for which rail facilities are integral must locate in proximity thereto. However, that criterion is self-evident. The policy does not add any guidance for the location, distribution, and extent of EEPs and large-scale commercial or industrial projects which do not require rail facilities.

62. Policy 2.1.2(f) requires the project to "provide sufficient open space, buffers, and screening from exterior boundaries where warranted to address all compatibility issues." Buffers, screening, and open space requirements are addressed at the PUD rezoning stage of development and do not provide guidance as to the location of development within any particular land area. Furthermore, the language does not direct an EEP or large-scale commercial or industrial development away from existing uses which may be incompatible therewith. The Plan Amendment actually anticipates incompatibility and requires

development techniques to address incompatibilities at the rezoning stage.

63. Policy 2.1.2(g) requires a minimum of 80 acres for a large-scale commercial or industrial development. The policy allows the County to increase that minimum size "if the County finds that a project with more land is necessary to address the impacts of the development on the surrounding area, or if the County concludes that a larger site is necessary to provide a viable project." The policy has a veneer of locational criterion: it excludes development or redevelopment of parcels, or aggregated parcels, which are smaller than the 80 acre threshold. However, the policy provides an exception for the County to require larger parcels solely at its discretion. Again, the policy anticipates incompatibility between large-scale commercial or industrial development and the existing land uses.

64. Policies 2.1.2(h), (i), (j), (k), (l), and (m) bear no relationship to location, distribution, or extent of the land uses allowed under the Plan Amendment.

65. Petitioner has proven beyond fair debate that the Plan Amendment neither provides for the general distribution, location, and extent of the uses of land for commercial and industrial purposes nor meaningful standards for the future

development of EEPs and large-scale commercial and industrial development.

66. Section 163.3177(1) requires local government plan amendments to establish meaningful guidelines for the content of more-detailed land development regulations.

67. Policy 2.1.2(b) requires large-scale commercial and industrial developments to be consistent with "siting proposals," which Ms. Catala testified are anticipated to be adopted in the County's land development code. Ms. Catala generally described a matrix that would help industry "get the best fit for their needs in the County."

68. The Plan Amendment does not provide any guidelines for adoption of a matrix or any other siting proposals to be adopted by County staff and approved by the Board of County Commissioners pursuant to Policy 2.1.2.(b).

69. Lastly, section 163.3177(6)(a) requires that the FLUE establish the general range of density and intensity of the uses allowed.

70. Ms. Catala testified that the intent of the Plan Amendment is not to change the density or intensity of uses from those already allowed in the plan.

71. The plain language of the Plan Amendment does not support a finding that densities and intensities of use remain the same under the Plan Amendment. The intensity of non-

residential development allowed under the Plan Amendment is, at best, unclear, and in some cases left entirely to the discretion of the Board of County Commissioners.

72. Policy 2.1.1 provides that the densities and intensities of EEPs "shall not exceed the values that are established for commercial and industrial uses in the respective land use categories."

73. The County argues that a fair reading of the Policy restricts non-residential development to the intensities established in the underlying category for non-residential development.

74. Under Policy 2.1.2, intensities of large-scale commercial and industrial developments "shall not exceed the Floor Area Ratio for Commercial and/or Industrial Uses established in their respective land use categories."

75. While a fair reading of Policy 2.1.1 restricts the intensity of commercial or industrial development to the density established in the underlying land use district, Policy 2.1.2 does not. The pronoun "their" refers back to the Commercial and Industrial land use categories. Thus, under Policy 2.1.2, commercial and industrial uses can develop in other land use categories at the intensities established in the Commercial or Industrial category.

76. Further, both Policy 2.1.1 and Policy 2.1.2 cap EEP intensity at 0.25 FAR in residential FLU categories. This language overrides the existing cap on non-residential development in those categories established in the FLUE. It also overrides those FLU categories, such as Residential Low-Density, which establish an FAR of 0.00.

77. Finally, Policy 2.1.2 contains no intensity cap on development of commercial and industrial development within residential FLU categories. The County explains that large-scale commercial and industrial developments are simply not allowed in FLU categories, such as Residential Low-Density, which establish an FAR of 0.00.

78. The County's interpretation is not consistent with the plain language of the policy. Policy 2.1.2 specifically allows large-scale commercial and industrial development in all land use categories except Agricultural-Conservation, Residential/ Pre-Existing Rural Estates, and Felda Estates. If the County intended to exclude other FLU categories, they would have been included in the list of exceptions.

79. Petitioner has proven beyond fair debate that the Plan Amendment does not establish the general range of intensity of large-scale commercial and industrial development.

Data and Analysis

80. Section 163.3177(6)(a)2. requires local government FLUE amendments "to be based upon surveys, studies, and data regarding the area, as applicable" including the following:

> a. The amount of land required to accommodate anticipated growth.
> b. The projected permanent and seasonal population of the area.
> c. The character of the undeveloped land.
> d. The availability of water supplies, public facilities, and services.
> e. The need for redevelopment, including the renewal of blighted areas and the elimination of nonconforming uses which are inconsistent with the character of the community.
> f. The compatibility of uses on land adjacent to an airport as defined in s. 330.35 and consistent with s. 333.02.
> g. The discouragement of urban sprawl.
> h. The need for job creation, capital investment, and economic development that will strengthen and diversify the community's economy.
> i. The need to modify land uses and development patterns with antiquated subdivisions.

81. County staff did not collect data or perform an analysis of the character of the undeveloped land affected by the Plan Amendment.

82. County staff did not perform any analysis of the suitability of the land area affected by the Plan Amendment for either a large-scale commercial or industrial development nor for an EEP.

83. County staff did not perform an analysis of the availability of the County water supplies, wastewater treatment, or other public facilities, to serve large-scale commercial or industrial development or an EEP located within the area affected by the Plan Amendment. In fact, County staff acknowledged that wastewater treatment facilities are inadequate to support full buildout of the industrial sites available at the Airglades airport facility.

