STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIDBROOK 1ST REALTY CORPORATION,

Petitioner,

vs. Case Nos. 13-3397GM
14-0135GM

MARTIN COUNTY, FLORIDA,

Respondent,

and

1000 FRIENDS OF FLORIDA, INC.;
MARTIN COUNTY CONSERVATION
ALLIANCE; TREASURE COAST
ENVIRONMENTAL DEFENSE FUND,
INC., d/b/a INDIAN RIVERKEEPER;
TOWN OF JUPITER ISLAND, FLORIDA;
TOWN OF SEAWALL'S POINT, FLORIDA;
and CITY OF STUART, FLORIDA,

Intervenors.
_________________________________/

RECOMMENDED ORDER

A duly-noticed final hearing was held in this matter in Stuart, Florida, on September 30 and October 1, 2014, before Suzanne Van Wyk, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner Midbrook 1st Realty Corp.:

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For Respondent Martin County, Florida:

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For Municipal Intervenors:

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For Organizational Intervenors:

Howard K. Heims, Esquire
Virginia Sherlock, Esquire
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STATEMENT OF THE ISSUE

Whether Martin County Comprehensive Plan Amendment 13-5, adopted by Ordinance 938 on August 13, 2013, as amended by Ordinance 957 on July 8, 2014, is "in compliance," as that term is defined in section 163.3184(1)(b), Florida Statutes (2014).[1/]

PRELIMINARY STATEMENT

On August 13, 2013, Hendry County adopted Comprehensive Plan Amendment (CPA) 13-5 which revised Chapters 1, 2, and 4 of the County's Comprehensive Growth Management Plan (Comprehensive Plan).

On September 12, 2013, Petitioner filed a Petition with the Division of Administrative Hearings challenging CPA 13-5 pursuant to section 163.3184.[2/] The case was originally assigned to Administrative Law Judge Gary Early, and was transferred to the undersigned on January 9, 2014. On January 13, 2014, the undersigned granted Unopposed Petitions to Intervene filed by 1000 Friends of Florida, Inc.; Martin County Conservation Alliance; and Treasure Coast Environmental Defense Fund, Inc., d/b/a Indian Riverkeeper (the Organizational Intervenors). On January 27, 2014, the undersigned granted opposed Petitions to Intervene filed by the Town of Jupiter Island, the Town of Seawall's Point, and the City of Stuart (the Municipal Intervenors).

The final hearing was initially scheduled for February 13, 14, and 17 through 21, 2014, but was later rescheduled to March 31, April 1, and April 14 through 17, 2014. On March 21, 2014, the case was placed in abeyance, during which time the County adopted Ordinance 957, further amending its Comprehensive Plan and resolving challenges to CPA 13-5 brought by other

parties. The amendments adopted by Ordinance 938, as amended by Ordinance 957, are the Operative Amendments for purposes of this Recommended Order.

Petitioner filed an Amended Petition on August 7, 2014, following adoption of Ordinance 957. Petitioner alleges that the Operative Amendments are not supported by relevant and appropriate data and analysis, as required by section 163.3177(1)(f), especially with regard to population projections, housing demand, and residential capacity determinations; are internally inconsistent, in violation of section 163.3177(2); and fail to provide meaningful and predictable standards for the use and development of land and meaningful guidance for the development of land development regulations, as required by section 163.3177(1). The hearing was subsequently rescheduled to September 30 through October 3, 2014.

The parties jointly submitted a pre-hearing stipulation on September 25, 2014, and the hearing commenced as scheduled.

At the final hearing, Petitioner presented the testimony of Maggy Hurchalla, former County Commissioner; Nicki Van Vonno, Director of the County's Growth Management Department; Clyde Dulin, the County's Senior Planner; Samantha Lovelady, the County's Principal Planner; David W. Depew, accepted as an expert in land planning and comprehensive planning; Hank

Fishkind, and Kenneth Metcalf. Petitioner's Exhibits P1 through P6, P12, P14, P16, P17, P19, P20 through P24, P26, and P27 were admitted in evidence.

Respondent offered the testimony of Clyde Dulin; Samantha Lovelady; Nicki Van Vonno; Charles Pattison, accepted as an expert in comprehensive planning; and Thomas Pelham, accepted as an expert in comprehensive planning and Florida's growth management laws. Respondent's Exhibits R1 through R3, R6 through R15, R17, R19, R24 through R30, R35, R37 through R39, R58, R59, and R65, were admitted in evidence.

Intervenors offered no additional witnesses. Organizational Intervenors' Exhibits OI1 through OI11, OI22, and OI23 were accepted in evidence. Municipal Intervenors' Exhibits MI1 through MI3 were accepted in evidence.

The three-volume Transcript of the final hearing was made available to the parties on or about October 29, 2014, but was not filed with the Division until March 13, 2015. Petitioner and Respondent both timely filed a Proposed Recommended Order on November 17, 2014. Both the Organizational Intervenors and the Municipal Intervenors joined in the County's Proposed Recommended Order. The parties' Proposed Recommended Orders have been carefully considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

I. The Parties and Standing

1. Respondent, Martin 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, Midbrook 1st Realty Corp. (Petitioner), owns real property and operates a business in Martin County.

3. On August 13, 2013, the County held a public hearing and adopted Ordinance 938, amending chapters 1, 2, and 4 of the Comprehensive Plan. On July 8, 2014, the County held a public hearing and adopted Ordinance 957, further amending chapters 1, 2, and 4 of the Comprehensive Plan. The plan amendments adopted by Ordinance 938, as amended by Ordinance 957, are the subject of this challenge and are referred to herein as the "Operative Amendments."

4. Petitioner submitted written and oral comments to the County concerning the Operative Amendments during the period of time between transmittal and adoption of the Operative Amendments.

5. Intervenor, 1000 Friends of Florida (1000 Friends), is a Florida not-for-profit organization with a substantial number of members residing in Martin County who are engaged in matters

related to the use and development of land, and the impacts therefrom, as set forth in the Comprehensive Plan.

6. Participation in the County's comprehensive planning process is part of 1000 Friends' mission.

7. 1000 Friends submitted written comments to Martin County during the period of time between transmittal and adoption of the Operative Amendments.

8. Intervenor, Martin County Conservation Alliance, Inc. (MCCA), is a Florida not-for-profit organization incorporated in the State of Florida in 1997, with members who reside in, own property in, or operate businesses in Martin County.

9. Representation of its members in proceedings concerning the Comprehensive Plan is part of MCCA's mission and function, and the organization has been recognized as a party in previous administrative proceedings involving the Comprehensive Plan.

10. MCCA submitted oral and written comments to Martin County during the period of time between transmittal and adoption of the Operative Amendments.

11. Intervenor, Treasure Coast Environmental Defense Fund, Inc., d/b/a Indian Riverkeeper (Riverkeeper) is a Florida not-for-profit organization operating in Martin County which was incorporated in 1999 for the purpose of encouraging and assisting in enforcement of federal, state, and local environmental laws and regulations through lawsuits and

administrative proceedings, as well as engaging in scientific and educational programs.

12. A substantial number of Riverkeeper's members reside in, own property in, or operate businesses in Martin County.

13. Riverkeeper submitted oral comments to Martin County during the period of time between transmittal and adoption of the Operative Amendments.

14. Municipal Intervenors are local governments adjoining Martin County whose residents all reside and/or own property, or operate businesses in Martin County.

15. The Town of Jupiter Island adopted Resolution 728 on December 17, 2013, in which it found, in pertinent part, as follows:

> WHEREAS, the Town Commission finds that a successful challenge by the Petitioners resulting in the repeal of these plan amendments would produce substantial impacts on areas in the Town which have been designated for protection or special treatment; and
>
> * * *
>
> WHEREAS, the Town Commission finds that a successful challenge by the Petitioners would increase the need for publically [sic] funded infrastructure, including the beaches and roads in the Town, and the Town's operation of its utility.

16. The Town of Seawall's Point adopted Resolution 792 on December 10, 2013, in which the Town Commission found that

"successful challenge by the Petitioners . . . would increase the need for publically [sic] funded infrastructure."

17. The City of Stuart adopted Resolution 152-2013 on December 9, 2013, in which the City Commission found that "successful challenge . . . would increase the need for publically [sic] funded infrastructure."

II. Background

A. EAR Amendments

18. The County's original Comprehensive Plan was adopted in 1990 and was challenged by the Department of Community Affairs (DCA) as not "in compliance." Since its inception, the Comprehensive Plan has been the subject of substantial litigation, most of which has little relevance hereto.

19. At least once every seven years, local governments are required to undertake an evaluation and appraisal of their comprehensive plans. See § 163.3191(1), Fla. Stat. During this evaluation, local governments must amend their plans to reflect changes in state requirements. See § 163.3191(2). The statute also encourages local governments to comprehensively evaluate changes in local conditions, and if necessary, update their plans to reflect said changes. See § 163.3191(3).

20. Local government plan amendments made pursuant to section 163.3191 are commonly referred to as "EAR amendments."

21. The County adopted its most recent EAR amendments in 2009, following an evaluation and appraisal of the Comprehensive Plan and changes in state requirements. The 2009 EAR amendments were challenged by a number of parties as not "in compliance." Administrative challenge to the EAR amendments concluded, and the amendments became effective in 2011.

B. Operative Amendments Adoption Process[3/]

22. The Operative Amendments originated with former County Commissioner Maggy Hurchalla, who made a presentation to the County Commission at its regular meeting on November 20, 2012, during which she proposed amendments to the Comprehensive Plan.

23. On December 11, 2012, the County Commission conducted a public workshop on amendments proposed by Ms. Hurchalla. The workshop agenda included draft Comprehensive Plan amendments in legislative (strike-through/underline) format, a summary of the amendments, and a draft resolution by which the County could initiate the proposed changes as text amendments to the Comprehensive Plan. The County Commission adopted the resolution initiating the amendments on that date.

24. On February 12, 2013, the County Commission held the first of three public meetings to discuss the proposed amendments to the Comprehensive Plan. The meeting focused on proposed changes to chapter 1, the Preamble to the Comprehensive Plan. The meeting materials included Ms. Hurchalla's proposed

amendments with highlighted comments from the County's planning staff.

25. On February 26, 2013, the County Commission held a second public meeting to discuss proposed changes, this time focusing on chapter 2, the Definitions for the Comprehensive Plan. Proposed changes to chapter 2 included incorporating "Overall Goals" of the Comprehensive Plan, as well as some new and revised definitions. The meeting materials included Ms. Hurchalla's proposed changes with highlighted comments from County planning staff.

26. On March 5, 2013, the County Commission held a third public meeting to discuss proposed changes to the Comprehensive Plan, this time focused on changes to chapter 4, the Future Land Use Element (FLUE). These changes were proposed by County staff to maintain consistency among chapters 1, 2, and 4.

27. On March 21, 2013, the Martin County Local Planning Agency (LPA) held a public hearing to consider Comprehensive Plan Amendment (CPA) 13-5, the product of Ms. Hurchalla's original proposal, as developed through three discussion meetings with the County Commission and planning staff. At the LPA meeting, staff recommended approval of the changes, and included a matrix which analyzed each change by section, goal, objective, or policy number, as applicable. The agenda packet included all public comments regarding the proposed amendments

received by the County subsequent to the February 12, 2013, meeting.

28. On April 16, 2013, the County Commission held a public hearing on proposed CPA 13-5. The Commission held a second public hearing on April 26, 2013, and voted to transmit the amendments to the state reviewing agencies, pursuant to section 163.3184(3).

29. County staff provided the County Commission with all state agency comments at a meeting on June 18, 2013, wherein County staff recommended additional changes to the Plan Amendment, and the Commission voted to schedule a public hearing on adopting CPA 13-5.

30. On July 9, 2013, the County Commission conducted a public hearing on CPA 13-5, directed staff to make changes to the amendments to address certain agency comments, and continued the public hearing to August 13, 2013. The Commission adopted CPA 13-5 by Ordinance 938 at the public hearing on August 13, 2013.

31. The record supports a finding that the County complied with all public notice requirements for the LPA public hearing, and the County Commission public meetings and public hearings conducted related to CPA 13-5.

32. On July 8, 2014, the County Commission adopted CPA 14-7 by Ordinance 957, further amending chapters 1, 2, and 4 of the Comprehensive Plan.

33. The record supports a finding that the County held the required public hearings required for adoption of CPA 14-7 and complied with applicable public notice requirements for said public hearings.

C. Urban Service Districts

34. A major reason for the DCA's compliance determination on the County's 1990 Comprehensive Plan was that it did not discourage urban sprawl. The state's challenge to the Comprehensive Plan was resolved by a compliance agreement under which the County amended the Comprehensive Plan to incorporate primary and secondary urban service districts (USDs).

35. There are two locations of the USDs. The Eastern USD is located east of the Florida Turnpike, and the Indiantown USD is located in western Martin County. According to the 2009 data on which the existing Comprehensive Plan is based, 87 percent of the County's population resides east of the Florida Turnpike. The Eastern and Indiantown USDs are separated by roughly 12 miles of mainly agricultural land.

36. The purpose of the USDs is to regulate urban sprawl by directing growth to areas where urban public facilities and services are available, or programmed to be available, at

appropriate levels of service. Public urban facilities and services are defined by the Comprehensive Plan as "[r]egional water supply and wastewater treatment/disposal systems, solid waste collection services, acceptable response times for sheriff and emergency services, reasonably accessible community park and related recreational facilities, schools and the transportation network."

37. Commercial, industrial, and urban-density residential development, as well as future development requiring public urban facilities, is concentrated within the primary USD. The boundaries of the primary USD may be expanded only when "reasonable capacity does not exist on suitable land in the existing [primary USD] for the 15-year planning period."

38. Rural and estate densities not exceeding one unit per acre (one unit/acre) are concentrated in the secondary USD where a reduced level of public facility needs are programmed to be available at appropriate levels of service. The boundaries of the secondary USD may only be expanded when "[r]easonable residential capacity does not exist on suitable land in the existing [secondary USD] for the 15-year planning period."

39. Development outside the USDs is limited to low-intensity uses, including Agricultural (not exceeding one unit/20 acres), Agricultural Ranchette (not exceeding one unit/five acres), and small-scale services necessary to support

rural and agricultural uses. Some residential estate development is allowed on the fringe of the USDs at one unit/acre.

III. Petitioner's Challenges

A. Residential Needs Analysis

40. Petitioner's first overarching challenge is with the County's methodology for determining need for future residential development. Need is determined using the basic variables of demand and supply, or capacity. Demand is, in turn, driven by projected population growth. Petitioner challenges each of the methodologies for calculating future need – population projections, residential demand analysis, and residential capacity analysis – each of which is taken in turn.

1. Population Projections

41. Section 163.3177(6)(a)4. requires that a local government FLUE "shall accommodate at least the minimum amount of land required to accommodate the medium [population] projections as published by the Office of Economic and Demographic Research for at least a 10-year planning period[.]"

42. Section 1.7.A of the Operative Amendments provides that "base data for population estimates and projections comes from the U.S. Decennial Census" and that "[i]n the years between the decennial Census, the permanent population estimates and

projections provided by BEBR [Florida's Bureau of Economic and Business Research] shall be used[.]"

43. Petitioner assails Section 1.7.A as inconsistent with the statute because it relies upon BEBR population estimates rather than Office of Economic and Demographic Research (OEDR).

44. Petitioner's argument is not persuasive. BEBR provides population estimates and projections to OEDR pursuant to a contract between the two entities. BEBR population estimates and projections are professionally-acceptable data commonly relied upon by jurisdictions in the State of Florida.

45. Section 1.7.A and Policy 4.1D.2 require County staff to annually produce a Population Technical Bulletin utilizing the BEBR medium population estimates for the County. Data from the Population Technical Bulletin are utilized in the County's residential demand analysis. The 2013 Bulletin reported a permanent population (i.e., excluding population in prisons and group homes) of 124,120 in 2010, and a projected permanent population of 136,621 for the year 2020 and 143,653 for the year 2025. Thus, the percentage increase in population is 1.10 percent for the year 2020 and 1.16 percent for the year 2025.

2. Residential Demand Methodology

46. Petitioner's next objection is with the County's methodology for determining residential housing demand, set forth in Section 1.7 and Policies 4.1D.3.[4/] Petitioner urges

that the methodology is neither professionally acceptable, nor "based upon relevant and appropriate data and analysis," pursuant to 163.3177(1)(f).

47. Policy 4.1D.3 provides the methodology for calculating residential housing demand, and reads as follows:

> 4.1D.3 *Future residential housing demand.* Future housing demand projections shall be based on all of the following:
>
> (1) The demand for future residential housing units in the unincorporated area shall be based on the percentage increase in permanent population projected by the Population Technical Bulletin.
>
> (2) Occupied housing units (HO) are classified by the Census as those residential units in use by permanent population. Vacant seasonal housing units (HS) are classified by the Census as those residential housing units that are seasonally occupied by residents who spend less than 6 months of the year in Martin County.
>
> (3) Permanent and seasonal population in residential housing is served by housing units in actual use (HU).
>
> Housing units in actual use (HU) equals the occupied housing units (HO) plus vacant seasonal housing units (HS).
> HU = HO + HS
>
> (4) Vacant housing not in seasonal use shall not be used in calculating housing unit demand, but shall be used in calculating supply. Hotel/motel units shall not be used in calculating residential housing demand.

(5) The projected demand for housing units in the future shall be determined by dividing the projected, permanent population (housing), as defined in Chapter 2, by the permanent population (housing) identified in the last decennial Census.

Projected permanent population (housing) / Permanent population (housing) in the last decennial Census = percentage increase in demand.

(6) This percentage increase in demand multiplied by the housing units in actual use (HU) in the most recent census year equals the projected residential housing unit need in the future period.

Percentage increase in demand x HU = projected housing unit demand.

48. Petitioner contends that the methodology is flawed because it excludes unoccupied housing units other than seasonal units, such as vacant rental units and residential units for sale. As such, Petitioner argues the methodology is not professionally acceptable.

