STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DONNA SUTTER MELZER,

Petitioner,

vs. Case No. 22-3021GM

MARTIN COUNTY, FLORIDA,

Respondent,

and

BECKER B-14 GROVE, LTD.,

Intervenor.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held on December 20 and 21, 2022, in Stuart, Florida, before the Honorable Francine M. Ffolkes, an Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Donna Sutter Melzer, Esquire
2286 Southwest Creekside Drive
Palm City, Florida 34990

For Respondent: Elyse A. Elder, Esquire
Martin County
2401 Southeast Monterey Road
Stuart, Florida 34996

For Intervenor: Christopher Paul Benvenuto, Esquire
S. Kaitlin Guerin, Esquire
Gunster, Yoakley & Stewart, P.A.
777 South Flagler Drive, Suite 500 East
West Palm Beach, Florida 33401

STATEMENT OF THE ISSUE

The issue to be determined in this proceeding is whether Amendment CPA 21-08 Becker B14 Text (Text Amendment) to the Martin County Comprehensive Growth Management Plan (Comprehensive Plan), adopted by Ordinance No. 1185 on September 13, 2022, is "in compliance" within the meaning of section 163.3184(1)(b), Florida Statutes.

PRELIMINARY STATEMENT

On February 22, 2022, Martin County (the County) voted to transmit the Text Amendment to the state planning agency for review. On September 13, 2022, the County adopted the Text Amendment, which created a new future land use (FLU) designation within its Comprehensive Plan, referred to as Rural Lifestyle (Rural Lifestyle). Both meetings were public hearings in front of the Martin County Board of County Commissioners.

Petitioner, Donna Sutter Melzer (Petitioner), challenged the Text Amendment by filing a petition at DOAH on October 6, 2022. Intervenor, Becker B-14 Grove Ltd. (Intervenor) joined the County in defense of the challenge. The parties filed their Joint Pre-hearing Stipulation on December 12, 2022. The issues listed for determination in this proceeding were:

> 1. Whether the Text Amendment is internally consistent with Policies 4.12A.2, 4.7A.2, 4.1E.7, and 4.7A.5 of the County's Comprehensive Growth Management Plan pursuant to section 163.3177(2), Florida Statutes.

> 2. Whether the Text Amendment establishes meaningful and predictable standards, pursuant to Sections 163.3177(2) and 163.3177(6)(a)1[.], Florida Statutes.
>
> 3. Whether the Text Amendment is based upon relevant and appropriate data and analysis by the local government, pursuant to section 163.3177(1)(f) and 163.3177(6)(a)2[.], Florida Statutes.

At the final hearing, Joint Exhibits 1 through 11 were admitted into evidence. Petitioner presented the expert testimony of Charles Gauthier, AICP, accepted as an expert in land use planning and the fact testimony of Clyde Dulin. Petitioner also testified on her own behalf. Petitioner's Exhibits 1, 2, 12, 12A, 12B through 15, 17, and 21 (and its attachments) were admitted into evidence. Petitioner's Exhibits 5, 6, 8 through 11, 13, 19, 20, and 22 were marked for identification, but were not admitted into evidence.

The County and Intervenor presented the expert testimony of Clyde Dulin, the County's Comprehensive Planning Administrator; and Morris Crady, AICP, accepted as an expert in land use planning. The County and Intervenor's Exhibits 1 through 3 were admitted into evidence. The County and Intervenor's Exhibits 4 through 6 were marked for identification, but were not admitted into evidence.

The two-volume Transcript of the hearing was filed with DOAH on January 6, 2023. The parties submitted proposed recommended orders on February 2, 2023, which were considered in the preparation of this Recommended Order.

References to the Florida Statutes are to the 2022 version unless otherwise noted.

FINDINGS OF FACT

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

The Parties

1. Petitioner owns property and resides within the boundaries of the County. Petitioner submitted oral or written comments, recommendations, or objections to the County, including at the February 22, 2022, and September 13, 2022, public hearings.

2. Petitioner lives at 2286 Southwest Creekside Drive, Palm City, Florida 34990, about three miles driving distance from land potentially affected by the Text Amendment. Petitioner's spouse commutes to four different hospitals for his job and relies on roads near land potentially affected by the Text Amendment. Petitioner would be adversely affected by any increased traffic from the Text Amendment, particularly due to there being only a few east-west roads for her and her family's routes to work, school, and medical needs.

3. The County is a political subdivision of the state of Florida that is subject to the requirements of part II of chapter 163.

4. Intervenor is a Florida limited liability company registered to do business in the state. Intervenor currently owns property in the County and is the applicant for the Text Amendment. Intervenor supported adoption of the Text Amendment by making presentations at both the February 22, 2022, and September 13, 2022, public hearings.

The Existing Martin County Comprehensive Plan

5. The Comprehensive Plan was adopted in 1990.

6. The Comprehensive Plan establishes urban service districts, which identify the geographic areas within the County designated to receive high levels of urban services, such as water, sewer, police, fire, parks, and libraries. The Primary Urban Service District (USD) receives the highest

level of urban service and contains the highest densities of residential and commercial use. The Secondary USD receives a level of urban service similar to, but slightly less than the Primary USD.