84. County staff did not perform an analysis of the compatibility of large-scale commercial or industrial development adjacent to the Airglades airport facility.

85. In preparing the Plan Amendment, County staff clearly relied upon data reflecting the County's needs for job creation, economic development, and a diversified economy, including the Department of Revenue Property Tax Overview for Hendry County, and the fact that the County is designated a Rural Area of Critical State Concern.

86. County staff also considered, in support of the Plan Amendment, the County Commission's recently-adopted Vision statement: "To be an outstanding rural community in which to live, work, raise a family and enjoy life by creating an economic environment where people can prosper."

87. No evidence was introduced to support a finding that County staff analyzed whether the Plan Amendment would achieve

the goals of strengthening and diversifying the County's economy.

88. The County introduced the testimony of Greg Gillman, the County's Economic Development Director, regarding his efforts to attract new business to the County, as well as the obstacles the County faces in these efforts. Mr. Gillman testified regarding five particular scenarios in which he worked with companies to find a suitable location in the County. In one scenario, the price was too high for the potential buyer. In another, the potential buyer was put off by the wooded acreage. In another, the seller would not subdivide. In another, the property is undergoing a PUD rezoning process. In the final scenario, Mr. Gillman testified the potential buyer rejected all proposed sites without explanation.

89. Mr. Gillman did not give a single example of a scenario in which a potential business opportunity was lost due to the need to change the FLUM designation of a property. In fact, Mr. Gillman testified that he does not even show sites without appropriate land use classifications to potential buyers.

90. While there is a plethora of data on the limited amount of land in the County classified for commercial and industrial uses, County staff gathered no data regarding, and conducted no analysis of, the vacancy rate of sites on which

commercial and industrial uses are currently allowed. Mr. Gillman provided anecdotal evidence regarding recent efforts to redevelop vacant sites, some of which have been successful.

91. Ms. Catala testified that, in addition to relying on the County's Vision statement and economic data, she reviewed the comprehensive plans of other jurisdictions. From that review, she gleaned the idea of an EEP.

92. The County introduced no evidence to support a finding that the threshold of 80 acres for an EEP was based upon data at all. Mr. Gillman's testimony revealed that Ms. Catala originally proposed a higher threshold (perhaps 120 acres), but that he recommended a smaller acreage. Mr. Gillman gave no explanation of the basis for his recommendation.

93. Section 163.3177(f) provides, "To be based on data means to react to it 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."

94. Given the lack of evidence linking the Plan Amendment to spurring economic development, the County failed to demonstrate that it reacted appropriately to the economic data on which it relied. Even if Mr. Gillman's anecdotes were accepted as data, they do not support eliminating plan

amendments to allow commercial and industrial development in a variety of other land use categories.

Internal Inconsistency

95. Section 163.3177(2) provides as follows:

> Coordination of the several elements of the local comprehensive plan shall be a major objective of the planning process. The several elements of the comprehensive plan shall be consistent.

96. The Petitioner alleges the Plan Amendment changes to the FLUE and Economic Development Element are inconsistent with a number of goals, objectives, and policies found within the FLUE and in other plan elements. Each one is taken in turn.

A. Future Land Use Element

97. First, Petitioner alleges internal inconsistency within the FLUE, specifically between the Plan Amendment and FLUE Goal 1, Objective 1.1, and Policies 1.1.1, 1.1.3, 1.1.4, 1.1.5, 1.1.9, 1.1.10, 1.1.11, and 1.1.13.

98. Policy 1.1.1 governs land uses allowed within the Agriculture FLU category. The policy states, in pertinent part, as follows:

> Purpose
>
> The purpose of the Agriculture Future Land Use Category is to define those areas within Hendry County which will continue in a rural and/or agricultural state through the planning horizon of 2040.
>
> * * *

> Location Standards
>
> Areas classified as Agriculture are located within the rural areas of Hendry County. Lands in this category are not within the urban area, but may be adjacent to the urban area. Some of these lands may be converted to urban uses within the 2040 planning horizon. However, the majority of the lands classified Agriculture will remain in a rural, agricultural land use through the year 2040.

99. The Plan Amendment affects more land designated as Agriculture than that designated in any other category. Slightly more than 70 percent of the County, almost 530,000 acres, is designated as Agriculture, and all of it is subject to development for an EEP or an 80-acre minimum commercial or industrial project under the Plan Amendment.

100. Development of ill-defined EEPs and 80-acre minimum large-scale commercial and industrial projects is not consistent with designating lands "which will continue in a rural and/or agricultural state" through 2040.

101. Respondent counters that the Plan Amendment is not inconsistent with Policy 1.1.1 because that Policy already allows a number of non-traditional agricultural uses which are commercial and/or industrial in nature, and may be sited through the PUD rezoning process, just as the uses allowed under the Plan Amendment.

102. Policy 1.1.1 authorizes the use of Agriculture lands for utilities, bio-fuel plants, mining and earth extraction and processing operations, solid waste facilities, resource recovery facilities, and other similar uses.

103. The County's argument is not persuasive.[7/] The non-agricultural uses allowed under the existing plan are agriculturally-related or agriculture-dependent uses, such as bio-fuel, mining, and resource recovery, or uses which, by their nature, are best suited to less-populated rural areas, such as utilities and solid waste facilities.

104. In contrast, large-scale commercial and industrial uses are not limited to agriculturally-related or utility uses. Under the Plan Amendment, anything from an auto parts manufacturing plant to a Super Walmart could be developed in areas designated Agriculture. Any number of urban uses could be developed under the auspices of an EEP or large-scale commercial.

105. Under the Plan Amendment, no amendment to the County's comprehensive plan will be needed to allow such urban uses in the Agriculture category.

106. Policies 1.1.3, 1.1.4, and 1.1.5 govern land uses in the following FLU categories: Residential – Rural Estates, Residential – Medium Density, and Residential – High Density, respectively.