49. The 2010 Census counted 5,228 vacant non-seasonal residential units in Martin County. Because the County's demand methodology ignores those units in calculating residential demand, Petitioner argues the methodology is not based on relevant and appropriate data.

50. To the contrary, vacant non-seasonal housing is a variable relative to residential housing supply, rather than housing demand. The appropriate methodology for calculating

housing demand is occupied permanent and occupied seasonal housing units multiplied by the percentage increase in population over the planning period. The County's methodology is professionally acceptable and does not ignore data available at the time the Operative Amendments were adopted.

51. The County previously used this same methodology for projecting residential housing demand, but it was not adopted as part of the Comprehensive Plan.

3. Residential Demand Calculations

52. In August 2013 the County produced a Residential Demand Analysis implementing the methodology adopted by the Operative Amendments.

53. In accordance with Policy 4.1D.3(1), the demand for future residential housing in the unincorporated area of the County is based on the percentage increase in permanent population projected in the Population Technical Bulletin.

54. Using the 2010 data supplied by the U.S. Census for the unincorporated area, the formula yields 54,709 occupied units, plus vacant seasonal housing units of 6,203, for a total yield of 60,912 housing units in use in the unincorporated area of Martin County.

55. Applying the percentage increase in projected population of 1.10 for the planning period to 2020, and 1.16 for

the planning period to 2025, yields a demand for 6,091 residential units for 2020, and 9,746 units for 2025.

56. Petitioner alleges that the County failed to follow its methodology adopted in Policy 4.1D.3 because it utilized 2010 Census data, rather than data from "the most recent census year" as stated in subsection (6) for calculation of the housing units in actual use (HU).

57. Petitioner's expert, Kenneth Metcalf, testified that the "most recent census data would have been 2012, rather than 2010." Thus, Petitioner argues that the Policy is likewise flawed because it is not based on the best available data.

58. The issue boils down to one of semantics – whether the term "most recent census year" in subsection (6) has a different meaning than the term "Census" used in subsection (2) to define the data source for the number of occupied housing units (HO) and the number of vacant seasonal housing units (HS). Petitioner points to the use of the term "last decennial Census" used in subsection (5) as the data source for permanent population numbers. Petitioner concludes that the County knew that "last decennial Census" had a different meaning than "most recent census year" and intended for the updated census information provided between the decennial Censuses to be utilized as the data set for projecting housing unit demand.

59. Petitioner’s argument ignores that the variable HU, utilized in the residential demand formula in subsection (6), is defined in subsection (3) as the sum of factors derived from Census data: HU = HO + HS, where HO is occupied housing units classified by the Census as those residential housing units in use by permanent population, and HS is vacant seasonal housing units classified by the Census as those residential housing units that are seasonally occupied.

60. If one ascribes a different meaning to the term “most recent census” than the term “Census,” the formula itself would be useless. HU is derived in subparagraph (2) from census data with a capital “C,” meaning the decennial Census. That same variable cannot be input in paragraph (6) as derived from a different source.

61. Petitioner’s theory likewise ignores that the Operative Amendments specify that, between decennial Census years, BEBR data shall be used in projections of demand for future residential housing units. See §§ 1.7.A and 4.2.A(8). Thus, if the County intended to use data more recent than the last Census, it would have specified BEBR data.

62. Moreover, the definition of “vacant seasonal housing units,” is “[t]he decennial Census count for residential housing units that are occupied, but for less than six months of the year.” See § 2.4(186).

63. Petitioner also assails the residential demand analysis as flawed because it is based exclusively on permanent population estimates in violation of section 163.3177(1)(f)3.

64. The operative statutory section provides, "[t]he comprehensive plan shall be based upon permanent and seasonal population estimates and projections[.]" § 163.3177(1)(f)3, Fla. Stat.

65. Contrary to Petitioner's assertion, the demand methodology includes seasonal population projections. Under Policy 4.1D.3, one factor in projecting housing unit needs is the housing units in actual use (HU), which is based on both permanent and seasonal population in residential housing.

66. Petitioner further contends that Policy 4.1D.3 conflicts with Section 1.7, which states, "appropriate resident and seasonal population figures are critical to the local government in assessing future needs for housing units," rendering the Comprehensive Plan internally inconsistent, in violation of section 163.3177(2).

67. In light of the finding that Policy 4.1D.3 does not exclude seasonal population in calculating residential demand, Petitioner's allegation has no merit.

4. <u>Residential Capacity Analysis</u>

68. Petitioner next contends that the residential capacity analysis (RCA) methodology is not "based upon relevant and

appropriate data and analysis," pursuant to 163.3177(1)(f); is "limited solely by the projected population," in violation of 163.3177(1)(f)3.; is internally inconsistent with other provisions of the Comprehensive Plan, in violation of 163.3177(2); and, as such, does not "establish meaningful and predictable standards for the use and development of land," pursuant to 163.3177(1).

69. In essence, Petitioner argues that the RCA overestimates the supply of land needed to meet residential housing demand in the 10- and 15-year planning periods.

70. Petitioner's argument relies, in part, upon a comparison of the results of the RCA methodology under the Operative Amendments to the results from applying the RCA adopted in 2009. The numbers are curious, indeed.

71. Utilizing the 2009 RCA, the County determined a total capacity of 16,025 residential units in the primary and secondary USDs. Utilizing the 2013 methodology, the County determined a total capacity of 26,446 residential units in the primary and secondary USDs.

72. Obviously, the total numbers are not dispositive of the issue. An examination of the methodology is required.

73. Policy 4.1D.5 provides the RCA methodology, and reads as follows:[5/]

Policy 4.1D.5 Residential capacity analysis. Martin County shall produce a residential capacity analysis every five years. Residential capacity defines the available residential development options within the Primary and Secondary Urban Service Districts that can meet the demand for population growth consistent with the Future Land Use Map. Residential supply shall consist of:

(1) Vacant property that allows residential uses according to the Future Land Use Map. The maximum allowable density shall be used in calculating the number of available units on vacant acreage. For the purpose of this calculation, the maximum allowable density for wetlands shall be one-half the density of a given future land use designation.

(2) Subdivided single family and duplex lots. The following lot types shall be included in the residential capacity calculation:

(a) Vacant single family or duplex lots of record as of 1982 developed prior to the County's tracking of development approvals.

(b) Vacant single family or duplex lots of record platted after 1982.

(3) Potential for residential development in Mixed Use overlays.

(4) Multifamily residential site plans with final approval shall be counted as vacant property under (1) above until such time as Certificates of Occupancy are issued. Where Certificates of Occupancy are issued for a portion or phase of a final site plan, appropriate acreage shall be removed from the vacant land inventory. Appropriate acreage shall be the same percentage of

the project acreage as the number of units with Certificates of Occupancy is to the total number of units for the final site plan.

(5) Excess vacant housing not in use by permanent or seasonal residents. Excess vacant housing is a vacancy rate higher than 3% of the number of housing units in actual use.

74. To calculate the residential supply of dwelling units that can be developed on existing vacant lands, Policy 4.1D.5 directs that the calculation begin by determining the maximum residential density allowed under each future land use category of the vacant lands. In the following discussion, the maximum density allowed under a future land use designation will be referred to as the "theoretical" maximum density.

75. Development is generally prohibited in wetlands. However, landowners whose lands contain wetlands can transfer half the "lost" density associated with the wetland acreage to the uplands. Thus, in calculating the acreage of vacant lands available for residential development, the RCA subtracts half the acreage of wetlands.

76. Other than wetlands, the RCA incorporates no limiting factors that prevent the attainment of theoretical maximum density on vacant acreage.

77. The RCA methodology under the Operative Amendment differs from the 2009 RCA methodology which took effect in 2011.

78. There are four major differences between the 2009 and the 2013 methodologies.

79. First, the 2009 methodology included a deduction from vacant residential acreage of 8.5 percent to account for the loss of developable acreage due to presence of road rights-of-way and utility easements within which development is prohibited. Under the Operative Amendments, the RCA does not reduce available residential acreage to account for said infrastructure.

80. The County offered no explanation for this change in the RCA methodology.

81. Second, the 2013 RCA includes, as vacant residential acreage, subdivided but vacant lots in single family and duplex subdivisions. The County's 2009 RCA did not include vacant lots in these "older" subdivisions as capacity. Including these units in the 2013 analysis accounted for approximately 3,300 residential units which were not counted as capacity in 2009.

82. Samantha Lovelady is a Principal Planner for the County. She has a master's degree in Urban and Regional Planning and is certified by the American Institute of Certified Planners. Ms. Lovelady testified that including the vacant lots is a more accurate reflection of residential capacity than that utilized in 2009.

83. Third, the 2013 methodology counts as capacity vacant acreage within approved multifamily residential projects.

84. Approved but unbuilt units in multifamily projects were counted as capacity in the 2009 RCA. The County tracks approved unbuilt projects through its Active Residential Development Program, or ARDP. In 2009, ARDP units were removed from the County's vacant residential acreage analysis and counted as capacity in addition to vacant acreage.

85. By contrast, the 2013 approach is based on acreage, rather than number of units. The 2013 approach first determines the percentage of total approved residential units to the number of units with certificates of occupancy. Then, the formula applies that same percentage to total project acreage to derive the "vacant acreage" of the multifamily project.

86. Policy 4.1D.5(1) requires the County to utilize the theoretical maximum density of the underlying land use category to calculate the potential residential units on the vacant acreage in the multifamily projects, regardless of whether the overall project was approved for maximum density or some lesser density.

87. The County's main response to this allegation is that the total number of units derived from this part of the RCA was small, only 382, and that those units were counted under the former methodology, but outside the vacant acreage analysis.

88. The County's response misses the mark. The issue is not whether the methodology substantially increased the County's capacity figures, but whether it is a professionally-acceptable method for gathering the data.

89. Ms. Lovelady has been employed by the County for six years, and conducts statistical analysis, especially with regard to population projections, for the Planning Department and Metropolitan Planning Organization. Ms. Lovelady prepared both the 2009 and the 2013 Population Technical Bulletins. She also prepared both the 2013 Residential Demand Analysis and the 2013 Residential Capacity and Vacant Land Analysis based on the methodologies in the Operative Amendments.

90. Ms. Lovelady testified that she would have calculated density on the vacant acreage at the same density as the built acreage within those developments. Ms. Lovelady further testified that she was not familiar with a methodology that calculated unbuilt acreage within a multifamily project at a density greater than the built acreage, either through professional planning literature or examples from any other communities. Ms. Lovelady's testimony is accepted as competent and reliable.[6/]

91. Petitioner's comprehensive planning expert, Dr. David Depew, also testified that the County's methodology is not professionally acceptable because it ignores the development

rights already assigned to the "vacant" property within approved multifamily projects.

92. Based on the record evidence, the RCA methodology used to calculate the capacity of vacant acreage in approved multifamily developments is not professionally acceptable.

93. Fourth, the formula includes as capacity "excess vacant housing" not in use by permanent or seasonal residents. For purposes of this calculation, the Operative Amendments define "excess vacant housing" as a vacancy rate in excess of three percent of the number of housing units in actual use. The variable allows for some vacancy rate in a "normal market," but provides that excess vacancy is actually available to serve the projected population through the 10- and 15-year planning timeframes.

94. The 2009 methodology did not include built, vacant housing in calculating residential capacity. Neither party presented any evidence on whether including vacant built housing in the RCA was professionally acceptable. Instead, the parties focused on the definition of excess as exceeding a three percent vacancy rate.

95. Petitioner assails the three percent vacancy rate as neither appropriate nor professionally acceptable for the Martin County housing market. Yet, Petitioner introduced no evidence

of a different vacancy rate which would be appropriate under normal market conditions.

96. A three percent vacancy rate under normal market conditions in Florida is supported by the "Planner's Estimating Guide, Projecting Land-Use and Facility Needs," Arthur C. Nelson, FAICP, Planners Press, American Planning Association (2004).[7/]

97. Petitioner's allegation with regard to use of the three percent vacancy rate in calculating residential supply was not proven beyond fair debate.

5. Merging Eastern and Indiantown USDs

98. Petitioner argues that the 2013 RCA methodology exacerbates the distortion of residential capacity by considering together, or "merging," the Eastern and Indiantown USDs in determining available capacity.

99. The 2009 methodology treated the Eastern and Indiantown USDs separately for purposes of calculating residential demand and supply and arrived at separate housing needs determinations for the two USDs.

100. Under the 2009 needs analysis, the County identified a shortfall of 616 units in the Eastern USD to meet demand for the 15-year planning period, and an oversupply of 6,260 units in the Indiantown USD for that same period.

101. By comparison, the 2013 needs analysis yielded an oversupply of 20,768 units in the combined USDs to meet demand for the 10-year planning period, and an oversupply of 17,361 for the 15-year planning period.

102. The 2009 methodology was based on population data showing that 87 percent of the County population resided east of the Florida Turnpike and an assumption that the trend would continue. The 2009 data showed an "imbalance" between the vacant land capacity in the Eastern and Indiantown USDs, and that, based on population projections for the Indiantown area, the imbalance was likely to continue. Having determined that separation of the USDs was appropriate for the County's population trends, the County proceeded to calculate demand for the two areas separately.

103. The County introduced no evidence of changed population data or trends to support aggregating the two USDs for purposes of calculating residential housing demand and supply in 2013.

104. In fact, the data and analysis in the County's 2013 Population Technical Bulletin revealed that 99.68 percent of the certificates of occupancy (COs) issued in the 2008-2012 timeframe were issued in areas east of the Florida Turnpike.[8/] The County's population projections by planning area, forecast 71.68 percent of the permanent population living east of the

Florida Turnpike by the year 2020, and 86 percent by the year 2025.[9/] The statistics are higher for the peak population during the same planning timeframes.[10/]

105. The County's decision to combine the Eastern and Indiantown USDs in the 2013 methodology is not supported by relevant data and analysis available at the time the Operative Amendments were adopted.

106. The County offers two explanations for the change, neither of which is persuasive. First, County staff testified that the County has always had only one primary and one secondary USD. County staff cited Policy 4.7A.7 as data supporting combining the Eastern and Indiantown USDs.

107. Policy 4.7A.7, as renumbered by the Operative Amendments, sets forth the criteria for expanding the primary urban service district boundary. The policy does not mention either the Eastern or Indiantown USD. Ms. Lovelady did not explain how this policy relates to the issue of combining the Eastern and Indiantown USDs for purposes of calculating housing needs in the County.[11/]

108. Second, County staff argued that the Eastern and Indiantown USDs were only considered separately for the first time in the 2009 methodology, and that was in error.

109. Separation of the two USDs for purposes of calculating housing demand and supply, as well as distributing

housing capacity, was adopted in the 2009 EAR amendment, which was found "in compliance" in 2011. The undersigned cannot assume the 2009 methodology was flawed. This methodology was supported by data and analysis regarding the population distribution within the County.

110. Further, County staff admitted that the housing demand has been, historically, lower in the Indiantown USD than in the Eastern USD. Ms. Lovelady offered her professional opinion that the difference in growth rate between the east and west areas is data supporting evaluating the housing needs separately.

111. Neither the 2013 demand methodology nor the 2013 RCA is supported by data and analysis regarding population projections and trends in the County. Combining the Eastern and Indiantown USDs is not an appropriate reaction to data showing a disparity in growth rates between the two USDs.

112. Petitioner proved, beyond fair debate, that neither Policy 4.1D.3 nor Policy 4.1D.5 is a professionally-acceptable method of collecting the applicable data.

6. Maximum Theoretical Density

113. Although not a change between the 2009 and 2011 RCA, Petitioner also challenged the 2013 RCA as not based on data and analysis because it does not account for development

restrictions which prevent a landowner from attaining maximum theoretical density.

114. Petitioner's expert, Dr. Depew, testified that the methodology ignores the fact that certain types of vacant land which may be designated for residential use cannot be developed at maximum capacity. Petitioner cited as examples, Policy 4.1F.2 (the County's "tiered development" policy), as well as unspecified setback and buffering requirements, and the County's former 8.5 percent reduction in vacant residential acreage to account for infrastructure needs.

115. Policy 4.1F.2 prohibits approval of maximum density for projects located adjacent to lands approved for "lower density" uses. Application of the policy is project-specific and dependent on the location and uses of the surrounding properties.

116. Required setbacks and buffers between land uses may be found in either the Comprehensive Plan or the County's land development regulations. Setbacks and buffers are very dependent on location of the project and the characteristics of surrounding uses.

117. For the reasons discussed in the Conclusions of Law, Petitioner did not prove beyond fair debate that the RCA is flawed because it does not account for limitations preventing attainment of maximum theoretical density.

B. Real Estate Markets

118. Section 163.3177(6)(a)4. requires that "the amount of land designated [by the local government] for future land uses should allow the operation of real estate markets to provide adequate choices for permanent and seasonal residents[.]" Petitioner alleges the Operative Amendments contravene this provision by combining the Eastern and Indiantown USDs for purposes of residential housing capacity.

119. Applying the 2009 methodology, the County concluded it could accommodate 94 percent of the residential need within the Eastern USD for the 15-year planning period, and 1,569 percent of the residential need for the Indiantown USD for that same period (an overcapacity of 6,260 units).

120. Applying the 2013 methodology, combining the Eastern and Indiantown USDs, the County concluded that it can accommodate 466 percent of the residential housing need for the 10-year planning period and 291 percent for the 15-year planning period.

121. Dr. Henry Fishkind is an economist with significant experience in analyzing real estate markets, as well as developing property for clients throughout Florida. He testified, credibly, that the residential housing market in the eastern part of the County is unique and distinct from the Indiantown market. The eastern market is characterized by high-

value coastal property, including golf course communities and master-planned developments. By contrast, the "market in and around Indiantown is relatively affordable housing for people who either work in the agricultural industries thereabouts, or travel south into West Palm Beach and Broward. There is very little seasonal or high-end housing.[12/] Dr. Fishkind concluded that the County's methodology interferes with operation of the housing market, limits choices, limits supply, and increases prices.