7. The Comprehensive Plan's policies establish the intensity of development that is permitted both inside and outside of these USDs.

8. Policy 4.7A.2, titled *Development in Primary Urban Service District*, requires "new residential development with lots of one-half acre or smaller, commercial uses and industrial uses to locate in the Primary [USD]."

9. Policy 4.12.A.2, titled *Restrictions outside urban service districts*, requires development outside urban service districts to be restricted to "low-intensity uses, including Agricultural lands, not exceeding one unit per 20 gross acres; Agricultural Ranchette lands not exceeding one unit per five gross acres; and small-scale service establishments necessary to support rural and agricultural uses."

10. The Comprehensive Plan also contains policies ensuring that equitable development is permitted for all landowners, including those situated outside the USDs.

11. Policy 4.7A.5, titled *Development options outside urban service districts*, states "Martin County shall provide reasonable and equitable options for development outside the urban service districts … ."

12. Objective 19.1A1 ensures that "private property rights are considered in local decision making." This includes the "right of a property owner to … develop, and improve his or her property … ."

<u>The Text Amendment & Rural Lifestyle</u>

13. The Text Amendment established the Rural Lifestyle FLU designation.

14. The Text Amendment explains the intention of creating Rural Lifestyle:

> [Rural Lifestyle] is intended to guide development of self-supporting, self-contained and rural communities including affiliated recreational amenities with an emphasis on maintaining and enhancing natural and manmade open space and promoting sustainability and stewardship of the land and water.

15. Rural Lifestyle has standards and guidelines for development including size, location, density, conservation, height, and open space requirements.

16. To be eligible for Rural Lifestyle, a property must be at least 1,000 contiguous acres and located adjacent to a USD.

17. Rural Lifestyle permits a residential density of one unit per 20 acres. There is a potential for an increased density of up to one unit per 5 acres, if one acre of open space is set aside off-site for every two acres assigned as Rural Lifestyle. The land set aside off-site must be held in a perpetual conservation or agricultural easement.

18. Rural Lifestyle establishes a 40-foot maximum building height requirement.

19. Finally, a property designated Rural Lifestyle must have a minimum of 70 percent of the gross land area maintained as open space. This requirement is independent from the previously mentioned conservation or agricultural easement that enables an increase in residential density.

Internal Consistency

20. The Text Amendment is reviewed for consistency with the several elements of the Comprehensive Plan.

21. Petitioner alleges that the Text Amendment is inconsistent with four policies in the Comprehensive Plan: Policy 4.12A.2, Policy 4.7A.2, Policy 4.1E.7, and Policy 4.7A.5.

Policy 4.12A.2 – Restrictions Outside Urban Service Districts

22. Policy 4.12A.2 states:

> Outside [USDs], development options shall be restricted to low-intensity uses, including Agricultural lands, not exceeding one unit per 20 gross acres; Agricultural Ranchette lands not exceeding one unit per five gross acres; and small-scale service establishments necessary to support rural and agricultural uses.

23. Petitioner argues that the Text Amendment is inconsistent with Policy 4.12A.2 and in support cites the testimony of her expert, Mr. Gauthier.

24. Mr. Gauthier testified that Rural Lifestyle allows for development "greater than low intensity uses." Mr. Gauthier asserts that Policy 4.12A.2 "itemizes three specific land use types appropriate outside of urban service districts and it doesn't include Rural Lifestyle."

25. First, Mr. Gauthier's interpretation of the word "including" within Policy 4.12A.2 is inconsistent with Florida law. As further explained in the Conclusions of Law, the word "including" in a statute is a word of expansion, not one of limitation.

26. Thus, using the word "including" in Policy 4.12A.2 provides an illustrative list. The fact that Rural Lifestyle was not specifically enumerated as a land use does not mean that Rural Lifestyle is inconsistent with the policy.

27. Next, contrary to Mr. Gauthier's testimony, Rural Lifestyle does not allow for development "greater than low intensity uses."

28. Mr. Gauthier explained that Rural Lifestyle would permit 0.4 units per gross acre. This would be "urban development," as defined in the Comprehensive Plan, and would not be a low intensity use. However, Mr. Gauthier recognized accessory dwelling units (ADUs) as a separate unit when determining the 0.4 unit per acre density. This is explicitly contrary to

the text of Rural Lifestyle, which states that ADUs "shall not count as a separate unit for the purpose of density calculations."

29. The practice of not counting ADUs for density calculations was approved as a "professionally acceptable planning practice" in previous litigation involving the Comprehensive Plan. The Comprehensive Plan identifies ADUs as permitted in six different FLU categories. Each occurrence states that the ADU "shall not count as a separate unit for the purpose of density calculations."