107. According to Policy 1.1.3, the purpose of the Residential – Rural Estates category is "to define those areas within Hendry County which have been or should be developed at lower density in order to promote and protect the rural lifestyle through the planning horizon of 2040." The Policy permits only residential and customary accessory uses within the category. The Policy specifically sets a FAR of 0.00 for non-residential development.

108. According to Policy 1.1.4, the purpose of the Residential – Medium Density category is "to identify those areas within Hendry County which currently, or should be, encouraged to become the primary location of residential development offering a mixture of residential products at suburban/urban style density through the planning horizon 2040." The policy permits single- and multi-family development, as well as mobile homes, and customary accessory uses. Commercial development is allowed only as an element of mixed-use developments, of which commercial is limited to 15 percent. Additional limitations on commercial apply, including limits on size and character, location within the mixed-use development, and buffering from adjacent residential uses. Policy 1.1.4 establishes an FAR of 0.10 for non-residential development.

109. According to Policy 1.1.5, the purpose of the Residential – High Density category is "to define those areas

within Hendry County which are or should become higher density residential development through the planning horizon 2040." The policy permits all types of residential development and customary accessory uses. As with medium-density category, Policy 1.1.5 allows some commercial development within mixed-use developments subject to limitations on size and character, location within the mixed-use development, and buffering. The policy establishes an FAR of 0.10 for non-residential development.

110. Under the Plan Amendment, each of these three Residential categories is available for siting an EEP. New Policy 2.1.2 allows for development of EEPs in these categories at an FAR of 0.25.

111. The Plan Amendment allows EEPs within the Residential – Rural Estates category directly in contravention of Policy 1.1.3, which limits uses to residential, recreational, and limited agricultural, and provides zero intensity for non-residential uses. As previously noted, the Plan Amendment broadly defines EEPs, and the record supports a finding that such a project could encompass anything from a manufacturing facility to a Super Walmart. The broad array of uses to diversify the County's economy is in conflict with the County's previous decision, reflected in Policy 1.1.3 to designate these

areas for future development at low-density residential "to promote and protect the rural lifestyle."

112. Likewise, the Plan Amendment opens up the Residential – Medium Density and Residential – High Density categories for location of ill-defined EEPs in contravention of Policies 1.1.4 and 1.1.5, which limit development in those categories to primarily residential, only allowing commercial within a mixed-use development and limited to a maximum of 15 percent. Furthermore, the Plan Amendment allows these developments at a greater intensity than the FAR of 0.10 established for non-residential density in those categories.

113. The parties disagreed as to whether the Plan Amendment authorizes large-scale commercial and industrial development in the Residential – Rural Estates category governed by Policy 1.1.3. The argument primarily turns on interpretation of new Policy 2.1.2, as discussed in the previous section herein titled "Meaningful and Predictable Standards."

114. The County contends that the correct interpretation of Policy 2.1.2 allows a large-scale commercial or industrial development at the maximum intensity established in the underlying land use category. In other words, if the underlying land use category establishes an FAR of 0.00 for industrial development, no industrial development is allowed. However, if the same category establishes an FAR for commercial development,

the Plan Amendment allows commercial development in that category limited to the intensity established by the FAR.

115. The undersigned has rejected that interpretation as discussed in the prior section herein.

116. Petitioner contends that the language allows commercial and industrial development in every non-exempt land use category at the intensities established in the Commercial and/or Industrial land use category, as applicable.

117. Petitioner's interpretation is the correct interpretation, and indeed the only possible reading of the plain language of Policy 2.1.2(l).[8/]

118. Policy 1.1.9 governs uses in the Commercial land use category. The Policy allows non-residential development at the following intensities:

> Retail Commercial – 0.25 FAR
> Office – 0.50 FAR
> 0.50 FAR for mixed-use building with a maximum of 25% retail and a minimum of 75% office
> 0.30 FAR for mixed-use development with commercial on the first floor and residential on stories above the first floor.

119. Allowing large-scale commercial development at the stated intensities directly conflicts with Policy 1.1.3, which provides an FAR of 0.00 for non-residential development in Residential – Rural Estates; Policy 1.1.4, which caps intensity

at 0.10 for commercial in Residential – Medium; and Policy 1.1.5, which provides an FAR of 0.10 in Residential – High.

120. Thus, Plan Amendment Policy 2.2.1 is in conflict with Policies 1.1.3, 1.1.4, and 1.1.5.

121. Policy 1.1.10 governs uses in the Industrial land use category. The Policy allows industrial development at an intensity of 0.75.

122. Allowing large-scale industrial development at an intensity of 0.75 directly conflicts with Policy 1.1.3, which provides an FAR of 0.00 for non-residential development in Residential – Rural Estates; and Policies 1.1.4 and 1.1.5, which limit non-residential uses to commercial and recreation in the Residential – Medium and Residential – High land use categories.

123. Thus, Plan Amendment Policy 2.1.2 is in conflict with Policies 1.1.3, 1.1.4, and 1.1.5.

124. Petitioner alleges the Plan Amendment is inconsistent with Policies 1.1.9 and 1.1.10 governing development within the Commercial and Industrial categories, respectively. The allegations were not supported by a preponderance of the evidence. The Plan Amendment does not alter either the uses allowed in those categories or the intensity of development allowed therein. Those policies are essentially unscathed. However, because the Plan Amendment allows the types and intensities of development described in the Commercial and

Industrial categories to occur in residential and other categories in which those uses and intensities conflict, the Plan Amendment is inconsistent with the policies governing those residential and other categories. Policies 1.1.9 and 1.1.10 are merely the conduits through which Policy 2.1.2 is found to be inconsistent with Policies 1.1.3, 1.1.4, and 1.1.5.