122. In response to Dr. Fishkind's testimony, the County offered the testimony of Charles Pattison, Policy Director for 1000 Friends, who was qualified as an expert in comprehensive planning. Mr. Pattison's testimony on the issue was conclusory in nature. He expressed the opinion that the Operative Amendment "does not violate that standard" and that, under the Amendment, when there is a shortfall in residential capacity, the County could "potentially expand the urban service area boundary or just [] provide additional capacity inside the urban boundary."

123. Mr. Pattison professed no expertise in, or familiarity with, the housing markets in the Indiantown and Eastern USDs or relate his testimony to the economic impact of merging the two USDs for purposes of calculating residential

capacity. Dr. Fishkind's testimony is accepted as more persuasive on the issue.

124. The County argues that the Operative Amendments are not contrary to section 163.3177(6)(a)4., because they do not change the amount of land designated for any future land use category.

125. The County is correct that the Operative Amendments do not include any change to the Future Land Use Map (FLUM). However, under the Operative Amendments, there is a direct, fundamental relationship between the RCA and the County's ability to accommodate future urban residential demand within the primary and secondary USDs. Policy 4.1D.6 provides,

> The residential capacity analysis will determine if the future demand for residential units exceeds the supply for residential units as provided in the residential capacity analysis. When the undeveloped residential acreage within either the Primary Urban Service District or the Secondary Urban Service District no longer provides for projected population growth for the fifteen year planning period, planning for expansion of residential capacity shall commence. When the undeveloped acreage within either the Primary Urban Service District or the Secondary Urban Service District provides for no more than 10 years of projected population growth, the County is required to expand capacity.

126. By spreading the capacity to meet housing demand across both the Indiantown and Eastern USDs, the Operative

Amendments effectively increase the threshold which triggers expansion of, or a density increase within, the USDs. It is illogical, and perhaps contrary to the intent of the statute, to require an affected person to wait for a FLUM amendment changing the amount of land designated for urban uses, to challenge the methodology by which that decision was made. Especially when the challenge relies upon an argument that the methodology is designed to prevent, or at least delay, said FLUM amendment.

C. Commercial and Industrial Lands

127. Petitioner asserts that Policy 2.4C.3 limits the extent of commercial and industrial land uses to population growth, and is thus not based upon relevant and appropriate data and analysis as required by section 163.3177(1)(f).[13/]

128. Policy 2.4C.3 reads as follows:

> Policy 2.4C.3. The county shall limit commercial and industrial land use amendments to that needed for the projected population growth for the next 15 years. The determination of need shall include consideration of the increase in developed commercial and industrial acreage in relation to population increases over the preceding ten years, the existing inventory of vacant commercial and industrial land, and the goals, objectives, and policies of the [Comprehensive Plan], including the Economic Element. The County shall update this analysis at least every two years.

129. While the first sentence appears to limit commercial and industrial land uses based solely on population growth, the

remainder of the policy includes other variables, such as existing vacant commercial and industrial land and policies within the Economic Element. This fact was confirmed by Mr. Pattison's testimony.

130. Petitioner did not demonstrate beyond fair debate that the Policy 2.4C.3 is not based on data and analysis.

D. <u>The "Stricter Rule</u>"

131. Among the contested provisions in Chapter 1, is language providing that where two or more policies conflict, the stricter policy will govern. The applicable provisions read, as follows:

> Section 1.1 – Purpose
>
> * * *
>
> In furtherance of these purposes the more restrictive requirements of this chapter and of the overall goals, objectives and policies of Chapter 2 shall supersede other parts of the Plan when there is conflict.
>
> * * *
>
> Section 1.4. – Comprehensive Basis
>
> * * *
>
> Where one or more policies diverge, the stricter requirement shall apply. Where a subject is addressed by two or more provisions of the Comprehensive Plan, all provisions apply, and the stricter provision shall prevail to the extent of conflict. Plan policies addressing the same issue shall be considered consistent when it is possible to apply the requirements of both

policies with the stricter requirements governing.

132. Petitioner first argues that this "stricter rule" both acknowledges and enables internal conflict within the Comprehensive Plan contrary to section 163.3177(2), which requires the several elements of the comprehensive plan "shall be consistent."

133. Rules of interpretation, such as the stricter rule, are commonly found in local government comprehensive plans. The fact that the County included the stricter rule of interpretation is not evidence, in and of itself, that inconsistencies exist within the Comprehensive Plan.

134. Petitioner cited a single example[14/] of an internal inconsistency: Objective 2.2A and Policies 2.2A.1 and 2.2A.2.[15/]

135. Objective 2.2A expresses the County's objective to preserve "all wetlands regardless of size unless prohibited by state law." Policy 2.2A.1 provides, "[a]ll wetlands shall be preserved except is [sic] set out in the exceptions listed below." Policy 2.2A.2 provides three exceptions to the requirement that all wetlands be preserved.

136. Dr. Depew testified that the statements are contradictory and it is not clear which one is stricter. Dr. Depew's testimony, as to this issue, is not accepted as either credible or persuasive.

137. The cited objective and policies set out a general rule with a series of exceptions, not an uncommon legislative construction. The provisions are not in conflict. Thus, the stricter rule does not apply.

138. Petitioner's cited example is insufficient evidence on which to base a finding that the stricter rule acknowledges any internal inconsistencies.

139. As to Petitioner's contention that the stricter rule enables unspecified inconsistencies to continue indefinitely, no credible evidence was presented. County staff acknowledged that conflicting provisions in the Comprehensive Plan have been discovered in the past, usually when reviewing a specific application for development order. Nicki Van Vonno, the County's Director of Growth Management, described the process by which conflicting policies have been reconciled by staff.

140. No evidence was introduced on which to base a finding that once the County discovered conflicting provisions, the County failed to correct said conflicting provisions. The undersigned cannot infer that fact from the evidence.

141. Petitioner next contends the stricter rule lacks meaningful guidance in determining which policy or provision would apply in the event of conflict. Ergo, Petitioner argues, the provisions render the Comprehensive Plan lacking in

"meaningful and predictable standards for the use and development of land" as required by section 163.3177(1).

142. In support of its argument, Petitioner highlights that the Comprehensive Plan does not define the term "stricter," leaving staff without guidance in determining which unspecified conflicting provision would apply in a particular development scenario.

143. Section 2.4.10 of the Comprehensive Plan provides that where a term is undefined, it shall be given its customary, or ordinary, meaning.

144. The plain and ordinary meaning of strict is "stringent in requirement or control." Merriam Webster 2d www.merriam-webster.com/dictionary.

145. Clyde Dulin was the County's Senior Planner responsible for preparation of agenda items and packages for the County Commission on the Operative Amendments.

146. Mr. Dulin is currently a principal planner with the County. In his experience interpreting the County's Comprehensive Plan, he has been called on to reconcile conflicting provisions, especially with regard to conflict between the plan and the County's land development regulations. Mr. Dulin acknowledged that County staff may be likewise required to reconcile any conflict if the Operative Amendments become effective.

147. Nicki Van Vonno has served as Director of the County's Growth Management Department since 1999, and has previously served the County in the Growth Management Department in various professional planning roles since 1983. Ms. Van Vonno obtained her planning certification from the American Institute of Certified Planners in 1991.

148. Ms. Van Vonno explained that, when conflicting provisions arise, it is usually in the context of reviewing a proposed Comprehensive Plan amendment, or applying the Comprehensive Plan to a specific development proposal.

149. In such cases, staff discusses the issue and consults with other County department staff who may have expertise in the issue area.

150. Both Ms. Van Vonno and Mr. Dulin were credible witnesses, and their testimony is determined by the undersigned to be reliable. County staff are capable, in most instances, of determining, between conflicting provisions, which is the more stringent requirement or control.

151. Despite staff's acknowledged experience interpreting and applying the Comprehensive Plan, Petitioner emphasized Mr. Dulin's and Ms. Van Vonno's testimony that there may be development scenarios in which staff could not determine which provision was more stringent. In such cases, the County Commission itself may be called upon to make the final decision.

152. The fact that the County Commission may be called upon to interpret its own legislative provisions does not necessitate a finding that the stricter rule lacks meaningful guidance for County staff. Nor does that fact support a finding that the County Commission will make said decisions arbitrarily, thus unpredictably, as pronounced by Petitioner's expert.[16/]

153. Petitioner further contends that Section 1.1(5) and 1.4 are in conflict with one another, thus both creating an internal inconsistency and failing to provide meaningful guidance for application of the Comprehensive Plan. This contention is without merit.

154. The Comprehensive Plan contains 17 chapters. Section 1.1(5) states that where conflict exists, the more restrictive provisions of Chapter 1 and 2 supersede provisions in other chapters. Section 4.1 provides that, in the event of a conflict, the more restrictive provisions of the plan, generally, prevails. Granted, the language is inartfully drafted. However, inartful drafting does not render the statements in conflict. Read together the language provides that, in the event of conflict, Chapters 1 and 2 prevail if provisions therein are more restrictive than provisions in other chapters. If the conflict is between chapters other than Chapters 1 or 2, the more restrictive provision of the remaining chapters applies.

155. Next, Petitioner argues that the stricter rule is not supported by data and analysis which is required by section 163.3177(1)(f).

156. Sections 1.1 and 1.4 are rules for interpreting and applying the Comprehensive Plan. The various experts disagreed about whether these sections are substantive, thus required to be supported by data and analysis, or procedural, thus not required to be supported by data and analysis.

157. The issue of whether Sections 1.1 and 1.4 are substantive, rather than procedural, thus subject to data and analysis requirements, is at least the subject of fair debate.

E. Balanced Development

158. Section 163.3177(1) requires a local government comprehensive plan to "provide the principles, guidelines, standards, and strategies for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the area that reflects community commitments to implement the plan and its elements."

159. Section 163.3177(6)(a)4. provides "the amount of land designated for future planned uses shall provide a balance of uses that foster vibrant, viable communities and economic development opportunities[.]"

160. Petitioner contends the Operative Amendments do not balance future economic development with environmental concerns

or provide a balance of uses to foster economic development opportunities. Petitioner advances several bases for this allegation.

161. First, Petitioner complains that the County conducted no analysis of the economic impact of the Operative Amendments.

162. The County was not required to prepare an economic analysis of the Operative Amendments prior to their adoption.

163. Next, Petitioner argues that the Operative Amendments exalt environmental concerns over other development considerations, in part because the Operative Amendments were drafted by Ms. Hurchalla, who has an admitted "environmentalist policy bent."

164. The Comprehensive Plan does demonstrate a commitment by the County to protecting the environment. However, a plan that contains stringent environmental protections is not necessarily out of balance as a whole.

165. Petitioner cites Sections 1.1 and 1.5 in support of its argument, urging those sections make environmental issues paramount and everything else, including economic development, subservient.

166. The plain language of Section 1.1 does not support Petitioner's contention. Section 1.1 cites "protect and restore natural and manmade resources" as one of many purposes of the Comprehensive Plan, along with "achieve and maintain

conservative prudent fiscal management" and "maintain the character, stability and quality of life for present and future County residents." No one purpose is afforded more weight than the others.[17/]

167. Further, under the Operative Amendments, "quality of life" includes both environmental and business concerns, as well as fiscal prudence.

168. Section 1.5 provides that a principle goal of the County is to promote balanced, orderly, sustainable economic growth by creating an economic environment "consistent with section 1.1" to enhance prosperity in the community. This section recognizes both the environment and quality of life as foundations of the County's economy. According to Tom Pelham, one of the Respondent's experts who has been professionally involved with the Martin County plan for a number of years, the County has demonstrated a strong commitment to implementing its plan through the USDs in the last 30 years.

169. Petitioner's expert also opined that the Operative Amendments fail to balance environmental and economic development issues by allowing, through Section 1.4, Chapters 1 and 2 to "trump" other chapters of the Comprehensive Plan.

170. Chapter 2 provides the overall goals and objectives of the Comprehensive Plan, but is not limited to environmental goals. Chapter 2 includes measures relating to providing public

facilities concurrent with needs of development, and measures for "prudent fiscal management," among others. As previously found, section 1.4 provides a method for reconciling competing provisions in the event they are discovered.

171. Petitioner also contends the Operative Amendments fail to designate sufficient land for commercial use, yet another basis for Petitioner's contention that the plan is out of balance. Petitioner's argument relies heavily on the assertion that the Operative Amendments limit commercial land use designations to permanent population growth. Having already rejected this interpretation of Policy 2.4C.3, the undersigned will not rely on that policy to support a finding that the Operative Amendments do not balance environmental and economic development issues.

172. Petitioner is correct that the data available to the County in 2009 demonstrated a deficit of commercial land necessary to accommodate future economic needs. That finding remains in the Operative Amendments at Section 4.2A(12).

173. The applicable Section of the Comprehensive Plan reads, as follows:

> The raw data appear to show a significant deficit of commercial land necessary to accommodate economic needs. Any attempt to remedy the deficits should be based on geographic area in order to reflect sustainability principles and provide population centers with necessary services

> in an orderly and timely fashion. Further analysis is planned to continue refining the inventory and consider whether population demands for retail/commercial services should be applied to the vacant land.

174. The Operative Amendments do not designate any new land for commercial use.

175. Prior to adopting the Operative Amendments, the County began updating its vacant commercial and industrial sites inventory. The County's strategy is to identify existing sites with infrastructure available to serve commercial and industrial needs, and designate those sites for expedited permitting. The strategy includes identifying parcels with outdated zoning inconsistent with the Comprehensive Plan as candidates for rezoning to effectuate use for commercial or industrial purposes, combining adjacent parcels in common ownership, and identifying undeveloped sites with approved site plans for remarketing. This approach is consistent with the County's urban containment strategy which it has sustained since the 1990 Plan.

176. Subsequent to the 2009 EAR amendments, the County adopted a FLUM amendment, known as Ag-Tec, which added substantial amounts of commercial and industrial land to the County's inventory. Dr. Fishkind opined that despite that addition, the County does not have adequate commercially-designated land to serve future needs. Dr. Fishkind's analysis

was criticized for excluding the Ag-Tec property because he relied upon the Property Appraiser's use designations, rather than the County's land use designations.

177. The issue of whether the Comprehensive Plan, under the Operative Amendments, designates adequate lands for commercial use to serve future needs is at least fairly debatable.

178. Petitioner also cited Objective 2.4C and Policy 2.4C.1 in support of its argument that the Operative Amendments do not balance economic concerns.

179. Petitioner did not identify Objective 2.4C and Policy 2.4C.1 as compliance issues in its Amended Petition for Formal Administrative Hearing. Neither that Objective nor those policies were identified in the parties' prehearing stipulation. Although testimony regarding those provisions was offered at the final hearing, that evidence has been disregarded and does not form the basis of any finding of fact herein.[18/]

180. Finally, Petitioner argues the Operative Amendments do not balance environmental and economic issues because they do not allow the operation of real estate markets to provide adequate choices for residents.

181. While Petitioner proved its allegation that the RCA does not allow the operation of real estate markets to provide adequate choices for residential housing, that finding does not

support a finding that the Operative Amendments do not balance economic and environmental concerns. In fact, the undersigned's determination that the Operative Amendments interfere with the normal operation of the housing market is dependent on the merging of the Indiantown and Eastern USDs for purposes of calculating residential demand and capacity, and is in no way dependent on environmental factors.

182. Thus, the matter of whether the Operative Amendments balance environmental and economic concerns is at least a matter of fair debate.

F. Supermajority Vote

183. Next, Petitioner challenges Section 1.11.D(6) of the Operative Amendments, which require "four votes for transmittal and for adoption" of plan amendments involving a number of critical issues specified therein.

184. Petitioner argues that the supermajority vote requirement is a substantive requirement of the Comprehensive Plan unsupported by data and analysis. The County maintains the supermajority vote requirement is a simple procedural issue requiring neither data nor analysis in support.

185. Petitioner concludes the requirement is substantive because it controls how the County Commission sets development policy by making it more difficult to amend the Comprehensive Plan in the future based on changed conditions. Petitioner's

expert, Dr. Depew, reasoned the vote requirement must be based on some data identifying a problem which necessitates the supermajority vote.

186. Petitioner's arguments are not persuasive. Regardless of the supermajority vote requirement, future amendments affecting identified critical issues (e.g., changes to the USD boundaries) must be supported by data and analysis, which may include changed conditions. The fact that the County Commission may have to adopt those changes by four votes rather than three, does not relieve the County Commission from supporting its legislative changes with appropriate data.

187. The supermajority vote issue is largely a legal question, rather than one to be discerned based on expert planning opinion. For the reasons discussed in the Conclusions of Law, Petitioner did not prove beyond fair debate that the supermajority vote is not supported by data and analysis.

G. Miscellaneous Issues

188. In its Amended Petition, Petitioner raised the following additional allegations: Neither the 15-year planning timeframe nor the density allocations in Objective 4.1F were supported by data and analysis; and, the RCA is inconsistent with section 163.3177(6)(f)(minimum requirements for the housing element). Petitioner did not present any evidence on these

issues. Thus, Petitioner did not prove these allegations beyond fair debate.

CONCLUSIONS OF LAW

189. 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.

190. 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.

191. The Organizational Intervenors and the Municipal Intervenors are affected persons with standing to intervene in this proceeding pursuant to 163.3184(1)(a).

192. "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.

193. 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 Operative Amendments are 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).

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

Public Participation

195. Section 163.3181 expresses the Legislature's intent that the public participate to the fullest extent possible in the comprehensive planning process. Petitioner did not prove beyond fair debate that the public was unable to participate in the process for adoption of the Operative Amendments, nor that Petitioner was prejudiced by the County's adoption of amendments which were originated by Ms. Hurchalla.

Meaningful and Predictable Standards

196. Section 163.3177(1) requires the Comprehensive Plan to "guide future decisions in a consistent manner," and "establish meaningful and predictable standards for the use and development of land[.]" Petitioner did not prove beyond fair debate that the "stricter rule" fails to establish meaningful standards for implementing the Comprehensive Plan, despite the fact that the term "stricter" is undefined therein, and that

sometimes the County Commission may be called upon to reconcile conflicting provisions if staff is unable to do so.