30. Petitioner did not prove beyond fair debate that Rural Lifestyle was inconsistent with Policy 4.12A.2.

Policy 4.7A.2 – Development in Primary Urban Service District

31. Policy 4.7A.2 states: "Martin County shall require new residential development with lots of one-half acre or smaller, *commercial uses* and industrial uses to locate in the Primary [USD]." (emphasis added.)

32. Petitioner argues that the Text Amendment is inconsistent with Policy 4.7A.2 because it allows for commercial uses outside the Primary USD. Mr. Gauthier testified that the community store, golf cottages, and "private and public recreation" permitted by Rural Lifestyle constitute commercial uses.

33. The phrase "commercial uses" is not defined in the Comprehensive Plan.

34. Rural Lifestyle would permit:

> [S]elf-supporting project elements such as … [a] community store … to reduce traffic impact and dependence on the lands within the urban service districts. A community store shall be restricted to utilization by only the residents, guests and employees of the [Planned Unit Development] and shall not exceed 6,000 square feet.

35. The County and Intervenor argue that the community store permitted by Rural Lifestyle does not constitute a commercial use for two reasons.

36. First, Mr. Dulin opined that the community store is materially different from commercial uses that appear in the County's existing General Commercial, Limited Commercial, Commercial/Office/Residential or Marine Waterfront General Commercial FLU designations. He explained that these existing commercial FLU designations are intended to provide for businesses that are open to the public, whereas the community store in Rural Lifestyle is limited to only "residents, guests, and employees" of the development.

37. However, even though the community store is different from the existing commercial uses in the Comprehensive Plan, it still may constitute a commercial use. Nowhere in the text of the Comprehensive Plan does it say that the phrase "commercial use" refers to the existing commercial FLU designations. Absent such a reference, the plain and ordinary meaning of "commercial use" includes the community store.

38. Second, Mr. Dulin testified that the community store would likely be located within a gated community and not open to the public. However, the Text Amendment does not require a community store to be within a gated community. Mr. Dulin's assumption that the development would be gated is based on assumptions regarding hypothetical developments and "high-end customer[s]." Such assumptions lack evidentiary support in this record.

39. Furthermore, the County and Intervenor cite Mr. Crady's testimony to argue that a community store is not a commercial use because it will reduce traffic impacts by capturing trips within the project so that residents would not have to utilize roads to obtain services that are needed within the project.

40. While this may be true, the merits of the community store are not at issue. Rather, the question is whether the community store is inconsistent with Policy 4.7A.2 by permitting a commercial use outside the Primary USD. A community store's ability to reduce traffic impacts does not change the fact that it is a commercial use.

41. Based on the foregoing, Petitioner proved beyond fair debate that the community store permitted by Rural Lifestyle is a commercial use and, as such, is inconsistent with Policy 4.7A.2.

42. Rural Lifestyle permits golf cottages as an accessory use to a golf course subject to the following conditions. First, they must remain owned, controlled, and operated by the owner(s) of the golf course. Second, they must be for the exclusive use of members or guests. Third, there shall only be one golf cottage per hole on each regulation 18-hole golf course up to a maximum of 54 holes. Fourth, golf cottages shall not be counted toward maximum density. Fifth, each golf cottage shall be limited to six bedrooms.

43. Petitioner argues that golf cottages constitute a commercial use because they are "transient lodging units" that are "part of the golf course business operation."

44. Mr. Dulin disagreed and explained that golf cottages are an accessory to the residential use in Rural Lifestyle and serves as a recreational amenity. Mr. Dulin explained that in drafting the restrictions surrounding golf cottages, the County was clear that they must be maintained as part of the golf course and not sold. The undersigned finds Mr. Dulin's testimony more persuasive on this issue.

45. Therefore, Petitioner did not prove beyond fair debate that the golf cottages constituted a commercial use that was inconsistent with Policy 4.7A.2.

46. Any development within Rural Lifestyle is required to provide various public benefits, which shall include, inter alia, "private or public recreation uses and events that support or complement sustainable rural or agricultural lifestyles and local charities or that provide direct environmental benefit, employment or economic opportunities."

47. Petitioner argues that these private, or public, recreational uses could constitute commercial uses. Mr. Gauthier testified that "you can't tell what recreational uses are included or not included [in Rural Lifestyle] and there's

no intensity standard." Mr. Gauthier opined that recreational development could be used for commercial purposes such as "a water park or a racetrack."

48. However, this position is inconsistent with the language of Rural Lifestyle that states recreational uses must "support or complement sustainable rural or agricultural lifestyles." In addition, the opening paragraph of Rural Lifestyle states that it shall include the "development of … rural communities including affiliated recreational amenities."

49. Thus, the text of Rural Lifestyle makes clear that the recreational uses must be tied to the rural community. Intervenor's expert, Mr. Crady, persuasively testified, giving examples of recreational uses that would be affiliated with a rural community, including trails connecting to a state park, land for equestrian activities, and a golf course.

50. Based on the foregoing, Petitioner did not prove beyond fair debate that public and private recreation, as described in Rural Lifestyle, constitutes a commercial use that is inconsistent with Policy 4.7A.2.