125. Policy 1.1.11 governs land uses in the Public category. The Policy establishes the following purpose and uses:

> Purpose
>
> The purpose of the Public Future Land Use Category is to establish regulations relative to use and location of publicly-owned lands, semi-public lands, and private lands authorized for public purposes which currently exist or which may become public through the planning horizon 2040.
>
> Description/Uses
>
> Lands in this category are areas designated for public and semi-public uses, including governmental buildings, schools, churches, and worship centers, utilities, solid waste handling and disposal facilities, airports, logistic centers when operated on public property, recycling facilities, and similar public and semi-public uses. This category may also include publicly-owned parks and other public/semi-public recreational facilities.

126. There is no dispute that the Plan Amendment would allow both EEPs and large-scale commercial and industrial uses within the Public land use category.

127. Large-scale commercial and industrial development is inconsistent with the purpose of the Public land use category adopted in Policy 1.1.11 and the uses established therein.

128. Because the Plan Amendment provides no clear definition of an EEP, and leaves the determination solely to the County Administrator, it is impossible to determine whether allowing said development in the Public land use category would necessarily be inconsistent with Policy 1.1.11.

129. Policy 1.1.13 governs uses in the Leisure/Recreation category. The Policy establishes the following purpose and uses:

> Purpose
> The purpose of the Leisure/Recreation Future Land Use Category is to define those areas within Hendry County which are used or may become used for free standing/independent leisure/recreation activities through the planning horizon 2040.
>
> * * *
>
> Description/Uses
> Leisure/Recreation areas are sites which are currently developed for leisure/recreation facilities or undeveloped sites which are designated for development as leisure/ recreation facilities. . . . Uses allowed within this category shall be limited to sports facilities whether individually developed or in sports complexes, active and/or passive parks, recreation vehicle parks, campgrounds (whether primitive or improved), marinas, golf courses, equestrian centers and riding areas, sporting clay facilities, eco tourism activities, and

> similar leisure and recreation facilities and ancillary facilities.

130. Large-scale industrial and commercial development would directly conflict with the purpose and types of use allowed within this category pursuant to Policy 1.1.13.

131. As the Plan Amendment provides a very broad definition of EEP, it is impossible to determine that every such use would be inconsistent with Policy 1.1.13. In fact, since an EEP may include eco-tourism uses, location within Leisure/Recreation may be entirely suitable.

132. Petitioner next contends that the Plan Amendment is internally inconsistent with Policy 1.5.17, which provides, as follows:

> The County's development regulations shall specifically encourage redevelopment, infill development, compatibility with adjacent uses, and curtailment of uses inconsistent with the character and land uses of surrounding area, and shall discourage urban sprawl.

133. No evidence was introduced regarding whether the County's land development regulations fall short of this Policy mandate. The County's expert testified that he had not reviewed the County's land development regulations to determine whether they met this requirement. Petitioner's expert provided no testimony on this issue.

134. Petitioner did not prove the Plan Amendment is inconsistent with Policy 1.5.17.

B. Other Plan Elements

135. Next, Petitioner contends the Plan Amendment is inconsistent with Infrastructure Element Objective 7.A.3 and Policy 7.A.3.1, which read as follows:

> Objective 7.A.3: The County shall maximize use of existing sewer facilities and discourage urban sprawl within infill development. In addition, limit the extension of sewer service to areas designated for urban development on the Future Land Use Map. This Objective shall be implemented through the following policies:
>
> Policy 7.A.3.1: The Future Land Use Element and Map allows density and the most flexibility for development in the areas near the Cities where sewer facilities are available, or are more feasible for sewer connections than the more remote areas.

136. The Plan Amendment allows development of both EEPs and large-scale commercial and industrial projects regardless of the availability of existing sewer facilities to the project site. The Plan Amendment expresses no preference between, and alternately allows said development with either, access to existing sewer facilities, or provision of on-site wastewater treatment.

137. The Plan Amendment does not change the land use designations on the existing Future Land Use Map. Nearly

580,000 acres opened up for EEPs and large-scale commercial and industrial development under the Plan Amendment is designated on the FLUM as Agriculture. Policy 1.1.1 specifically defines the Agriculture category for those areas of the County "which will continue in a rural and/or agricultural state through the planning horizon of 2040." The Policy clearly characterizes the Agriculture designations on the FLUM as "rural areas of Hendry County," and, while it recognizes that "some of these lands may be converted to urban uses" within the planning horizon, "the majority of the lands classified Agriculture will remain in a rural, agricultural land use through the year 2040."

138. Policy 2.1.2 specifically allows a public or private provider to "extend and/or expand" utilities in order to serve an EEP or large-scale commercial or industrial development. Thus, the Plan Amendment does not "limit the extension of sewer service to areas designated for urban development on the Future Land Use Map" as required by Objective 7.A.3.

139. Likewise, the Plan Amendment does not "allow the greatest density and the most flexibility for development in the areas near the Cities where sewer facilities are available, or are more feasible for sewer extensions than the more remote areas." Indeed, Ms. Catala testified consistently that one of the main objectives of the Plan Amendment was to provide more

flexibility for development than allowed under the existing plan.

140. Next, Petitioner maintains the Plan Amendment is inconsistent with Traffic Circulation Element Policy 8.5.3, which reads as follows:

> Revisions of the roads on the Future Traffic Circulation Map shall be coordinated with and connect or directly serve existing development areas or projected growth areas shown on the Future Land Use Map.

141. The Plan Amendment does not revise any roads on the Future Traffic Circulation Map. No evidence was presented that the said revisions would not be coordinated with existing or projected growth areas shown on the Future Land Use Map.

142. Thus, Petitioner did not prove the Plan Amendment is inconsistent with Policy 8.5.3.

143. Next, Petitioner contends the Plan Amendment is inconsistent with Concurrency Management Element Policy 9.2.1, which reads, as follows:

> The Future Land Use Map is developed to coincide with the availability of public facilities and/or natural resources such that new facilities are not necessarily required for new development.