Internal Consistency

197. Section 163.3177(2) requires that "coordination of the several elements of the comprehensive plan shall be consistent," and that "[w]here data is relevant to several elements, consistent data shall be used, including population estimates and projections."

198. Petitioner did not prove beyond fair debate that the Operative Amendments create inconsistencies within the Comprehensive Plan, or acknowledge inconsistencies through adoption of the "stricter rule." Nor did Petitioner establish that Policy 4.1D.3 excludes seasonal population from the calculation of residential housing demand, thus creating an internal conflict with Section 1.7.

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. 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.

201. Based upon the foregoing Findings of Fact, the Operative Amendments do not react to the readily-available data regarding the County's population projections and trends by separating out the Eastern and Indiantown USDs for purposes of calculating both residential demand and residential capacity. The methodologies in Sections 1.7.B and 1.7.C, as well as Policies 4.1D.3 and 4.1D.5, are thus, not based on data and analysis.

202. Likewise, Petitioner proved beyond fair debate that Policy 4.1D.5(4) is not based on data and analysis because it is not a professionally acceptable methodology for obtaining data on residential capacity within approved multifamily developments.

203. The supermajority vote requirement in Policy 1.11.D is a purely procedural issue. Section 163.3184 provides that a local government decision to amend its plan "shall be by affirmative vote of <u>not less than a majority</u> of the members of the governing body present at the hearing." § 163.3184(11)(a), Fla. Stat. (emphasis supplied). The procedural requirements of section 163.3184 are not compliance issues. § 163.3184(1)(b),

Fla. Stat. Only the substantive elements of a local government comprehensive plan must be supported by data and analysis, pursuant to section 163.3177(1)(f). Thus, Petitioner did not prove beyond fair debate that Policy 1.11.D(6) is not based upon data and analysis.

204. Policy 2.4C.3 was challenged by Petitioner as limiting commercial and industrial land uses solely based on future population projections. As found herein, Petitioner did not prove that allegation. Thus, Petitioner failed to prove beyond fair debate that Policy 2.4C.3 is not based on data and analysis.

205. Petitioner also challenged the RCA as not based on relevant and appropriate data because it does not account for limitations affecting a landowner's ability to achieve maximum residential capacity.

206. Provisions in a local comprehensive plan which will prevent the achievement of a maximum residential density should be taken into account when calculating residential supply. See Martin Cnty. Conser. Alliance, Inc. v. Martin Cnty., Case No. DCA11-GM-001 (DCA Jan. 3, 2011). To that end, the RCA allocates only one-half the density afforded to underlying wetland areas, to reflect the Comprehensive Plan policy prohibiting development in wetlands, but allowing the landowner to transfer half the density to the upland area.

207. However, provisions which may or may not cause a density reduction, such as the County's "tiered-development" policy, should not be taken into account. See Id. at 14. To the extent Petitioner's argument is based on limitations located outside the Comprehensive Plan, the County is not required to account for those in calculating residential supply. See Id. at 8-9.

208. Petitioner did not prove beyond fair debate that the RCA is not based on data and analysis for failure to account for limitations affecting a property owner's ability to achieve maximum theoretical density.

Real Estate Markets

209. Section 163.3177(6)(a)4. requires that the amount of land designated by the local government for future land uses "should allow the operation of real estate markets to provide adequate choices for permanent and seasonal residents and may not be limited solely by the projected population."

210. Petitioner proved beyond fair debate that the County's methodology for calculating housing demand and supply does not take into account the separate and distinct housing markets in the Eastern and Indiantown USDs, thus interfering with the operation of the normal market, effectively limiting choices for residential consumers.

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

Balance of Uses

212. Petitioner failed to prove beyond fair debate that the Operative Amendments fail to achieve a balance of uses to foster a vibrant, viable community and economic development opportunities, as required by 163.3177(6)(a)4., or provide principles, guidelines, standards, and strategies for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the County, as required by 163.3177(1).

Conclusion

213. For the reasons stated in the Findings of Fact, the Petitioner has proven beyond fair debate that the Operative Amendments are not in compliance with the specified 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 2nd day of June, 2015, in Tallahassee, Leon County, Florida.

Suzanne Van Wyk

SUZANNE VAN WYK
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this 2nd day of June, 2015.

ENDNOTES

[1/] Except as otherwise provided herein, all references to the Florida Statutes are to the 2014 version, which was in effect when Ordinance 957 was adopted. Although the 2013 statutes were in effect when Ordinance 938 was adopted, there was no substantive change to the applicable 2014 statutes relevant to the issues raised herein.

[2/] A number of other Petitioners, including Consolidated Citrus, LP; Running with Citrus, LP; Tesoro Groves; Becker Holding Corporation; Lake Point Phase I, LLC; and Lake Point Phase II, LLC; also challenged the Plan Amendment. The cases were subsequently consolidated under Case No. 13-3393GM. The other Petitioners' challenges were subsequently settled and dismissed. For purposes of this Recommended Order, Midbrook 1st Realty Corp. is the sole Petitioner.

[3/] On January 23, 2014, the undersigned entered an Order on Respondent's Motion in Limine, or in the Alternative, Motion to Strike (Order) specific allegations from the Petition as outside the scope of this proceeding. With regard to Petitioner's allegations that the Operative Amendments violate statutory public participation requirements, the undersigned ruled Petitioner was entitled to make a record to demonstrate

prejudice from the alleged irregularities. The undersigned includes findings of fact under this subheading consistent with that Order.

[4/] Policy 4.1D.3 restates the demand methodology in Section 1.7.B. Petitioner's challenge applies to both provisions.

[5/] Policy 4.1D.5 restates the capacity methodology in Section 1.7.C. Petitioner's challenge applies to both provisions.

[6/] Petitioner's counsel objected to opinion testimony from Ms. Lovelady during her direct examination by Respondent's counsel because Ms. Lovelady was not identified in the prehearing stipulation as an expert witness. However, Ms. Lovelady was deposed by Petitioner and the undersigned finds, from the record as a whole, that these particular opinions expressed by Ms. Lovelady during the final hearing were also revealed during her deposition. To the extent Petitioner had an objection to Ms. Lovelady's opinion, that objection was waived when Petitioner's counsel elicited the opinions from her on counsel's direct examination.

[7/] Two other exhibits were introduced in support of the three percent vacancy rate: a needs analysis compiled by Miami Economic Associates, Inc., in support of proposed 2011 amendment to the Comprehensive Plan for the Hobe Grove development, and Petitioner's Exhibit 14, a series of electronic mail communications between Ms. Hurchalla and C. Scott Dempwolf, citing census data on owner-occupied housing and rental housing vacancy rates. The undersigned does not rely on either of those documents in finding that the three percent vacancy rate is professionally acceptable.

[8/] Martin County Exhibit 37, p. 11.

[9/] Id. at 13, Table 5.

[10/] Id. at 13, Table 6.

[11/] Ms. Lovelady's testimony was conclusory in nature. She stated, "that's the analysis we did to show that you really needed to combine them because the policy talks about one urban service district, one primary and one secondary." [T.113:8-11]. No other witness referred to Policy 4.7A.7.

[12/] T.276:2-6.

[13/] Petitioner may have withdrawn this allegation at the final hearing, but the record is not entirely clear. In an abundance of caution, the undersigned included findings relative thereto.

[14/] Despite Petitioner's contention in its Proposed Recommended Order that its experts provided multiple examples.

[15/] Petitioner's expert gave a second example to illustrate the point that the stricter rule does not provide meaningful guidance to staff. The example concerned a speculative scenario in which the County adopted a policy of encouraging affordable housing and determined that a residential density of twenty dwelling units per acre (20 du/acre) was necessary to accomplish that goal, but had a previously-existing 15 du/acre limitation. The expert opined that the County would have to decide which policy was more restrictive, the existing 15 du/acre limitation or the affordable housing goal. Rather than presenting an example of conflict applying the Comprehensive Plan to a particular development application, the scenario presents the question of whether "to adopt a policy allowing twenty units per acre" [T.249:19-20]. Thus, the scenario involves the formulation of policy by amending the Comprehensive Plan. A decision to amend the Comprehensive Plan to increase the residential density from 15 to 20 du/acre would set the policy guiding future application of the Comprehensive Plan.

[16/] T.248:1-5; T.249:4-8.

[17/] Additionally, Section 1.1 as amended by the Operative Amendments, is not substantially different from the prior version, which read, "The purpose of planning is to protect natural and manmade resources and maintain, through orderly growth and development, the character, stability and quality of life for present and future Martin County residents."

[18/] A petitioner is limited to issues that are timely raised and is bound by allegations in its petition. See Sunset Dr. Holdings, Inc. v. City of Lake Worth, Case No. 10-1973GM, *21 n.4 (Fla. DOAH Mar. 24, 2011; Fla. DCA April 28, 2011) (Petitioner's allegation that City violated specified sections of Florida Administrative Code Rule 9J-11, which were not raised in Petitioner's third amended petition or by stipulation of the parties, were untimely); Burgess v. Dep't. of Cmty. Aff., Case No. ACC-10-008 (Fla. ACC Feb. 24, 2011)(ALJ not required to make finding of fact about Petitioner's allegation regarding the planning period of the Coastal Management Element where Petitioner did not identify that issue in either the amended

petition or the joint prehearing stipulation); St. George Plantation Owners' Ass'n v. Franklin Cnty., Case No. 96-5124GM (Fla. DOAH Feb. 13, 1997; Fla. ACC Mar. 25, 1997)(Petitioner's argument on internal inconsistency of the comprehensive plan raised for the first time at the hearing was untimely and was disregarded by the ALJ); Heartland Envtl. Council, Inc. v. Dep't. of Cmty. Aff., Case No. 94-2095GM (Fla. DOAH Nov. 16, 1996; Fla. DCA Nov. 25, 1996)(Petitioner is limited to the specific plan elements cited in the Petition, as narrowed by the Prehearing Stipulation, as evidence to support its broad allegation that the amended plan did not "meet minimum criteria and State requirements for protection of identified biological communities, cultural resources and groundwater from contamination"); cf. Heston v. City of Jacksonville, Case No. 03-4283 (Fla. DOAH Mar. 5, 2004; Fla. ACC Sept. 22, 2004) (Respondent's contention that specified policies of the challenged plan raised for the first time in a post-hearing filing is untimely).

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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.

STATE OF FLORIDA
ADMINISTRATION COMMISSION

MIDBROOK 1ST REALTY CORP.,

Petitioner,

CASE NOs.: 13-3397
14-135

v.

MARTIN COUNTY, FLORIDA,

Respondent,

and

1000 FRIENDS OF FLORIDA, INC.;
MARTIN COUNTY CONSERVATION ALLIANCE; TREASURE COAST ENVIRONMENTAL DEFENSE FUND, INC. d/b/a INDIAN RIVERKEEPER;
TOWN OF JUPITER ISLAND, FLORIDA;
TOWN OF SEWALL'S POINT, FLORIDA; and
CITY OF STUART, FLORIDA

Intervenors.
_______________________________________/

PETITIONERS EXCEPTIONS TO THE RECOMMENDED ORDER

Petitioners, Midbrook 1st Realty Corp. ("Petitioners"), by and through undersigned counsel, pursuant to Rule 28-106.217, Florida Administrative Code ("F.A.C."), hereby submit the following exceptions to the findings of fact and conclusions of law contained in the Administrative Law Judge's ("ALJ's") Recommended Order ("RO") entered on June 2, 2015.

An administrative agency may reject a hearing officer's findings of fact if it can state with particularity that the finding was not based on competent, substantial evidence after a review of the entire record. *Goin v. Commission on Ethics*, 658 So.2d 1131, 1138 (1st DCA 1995). When determining whether to reject or modify the findings of fact in a recommended order, the agency may not weigh the evidence, judge the credibility of the witnesses, or interpret the evidence to fit

its ultimate conclusions. *Packer v. Orange County Sch. Bd.*, 881 So. 2d 1204, 1206-07 (Fla. 5th DCA 2004). However, findings of fact infused with policy considerations may be overturned by the agency. *See Utilities of Fla. v. Public Serv. Comm'n*, 420 So. 2d 331, 333 (Fla. 1st DCA 1982).

The ALJ's legal conclusions, unlike factual determinations, come to the agency with no presumption of correctness. *Harloff v. City of Sarasota*, 575 So.2d 1324, 1327 (2nd DCA 1991). An agency has the authority to modify or reject conclusions of law in a recommended order that are within the agency's substantive jurisdiction and substitute its own conclusions. Section 120.57(l), Florida Statutes;[1] *Charlotte County v. IMC Phosphates*, 18 So.3d 1089, 1092 (2nd DCA 2009). It is the substance of a provision in the recommended order and not the label applied to it that determines whether the provision is a finding of fact or conclusion of law. *Battaglia Properties, Ltd. v. Florida Land and Water Adjudicatory Commission*, 629 So.2d 161, 168 (5th DCA 1993). When a reviewing agency's construction of a statute or rule necessitates additional fact-finding, the proper procedure is for the agency to remand the case to hearing officer for that purpose. *Grier v. Agency for Health Care Administration*, 704 So.2d 1072, 1075 (1st DCA 1997). There is no need for a remand if the findings necessary to support the new construction are already included in the recommended order. *Id*.

EXCEPTIONS

Exceptions 1 - 3: Commercial and Industrial Lands

Exception 1: Paragraph 129

Petitioner takes exception to Paragraph 129, which purports to find that Policy 2.4C.3[2] of the Martin County Comprehensive Growth Management Plan ("CGMP"), as amended by

[1] All references herein to the Florida Statues are to the 2014 version, unless otherwise noted.

Ordinance 938 (the "Operative Amendments") does not limit commercial growth to the projected population. Paragraph 129 provides:

> While the first sentence appears to limit commercial and industrial land uses based solely on population growth, the remainder of the policy includes other variables, such as existing vacant commercial and industrial land and policies within the Economic Element. This fact was confirmed by Mr. Pattison's testimony.

Paragraph 129 is labeled a finding of fact, but as an interpretation of the plain language of an agency rule it is a conclusion of law. *Duke's Steakhouse Ft. Myers, Inc. v. G5 Properties LLC, 106 So.3d 12, 15 (2nd DCA 2013); Collier County Board of County Commissioners v. Fish and Wildlife Conservation Commission*, 993 So.2d 69, 72-73 (2nd DCA 2008); *Environmental Confederation of Southwest Florida, Inc. v. Department of Community Affairs*, 1997 WL 1053447, at *7 (DOAH Final Order, December 16, 1997). The fact that Mr. Pattison testified to the interpretation utilized by the ALJ cannot change that it is a conclusion of law.

Following the ALJ's reasoning, the amount of commercial land made available can be determined using any other provision in the entire comprehensive plan (i.e., "the goals, objectives, and policies of the [Comprehensive Plan], including the Economic Element"), and the amount of available land is not limited to population growth. This would nullify the first sentence of Policy 2.4C.3 that *requires* the County to limit commercial and industrial land use solely to population growth. This is improper; an interpretation giving full effect to all provisions is preferred over an interpretation that renders a provision meaningless. *Bennett v. St. Vincent's Medical Center, Inc.*, 71 So.3d 828, 838 (Fla. 2011).

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[2] Policy 2.4C.3 provides: "The county *shall limit* commercial and industrial land use amendments to that needed for the *projected population growth* for the next 15 years. The determination of need shall include consideration of the increase in developed commercial and industrial acreage in relation to population increases over the preceding ten years, the existing inventory of vacant commercial and industrial land, and the goals, objectives, and policies of the [Comprehensive Plan], including the Economic Element. The County shall update this analysis at least every two years."

Following appropriate rules of construction - giving effect to the entirety of Policy 2.4C.3- the only reasonable legal interpretation is that the second sentence of Policy 2.4C.3 is the method by which Martin County will determine how soon commercial and industrial land use will be needed to meet the population growth; not that it isn't limited as required by the first sentence. "Consideration of the increase in developed commercial and industrial acreage in relation to population increases over the preceding ten years" is a rough means of measuring the rate at which "the existing inventory of vacant commercial and industrial land" will be used. This calculation of the rate at which existing vacant commercial and industrial land will be used may be modified by other considerations in the comprehensive plan that might alter the rate of such development or the rate of population growth, such as, for example, changes to the economic element that might spur faster development. Under this interpretation, in contrast to the ALJ's interpretation, the considerations in the second sentence simply provide the method to determine how fast the commercial and industrial land will be consumed (important to know when working within the 15-year population growth window), but does not extend allowable development beyond the 15-year population growth window. This gives full effect to all provisions, and shows that the Policy 2.4C.3 is improperly limited solely to population growth.

Exception 2: Paragraphs 130 and 204

Paragraph 130 relies on paragraph 129 to find that Petitioner did not demonstrate beyond fair debate that Policy 2.4C.3 is not based on data and analysis, and paragraph 204 relies on paragraphs 129 and 130 to reach the same conclusion. As explained above, paragraph 129 should be rejected as an improper conclusion of law. Once rejected, there is no support for the conclusions of law in paragraphs 130 and 204 that Policy 2.4C.3 is fairly debatable. *See Environmental Confederation*, 1997 WL 1035447, at *10. Because the legally correct interpretation of Policy 2.4C.3 makes the policy contrary to Section 163.3177(6)(a)4, Florida

Statutes,[3] which prohibits limiting future land uses to projected population, the only appropriate finding is that the CGMP is not "in compliance." This is a matter of law – the application of the plain language of the CGMP to the plain language of 163.3177(6)(a)(4), Florida Statutes. The policy explicitly ties future commercial and industrial land use solely to projected population growth. As a result, the Administration Commission should reject this conclusion and find Policy 2.4C.3 of the Operative Amendments is not in compliance with Section 163.3177(6)(a)4, Florida Statutes.