Policy 4.1E.7 - Density Blending

51. Policy 4.1E.7 states: "[d]ensity blending shall only be used in residential [FLU] designations."

52. Petitioner argues that Rural Lifestyle is not a residential FLU designation and, therefore, cannot permit development with blended densities. Mr. Gauthier opined that the Comprehensive Plan only identifies five residential land use designations. Mr. Gauthier based his opinion on the fact that a separate policy titled "Policy 4.13A.7 *Residential development*," only provides details for five land use designations.

53. However, Mr. Gauthier conceded during cross-examination that there is no language in Policy 4.1E.7 that cross-references Policy 4.13A.7, or otherwise provides a restriction that the only residential FLU designations in the Comprehensive Plan are those listed in Policy 4.13A.7.

54. The County's expert, Mr. Dulin, persuasively testified that Rural Lifestyle allows for residential uses and, therefore, is a residential FLU

designation. As such, Rural Lifestyle's use of blended densities is consistent with Policy 4.1E.7.

55. Based on the foregoing, Petitioner did not prove beyond fair debate that Rural Lifestyle is inconsistent with Policy 4.1E.7.

Policy 4.7A.5 - Options for Development Outside of USDs

56. Policy 4.7A.5 currently states: "Martin County shall provide … options for development outside the [USDs], including agriculture and small-scale service establishments necessary to support rural and agricultural uses."

57. The Text Amendment would change the language of Policy 4.7A.5 to read as follows:

> Martin County shall provide … options for development outside the urban service districts, including all permitted in the following future land use designations: (1) Agricultural. (2) Agricultural Ranchette. (3) Rural Lifestyle. (4) Small-scale service establishments necessary to support rural and agricultural uses (as described in the Rural Services Node future land use designation).

58. Petitioner argues that the Text Amendment elevates Rural Services Nodes to a FLU category. This, according to Petitioner, creates an inconsistency because Policy 4.13A.8 describes a Rural Services Node as a development option that "shall not require an amendment to the Future Land Use Map."

59. However, as both Mr. Gauthier and Mr. Dulin confirm, Policy 4.13A.8 is a list of FLU designations that already lists Rural Services Nodes as a FLU category. Thus, the Text Amendment is not elevating it to such a status.

60. Based on the foregoing, Petitioner failed to prove beyond fair debate that the Text Amendment is inconsistent with Policy 4.7A.5.

<u>Relevant and Appropriate Data and Analysis</u>

61. Comprehensive plan amendments must be based upon relevant and appropriate data and analysis by the local government. "To be based on data means to react to it in an appropriate way and to the extent necessary

indicated by the data available on that particular subject at the time of adoption of the plan or plan amendment at issue." § 163.3177(1)(f), Fla. Stat. Data supporting an amendment must be taken from professionally accepted sources.

62. Petitioner contends the Text Amendment is not based on relevant and appropriate data and analysis for two reasons. First, that the County failed to perform a residential capacity analysis for Rural Lifestyle. Second, that the County's 2018 residential capacity analysis (2018 Analysis) shows that there is ample capacity within the USDs. Thus, there is no need for Rural Lifestyle.

63. The Comprehensive Plan requires the County to perform a residential capacity analysis when there is "any proposed amendment to either the Primary [USD] or the Secondary [USD]." The County's expert explained that Rural Lifestyle is for areas outside the USDs and does not involve an expansion of the USDs. As such, the Comprehensive Plan does not require the County to perform a residential capacity analysis for Rural Lifestyle.

64. The County's 2018 Analysis shows that the Primary and Secondary USDs collectively are able to accommodate 162 percent of the demand through the year 2025. Similarly, the two districts can support 139 percent of the demand through the year 2030. Based on this data, Mr. Gauthier opined that there is no demonstration of need to create Rural Lifestyle.

65. However, Mr. Dulin explained that Rural Lifestyle does not have anything to do with whether or not the County has capacity for more residential units. Rural Lifestyle is not intended to address a need for more residential capacity. Instead, as explained by Mr. Crady, the County's intent with Rural Lifestyle is to satisfy the growing demand for rural communities with open space and recreational uses. In addressing this demand, the County considered the data and analysis described in the Findings of Fact below.

66. The County contracted with a consultant called EDAW to analyze the Comprehensive Plan and specifically give suggestions for development options outside the USDs aside from the options already permitted. The County also considered a Development Pattern Study that focused on "clustering options for the preservation of agricultural land and open space and environmental and sensitive land." The County also considered a publication by the American Planning Association that further discussed clustering of density. There was no dispute that this information came from professionally acceptable sources.

67. The County received and reacted to comments from the Treasure Coast Regional Planning Council and the Department of Economic Opportunity (DEO). In addition, a group called Guardians of Martin County put on a workshop that demonstrated the proliferation of large-lot subdivisions across western Martin County. These large-lot subdivisions are currently permitted by the Comprehensive Plan and are "taking hundreds, if not thousands of acres" away from the available open space in western Martin County. There was no dispute that this information was gathered in a professionally acceptable manner.