144. The Plan Amendment allows both EEPs and large-scale commercial and industrial development to occur without regard to availability of public facilities. Although Policy 2.1.2 recognizes the importance of serving these new projects by

adequate utilities of all types, it specifically allows public providers to build new, or extend existing, infrastructure to serve those developments.

145. Further, the Plan Amendment anticipates the construction of new facilities to serve these developments, even requiring the County to accelerate projects in its Capital Improvements Program.

146. The Plan Amendment conflicts with Policy 9.2.1 by authorizing development in areas on the FLUM for which public facilities are neither available nor planned.

C. Future Land Use Map Series

147. Finally, Petitioner alleges the Plan Amendment is inconsistent with the maps adopted in the current plan, specifically the FLUM and Conservation Map series.

148. Because the Plan Amendment allows large-scale commercial and industrial developments in land use categories with which those uses are inconsistent, the location and distribution of uses shown on the FLUM are no longer accurate.

149. The Conservation Map series indicates the generalized location in the County of eight different environmental categories, including soils, panther habitat, and historical resources. Very little evidence was adduced relative to whether the Plan Amendment directly conflicted with any one of the maps in the series. The evidence presented related more to the issue

of whether the Plan Amendment was supported by data and analysis. Petitioner did not prove beyond fair debate that the Plan Amendment directly conflicts with the Conservation Map series.

Urban Sprawl

150. Petitioner's final challenge to the Plan Amendment is that it does not discourage urban sprawl as required by section 163.3177(6)(a)9.

151. Section 163.3177(6)(a)9.b. provides as follows:

> The future land use element or plan amendment shall be determined to discourage the proliferation of urban sprawl if it incorporates a development pattern or urban form that achieves four or more of the following:
>
> (I) Directs or locates economic growth and associated land development to geographic areas of the community in a manner that does not have an adverse impact on and protects natural resources and ecosystems.
>
> (II) Promotes the efficient and cost-effective provision or extension of public infrastructure and services.
>
> (III) Promotes walkable and connected communities and provides for compact development and a mix of uses at densities and intensities that will support a range of housing choices and a multimodal transportation system, including pedestrian, bicycle, and transit, if available.
>
> (IV) Promotes conservation of water and energy.

(V) Preserves agricultural areas and activities, including silviculture, and dormant, unique, and prime farmlands and soils.

(VI) Preserves open space and natural lands and provides for public open space and recreation needs.

(VII) Creates a balance of land uses based upon demands of the residential population for the nonresidential needs of an area.

(VIII) Provides uses, densities, and intensities of use and urban form that would remediate an existing or planned development pattern in the vicinity that constitutes urban sprawl or if it provides for an innovative development pattern such as transit-oriented development or new towns as defined in s. 163.3164.

152. Petitioner maintains the Plan Amendment does not meet any of the listed criterion, thus the Plan Amendment does not discourage the proliferation of urban sprawl.

153. The County maintains the Plan Amendment meets at least four of the foregoing indicators, and, thus, must be determined to discourage the proliferation of urban sprawl.

154. The County's expert witness testified that, in his opinion, the Plan Amendment meets indicators I, II, IV, V, VII, and perhaps VI. In making the following findings, the undersigned considered the testimony of both Petitioner's and Respondent's expert witnesses and found Petitioner's expert opinions to be the more credible and persuasive.

155. The Plan Amendment meets indicator I if it directs or locates EEPs and large-scale commercial and industrial development "in a manner that does not have an adverse impact on and protects natural resources and ecosystems."

156. The Plan Amendment contains no locational criteria for EEPs and large-scale commercial and industrial developments within the 580,000 acres of land opened up for these uses under the Plan Amendment. County staff had data, in the form of the existing conservation land use map series and the soils map, to draw from in determining areas inappropriate for these types of development. Ms. Catala did not rely upon that data, however, explaining instead that her knowledge of the location of wetlands, floodplains, and other natural resources within the subject area was derived from her day-to-day work. Ms. Catala performed no analysis of the impact of potential large-scale commercial or industrial uses on the natural resources and ecosystems which are present in the affected area.

157. The County argues that the Plan Amendment meets criterion I because it does not allow the subject developments in the Agriculture Conservation Land Use Category, thus the Plan Amendment directs development away from natural resources located in that category.

158. Policy 1.1.1(b). states the purpose of the Agriculture Conservation category is to define those areas

within the County which are predominantly jurisdictional wetlands or contain a large portion of wetlands. Land in this category also includes state projects designed to meet the water quality and quantity goals related to the Comprehensive Everglades Restoration Plan. The policy strictly limits both the type and intensity of development which may be located within this category. For example, non-agricultural development is limited to large-lot single-family homes, clustered developments, and rural PUDs, at an intensity no greater than 0.10.

159. The County's argument misses the mark. The issue is not whether the uses allowed under the Plan Amendment are excluded from land in protected categories, but whether the Plan Amendment directs development away from natural resources present in the 580,000 acres affected by the Plan Amendment.

160. The Conservation Element Map Series documents the location of wetland, floodplains, primary and secondary panther habitat, and hydric soils within the County, including the area affected by the Plan Amendment. Because the Plan Amendment allows the subject development to occur anywhere within the 580,000 acres without regard to location of natural resources, it cannot be found to direct or locate development "in a manner that does not have an adverse impact on and protects natural resources and ecosystems."

161. The Plan Amendment does not meet criterion I.

162. Criterion II applies if the Plan Amendment promotes the efficient and cost-effective provision or extension of public infrastructure and services.

163. The Plan Amendment allows the subject development to locate without regard to the availability of public infrastructure or services. The Plan Amendment acknowledges that the development must be served, but anticipates that a public or private provider may have to extend services to the property, and does not discourage location of said projects in remote areas where said services are neither available nor planned. Further, the Plan Amendment acknowledges that the County may have to "expend funds not already provided for in the County Capital Improvement Program" to serve the development. Extending services to remote areas of the County is neither efficient nor cost-effective, especially in light of the fact that development could occur in multiple far-flung areas under the Plan Amendment.