Exception Nos. 3 - 6: Balanced Development

Paragraphs 158 through 182 relate to Petitioner's arguments that the Operative Amendments create a lack of balance in the CGMP in violation of two different provisions of the Growth Management Act. First, the Operative Amendments fail to "provide the principles guidelines, standards and strategies for the orderly and balanced future economic, social, physical environmental, and fiscal development of the area…." Section 163.3177(1), Florida Statutes. Second, "the amount of land designated for future planned uses shall provide a balance of uses that foster vibrant, viable communities and economic development opportunities." Section 163.3177(6)(a)4., Florida Statutes. Petitioner advanced several lines of evidence as to why the Operative Amendments would create a lack of balance related to both these statutory requirements. Because the ALJ erred in rejecting several of these arguments as a matter of law, the ALJ's rejection of the Petitioner's argument regarding lack of balance should be re-opened through a remand to the ALJ, with direction to re-weigh the pertinent evidence regarding lack of balance in the light of the Administration Commission's conclusions of law. *See Environmental Confederation, Supra.*

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[3] Section 163.3177(6)(a)4, Florida Statutes, provides in pertinent part: The amount of land designated for future land uses should allow the operation of real estate markets to provide adequate choices for permanent and seasonal residents and business and may not be limited solely by the projected population.

Exception 3: Paragraph 162

As noted by the ALJ in paragraph 161, Petitioner's first line of evidence regarding the CGMP's lack of balance, is that Martin County failed to do *any* analysis of the economic impacts of the Operative Amendments. In paragraph 162, the ALJ does not find that such an analysis was performed, but instead asserts that "[t]he County was not required to prepare an economic analysis of the Operative Amendments prior to their adoption." This wholly unsupported assertion interpreting a statute is a conclusion of law and should be rejected. *See Beckett v. Department of Financial Services*, 982 So.2d 94, 102 (1st DCA 2008) (interpreting a statute is a matter of law).

It is logically impossible for a local government to balance various factors when undertaking amendments or provide a balance of uses that "foster … *economic* development opportunities" without doing any *economic* analysis of the amendments whatsoever. Indeed, as the plain language and legislative history demonstrate, fostering economic development was a critical part of the 2011 legislative changes that resulted in this new provision in Section 163.3177(6)(a)4. *See* Section 163.3177(6)(a)4, Florida Statutes; *see also Final Bill Analysis*, at 1, 2, and 26 (H.B. 7207, Reg. Sess. 2011) (stating the bill's "ability to promote increased economic development" and making similar assertions). The failure to consider the economic impacts of the Operative Amendments shows that such balance cannot exist, and should not have been ignored by the ALJ in determining whether Martin County provided the necessary balance in the CGMP. The Administration Commission should reject the ALJ's interpretation of the statutory provisions as not requiring economic analysis and, because substantial competent evidence exists in the record showing that no economic analysis was done, and no finding was made to the contrary, the Administration Commission should conclude that the CGMP as

amended lacks balance and is in violation of Sections 163.3177(1) and 163.3177(6)(a)4., Florida Statutes. [Vol. II, 259/12-260/10].[4]

Exception 4: Paragraphs 171, 176, and 177

Paragraphs 171 through 177 explain Petitioner's evidence regarding the lack of necessary land provided in the CGMP. The lack of sufficient land shows the lack of balance in the CGMP. The RO ultimately finds that whether adequate commercial land is available is fairly debatable, but that conclusion rests entirely on the ALJ's earlier misinterpretation of Policy 2.4C.3, as discussed above in Exceptions 1-3. The only other evidence pertaining to the sufficiency of available land is the 2009 data, still in the CGMP, showing a deficit of commercial land necessary to accommodate future economic needs, and the Operative Amendments do not make any new land available. [RO, Para. 173-174].[5] As discussed above, Policy 2.4C.3 improperly limits commercial land solely to projected population growth and must be understood in that way for purposes of assessing whether the CGMP balances the requirements of the Growth Management Act. When the existing findings are considered in light of the legally correct interpretation of Policy 2.4C.3, the ALJ's decision that balance in the CGMP was fairly debatable is sufficiently in doubt to justify a remand for proceedings consistent with the Administration Commission's interpretation of Policy 2.4C.3.

Exception 5: Paragraph 179

Additional evidence about the lack of overall balance in the CGMP as a result of the Operative Amendments is demonstrated by Objective 2.4C and Policy 2.4C.1. The ALJ refused to consider this argument because the objective and policy were not identified in the prehearing stipulation. The ALJ misinterpreted Petitioner's position. Petitioner cites Objective 2.4C and Policy 2.4C.1 as *evidence* of the lack of balance that is an issue identified in the prehearing

[4] Citations to the Exhibits are described as either "[Pet. Ex. ___, P. ___] or [Resp. Ex. ___, P. ___]."
[5] Citations to the Recommended Order are described as "[RO, Para. ___]."

stipulation. There is no more need for Petitioner to cite evidence for finding other elements not in compliance than there is, for example, for Martin County to cite the economic element of the CGMP, on which they (incorrectly) rely in attempting to show balance, in the prehearing stipulation.

The prehearing stipulation clearly identified as contested facts "whether Martin County considered economics in its adoption of the Operative Amendments" and "whether the CGMP as amended by the Operative Amendments balances economic, social, physical, environmental, and fiscal development in the County." [Prehearing Stip., Para. 6(g), 6(l)].[6] Thus, there is no competent substantial evidence to support the ALJ's finding that the issues were not raised in the prehearing stipulation and, in any event, Martin County's failure to object to such testimony waived any objection to its admission. In the Interest of A.M., 614 So.2d 1161 (Fla. 4th DCA 1993) (any defect in the petition was waived by failure to object to introduction of certain evidence at trial).

Objective 2.4C[7] and Policy 2.4C.1[8] are evidence that Martin County did not consider economics and did not balance economics with rest of the plan. Mr. Metcalf testified that the limitations in Objective 2.4C and Policy 2.4C.1 would exacerbate the lack of economic balance. [Vol. II, 235/9- 236/23]. Those provisions limit residential development during the first five years of the 15-year planning horizon to 125% of the projected need for residential units for that period. [Resp. Ex. 3, P. 36]. The stated reason for this requirement is to avoid capital

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[6] Citations to the Prehearing Stipulation are described as "[Prehearing Stip., Para. ___]."

[7] Objective 2.4C provides:

> Martin County shall coordinate the timetables of developments with expected population projections so that development approvals are consistent with a fiscally feasible strategy for planning and construction of public facilities.

[8] Policy 2.4C.1 provides:

> Because excessive development approvals require capital expenditures on facilities that will not be needed, the county shall adopt a planning system to track residential development approvals and limit final residential development approvals scheduled for the first five years of the 15 year planning period to 125% of the projected need for residential units for that period.

expenditures for facilities that will not be needed. [Resp. Ex. 3, P. 36]. As Mr. Metcalf explained, however, such an inflexible approach fails to consider localized or temporary conditions that may not require "shut[ting] down all permitting throughout the entire County because of what might be a localized infrastructure capacity problem." [Vol. II, 235/9-236/23]. Mr. Metcalf's testimony was unrebutted.

Whether Objective 2.4C and Policy 2.4C.1 were waived is a conclusion of law, but not within the Administration Commission's substantive jurisdiction, so the Administration Commission should remand with directions to the ALJ to consider Objective 2.4C and Policy 2.4C.1 as *evidence* related to balance in the CGMP.

Exception 6: Paragraphs 181, 182, and 212

In paragraph 181, the ALJ acknowledges that Petitioner proved its allegation that the residential capacity analysis in the Operative Amendments prevent the operation of residential real estate markets. Somehow, however, the ALJ decided that such a finding did not mean the CGMP as amended by the Operative Amendments lacked balance.

It is wholly illogical to allow a comprehensive plan to prevent the operation of the entire residential real estate market and still find that it still provides for balanced economic development, as required by Section 163.3177(1), Florida Statutes, or provides for a balance of uses that foster vibrant, viable communities and economic development opportunities as required by Section 163.3177(6)(a)4, Florida Statutes. If preventing the operation of the residential real estate market is not enough to show a lack of balanced economic development or provides sufficient land for vibrant, viable communities and economic development opportunities, then no such showing can be made under the plain language of the statute that specifically requires that comprehensive plans allow for the operation of the real estate markets for seasonal and permanent residents. Consequently, as a matter of statutory interpretation within the

Administration Commission's substantive jurisdiction, the only correct conclusion is that the CGMP as amended fails to allow for the operation of the residential real estate market and lacks balance. The Administration Commission should conclude that the CGMP as amended is not in compliance with Sections 163.3177(1) and 163.3177(6)(a)4, Florida Statutes. *See Grier*, 704 So. 2d at 1075 (stating that a remand was not necessary because the factual findings to support the new interpretation of the statute were already in the recommended order).[9]

Exceptions No. 7: Supermajority Vote, Paragraphs 186, 187, and 203

Paragraphs 183 through 187 constitute the ALJ's findings regarding the supermajority voting provisions placed into the CGMP by the Operative Amendments. Section 1.11.D(6) requires a "super-majority" vote, i.e., 4 votes from a Commission of 5, to approve amendments addressing specified "critical issues." [Resp. Ex. 3, P.18]. The critical issues include changes to the USD, allowing urbanization outside the USD, extending commercial and industrial use outside the USD, or making further changes to the super-majority vote provision. [Resp. Ex. 3, P. 18-19]. The principal drafter of the Amendments, Ms. Maggy Hurchalla, determined that these were the appropriate critical issues for a super-majority vote. [Vol. I, 51/11-15]. Petitioners contend that the supermajority voting provisions require supporting data and analysis. As the ALJ acknowledges, the issue is "largely a legal question." In fact, determining whether data and analysis is required under Section 163.3177(1)(f) is entirely a legal question, and within the Administration Commission's substantive jurisdiction. *Duke's Steakhouse Ft. Myers, Inc.*, 106 So.3d at 15.

In the conclusions of law, paragraph 203, the ALJ concludes the supermajority vote requirement is purely procedural because Section 163.3184, Florida Statutes, requires a vote by "not less than a majority" of the members of the County Commission. The ALJ then concludes

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[9] In the alternative, the Administration Commission should determine as a matter of overriding policy that balanced economic development requires an operational real estate market. *See Utilities of Fla.*, 420 So. 2d at 333.

that the requirements of Section 163.3184, Florida Statutes are not compliance issues and, implicitly, that the supermajority voting provisions are procedural because procedural requirements do not require supporting data and analysis.

The ALJ's analysis is incorrect and should be rejected. The challenge to the supermajority provision as not being "in compliance" is not based in Section 163.3184, Florida Statutes. That provision does not identify whether a provision fixing the number of votes is procedural or substantive in nature and whether it requires data and analysis. It merely establishes a minimum. The question of whether a matter is substantive or procedural is determined based on its impact. *See Benyard v. Wainwright*, 322 So.2d 473, 475 (Fla. 1975)("An argument can be made that the manner of the imposition of the sentence is procedural; however, it is our opinion that whether a sentence is consecutive or concurrent directly affects the length of time spent in prison and, therefore, rights are involved, not procedure.")

Black's Law Dictionary defines a procedural law as "the rules that prescribe *the steps* for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves." Black's Law Dictionary (10th ed. 2014) (emphasis added). Similarly, Merriam-Webster legal definition for procedure is "a series of *steps* followed in a regular definite order." Webster's New Collegiate Dictionary 937 (9th ed. 1989) (emphasis added). Broadly speaking, therefore, procedural provisions provide the steps to be taken, and substantive provisions impact the outcome. The fact that a vote is required is procedural. But, how many votes is substantive.

Unlike provisions that, for example, dictate when or how to file an application that do not make it more or less likely that such an application will be granted, the entire point of this supermajority provision is to make passage more difficult, as the County's own witness effectively acknowledged when explaining the purpose of the provision was to ensure "strong

near consensus support." [Vol. III, 320/11-17]. A supermajority provision, therefore, is no different in effect from heightening the standards for a particular application to be granted. The potential impact on the Petitioner's rights is the critical distinction. *See, e.g., Benyard, supra*.

Because the supermajority voting provision is substantive and not procedural, supporting data and analysis is required. Because no competent substantial evidence of such supporting data and analysis exists, the supermajority provision should be found to be not "in compliance."

Respectfully submitted, this 16th day of June, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following by email only on this 16th day of June, 2015. The original of this document will be retained in my office for the duration of this case and of any subsequent appeal or subsequent proceeding.

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STATE OF FLORIDA
ADMINISTRATION COMMISSION

MIDBROOK 1ST REALTY CORP.,

Petitioner,

v.

CASE NOs.: 13-3397
14-135

MARTIN COUNTY, FLORIDA,

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Intervenors.
_______________________________________/

RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED ORDER

Respondent, Martin County, Florida ("Respondent"), by and through its undersigned counsel and pursuant to Rule 28-106.217, Florida Administrative Code, hereby submit its exceptions to the Recommended Order ("RO") of the Administrative Law Judge ("ALJ") entered on June 2, 2015.

Unlike findings of fact, an ALJ's legal conclusions carry with them no presumption of correctness. An agency may enter a final order rejecting or modifying conclusions of law over which it has substantive jurisdiction. Fla. Stat.

§120.57(1). Moreover, the label assigned by the ALJ to a finding of fact or conclusion of law is not dispositive as to whether the statement is a finding of fact or conclusion of law. See, *Kinney v. Dept. of State*, 501 So.2d 129, 132 (Fla. 5th DCA 1987).

An interpretation of the meaning of a provision in a comprehensive plan is a conclusion of law and the plain meaning of the provision therefore is usually applied unless the provision is ambiguous. See, *Johnson v. Gulf County*, 26 So.3d 33, 41 (Fla. 1st DCA 2010); *Dixon v. City of Jacksonville*, 774 So.2d 763, 765 (Fla. 1st DCA 2000) ("it is well established that the construction of statutes, ordinances, contracts, or other written instruments is a question of law . . . unless their meaning is ambiguous"). Similarly, whether a comprehensive plan amendment is consistent with a statute or rule is also a question of law. See, *Ashley v. State Admin. Comm'n*, 976 So.2d 1130, 1133 (Fla. 1st DCA 2008).

<u>Exception 1: Paragraph 35</u>

Respondent takes exception to first two sentences of paragraph 35, page 13 of the RO, "There are two locations of the USDs. The Eastern USD is located east of the Florida Turnpike, and the Indiantown USD is located in western Martin County." The subject sentences represent a mixed question of law and fact; the subject sentences represent an error of law in interpreting the Martin County Comprehensive Growth Management Plan ("CGMP").

The first of the subject sentences represents that there are more than one Urban Service District ("USD"), stating that there are two locations of the "USDs" (in plural form). The second of the subject sentences specifies an "Eastern USD" and an "Indiantown USD."

As opposed to the "Eastern USD" and an "Indiantown USD" as described in this paragraph, there is a Primary USD ("PUSD") and a Secondary USD ("SUSD"). A portion of the PUSD is located in eastern unincorporated Martin County, and a portion is located in an unincorporated Martin County area known Indiantown. Likewise, a portion of the SUSD is located in eastern Martin County, and a portion is located in Indiantown. T. 89-90; T. 354; County Ex. 1, P4-48.1 through P4-50; Pet. Ex. 1 Fig. 4-2;[1] see, Respondent's Proposed Recommended Order, paragraph 79 at page 22. This fact is clearly supported by the County's CGMP. Figure 4-2 is the adopted Exhibit in the CGMP that illustrates the County's PUSD and SUSD; it is attached hereto as "Exhibit A." See also, Policy 4.1C.1. (5), and Policy 4.7A.6 as two examples where this Figure is referenced. The separation of the USDs by eastern Martin County and Indiantown is referenced in only one policy, Policy 4.1D.4, as a factor to "consider" in the County's residential capacity analysis.

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[1]"T" refers to the transcript; "Ex." refers respective to exhibits of the County or the Petitioner ("Pet.).

To rectify the misinterpretation of the governing law, the subject sentences should be rewritten as follows: "There are two USDs. One is the Primary USD ("PUSD") and the other is the Secondary USD ("SUSD"). Portions of the PUSD and the SUSD are located east of the Florida Turnpike, as well as in Indiantown in western Martin County."

Exception 2: Title of Section 5

Respondent takes exception the title of section 5, page 30 of the RO, "Merging Eastern and Indiantown USDs" for the reasons provided in Exception 1, supra, which demonstrate that there are not Eastern and Indiantown USDs provided in the CGMP, but a PUSD and an SUSD, portions of each of which are located in eastern Martin County as well as Indiantown.

Exception 3: Paragraph 98

Respondent takes exception to paragraph 98, page 30 of the RO, by describing Petitioner as arguing against the "merging" of the "Eastern and Indiantown USDs" in determining residential capacities. Rather, Petitioner challenges "a merging of two separate areas of the County . . . even though the areas are not in proximity . . . . " See, "Amended Petition for Formal Administrative Hearing Following Partial Settlement," paragraph 27 at pp. 7-8.

For the reasons provided in Exception 1, supra, which demonstrate that there are not Eastern and Indiantown USDs provided in the CGMP, but a PUSD and an

SUSD, portions of each of which are located in eastern Martin County as well as Indiantown. The paragraph should be rewritten to accurately represent Petitioner's challenge to merging the analyses for two separate portions of the County, eastern Martin County and Indiantown.

Exception 4: Paragraph 99

Respondent takes exception to the phrase in paragraph 99, at page 30, "Eastern and Indiantown USDs" for the reasons provided in Exception 1, supra, which demonstrate that there are not Eastern and Indiantown USDs provided in the CGMP, but a PUSD and an SUSD, portions of each of which are located in eastern Martin County as well as Indiantown. The phrase "Eastern and Indiantown USDs" should be replaced with the phrase "eastern portion of Martin County and Indiantown."

Exception 5: Paragraph 100

Respondent takes exception to the phrases "Eastern USD" and "the Indiantown USD" in paragraph 100, at page 30, for the reasons provided in Exception 1, supra, which demonstrate that there are not Eastern and Indiantown USDs provided in a plan, but a PUSD and an SUSD, portions of each of which are located in eastern Martin County as well as Indiantown. The phrase "Eastern USD" should be replaced with "eastern portion of Martin County" and the phrase "Indiantown USD" should be replaced with the word "Indiantown."