68. The Text Amendment is an appropriate reaction to the surveys, studies, and data regarding the area under consideration by the County.

69. Based on the foregoing, Petitioner failed to prove, beyond fair debate, that the Text Amendment is not based upon relevant and appropriate data and analysis by the local government.

Meaningful and Predictable Standards

70. 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.

71. Petitioner asserts two reasons why Rural Lifestyle does not provide meaningful and predictable standards.

Intensity Standard for Non-residential Uses

72. Petitioner first argues that Rural Lifestyle does not provide meaningful and predictable standards because it lacks an intensity standard for non-residential uses. Petitioner focuses this argument on three aspects of Rural Lifestyle: the community store, the golf cottages, and the recreational uses.

73. DEO also commented that Rural Lifestyle "will allow for non-residential development but does not set a maximum intensity standard for it."

74. The County responded by adding a limitation on the community store of 6,000-square-foot maximum. The 6,000-square-foot maximum is an objective measure of the extent of land development and constitutes a meaningful and predictable standard for the community store.

75. Petitioner further alleges that Rural Lifestyle does not have a maximum size of the golf cottages. The Text Amendment, however, explicitly states that each golf cottage shall be limited to six bedrooms. This limitation is in addition to the other standards in Rural Lifestyle that require golf cottages to be owned and operated by the golf course, to be exclusively used by members and their guests, and only permitting one golf cottage per hole. Collectively, these standards are sufficient to provide meaningful and predictable standards for golf cottages.

76. Lastly, Petitioner alleges that Rural Lifestyle's recreational uses have no limit at all, other than providing for 70 percent open space. The Text Amendment requires recreational uses to have an emphasis on "maintaining and enhancing natural and manmade open space and promoting sustainability and stewardship of the land and water." In addition, the opening paragraph requires that recreational uses be affiliated with the "self-supporting, self-contained, and rural" characteristics. These standards for

recreational uses constitute meaningful and predictable standards.

Implementation of Mixed-Use Development

77. Petitioner contends that Rural Lifestyle fails to include "guidelines for the implementation of mixed-use development including the types of uses allowed, the percentage distribution among the mix of uses, or other standards, and the density and intensity of each use." § 163.3177(6)(a)3.h., Fla. Stat.

78. The term "mixed use development" is defined in the Comprehensive Plan as "a mix of residential and commercial, institutional, or limited impact industrial uses, in the form of a mixed-use pattern or a mixed-use project."

79. Rural Lifestyle undoubtedly contains residential uses. Moreover, as previously discussed, the community store in Rural Lifestyle constitutes a commercial use. Because Rural Lifestyle is a mix of residential and commercial uses, it would constitute a mixed-use development if it were "in the form of a mixed-use pattern or a mixed use project."

80. The Comprehensive Plan defines a mixed-use project as "[o]ne or more buildings containing a residential use and one or more complementary commercial, institutional, and limited impact industrial uses, in close proximity and planned and approved as a single, unified project."

81. The community store is within close proximity to the residential uses of Rural Lifestyle. Additionally, any Rural Lifestyle development would be "approved as a single, unified project." Therefore, Rural Lifestyle is in the form of a mixed-use project and satisfies the Comprehensive Plan's definition.

82. Given that Rural Lifestyle is a mixed-use development, it must comply with section 163.3177(6)(a)3.h. Petitioner specifically challenges that Rural Lifestyle fails to provide "percentage of distributions for each use and consideration of the public facility needs." Section 163.3177(6)(a)3.h. does not mention public facility needs and thus is irrelevant to this specific challenge.

83. While it is true that Rural Lifestyle lacks a "percentage distribution," that phrase in the statute is followed by "or other standards." Rural Lifestyle

includes several other standards that guide the implementation of mixed-use development. For example, the limit on the size of the community store and the limit on who can use the community store, both guide the density and intensity of the use. Thus, failing to include a percentage distribution is not a violation of section 163.3177(6)(a)3.h.

84. Based on the foregoing, Petitioner failed to prove, beyond fair debate, that the Text Amendment does not establish meaningful and predictable standards.

CONCLUSIONS OF LAW

Standing and Scope of Review

85. To have standing to challenge a comprehensive plan amendment, a person must be an "affected person" as defined in section 163.3184(1)(a). The record evidence established that Petitioner is an affected person and has standing to challenge the Text Amendment. The record evidence established that Petitioner's substantial interests are affected by the actions of the County in approving the Text Amendment. *See* § 120.569, Fla. Stat.

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

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

88. The County's determination that the Text Amendment is "in compliance" is presumed to be correct and must be sustained if the City's determination of compliance is fairly debatable. *See* § 163.3184(5)(c), Fla.

Stat.; *Coastal Dev. of N. Fla. Inc., v. City of Jacksonville Beach*, 788 So. 2d 204, 210 (Fla. 2001).