164. The Plan Amendment does not meet criterion II.

165. Likewise, the Plan Amendment does not meet sprawl criterion IV because it does nothing to promote conservation of water and energy. The Amendment allows on-site utilities, including wells, to service new development. By allowing

development in remote areas of the County, the Plan Amendment does not promote energy conservation.

166. Likewise, the Plan Amendment does not meet criterion V, "[p]reserves agricultural areas and activities, including silviculture, and dormant, unique and prime farmland and soils." The Plan Amendment does not relate to the soils map and direct development away from prime farmland and soils. Further, the Plan Amendment allows conversion of some 580,000 acres of land designated "Agriculture" to non-agricultural uses. Lands in the Agriculture land use category have been designated by the County to "continue in a rural and/or agricultural state through the planning horizon of 2040."

167. The Plan Amendment meets criterion VI if it "preserves open space and natural lands and provides for public open space and recreation needs." The County's expert testified that the Plan Amendment will increase the County's tax base so that more public open space and recreation can be provided. Petitioner's expert testified that the subject developments will intrude into rural open spaces and natural lands and "could change the scenic landscape" of the County.

168. The Plan Amendment does not meet criterion VI.

169. Criterion VII applies if the Plan Amendment creates a balance of land uses based upon demands of the residential population for the non-residential needs of the area. Neither

party introduced any evidence regarding the amount of commercial or industrial development needed to serve the residential population of the County. Certainly the unemployment statistics indicate a need for employment opportunities. Petitioner did not prove that the Plan Amendment does not meet criterion VII.

170. Criterion III and VIII do not apply to the Plan Amendment.

171. Having determined that the Plan Amendment does not meet four or more of the criterion to be determined not to promote the proliferation of urban sprawl, the analysis then turns to the primary indicators of urban sprawl.

172. Section 163.3177(6)(a)9.a. lays out 13 primary indicators that a plan amendment does not discourage the proliferation of urban sprawl.

173. Again, the evidence conflicted as to whether the Plan Amendment meets any of the indicators. In making the following findings, the undersigned has considered the testimony of both Petitioner's and Respondent's expert witnesses, and found the testimony of Petitioner's expert to be the more credible and persuasive.

174. The Plan Amendment meets several of the primary indicators of the proliferation of urban sprawl.

175. The Plan Amendment allows loosely-identified EEPs and large-scale commercial development to occur in roughly 580,000

largely rural acres currently designated for Agriculture. The Plan Amendment does not limit location of these developments within the Agriculture designation. Thus, the Plan Amendment "[p]romotes, allows, or designates significant amounts of urban development to occur in rural areas at substantial distances from existing urban areas while using undeveloped lands that are available and suitable for development" which is indicator II. Promoting these areas for development is, in fact, the main purpose of the Plan Amendment.

176. Indicator IV is triggered if the Plan Amendment "[f]ails to adequately protect and conserve" a litany of natural resources and natural systems. The Plan Amendment meets this indicator because it does not direct development away from natural resources which may be located within the 580,000 acres in which it promotes development.

177. Under the Plan Amendment, vast areas currently in, or designated for, agricultural uses, are allowed to convert to urban uses without a plan amendment. The Plan Amendment does not direct development away from existing agricultural uses. Thus, the Plan Amendment meets indicator V: "Fails to adequately protect adjacent agricultural areas and activities, including silviculture, active agricultural and silvicultural activities, passive agricultural activities, and dormant, unique, and prime farmlands and soils."

178. Similarly, the Plan Amendment "[f]ails to provide a clear separation between rural and urban uses[,]" thus triggering indicator IX.

179. On the issue of public facilities, the Plan Amendment meets both criterion VI and VII. The Plan Amendment fails to maximize the use of existing public facilities because it does not direct development to areas where public facilities, including roads, sewer, and water, are available. Likewise, the Plan Amendment fails to maximize the use of future public facilities, because it allows development to occur in areas where public facilities are not planned. In addition, the Plan Amendment anticipates the extension of facilities to serve potentially far-flung development, but would not require subsequent future development to locate where the new service was available (i.e., infill development). For this same reason, the Plan Amendment discourages infill development, triggering indicator X.

180. Similary, because it allows scattered large-scale development, the Plan Amendment triggers indicator VIII: "Allows for land use patterns or timing which disproportionately increase the cost in time, money, and energy of providing and maintaining" a litany of public facilities and services.

181. Petitioner did not prove by a preponderance of the evidence that the Plan Amendment triggers indicators I, III, XI, XII, and XIII.

182. Petitioner proved that the Plan Amendment meets indicators II, IV, V, VI, VII, VIII, IX, and X. On balance, the Plan Amendment does not discourage the proliferation of urban sprawl.

CONCLUSIONS OF LAW

183. The Division of Administrative Hearings has jurisdiction over the subject matter and parties hereto pursuant to sections 120.569, 120.57(1), and 163.3184(5), Florida Statutes (2014).

184. To have standing to challenge or support a plan amendment, a person must be an affected person as defined in section 163.3184(1)(a). Petitioner is an affected person within the meaning of the statute.

185. "In compliance" means "consistent with the requirements of §§ 163.3177, 163.3178, 163.3180, 163.3191, 163.3245, and 163.3248, with the appropriate strategic regional policy plan, and with the principles for guiding development in designated areas of critical state concern and with part III of chapter 369, where applicable." § 163.3184(1)(b), Fla. Stat.

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

to any challenge filed by an affected person. Therefore, Petitioner bears the burden of proving beyond fair debate that the challenged Plan Amendment is not in compliance. This means that "if reasonable persons could differ as to its propriety," a plan amendment must be upheld. Martin Cnty. v. Yusem, 690 So.2d 1288, 1295 (Fla. 1997). Or, 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 Cnty. v. Section 28 P'ship, Ltd., 772 So. 2d 616, 621 (Fla. 4th DCA 2000).