Additionally, Respondent takes exception to the entire paragraph 100 as in error and inconsistent with paragraph 101 insofar as it identifies a shortfall of 616 units; subtracting 616 from 6, 260 provides the net excess capacity for the 2009 need analysis for both portions of the USDs. If this number is compared to the oversupply of 17, 361 in the 2013 needs analysis – identified in paragraph 101 – then clearly merging the two portions of the USDs do not account for the substantial difference in the numbers.

Exception 6: Paragraph 102

Respondent takes exception to the sentences in paragraph 102, at page 31, “The 2009 data showed an ‘imbalance’ between the vacant land capacity in the Eastern and Indiantown USDs, and that, based on population projections for the Indiantown area, the imbalance was likely to continue. Having determined that separation of the USDs was appropriate for the County’s population trends, the County proceeded to calculate demand for the two areas separately.”

For the reasons provided in Exception 1, supra, which demonstrate that there are not Eastern and Indiantown USDs provided in a plan, but a PUSD and an SUSD, portions of each of which are located in eastern Martin County as well as Indiantown. Thus, the premise for the subject sentences in this paragraph is fundamentally flawed and based on a misinterpretation of the law. CGMP Goal 4.7 of the CGMP regulates urban sprawl by directing growth to areas with urban

public facilities and services consistent with levels of service. Objective 4.7A seeks to concentrate higher densities and intensities of development where public facilities are available or are programmed to be available at the levels of service in the Capital Improvements Element. These Goals, Objectives, and Policies ("GOPs") have not been amended since they were adopted in 1992. Since these GOPs form the operative basis for decisions made as to development in the PUSD, the methodology used to calculate population data is irrelevant to a determination as to whether the Operative Amendments are "in compliance" and the subject sentences in paragraph 102 should be stricken.

Exception 7: Paragraph 105

Respondent takes exception to paragraph 105, page 32 of the RO, which states, "The County's decision to combine the Eastern and Indiantown USDs in the 2013 methodology is not supported by relevant data and analysis available at the time the Operative Amendments were adopted." The explanation for this exception is provided more fully in Exception 6, supra. Moreover, since the GOPs of the CGMP cited in Exception 6 have not been amended since they were adopted in 1992, "relevant data and analysis available at the time the Operative Amendments were adopted," as iterated in this paragraph, is misplaced as such data and analysis is not required to support a methodology for making population calculations based upon the specified GOPs. Residential capacity analysis considers the entire

unincorporated area of the specific USD that would be analyzed under Goal 4.7. See specifically Policy 4.7.A.6 for the PUSD and Policy 4.7B.3 for the SUSD. Neither Policy requires the expansion of the USD to be based on reasonable capacity existing in a portion of the USD.

<u>Exception 8: Paragraphs 106, 107, 108, 109, 110, and 111</u>

Respondent takes exception to paragraphs 106, 107, 108, 109, 110, and 111, pages 32-33 of the RO, for the reasons fully outlined in Exceptions 6 and 7, supra. Like the bases for the Exceptions 6 and 7, these paragraphs represent a fundamental error in interpreting the CGMP. The methodology for arriving at population data to support the longstanding GOPs in the CGMP, as iterated in Exceptions 6 and 7, is irrelevant and is not a basis for determining that the Operative Amendments are not “in compliance.” These paragraphs should be stricken.

<u>Exception 9: Paragraph 112</u>

Respondent takes exception to paragraph 112, page 33 of the RO, for the reasons fully outlined in Exceptions 6, 7, and 8, supra. For those reasons and the others iterated in this exception, this paragraph should be stricken.

Based on the reasons outlined in Exceptions 6, 7, and 8, this conclusory paragraph is based upon a fundamental misreading of the CGMP, which has resulted in erroneous conclusions of law therein. Additionally, by the terms of

existing Policy 4.1D.3 and Policy 4.1D.5, there is no mention of where the demand for housing is to be located. Existing policy 4.1D.4 does specify that the Urban Service Districts for eastern Martin County and Indiantown "shall be considered separately" and, as a result, the calculations are made separately for each of these two areas and the demand is evaluated likewise. The existing policy does not preclude the County, however, from using the calculations "considered" for each of these areas to determine the appropriate allocations between and among all locations of the PUSDs and SUSDs within its jurisdiction. This paragraph thus represents an erroneous conclusion of law and should be replaced as follows:

> 111. The County's data collection regarding population projections and trends are calculated and considered separately for the eastern part of Martin County and Indiantown. There is nothing in the existing CGMP Policy 4.1D.4 that prohibits the County for making appropriate allocations between and among all locations of the PUSD and the SUSD within its overall jurisdiction, however, once those projections and trends are calculated and considered separately.
>
> 112. Petitioner has not proved, beyond fair debate, that merging two separate areas of the County to determine ultimate residential capacity within the overall jurisdiction of the County – or that the provisions of Policy 4.1D.3 or Policy 4.1D.5 – are professionally unacceptable.

Exception 10: Paragraph 118

Respondent takes exception to the second sentence of paragraph 118, page 35 of the RO, “Petitioner alleges the Operative Amendments contravene this provision by combining the Eastern and Indiantown USDs for purposes of residential housing capacity.” The reasons that the reference to “Eastern and Indiantown USDs” is an error of law in interpreting the CGMP is fully outlined in Exceptions 6, 7, and 8, supra. More specifically, for the reason outlined in Exception 3, supra, the sentence should be rewritten to accurately represent Petitioner’s challenge to merging the analyses for two separate portions of the County, eastern Martin County and Indiantown, rather than the “Eastern and Indiantown USDs.”

Exception 11: Paragraphs 118 and 119

Respondent takes exception to the following phrases in each of the respective paragraph 118 – “Eastern and Indiantown USDs” – paragraph 119 – “Indiantown USD” – and paragraph 120 – “Eastern and Indiantown USDs” for the reasons iterated in Exceptions 6, 7, and 8, supra. These references should be modified to reflect “eastern Martin County” and “Indiantown,” respectively.

Exception 12: Paragraph 123

Respondent takes exception to the phrase "merging the two USDs" in the first sentence of paragraph 123, pages 36-37 of the RO. The phrase should be replaced with the phrase, "merging two separate areas of the County to determine residential capacity," for the reasons fully iterated in Exceptions 6, 7, and 8, supra.

Exception 13: Paragraph 126

Respondent takes exception to paragraph 126, pages 37-38 of the RO, and it should be stricken. First, the paragraph represents a fundamentally flawed analysis of the CGMP, as outlined in Exceptions 6, 7, and 8, supra. Additionally, Policy 4.7A.7 of the Operative Amendments was not challenged. See, "Amended Petition for Formal Administrative Hearing Following Partial Settlement."

The paragraph is thus outside the record and is speculative and represents an erroneous conclusion of law in interpreting the CGMP. The CGMP allows approval of a Future Land Use Map amendment without the required outcome of the Residential Capacity Analysis ("RCA") for uses within the USDs.

Exception 14: Paragraphs 201 and 202

Respondent takes exception to paragraphs 201 and 202, page 56 of the RO, and those paragraphs should be stricken, for the reasons articulated in Exceptions 6, 7, and 8, supra. The substance of these two paragraphs represent erroneous conclusions of law based on a fundamental misinterpretation of the CGMP.

Exception 15: Paragraph 210

Respondent takes exception to paragraph 210, page 58 of the RO. It should be stricken for the reasons provided in Exceptions 6, 7, and 8. It should be rewritten to provide, "Petitioner has not proved beyond fair debate that the County's methodology for calculating housing demand and supply based on the PUSD and SUSD must be supported in the Operative Amendments by data and analysis."

Exception 16: Paragraph 211

Respondent takes exception to paragraph 211 for the reasons expressed in the above exceptions. The paragraph is an erroneous conclusion of law and is inconsistent with the findings of fact. It should be rewritten to state, "Petitioner has not proved beyond fair debate that the Plan Amendment is inconsistent with section 163.3177(2)."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following by electronic mail on this 17th day of June, 2015.

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_/S/ *Dan R. Stengle*

STATE OF FLORIDA
ADMINISTRATION COMMISSION

MIDBROOK 1ST REALTY CORP.,

Petitioner,

v.

CASE NOs.: 13-3397
14-135

MARTIN COUNTY, FLORIDA,

Respondent,

and

1000 FRIENDS OF FLORIDA, INC.; MARTIN COUNTY CONSERVATION ALLIANCE; TREASURE COAST ENVIRONMENTAL DEFENSE FUND, INC. d/b/a INDIAN RIVERKEEPER; TOWN OF JUPITER ISLAND, FLORIDA; TOWN OF SEWALL'S POINT, FLORIDA; and CITY OF STUART, FLORIDA

Intervenors.
____/

NOTICE OF FILING "EXHIBIT A" TO RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED ORDER

Respondent, Martin County, Florida ("Respondent"), by and through its undersigned counsel and pursuant to Rule 28-106.217, Florida Administrative Code, hereby submit "EXHIBIT A" to its exceptions to the Recommended Order of the Administrative Law Judge entered on June 2, 2015.

Respectfully submitted,

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_/S/ Dan R. Stengle

Martin County

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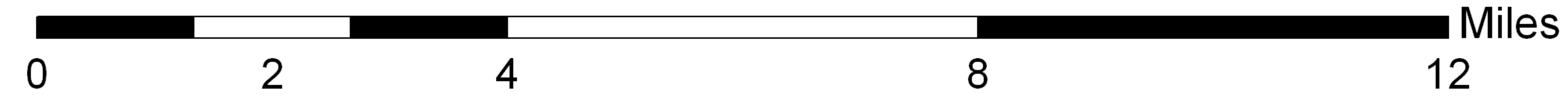
Created By: Emily Kohler (GMD)
Plot Date: July 9, 2013

Urban Service District - Figure 4-2



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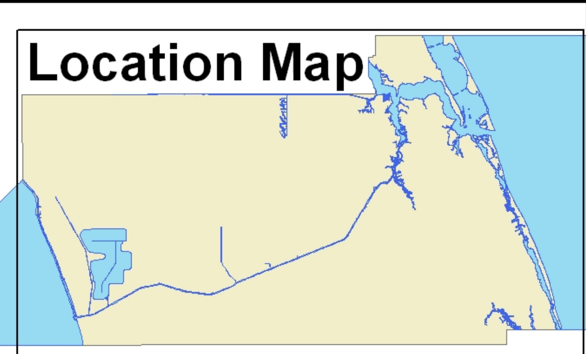


Legend

- Major Roads
- Roads
- Primary Urban Service District
- Secondary Urban Service District

NE CAUSEWAY BLV
NE INDIAN RIVER DR
NW JENSEN BEACH BLV
NE SAVANNAH RD
NW FEDERAL HWY
NE OCEAN BLV
NE DIXIE HWY
NW DIXIE HWY
SW FEDERAL HWY
SE OCEAN BLV
SE OCEAN A1A BLV
SE OCEAN BLV
SW MURPHY RD
SW HIGH MEADOW AVE
SE MONTEREY RD
SW MARTIN DOWNS BLV
S KANNER HWY
SE INDIAN ST
SW MARTIN HWY
FLORIDA TRP
SE WILLOUGHBY BLV
SE SALERNO RD
SE COVE RD
SE DIXIE HWY
SW WARFIELD BLV
SW 96 TH ST
SW ALLAPATTAH RD
SW PRATT-WHITNEY RD
SE BRIDGE RD
SE BEACH RD
SW BRIDGE RD
SE BRIDGE RD
SW CITRUS BLV
SW CONNERS HWY
SW KANNER HWY
INTERSTATE 95
SE FEDERAL HWY

STATE OF FLORIDA
ADMINISTRATION COMMISSION

MIDBROOK 1ST REALTY CORP;

Petitioner,

CASE NOs: 13-3397GM
14-0135GM

v.

MARTIN COUNTY, FLORIDA,

Respondent,

and

1000 FRIENDS OF FLORIDA, INC.;
MARTIN COUNTY CONSERVATION
ALLIANCE; TREASURE COAST
ENVIRONMENTAL DEFENSE FUND, INC.
d/b/a INDIAN RIVERKEEPER;
TOWN OF JUPITER ISLAND, FLORIDA;
TOWN OF SEWALL'S POINT, FLORIDA; and
CITY OF STUART, FLORIDA

Intervenors.
_______________________________________/

MARTIN COUNTY'S RESPONSE TO PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

Respondent Martin County ("Respondent"), by and through its undersigned counsel and pursuant to Rule 28-106.217, Florida Administrative Code, hereby submits its Response to the Exceptions to Recommended Order filed by Petitioner, Midbrook 1st Realty Corp. ("Petitioner") on June 16, 2015.

RESPONSE TO EXCEPTION 1: PARAGRAPH 129

Petitioner's Exception to Paragraph 129 is unclear about precisely what it requests the Commission to do about the paragraph. Apparently, however, it takes issue with the

Administrative Law Judge's ("ALJ's") summary and characterization of the language that appears in Policy 2.4C.3.

In the first sentence of Policy 2.4C.3, the ALJ indicates that the policy, read as a whole, includes variables other than solely projected population growth when determining the need for commercial and industrial land use amendments. Petitioner's exception asserts that it is appropriate to give "full effect" to all provisions of a policy. Its exception, however, then fails to do so, and seeks to nullify the language in Policy 2.4C.3 that clearly states – by its express terms – that the determination of need must consider other factors than just projected population growth. These factors include both permanent and seasonal populations (T. 433-434), as well as: (1) the increase in developed commercial and industrial acreage in relation to population increases over the preceding ten years, (2) the existing inventory of vacant commercial and industrial land, and (3) the goals, objectives, and policies of the comprehensive plan, including the Economic Element. (T. 411; County Ex. 2, pp 7-8)

It is unclear whether Petitioner's exception supports, reinterprets, or assails the second sentence of Paragraph 129. What is clear is that the exception seeks to improperly re-label a finding of fact as a conclusion of law. Charles Pattison – a former Planning Division Director at the state land planning agency and a Fellow of the American Institute of Certified Planners – testified as a fact as to what the Policy provides, and testified that the Policy does not impermissibly limit commercial and industrial plan amendments based solely on population growth. (T. 411) The argument in this exception should be rejected as there is indeed competent substantial evidence in the record to support the findings of fact in Paragraph 129. Petitioner's exception cites to no record evidence to the contrary.

As the testimony established, the purpose of Policy 2.4C.3 is to require an assessment by the County of the adequacy of the amount of land in its jurisdiction that can accommodate commercial and industrial land uses and how to analyze future plan amendments proposed for the same. (T. 432) If the Commission determines that Policy 2.4C.3 should be amended to more clearly indicate that the commercial and industrial lands assessment includes other factors in addition to population growth, it should direct the Respondent to make such an amendment to the Policy.

Alternatively, this paragraph should be upheld as a reasonable interpretation of Policy 2.4C.3. This Policy read as a whole plainly supplies multiple considerations, not only population projections, in considering the amount of land needed to accommodate commercial and industrial uses. Each of those factors are appropriate factors under Section 163.3177(6), Florida Statutes, for determining land use needs.

RESPONSE TO EXCEPTION 2: PARAGRAPHS 130 and 204

Petitioner takes exception to the ALJ's conclusion in Paragraphs 130 and 204 that Petitioner did not demonstrate beyond fair debate that Policy 2.4C.3 is not based on data and analysis. This exception must be rejected because Petitioner did not provide – nor can it cite to – any record evidence regarding contrary relevant and appropriate data and analysis in existence at the time the Policy was adopted. It bears noting that this Policy was amended during the proceedings as a result of a Partial Settlement agreement with other Petitioners. (County Ex. 2)

The burden of proof and persuasion is placed squarely on Petitioner in proceedings such as the instant case. Having failed to meet its burden of proof at the hearing, Petitioner now asks the Commission to overlook this shortcoming in its proof by constructing an argument that avoids the question entirely. Petitioner's exception misreads the policy as being limited to the

factor of population projections, as explained in Respondent's response to Petitioner's Exception 1, supra.

Policy 2.4C.3 is further supported by the provisions of Sections 163.3177(2), and (6)(a)2, Florida Statutes, which supply several factors for allocating land uses. Those statutory provision themselves can be considered as relevant and appropriate supporting data and analysis for the Policy.

Petitioner's exception to Paragraphs 130 and 204 should be denied.

RESPONSE TO EXCEPTIONS 3 - 6: BALANCED DEVELOPMENT

Petitioner's general exceptions 3-6 encompass more than 20 paragraphs in the Recommended Order. Nonetheless, these sweeping exceptions do not advise the Commission of which specific paragraphs they complain, nor of the specific concerns they raise about the numerous paragraphs that are purported to be assailed in these broadside exceptions. "[A]n agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." §120.57(1)(k), Fla. Stat. Moreover, in these exceptions, Petitioner does not request any specific action of the Commission as to any specific paragraphs in the Recommended Order, but instead asks for a remand on the basis that the ALJ erred in not accepting some of Petitioner's theories regarding deficiencies in the amendment.