89. The term "fairly debatable" is not defined in chapter 163. In *Martin County v. Yusem*, 690 So. 2d 1288, 1295 (Fla. 1997), the Florida Supreme Court explained, "the fairly debatable standard of review is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety." The Court further explained, "[a]n ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity." *Id.* Put another way, where "there is evidence in support of both sides of a comprehensive plan amendment, it is difficult to determine that the County's decision was anything but 'fairly debatable.'" *Martin Cnty. v. Section 28 P'ship, Ltd.*, 772 So. 2d 616, 621 (Fla. 4th DCA 2000).

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

Standard of Proof

91. Findings of fact shall be based on a preponderance of the evidence and exclusively on the evidence of record. § 120.57(1)(j), Fla. Stat. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. § 120.57(1)(c), Fla. Stat.

92. In this de novo hearing, it is the undersigned's "function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings

of fact based on competent, substantial evidence." *Heifetz v. Dep't of Bus. Regul.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985).

93. "If, as is often the case, the evidence presented supports two inconsistent findings, it is the [administrative law judge's] role to decide the issue one way or the other." *Id.; see also Collier Med. Ctr., Inc. v. Dep't of Health and Rehab. Servs.*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985)("It is clear that the decision regarding which expert's testimony should be accepted resides in the [administrative law judge].").

94. The mere existence of expert testimony in support of land planning decision is not sufficient to establish that the decision is "fairly debatable." It is firmly established that:

> [E]ven though there was expert testimony adduced in support of the City's case, that in and of itself does not mean the issue is fairly debatable. If it did, every zoning case would be fairly debatable and the City would prevail simply by submitting an expert who testified favorably to the City's position. Of course that is not the case. *The trial judge still must determine the weight and credibility factors to be attributed to the experts.* Here the final judgment shows that the judge did not assign much weight or credibility to the City's witnesses. (emphasis added.)

City of Boca Raton v. Boca Villas Corp., 371 So. 2d 154, 159 (Fla. 4th DCA 1979).

Internal Consistency

95. Section 163.3177(2) requires the elements of a comprehensive plan to be consistent. A plan amendment creates an internal inconsistency when it conflicts with an existing provision of the plan. Internal consistency does not require a comprehensive plan amendment to further every goal, objective, and policy in the comprehensive plan. It is enough if a plan provision is "compatible with," i.e., does not conflict with, other goals, objectives, and policies in the plan. If the compared provisions do not conflict, they are

coordinated, related and consistent. *See Melzer, et al. v. Martin Cnty.,* Case Nos. 02-1014GM and 02-1015GM, RO at ¶¶ 194-195 (Fla. DOAH July 1, 2003; Fla. DCA Oct. 24, 2003).

96. Consistency of the Text Amendment with the County's land development regulations is not an issue of law to be determined in this proceeding. *See Amelia Tree Conservancy, Inc., City of Fernandina Beach*, Case No. 19-2515GM (Fla DOAH Sept. 16, 2019; Fla. DEO Oct. 16, 2019).

97. Petitioner alleges that the Text Amendment is inconsistent with Policy 4.12A.2, Policy 4.7A.2, Policy 4.1E.7, and Policy 4.7A.5.

98. As found above, Mr. Gauthier's interpretation of the word "including" in Policy 4.12A.2 is inconsistent with Florida law. The Florida Supreme Court has held that the word "including" in a statute is a word of expansion, not one of limitation. *See White v. Mederi Cartenders Visiting Servs. of Se. Fla., LLC*, 226 So. 3d 774, 781 (Fla. 2017). Therefore, "[t]he word 'include' in a statute generally signals that entities not specifically enumerated are not excluded." *Id.* at 783; *see also Advisory Opinion to Governor re Implementation of Amendment 4, The Voting Restoration Amendment*, 288 So. 3d 1070, 1080 (Fla. 2020) (confirming that "the word 'include' … is a word of expansion, not one of limitation"); *Childers v. State*, 936 So. 2d 585, 597 (Fla. 1st DCA 2006) (explaining that a list following the word "includes" is "illustrative rather than exhaustive").

99. The use of the phrase "including" in Policy 4.12A.2 provides an illustrative list. Thus, the fact that Rural Lifestyle was not specifically enumerated as a land use in Policy 4.12A.2 does not mean that Rural Lifestyle is inconsistent with the policy.

100. As found above, the practice of not counting ADUs for density calculations is "a professionally acceptable planning practice." *Martin Cnty. Conservation All., Inc. v. Martin Cnty.*, Case No. 10-1164GM, RO at ¶ 49 (Fla. DOAH Sept. 7, 2010; Fla. DCA Jan. 3, 2011).

101. Therefore, based on the foregoing Findings of Fact and Conclusions of Law, Petitioner did not prove beyond fair debate that Rural Lifestyle was inconsistent with Policy 4.12A.2.