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

Meaningful and Predictable Standards

188. Based on the foregoing Findings of Fact, Petitioner proved beyond fair debate that the Plan Amendment does not provide meaningful and predictable standards for the use and development of land affected by the Plan Amendment, as required by section 163.3177(1). The Plan Amendment authorizes the development of ill-defined EEPs and large-scale commercial and industrial development anywhere within 580,000 acres of the County. Indeed, the acknowledged purpose of the Plan Amendment is to provide flexibility in siting said projects to encourage economic development.

189. Petitioner also proved beyond fair debate that the Plan Amendment does not designate the approximate acreage and the general range of intensity of large-scale commercial and industrial uses, as required by 163.3177(6)(a). Allowable intensity of said projects was unclear, at best.

190. Petitioner likewise proved beyond fair debate that the Plan Amendment does not designate the general distribution, location, and extent of the use of land for large-scale commercial and industrial development, as required by 163.3177(6)(a).

191. In support of its argument that the Plan Amendment provides meaningful standards, Respondent sites the undersigned's findings in Kemp v. Miami-Dade, Case No. 13-0009 (Fla. DOAH Aug. 1, 2013; DEO Sept. 24, 2013).

192. In Kemp, Petitioners challenged a County FLUM amendment redesignating a former golf course property for future use as industrial and office. The Amendment was adopted concurrently with binding restrictions on use of the property, which required, among other things, the developer to "direct all lighting away from adjacent residential uses, require sound deadeners for any metal work or welding-related uses, and prohibit outdoor speaker systems." Petitioner challenged the amendment as inconsistent with, among others, a future land use policy which required the County to "consider such factors as

noise [and] lighting" in evaluating compatibility among proximate land uses.[9/]

193. The Petitioners in Kemp argued that the restrictions "requiring lighting to be directed away from adjoining residential areas" and "require sound deadeners for outdoor metal work" were meaningless because they did not contain measurable standards, such as maximum lumens or decibel levels. The undersigned concluded that the Petitioners had not proven that the standards contained therein were either meaningless or unenforceable.

194. By contrast, in the case at hand, Petitioner proved that the standards for siting EEPs and large-scale industrial and commercial development set forth in Policy 2.1.2 are essentially meaningless. Boiled down to the essentials, the only "locational criterion" included in the policy are that developments have access to a road or railway, if applicable, and be served by utilities. These statements are merely development necessities clothed as criterion.

195. Further, the Plan Amendment does not provide any guidelines for the adoption of "siting proposals" to be adopted by County staff and approved by the Board of County Commissioners pursuant to Policy 2.1.2.b. As such, the Plan Amendment does not establish meaningful guidelines for the

content of more detailed land development regulations, as required by section 163.3177(1).

196. In addition, the Plan Amendment violates the requirement in section 163.3177(6)(a) that the FLUE establish the general range of intensity of the uses allowed. The intensity of non-residential development allowed under the Plan Amendment is, at best, unclear, and in some cases left entirely to the discretion of the Board of County Commissioners.

197. Finally, the Plan Amendment does not provide a meaningful definition of "EEP," tying said projects to a list of "target industries" chosen by, and which can be altered by, Enterprise Florida, Florida's Heartland Regional Economic Development Initiative, and Visit Florida. The Plan Amendment does not adopt any particular version of the industry lists published by those entities. As such, the Plan Amendment is self-amending, which is prohibited by section 163.3177(1)(b).

198. Petitioner proved beyond fair debate that the Plan Amendment is inconsistent with sections 163.3177(1) and (6)(a).

Data and Analysis

199. Section 163.3177(1)(f) requires plan amendments to be "based upon relevant and appropriate data and analysis" by the local government, and includes "surveys, studies, community goals and vision, and other data available at the time of adoption." Data must be taken from professionally-accepted

sources. § 163.3177(1)f.2., Fla. Stat. A local government is not required to collect original data, but may do so if the methodologies are professionally-accepted. Id.

200. The County characterizes the Plan Amendment as "aspirational" and argues that, as such, it can be based on less data and analysis than might otherwise be required.

201. The complexity and detail of data and analysis should be commensurate with the type of amendment being adopted. See § 163.3177(1)(f), Fla. Stat. ("plan amendments shall be based upon relevant and appropriate data and analysis[.]"); Zemel v. Lee Cnty., Case No. 90-7793GM (Fla. DOAH Dec. 12, 1992), aff'd, 642 So. 2d 1367 (Fla. 1st DCA 1994)("Projections of aquifer thickness and transmissivity are not traffic counts. Setting 'mimimum' standards for these values, as an indication of an area's potential for wellfield development, is not as exact a process as calculating the volume-to-capacity ratios defining different levels of service on road segments.")

202. In Indian Trail Improvement District v. Department of Community Affairs, 946 So. 2d 640 (Fla. 1st DCA 2007), the court approved the Department of Community Affairs' (Department's) policy that "aspirational amendments," those which "merely represent a policy or directional change and depend on future activities and assessments," do not require the degree of data and analysis that other amendments require. In Indian Trail, an

independent special district challenged a plan amendment designating the County as the provider of water and wastewater services to the unincorporated rural areas. Id. The Department reasoned that, "if an amendment does not have an immediate impact on the provision of services in the unincorporated area, is policy-based, does not require any capital improvement expenditures at the time the amendment is adopted, and simply represents a directional change in the County's long-term . . . planning, it is similar to an aspirational amendment and can be based on less data and analysis than might otherwise be required." Id.