The bases for Petitioner's exceptions are confusing and unclear. The exceptions state that "Petitioner advanced several lines of ***evidence*** as to why the Operative Amendments would create a lack of balance . . . ." [Emphasis added.] These exceptions then state, "[T]he ALJ erred in rejecting several of these arguments ***as a matter of law*** . . . ." and seek a remand to the ALJ

"with direction to reweigh the pertinent ***evidence*** . . . in the light of the Administration Commission's ***conclusions of law***." [Emphases added.] Evidence is not a conclusion of law and conclusions of law are not evidence, and the standards for review of findings of fact and conclusions of law are entirely different, as both Petitioner and Respondent have outlined in their Exceptions to the Recommended Order. The Third District Court of Appeal summarized clearly the law as follows:

> In *Gross v. Department of Health,* 819 So.2d 997, 1001 (Fla. 5th DCA 2002), the court held that an agency may not reweigh the evidence or reject the findings of fact contained in a recommended order. The Fifth District stated:
> Findings of fact in a recommended order may not be rejected or modified unless the agency states with particularity in its final order that the findings were not based upon competent substantial evidence or that the proceedings on which the findings are based did not comply with the essential requirements of law. When determining whether to reject or modify findings of fact in a recommended order, the agency is not permitted to weigh the evidence, judge the credibility of the witnesses, or interpret the evidence to fit its ultimate conclusions. Neither may an agency's responsibility to determine if substantial evidence supports the administrative law judge's findings of fact be avoided by merely labeling, either by the administrative law judge or the agency, contrary findings as conclusions of law. *Id.* at 1000–01 (citations and footnotes omitted). In addition, an agency abuses its discretion when it ignores findings of fact that are based upon competent substantial evidence. *Strickland v. Fla. A & M Univ.,* 799 So.2d 276, 278 (Fla. 1st DCA 2001).

N.W. v. Department of Children and Families, 981 So. 2d 599, 600 (Fla. 3rd DCA 2008)("[T]he Department had no authority to reweigh the evidence here. It was only allowed to determine whether the evidence was competent and substantial to support the ALJ's decision. *Brogan v. Carter,* 671 So.2d 822, 823 (Fla. 1st DCA 1996)." *Id.* at 602.

Likewise, it would be entirely inappropriate and illegal to remand a matter to an administrative law judge to require a reweighing of the evidence in a particular way that is more to a party's liking. Petitioner's blanket exception encompassing Paragraphs 158 through 182 and its suggestion that the case be remanded should be denied.

RESPONSE TO EXCEPTION 3: PARAGRAPH 162

In specific Exception 3 as to Paragraph 162, Petitioner requests that the Commission reject the ALJ's finding that the County was not required to prepare an economic analysis of the Operative Amendments prior to their adoption. This exception should be denied because there is record evidence to support the finding and, in addition, paragraph 162 contains an accurate statement of the law.

Charles Pattison testified that a local government is not required to analyze how policies will potentially impact property owners before adopting a comprehensive plan amendment. (T. 411-412) In addition, Section 163.3177(1)(f)2., Florida Statutes, provides that a local government is not required to undertake original data collection as part of the plan amendment process, contrary to what the economic analysis suggested by this exception would require.

To grant Petitioner's exception on this point would establish a new requirement that is not supported by the statutes. Further, granting the exception would place an impermissible burden on local governments for each and every plan amendment that is adopted.

RESPONSE TO EXCEPTION 4: PARAGRAPHS 171, 176 and 177

In Exception 4, Petitioner significantly misstates the Findings of Fact made by the ALJ with regard to Petitioner's failure to carry its burden of proof on the adequacy of commercial land in the CGMP. The ALJ noted that the outdated raw data contained in the CGMP, at Section 4.2.A(12)(b) (FOF 173; County Ex. 3, p. 32), had not been updated since the adoption of a FLUM amendment. The ALJ found that the FLUM amendment, known as Ag-TEC, added a substantial amount of commercial and industrial land to the County's inventory (FOF 176). Therefore, the ALJ found that the Petitioner had not carried its burden of proving beyond fair

debate that that CGMP does not designate adequate lands for commercial use to serve future needs. This exception should be denied.

RESPONSE TO EXCEPTION 5: PARAGRAPH 179

In its exception to Paragraph 179, Petitioner complains that the ALJ misinterpreted Petitioner's position regarding testimony offered at hearing regarding Objective 2.4C and Policy 2.4C.1. In this Finding of Fact, the ALJ correctly determined that Petitioner did not identify either the Objective or Policy in its Amended Petition for Formal Administrative Hearing, nor were they identified as issues in the Prehearing Stipulation.

Petitioner's exception is based on the legal authority of *In the Interest of A.M.*, 614 So. 2d 1161 (Fla. 4th DCA 1993). Petitioner's cited case is a child abandonment case under the Juvenile Justice Act. The appeals court upheld therein a finding of fact that the mother in the case had not lived up to her obligations to the child and failed repeatedly to adhere to the terms of a child protection performance agreement. The appellate court did not determine whether the petition was defective, but cited several opportunities for the mother to object in the trial court to the state's request to terminate parental rights, to which she did not avail herself. The legal basis cited in this exception is wildly inapposite.

Rather, the extensive list of definitive administrative cases outlined in footnote 18 of the Recommended Order controls. The Petitioner is limited to issues that were timely raised and is bound by the allegations in its petition.

Even these cases notwithstanding, the procedural basis upon which Petitioner takes exception to this paragraph should be rejected. Respondent objected to testimony offered by Mr. Metcalf on this issue, and did not waive its objection. (T. 231) Petitioner's issue was not raised in

its petition, and thus was determined to be untimely when raised at the hearing, and is even more so now.

Further, the exception provides that the Commission does not have jurisdiction to consider whether there was a waiver, and therefore asks for a remand to the ALJ as a **conclusion of law** with directions to consider the subject Objective and Policy "as ***evidence*** related to balance in the CGMP [Emphasis in original]." These evidentiary issues have already been determined by the ALJ, the evidence has been disregarded, and the evidence did not form the basis for any finding of fact. It would be entirely inappropriate to remand to the ALJ for a finding of fact that the Petitioner prefers, as more specifically outlined in Response to Exceptions 3-6, supra. This exception should be rejected.

RESPONSE TO EXCEPTION 6: PARAGRAPHS 181, 182 and 212

In Paragraph 181, the ALJ found that, even though the residential capacity analysis "does not allow the operation of real estate markets to provide adequate choices for residential housing, that finding does not support a finding that the Operative Amendments do not balance economic and environmental concerns." Petitioner's exception misstates the finding and the provisions of Sections 163.3177(1) and Section 163.3177(6)(a)4., Florida Statutes, to isolate its focus on "balanced economic development." The statutory provisions do not isolate or even mention "balanced economic development," but instead require that a comprehensive plan "provide the principles, guidelines, standards, and strategies for the orderly and balanced future ***economic, social, physical, environmental, and fiscal development of the area***" and that the future land use element provides for the "***amount of land designated for future planned uses***" *to* "***provide a balance of uses that foster vibrant, viable, communities and economic development***

opportunities." [Emphasis added.] In other words, a local government must include much more in its comprehensive plan than economic development strategies.

In Finding of Fact 181, the ALJ determined that the Operative Amendments interfere with the normal operation of the housing market. This determination was dependent upon the merging of the Indiantown and Eastern USDs, which the ALJ perceived as a defect in the Residential Capacity Analysis. Respondent disagrees with the ALJ's ruling on the merger issue and has filed exceptions thereto, but it supports the narrow basis for the determination that the normal operation of the housing markets are disrupted by the Operative Amendments.

Petitioner did not meet its burden beyond fair debate to prove that the Operative amendments do not balance environmental and economic concerns; therefore, this exception should be denied.

RESPONSE TO EXCEPTION 7: SUPERMAJORITY VOTE PARAGRAPHS 186, 187 and 203

Petitioner asserts that the Findings of Fact and Conclusions of Law relating to the supermajority voting provisions in Section 1.11.D(6) should be rejected because the provisions are not supported by data and analysis. In asserting that the supermajority provisions are substantive, thus requiring supporting data and analysis, Petitioner apparently concedes that, if the voting requirements are determined to be procedural, data and analysis are not needed to support the provisions.

Legally, factually, and logically, voting requirements for adoption of a comprehensive plan amendment are procedural in nature. In a challenge to a charter amendment requiring a unanimous vote by a city commission on matters affecting five or fewer parcels, the court determined that "the number of commissioners who must agree on an amendment" is a ***procedural*** requirement. *Citizens for Responsible Growth, v. City of St. Pete Beach*, 940 So. 2d

1144, 1149 (Fla. 2nd DCA 2006). Similarly, where a two-thirds vote requirement was imposed and resulted in the denial of a developer's rezoning application, the court found that the developer was not deprived of due process even if he was not aware of the two-thirds voting requirement because the city was not required to disclose that "procedural rule" to the developer. *Indiana Land Company v. City of Greenwood*, 378 F.3d 705 (U.S. Ct. App. 7th Cir. 2004).

The exception cites *Benyard v. Wainwright*, 322 So. 2d 473 (Fla. 1975) as the only legal basis for its argument. The case considers the issues pertaining to "substance" and "procedure" as between the Florida Legislature and the Supreme Court in a case dealing with whether a criminal sentence is concurrent or consecutive. The case is entirely inapplicable to the question in this case and could not be less controlling. Other than that case, the exception cites no case precedent for its assertion that the number of votes required for passage of a measure is substantive.

The supermajority requirement at issue is limited to a number of specific issues that are considered to be critical to the County. The only suggestion in the record by Petitioner as to what data and analysis are conceivably relevant and appropriate is that the County should have demonstrated difficult in implementing the plan with a simple majority vote. Unsurprisingly, the ALJ found this assertion to be without merit. As pointed out by the ALJ, data and analysis will be required to support future plan amendments, regardless of whether the amendment at issue needs three or four votes to attain approval. In *Hope v. City of Gainesville*, 55 So.2d 1172 (Fla. 1978), the Florida Supreme Court upheld the constitutionality of a city ordinance requiring four-fifths vote of the city commission to approve a zoning change when a written protest of more than 20 percent of land ownership in the area to be rezoned was filed, and stated that it "would appear to be not only a valid ordinance, ***but one which is desirable***. Both the public interests and

private interests are considered with the resultant effect that the public interests are paramount but not in derogation of the private interests . . . . *Id.* at 1174 [emphasis added].

As further evidence of the procedural nature of the supermajority voting requirements, it is noted that the provisions at issue are not included in the Goals, Objectives and Policies portion of the Martin County Comprehensive Growth Management Plan, but instead are included in a portion of the Plan entitled "Preamble," and subtitled "Section 1.11. – Amendment Procedure." That Section sets forth the dates upon which amendment applications must be filed, the procedures to be followed for processing applications, and the processes – including voting requirements – that the County Commission will follow in taking action on amendments. (County Ex. 3. pp. 11-17)

In its exception relating to the supermajority requirement, Petitioner continues to ignore the irrefutable fact that the provisions of the Florida Statutes applicable to adopting comprehensive plan amendments are located in Section 163.3184, and that section is not listed in the definition of "in compliance" found in Section 163.3184(1)(b), Florida Statutes. That provision states:

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

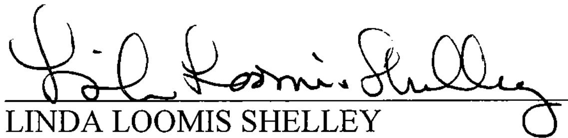
The only bases for which a determination of compliance may be made are the enumerated statutes and plans set forth in the above-cited statutory provision. See, *Cemex Constr. Materials Fla., LLC et al v. Lee County*, Case No. 10-2988GM (DOAH June 24, 2011; DCA Apr. 10, 2012); *Emerald Lakes Residents' Ass'n Inc. v. Collier County*, Case No. 02-3090GM (DOAH Feb. 10, 2003), adopted in part by Case no. DCA 03-GM-103 (DCA May 8, 2003); *Dep't of*

Community Affairs v. Metro-Dade County, Case No. 90-3599GM (DOAH Dec. 26, 1991; DCA May 31, 1993). In taking final action in a compliance case, the Administration Commission cannot go beyond the authorities listed in Section 163.3194(1)(b), Florida Statutes, in making a determination of compliance.

The supermajority voting requirement is the result of a discretionary decision wholly within the County's home rule powers. It does not alter or add any steps to the plan amendment process outlined in Chapter 163, Part II, Florida Statutes.

The exception should be rejected.

Respectfully submitted this 26th day of June, 2015,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following by email only on this 26th day of June, 2015.

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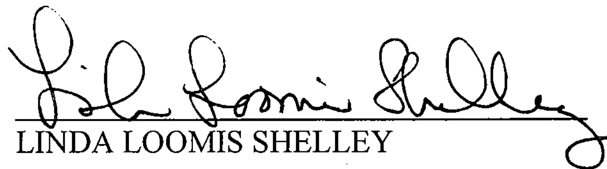

LINDA LOOMIS SHELLEY

STATE OF FLORIDA
ADMINISTRATION COMMISSION

MIDBROOK 1ST REALTY CORP.,

Petitioner,

CASE NOs.: 13-3397
14-135

v.

MARTIN COUNTY, FLORIDA,

Respondent,

and

1000 FRIENDS OF FLORIDA, INC.;
MARTIN COUNTY CONSERVATION
ALLIANCE; TREASURE COAST
ENVIRONMENTAL DEFENSE FUND, INC.
d/b/a INDIAN RIVERKEEPER;
TOWN OF JUPITER ISLAND, FLORIDA;
TOWN OF SEWALL'S POINT, FLORIDA; and
CITY OF STUART, FLORIDA

Intervenors.
____/

PETITIONER'S RESPONSES TO RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED ORDER

Petitioner, Midbrook 1st Realty Corp. ("Petitioners"), by and through undersigned counsel, pursuant to Rule 28-106.217, Florida Administrative Code, hereby submits the following responses to the Respondent's Exceptions to the Recommended Order. Respondent, Martin County ("Respondent" or "County") filed its exceptions to the Recommended Order ("RO") on June 17, 2015. Petitioner timely files this response within 10 days from the date Respondent filed its exceptions with the Administration Commission.

General Response

Respondent's arguments focus exclusively on three concepts as related to the change in the way it views its Urban Service Districts ("USDs") for calculating future residential demand

and available residential capacity to meet that demand. Calculating future housing demand and the residential capacity to meet that demand is necessary to meet the requirements of Section 163.3177(1)(f)3, Florida Statutes, of the Community Planning Act to plan for 10 years of growth. [Vol. III, 354/12-18, 390/25-391/5].[1] Respondent therefore performs two sets of calculations. First, Respondent calculates the future demand for residential housing. [Vol. I, 106/4-12]. Second, it calculates the capacity of existing residential housing to accommodate the future demand. [Vol. I, 105/21-25]. Any demand that exceeds capacity eventually results in an expansion of the urban service districts, i.e., the region in which growth is generally allowed. [Resp. Ex. 3, P. 112; Vol. II, 186/3-8].[2]

For some time Respondent has had two types of urban service districts: a primary urban service district, where growth is focused, and a secondary urban district, which serves as a transition area to rural parts of the County. [Resp. Ex. 3, PP. 111, 114]. As shown in Exhibit A to Respondent's Exceptions and Petitioner's Exhibit 27, the primary and secondary urban service districts are spatially separated such that one section of the primary urban service district and one section of the secondary urban service district are East of the Florida turnpike along the coast, and another section of the primary and secondary urban service districts are located West of the Florida turnpike, near Indiantown. In the set of amendments being proposed by Respondent (the "Operative Amendments"), Respondent combined the demand and capacity of the primary urban service district in the East with the demand and capacity near Indiantown when performing the demand and capacity calculations. [Vol. II, 275/15-23]. It similarly combined the secondary urban service district locations in the East and near Indiantown for these calculations. [Vol. II, 275/15-23]. This merger is the root problem of the residential demand and residential capacity analysis in the CGMP, as amended.

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[1] Citations to the transcript of the hearing are described as "[Vol. ___, P/L]."
[2] Citations to the Exhibits are described as either "Pet. Ex. ___, P. ___]" or "[Resp. Ex. ___, P. ___]."

Respondent's exceptions are all intertwined and based on a misreading of the RO, in that Respondent believes the ALJ misunderstood Martin County's urban service districts. The ALJ did not misunderstand. The ALJ noted that Martin County has primary and secondary urban service districts. [RO, Para. 34].[3] The ALJ referred to the primary and secondary urban service district in the East as the Eastern USDs, and referred to the primary and secondary urban service district near Indiantown as the Indiantown USDs. [RO, Para. 35]. The parties similarly referred to these at hearing as the Eastern and Indiantown USDs, as was done before the Operative Amendments in the CGMP. [Resp. Ex. 3, PP. 71, 93; Vol. I, 90/18-23].

The Eastern USDs and the Indiantown USDs are significantly different. The Eastern and Indiantown USDs are separated by twelve miles of agricultural land. [Pet. Ex. 27; Vol. I, 108/15-21]. The Indiantown USDs are characterized by low residential demand and high capacity. [Vol. II, 275/14-23]. Its residents are primarily engaged in agricultural work or commute to Palm Beach or Broward County. [Vol. II, 275/24-276/6]. The Eastern USDs are characterized by high demand and low capacity. [Vol. II, 275/14-23]. The area east of the Florida turnpike – where the Eastern USDs are located – contains almost 88% of the County's population. [Pet. Ex. 26, P. 5]. In the Operative Amendments, Respondent attempts to prevent growth in the Eastern USDs by combining the Eastern USD and Indiantown USD for purposes of calculating capacity (i.e., supply) and demand. [Vol. II, 157/2-158/9, 186/3-8]. So long as abundant capacity continues to exist in the Indiantown USDs, new development is required to be located there, before Respondent can expand the Eastern USDs, even though that is where demand will exist.

A significant amount of excess capacity exists in the Indiantown USD. In 2009, before the Operative Amendments, Respondent calculated a *shortage* of 616 units in the Eastern USD to meet demand, and an *oversupply* of 6,260 units in the Indiantown USD. [Pet. Ex. 26, P. 11].

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[3] Citations to the Recommended Order are described as "[RO, Para. ___]."

As would be required by the Operative Amendments, Respondent did not separate the Eastern and Indiantown USD in its residential calculations in 2013, but calculated an even greater oversupply of housing. [Resp. Ex. 39, PP. 9-10]. The only evidence regarding the relative capacity between the Eastern and Indiantown USDs in 2013 was that it had not significantly changed. [Resp. Ex. 7, PP. 11-14]. Therefore, when the Eastern and Indiantown USDs are combined to calculate residential capacity and demand, the abundance of residential capacity and the lack of residential demand in the Indiantown USDs will support a conclusion that there is no need to expand the Eastern USDs, even though there is no residential capacity and high residential demand in the Eastern USDs.