102. The phrase "commercial use" must be given its plain and ordinary meaning. *See Realty Assocs. Fund IX, L.P. v. Town of Cutler Bay*, 208 So. 3d 735, 738 (Fla. 3d DCA 2016) ("our first task is to inquire as to the plain meaning of the language in the comprehensive plan, and if the language chosen by the drafters of the comprehensive plan is clear and unambiguous, then the plain meaning of that language will control").

103. The phrase "commercial use" means "[a] use that is connected with or furthers an ongoing profit-making activity." *Commercial use*, BLACK'S LAW DICTIONARY (11th ed. 2019). The word "commercial" simply means "[o]f, relating to, or involving the buying and selling of goods." *Commercial*, BLACK'S LAW DICTIONARY (11th ed. 2019). These definitions are consistent with how Florida courts have analyzed the phrase "commercial use" in land use cases. *See, e.g., Keene v. Zoning Bd. of Adjustment*, 22 So. 3d 665, 670 (Fla. 5th DCA 2009) (explaining that a horseback riding school is a commercial use because it charges money for the riders to attend); *Baker v. Metro. Dade Cnty.*, 774 So. 2d 14, 21 (Fla. 3d DCA 2000) (explaining that parking lots are a commercial use if they collect money from customers to park there or support a commercial structure); *Easton v. Appler*, 548 So. 2d 691, 695 n.5 (Fla. 3d DCA 1989) (stating that the test for commercial use "is whether the purpose is primarily for profit"). A community store unquestionably furthers a profit-making activity. Clearly, the community store is a commercial use.

104. Contrary to Mr. Dulin's testimony, the community store is a commercial use despite being restricted to residents and guests. In *Ashley v. State, Administration Commission,* 976 So. 2d 1130, 1133 (Fla. 1st DCA 2007), the court analyzed the adoption of a new land use element that permitted residential as well as "free-standing non-residential, commercial

uses intended to serve residents and their guests." *Ashley*, 976 So. 2d at 1133. The court in *Ashley* held that those uses constituted commercial use, even though they were designed to serve residents and guests. *Id.* at 1134. Thus, the community store does not become a non-commercial use merely by limiting their service to residents and guests.

105. Based on the foregoing Findings of Fact and Conclusions of Law, Petitioner proved beyond fair debate that the community store permitted by Rural Lifestyle constitutes a commercial use and as such is inconsistent with Policy 4.7A.2.

106. Petitioner argues that golf cottages constitute a commercial use because they are "transient lodging units" that are "part of the golf course business operation." Mr. Dulin explained that golf cottages are an accessory to the residential use in Rural Lifestyle and serves as a recreational amenity. Mr. Dulin further explained that in drafting the restrictions surrounding golf cottages, the County was clear that they must be maintained as part of the golf course and not sold. Mr. Dulin's testimony on this issue is credited.

107. Based on the foregoing Findings of Fact and Conclusions of Law, Petitioner did not prove beyond fair debate that the golf cottages constituted a commercial use that was inconsistent with Policy 4.7A.2.

108. Petitioner argues that the "private or public recreational uses" required by Rural Lifestyle could constitute commercial uses. However, Petitioner's argument is inconsistent with the language of Rural Lifestyle that states the recreational uses must "support or complement sustainable rural or agricultural lifestyles." In addition, Rural Lifestyle states that it shall include the "development of … rural communities including affiliated recreational amenities." Thus, in two different sections of Rural Lifestyle, the text makes clear that recreational uses must be tied to the rural community. Mr. Crady persuasively testified about examples of recreational uses that would be affiliated with a rural community, such as: trails connecting to a state park, land for equestrian activities, and a golf course.

109. Based on the foregoing findings and conclusions, Petitioner did not prove beyond fair debate that public and private recreation constitutes a commercial use that is inconsistent with Policy 4.7A.2.

110. As outlined in the Findings of Fact, Rural Lifestyle's use of blended densities is consistent with Policy 4.1E.7. Therefore, Petitioner did not prove beyond fair debate that Rural Lifestyle is inconsistent with Policy 4.1E.7.

111. With regard to Policy 4.13A.8 FLU designations list, Petitioner and the County's experts agreed that Rural Services Nodes is already listed as a FLU designation in the Comprehensive Plan and the Text Amendment is not elevating it to such status.

112. Based on the foregoing, Petitioner failed to prove beyond fair debate that the Text Amendment is inconsistent with Policy 4.7A.5.

Relevant and Appropriate Data and Analysis

113. Section 163.3177(1)(f) requires that comprehensive plan amendments be based upon relevant and appropriate data and analysis by the local government. "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)2., Fla. Stat. Data supporting an amendment must be taken from professionally accepted sources. *Id.* However, local governments are not required to collect original data. *See 222 Lakeview LLC v. Cty. of West Palm Beach*, Case Nos. 18-4743GM and 18-4773GM RO at ¶ 84 (Fla. DOAH Dec. 26, 2019), *aff'd per curiam*, 295 So. 3d 1185 (Fla. 4th DCA 2020).

114. Findings of Fact 62 through 67 establish that the County both commissioned and considered surveys, studies, and data from professionally accepted sources and gathered through professionally accepted methodologies. The Text Amendment is an appropriate reaction to the surveys, studies, and data regarding the area under consideration by the County.