203. Administrative decisions prior to Indian Trail distinguished certain plan amendments as aspirational in nature, based upon the Department's policy, requiring little or no data and analysis. See Bakker v. Town of Surfside, Case No. 14-1026 (Fla. DOAH June 17, 2014; DEO Aug. 27, 2014)(plan amendments which "simply add a religious use to limited properties within the Low Density Residential land use category" do not implicate the provision of services or capital improvements, nor require the Town to take any immediate action, and are thus aspirational in nature and can be based on less data and analysis); Collier Cnty. v. Dep't of Comm. Aff., Case No. 04-1048 (Fla. DOAH Aug. 24, 2004; DCA Dec. 29, 2004)(plan amendment restricting roadway overpasses and flyovers in the City is "merely a policy

choice by a local government which has a limited or cosmetic effect"); and Dibbs v. Hillsborough Cnty., Case No. 12-1850 (Fla. DOAH Apr. 22, 2013; Fla. DEO Dec. 10, 2013); appeal pending (amendment expressing community support for expansion of a highway to relieve traffic could be fairly characterized as aspirational); see also Dunn Creek v. City of Jacksonville, Case No. 07-3539 (Fla. DOAH Dec. 28, 2009; DCA Apr. 1, 2010) (remedial FLUM amendment changing the land use back to its original classification can be based on less data and analysis than other types of amendments).

204. The case at hand is distinguishable from the foregoing precedents. The Plan Amendment does not add a single use to limited properties within a single land use category as in Bakker.[10/] On the contrary, the Plan Amendment adds large-scale commercial and industrial uses, as well as broadly-defined EEPs, as allowable uses in all but three land use categories in the County encompassing roughly 580,000 acres.

205. The amendment does not simply express a policy choice by the County to discourage flyovers and overpasses, limit the height of structures, or designate itself as a utility service provider. While the goal of diversifying the economy or encouraging more taxable development in the County may be aspirational, the undersigned cannot conclude that the Plan

Amendment itself is aspirational such that it requires limited data and analysis.

206. The County maintains that the Plan Amendment is based on data, including the community vision statement adopted by the Board of County Commissioners to create "an economic environment where people can prosper," the County's low ranking on key economic indicators, the limited amount of property in the County which is subject to taxation at just value, and the limited amount of land designated for commercial and industrial development in the current comprehensive plan.

207. However, 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." § 163.3177(1)(f), Fla. Stat. Based upon the foregoing findings of fact, the Plan Amendment does not react to the data in an appropriate way or to the extent necessary to encourage economic development. The County presented no evidence that the Plan Amendment would achieve the goal of spurring economic development in the County. On the contrary, the County presented anecdotal evidence that potential businesses have decided against location in the County for reasons such as price, inability to subdivide, or existing on-site vegetation.

208. Petitioners proved beyond fair debate that the Plan Amendment is not based upon relevant and appropriate data and analysis as required by section 163.3177(1)(f).

Internal Inconsistencies

209. Section 163.3177(2) provides that the elements of the local comprehensive plan "shall be consistent" and that coordination of the several elements of the plan is a "major objective" of the planning process.

210. Petitioner proved that the Plan Amendment creates internal consistencies with FLUE Policies 1.1.1, 1.1.3, 1.1.4, 1.1.5, 1.1.11, 1.1.13, Infrastructure Element Objective 7.A.3 and Policy 7.A.3.1, Concurrency Management Element Policy 9.2.1, as well as the FLUM.

211. Petitioner proved beyond fair debate that the Plan Amendment is inconsistent with section 163.3177(2).

Urban Sprawl

212. For the reasons set forth above in the Findings of Fact, Petitioner proved beyond fair debate that the Plan Amendment does not discourage the proliferation of urban sprawl as required by section 163.3177(6)(a)9.

Conclusion

213. For the reasons stated in the Findings of Fact, the Petitioner has proven beyond fair debate that the Plan Amendment is not in compliance with various provisions of chapter 163.

RECOMMENDATION

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

RECOMMENDED that the Administration Commission enter a Final Order determining that the Plan Amendment is not "in compliance."

DONE AND ENTERED this 12th day of February, 2015, in Tallahassee, Leon County, Florida.

SUZANNE VAN WYK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of February, 2015.

ENDNOTES

[1/] Except as otherwise provided herein, all references to the Florida Statutes are to the 2013 version.

[2/] The percentage of land within a given Future Land Use Element (FLUE) category excludes acreage in the cities of LaBelle and Clewiston, the Big Cypress Indian Reservation, and the Lake Levee.

[3/] The County may only lease sites at the publicly-owned airport. Potential businesses cannot recoup the benefit of any improvements which increase the property value.

[4/] The total acreage of the unincorporated County outside of the three excluded categories under the Plan Amendment is 589,585.65 acres. The County disputed that all of the acreage was actually available for the uses defined under the Plan Amendment, pointing to the limitations of government-owned properties, properties in public use, and properties within designated conservation easements. However, the County did not quantify the acreage of properties so limited. The 580,000-acre figure was determined by the undersigned based on the preponderance of the evidence.

[5/] Words ~~stricken~~ are deletions and words underlined are additions.

[6/] EEPs must meet these same requirements with the exception of 2.1.2(g). Policy 2.1.2(g) requires large-scale commercial or industrial developments to be located on a minimum of 80 acres of land. EEPs are allowed on a property of any size.

[7/] The County's argument also begs the question "Why did the County adopt the amendment if it does not change the uses already allowed in the Agriculture category?"

[8/] Ms. Catala apparently testified in deposition that Petitioner's interpretation was correct. At the final hearing, though, she testified that she "misspoke" in her deposition.

[9/] Respondent's reliance on the undersigned's findings in Kemp is misplaced. The issue in that case was whether the County had considered the impacts of noise and lighting on adjoining residential properties as required by its existing comprehensive plan.

[10/] It is noteworthy that the decision in Bakker did not turn on the fact that the plan amendment was aspirational in nature. Administrative Law Judge Alexander determined in Bakker that "[w]hether considered an aspirational amendment or not, it is at least fairly debatable that the Town satisfied the [statutory] data and analysis requirements[.]"

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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.