115. Based on the foregoing, Petitioner failed to prove beyond fair debate that the Text Amendment is not based on relevant and appropriate data and an analysis by the local government, as required by section 163.3177(1)(f).

Meaningful and Predictable Standards

116. 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.

117. More specifically "[e]ach future land use category … must include standards to be followed in the control and distribution of population and building and structure intensities." § 163.3177(6)(a)1., Fla. Stat.; *see also Vill. of Key Biscayne v. Dep't of Cmty. Affs.*, 696 So. 2d 495 (Fla. 3d DCA 1997) (stating that a proposed comprehensive plan amendment is invalid if it does not include specific standards for density or intensity of use). Intensity is defined as:

> [A]n objective measurement of the extent to which land may be developed or used, including the consumption or use of the space above, on, or below ground; the measurement of the use of or demand on natural resources; and the measurement of the use of or demand on facilities and services.

§ 163.3164(22), Fla. Stat.

118. Petitioner asserts two arguments as to why Rural Lifestyle does not provide meaningful and predictable standards.

Intensity Standard for Non-residential Uses

119. Petitioner first argues that Rural Lifestyle does not provide meaningful and predictable standards because it lacks an intensity standard for non-residential uses. Petitioner focuses this argument on three aspects of Rural Lifestyle: the community store, the golf cottages, and the recreational uses.

120. The County added a limitation on the community store of 6,000-square-foot maximum, which is an objective measure of the extent of land development. This constitutes a meaningful and predictable standard for the community store.

121. Petitioner further alleges that Rural Lifestyle does not have a maximum size of the golf cottages. The Text Amendment, however, explicitly states that each golf cottage shall be limited to six bedrooms. Other standards require golf cottages to be owned and operated by the golf course, to be exclusively used by members and their guests, and only permitting one golf cottage per hole. Collectively, these standards provide meaningful and predictable standards for golf cottages.

122. Petitioner alleges that Rural Lifestyle's recreational uses have no limit at all, other than providing for 70 percent open space. The Text Amendment requires recreational uses to have an emphasis on "maintaining and enhancing natural and manmade open space and promoting sustainability and stewardship of the land and water." In addition, the opening paragraph requires that recreational uses be affiliated with the "self-supporting, self-contained, and rural" characteristics. These standards for recreational uses constitute meaningful and predictable standards. The standards when "viewed in the context of the guidance that is provided by the entire [Comprehensive] Plan," constitute meaningful and predictable standards for recreational uses. *See Bakker v. Town of Surfside*, Case No. 14-1026GM, RO at ¶ 30 (Fla. DOAH June 17, 2014; Fla. DEO Aug. 27, 2014).

Implementation of Mixed-Use Development

123. Petitioner contends that Rural Lifestyle fails to include guidelines for the implementation of mixed-use development pursuant to section 163.3177(6)(a)3.h. Comprehensive plans must "provide guidelines for the implementation of mixed-use development including the types of uses allowed, the percentage distribution among the mix of uses, or other

standards, and the density and intensity of each use." § 163.3177(6)(a)3.h., Fla. Stat.

124. The Findings of Fact establish that Rural Lifestyle is a mixed-use development that must comply with section 163.3177(6)(a)3.h. Petitioner's proposed recommended order argues that Rural Lifestyle fails to provide "percentage of distributions for each use and consideration of the public facility needs."

125. However, section 163.3177(6)(a)3.h. does not mention consideration of public facility needs. While it is true that Rural Lifestyle lacks a "percentage distribution," that phrase in the statute is followed by "or other standards." The limit on the size of the community store and the limit on who can use the community store both guide the density and intensity of the use. Thus, Rural Lifestyle includes other standards that guide the implementation of the mixed-use development.

126. Based on the foregoing, Petitioner failed to prove beyond fair debate that the Text Amendment does not establish meaningful and predictable standards.

Conclusion

127. Petitioner proved by preponderance of the evidence, and beyond fair debate, that the Text Amendment is not internally consistent with Policy 4.7A.2 and thus does not comply with section 163.3177(2).

128. The County's determination of "in compliance" is rebutted by a preponderance of the evidence in this de novo proceeding and cannot be sustained. Thus, the County's determination that the Text Amendment is "in compliance" is not fairly debatable. *See* § 163.3184(5)(c), Fla. Stat.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Administration Commission[1] enter a final order finding the Text Amendment "not in compliance" under section 163.3184(1)(b).

DONE AND ENTERED this 17th day of March, 2023, in Tallahassee, Leon County, Florida.

FRANCINE M. FFOLKES
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Filed with the Clerk of the
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[1] "If the administrative law judge recommends that the amendment be found not in compliance, the judge shall submit the recommended order to the Administration Commission for final agency action. The Administration Commission shall make every effort to enter a final order expeditiously, but at a minimum within the time period provided by s. 120.569." § 163.3184(5)(d), Fla. Stat.

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.