Respondent's combination of urban service districts for purposes of measuring demand and capacity knowingly defies the reality of where the demand for growth exists and Respondent was unable to present any data or analysis to support this reality-defying approach to comprehensive planning and unable to show that their methodology is based on professionally accepted principles. Respondent's own staff member responsible for making such calculations, Ms. Samantha Lovelady, testified she would want to know the pertinent information for the Eastern and Indiantown USDs, not just their combined totals. [Vol. I, 116/13-16]. The semantic arguments in the Respondent's Exceptions do not change this factual determination made by the ALJ and supported by the record. [Resp. Exceptions, P. 7].[4]

Aside from Respondent's semantic misunderstanding, Respondent's arguments now boil down to an assertion that they do not need to prove that their "methodology for calculating housing demand and supply based on the [urban service districts] must be supported in the Operative Amendments by data and analysis." [Resp. Exceptions, P.12]. A slight variation on this argument is that no data and analysis is needed to justify combining the Eastern and

[4] Citations to the Respondent's Exceptions are described as "[Resp. Exceptions, P. ___]."

Indiantown USDs in their future planning efforts because of other provisions in the Martin County Comprehensive Growth Management Plan ("CGMP"), although this is really an effort to revive their argument that they should be able to insist on growth where people do not want to live.

Respondent's argument that they do not need to supply data and analysis to justify combining the Eastern and Indiantown urban service districts for purposes of calculating residential capacity and demand is not supported by the facts, the law, or logic. Respondent's position in the prehearing stipulation was "[t]he population projections, residential demand analysis and residential capacity and vacant land analysis methodologies are professionally acceptable and are based upon relevant and appropriate data and analysis, to which the County reasonably reacted." [Prehearing Stip., Para. 2(b)(2)].[5] This is the position Respondent presented through testimony at trial and in its Proposed Recommended Order. [Vol. III, 408/9-15; Resp. PRO, Paras. 106-11].[6] While the County asserted repeatedly (albeit incorrectly) at hearing that other provisions of the CGMP were procedural or interpretative and did not, therefore, require supporting data and analysis, they presented no testimony that components of the residential capacity or demand methodology could lack data and analysis. This after the fact argument should be dismissed as untimely and without merit.

Section 163.3177(1)(f), Florida Statutes, is abundantly clear. "All mandatory and optional elements of the comprehensive plan and plan amendments *shall* be based upon relevant and appropriate data and an analysis by the local government that may include, but not be limited to, surveys, studies, community goals and vision, and other data available at the time of adoption of the comprehensive plan or plan amendment" (emphasis added). The County's position is inconsistent with this requirement. If the County's argument is accepted, Respondent's position

[5] Citations to the Joint Prehearing Stipulation are described as "[Prehearing Stip., Para. ___]."
[6] Citations to the Respondent's Proposed Recommended Order are described as "[Resp. PRO, Para. ___]."

would allow local governments to make housing demand and capacity determinations based on fantasy, divorcing comprehensive plans from reality. As noted by Respondent's expert, Mr. Pelham, local governments perform capacity analysis because there is a statutory requirement that a local government accommodate a minimum of ten years of population growth. [Vol. III, 391/6-12]. Respondent's novel approach would therefore not only undermine the data and analysis requirement in Section 163.3177(1)(f), Florida Statutes, but would also undermine the requirement in Section 163.3177(1)(f)3, Florida Statutes, referenced by Mr. Pelham. The Administration Commission should reject this reckless approach to community planning.

Respondent also asserts that it can "make appropriate allocations between and among all locations of the primary and the secondary urban service districts within its overall jurisdiction…." [Resp. Exceptions, P.9]. This vague assertion seems to suggest that regardless of where demand actually exists, the County can insist on allocating that demand elsewhere. This is not planning at all. Petitioner presented the sole economic expert at the hearing, Dr. Fishkind. He testified that while Martin County might like to treat the areas as a single unit for planning, they cannot "change arithmetic to… say two plus two equals twenty-seven. The laws of arithmetic have not been revoked in Martin County. So simply combining the two areas in these amendments that were separated, east and west, is a cynical attempt to get around economics and put a planning persona on it…." [Vol. II, 290/4-15]. If accepted, Respondent's theory would allow a local government to locate future development far from a location where anyone could or would want to live yet claim to have met its statutory obligations to accommodate new growth. Such escapes from reality would undermine the purposes of the Community Planning Act.

<u>Response to Exception 1</u> (Paragraph 35)

Respondent asserts that the RO is incorrect in stating that there are two locations for the urban service districts, and labeling these as the Eastern and Indiantown USD, when according to Respondent the two urban service districts are the primary and secondary urban service districts. The ALJ's explanation of the urban service districts is clear and correct. In paragraph 34, the ALJ recognizes that the County "incorporate[d] primary and secondary urban service districts (USDs)" in 2009, and says in paragraph 35 that there are "two locations of the USDs." Paragraph 35 uses the plural ("USDs") indicating that the RO is referring to both the primary and secondary USD as was done in paragraph 34. The ALJ understood the difference.

Respondent asserts that the separation of the Eastern and Indiantown USDs is referenced only in Policy 4.1D.4 and only then as a factor to "consider" in the residential capacity analysis. This is contradicted by other provisions in the CGMP and Respondent's own employees. Newly-created Section 1.7C of the Operative Amendments explains how residential capacity would be calculated, providing that it will measure "capacity for residential development within each of the urban service districts [referring to the primary and secondary urban service districts] to meet the projected population needs …." [Resp. Ex. 3, P. 10]. It makes no mention of calculating the capacity for the Eastern or Indiantown portions of the PUSD or SUSD, meaning that the Eastern and Indiantown USDs will not be independently calculated, because they are merged. Similarly, Table 4-6 which presented the residential capacity for the "eastern USD and Indiantown USD" – the same language used by the ALJ - has been deleted. At hearing, the Martin County employee who performed the population projections in 2009 and again in 2013 testified as follows:

> Mr. Seymour: Well, here [in the residential capacity calculations for 2009] you have an east and you have a west chart. You don't look at them separately anymore now; is that correct?

Ms. Lovelady: Yes.

[Vol. III, 112/4-7]. Petitioner's expert also testified that the available capacity in the Indiantown USDs will prevent the expansion of the Eastern USDs. [Vol. I, 157/2-155/9, 186/3-189/2].

There was no legal misinterpretation of the CGMP by the ALJ regarding the two USDs, but a finding of fact for which there is competent, substantial evidence that Respondent no longer separates its two urban service districts into Eastern and Indiantown locations in calculating residential capacity. To the extent any legal interpretation of the CGMP is involved, it is interpretation of a vague or ambiguous provision about what it means to be "considered" and is appropriately resolve by a finding of fact supported by Respondent's own staff that cannot be overturned based on the competent, substantial evidence. *See Dixon v. City of Jacksonville*, 774 So.2d 763, 765 (Fla. 1st DCA 2000).

Respondent's exception should be rejected.

Response to Exceptions 2-5 (Title of Section 5, Paragraphs 98-100)

Here again, Respondent argues that it is incorrect for the RO to refer to Eastern and Indiantown USDs because there is instead a Primary USD and Secondary USD. As explained in the Response to Exception 1, however, Respondent split the Primary USD and Secondary USD into Eastern and Indiantown sections in 2009 and attempts to combine them in the Operative Amendments. Such a finding is based on competent, substantial evidence and cannot be disturbed.

Respondent argues that the change from the 2009 residential capacity presented in paragraph 100 could not account for the substantial oversupply in paragraph 101. The RO does not suggest that the merging of the urban service districts accounts for the entire oversupply in 2013, and addresses elsewhere in Section 4 additional possible reasons for this change. [RO,

Paras. 70-92]. There was testimony explaining how numerous changes to the CGMP as amended caused this sudden increase in supply. [Vol. II, 154/8-155/4]. Regardless, there is competent, substantial evidence to support paragraph 100, as it quotes nearly verbatim from the Respondent's Vacant Land Inventory and Residential Capacity Analysis Technical Memorandum, which was incorporated into the CGMP. [Pet. Ex. 26, P. 11; Resp. Ex. 3, P. 85].

Respondent's exceptions should be rejected.

Response to Exception 6 (Paragraph 102)

This exception is based on Respondent's improper position that there are no Eastern and Indiantown USDs in the CGMP. As explained earlier, however, the existence of Eastern and Indiantown USDs is based in the plain language of the CGMP and is supported by competent, substantial evidence and should not be disturbed.

Respondent also appears to argue that the existence of the Eastern and Indiantown USDs is based on Goals, Objectives, and Policies elsewhere in the CGMP and consequently the population methodology is irrelevant. This either amounts to an argument that Martin County can allocate demand wherever it deems appropriate or does not need to provide data and analysis. As explained above, if accepted, this position would allow Respondent to flout reality by insisting on development only in places far from where people want to live.

Regardless, paragraph 102 is a simple finding of historical fact and is based on competent, substantial evidence. Respondent's 2009 Vacant Land Inventory and Residential Capacity Analysis Technical Memorandum showed the imbalance in available land between the Eastern and Indiantown USDs (i.e., a shortage of 616 units in the Eastern USD, and a supply of 6,260 units in the Indiantown USD) and then says it is appropriate to treat these areas separately based on population trends east of the Florida turnpike. [Pet. Ex. 26, P. 11].

Respondent's exception should be rejected.

Response to Exception 7 (paragraph 105)

In addition to reiterating arguments made and responded to above, Respondent also asserts in Exception 7 that "[n]either Policy [4.7A.6 or 4.7B.3] requires the expansion of the USD to be based on reasonable capacity existing in a portion of the USD." It is not clear what this means. The CGMP, as amended, is clear that the USDs cannot be expanded so long as capacity for development exists in the USDs during the planning window. [Resp. Ex. 3, PP. 80, 91, 112; Vol. II, 186/3-8]. In any event, Paragraph 105 is a finding of fact is supported by competent, substantial evidence in the form of expert testimony by Petitioner's expert Dr. Depew. [Vol. II, 156/24-157/1].

Respondent's exception should be rejected.

Response to Exception 8 (paragraph 106-111)

Respondent next argues that paragraphs 106-111 must be stricken based on its previous exceptions. The previous exceptions being without merit, so too is this exception. Paragraphs 106-111 are findings of fact supported by competent, substantial evidence.

These paragraphs provide that Respondent offered two explanations for merging the Eastern and Indiantown USDs in their residential capacity analysis "neither of which are persuasive." Respondent says Policy 4.7A.7 supports the combination. The ALJ correctly rejected the argument regarding Policy 4.7A.7 because Respondent did not explain its relationship to the merger. [RO, Para. 107 & n.11]. This finding is supported by Policy 4.7A.7, which does not make clear or explain any connection to the decision to merge the Eastern and Indiantown USDs, and the credibility determination about Ms. Lovelady's conclusory testimony on this point. [Resp. Ex. 3, P. 112; Vol. I, 113/6-114/5]. As the ALJ notes, Ms. Lovelady never articulates why Policy 4.7A.7 supports the re-combination. [Vol. I, 113/6-114/5]. The ALJ is

free to reject Ms. Lovelady's testimony on this point and that determination is not subject to review at this stage of the proceedings.

Respondent's witness, Ms. Lovelady, also testified that the USDs should not have been separated in 2009. As the ALJ notes, Ms. Lovelady never explained why they should not have been separated. [Vol. I, 113/6-114/5]. Moreover, this is inconsistent with her own testimony that she would have wanted to know the distinction between the Indiantown USD and Eastern USD in the residential analysis. The ALJ's decision on this point is supported by competent, substantial evidence.

There is no basis for assuming it was a mistake to separate the USDs in 2009. The 2009 methodology, including the separate USDs, was found to be in compliance by the state land planning agency at that time. [Vol. I, 114/6-8]. The parties agreed at the hearing that the CGMP was in compliance immediately following the 2009 amendments. [Vol. II, 243/20-244/6]. Moreover, as Respondent testified and the ALJ properly noted, the historic demand has been lower in Indiantown USD than in the Eastern USD. [Vol. I, 90/24-91/1]. This disparity also constitutes competent, substantial evidence to support the ALJ's finding in paragraph 111 that combining the Eastern and Indiantown USDs is not supported by relevant and appropriate data and analysis.

Respondent's exception should be rejected.

<u>Response to Exception 9</u> (Paragraph 112)

Respondent argues that paragraph 112 must be stricken based on its previous exceptions. The previous exceptions being without merit, so too is this exception. Paragraph 112 is a finding of fact supported by competent, substantial evidence.

Respondent further argues, as before, that nothing in Policy 4.1D.3 (Future Residential Housing Demand) and Policy 4.1D.5 (Residential Capacity Analysis) requires Martin County to

actually separate the Eastern and Indiantown USDs when performing residential demand and residential capacity analyses. Respondent's proposed finding is squarely at odds with the Operative Amendments. Respondent proposes that the allocations among the Eastern and Indiantown USDs are not prohibited "once those projections and trends are calculated and considered separately." [Resp. Exceptions, P.9]. The strikethrough section in the Operative Amendments, however, provides: "~~The eastern Urban Service District and the Indiantown Urban Service District shall be considered separately~~." [Resp. Ex. 3, P. 91]. The strikeout clearly means the County will not consider the USDs separately. This is exactly what Ms. Lovelady testified to – the County would not consider them separately under the Operative Amendments. [Vol. I, 112/4-7]. Petitioner's expert also testified that the Operative Amendments required the Eastern and Indiantown USDs to be treated as a single entity. [Vol. II, 155/12-156/4].

Respondent also states in its proposed finding that Policy 4.1D.3 and 4.1D.5 are professionally acceptable. The reasons expressed in paragraphs 110 and 111 – the difference in historic growth rates between Eastern and Indiantown USDs and the lack of appropriate data and analysis supporting the combination of the USDs – are competent, substantial evidence supporting the finding in paragraph 112 that merging the calculations for those locations to calculate demand and capacity are not professionally acceptable. In addition, as explained by Dr. Fishkind:

> [M]ost of the capacity is in Indiantown, where few people want to go. There is insufficient capacity on the east, where people want to go. So by allocating the supply over to where people don't want to go particularly, to me it's a cynical attempt to limit growth in the county and cast it up as data and analysis; it flies in the face of economic realities.

[Vol. II, 275/15-23]. Another of Petitioner's experts, Dr. Depew, testified that combining these calculations will "distort" the capacity and demand analysis. [Vol. II, 156/13-21]. The ALJ's finding in paragraph 112 is therefore supported by competent, substantial evidence.

Respondent's exception should be rejected.

Response to Exception 10 (Paragraph 118)

Respondent relies on its earlier arguments to support this exception. For the reasons explained above, Respondent's arguments should be rejected. Paragraph 118, stating Petitioner's allegations, is supported by competent, substantial evidence. [Vol. I, 18/3-7; Vol. II, 275/4-23].

Response to Exception 11 (Paragraphs 118 and 119)

Respondent reiterates its earlier semantic argument that there is no Eastern USD and Indiantown USD. For the reasons explained above, referring to the Eastern and Indiantown USDs is supported by competent, substantial evidence.

Respondent's exception should be rejected.

Response to Exception 12 (Paragraph 123)

Respondent reiterates its opposition to the phrase "merging the two USDs," and for the reasons already explained above, this phrase is supported by competent, substantial evidence.

Respondent's exception should be rejected.

Response to Exception 13 (Paragraph 126)

Respondent presents two arguments regarding paragraph 126 in addition to incorporating previous arguments, which should be rejected as noted above. First, Respondent argues that because the Operative Amendments do not change the Future Land Use Map (FLUM), the amount of land designated for future land uses has not changed and is therefore in compliance. The ALJ's response to this argument constitutes paragraph 126 and is too kind to Respondent's argument. The Operative Amendments make it realistically impossible to change the FLUM.

Respondent now argues that until someone attempts to change the FLUM, sufficient land must be available. The ALJ rightly rejected this absurd position as "illogical." Because Respondent has combined the urban service districts, no one would have a basis (under Policy 4.7A.7) to change the FLUM. If Respondent's argument was accepted, Martin County could calculate demand and capacity in any haphazard manner and have such calculations insulated from review so long as the calculations continued to show there was no need to amend the FLUM. In truth, Martin County did not even consider how the Operative Amendments might require updating the FLUM. [Vol. II, 230/11-231/4].

Second, Respondent argues that Petitioners did not challenge Policy 4.7A.7 of the Operative Amendments. Policy 4.7A.7 is part of the existing CGMP and was not challenged because, absent the combination of the Eastern and Indiantown USDs, it does not create a compliance problem under Chapter 163. Petitioners most certainly did contest whether the CGMP as amended by the Operative Amendments provides land that will allow adequate choices for permanent and seasonal residents and businesses. [Am. Pet, Para. 12; Prehearing Stip., Para. 5(e)].[7] It was this provision of Chapter 163.3177(6)(a)4 being analyzed in paragraph 126. Policy 4.7A.7 is only applicable to the extent it responds to the Respondent's argument regarding the FLUM.

Paragraph 126 is a finding of fact supported by competent, substantial evidence in the form of Petitioner's witness Dr. Depew, who testified on cross-examination that Respondent could not separate the FLUM from the analysis of needed land because the analysis will directly impact the allocation of future land uses. [Vol. II, 243/11-19].

Respondent's exception should be rejected.

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[7] Citations to the Amended Petition for Formal Administrative Hearing Following Partial Settlement are described as "[Am. Pet., Para. ___]."

Response to Exception 14 (Paragraphs 201 and 202)

Respondent relies entirely on its previous arguments in this exception, which have all been addressed above. As above, Respondent's exception should be rejected.

Response to Exception 15 (Paragraph 210)

Among other arguments already addressed which as noted should be rejected, Respondent asserts its position that no data and analysis is required to support "the methodology for calculating housing demand and supply based on the PUSD and the SUSD…." Respondent's position – that there are no Eastern and Indiantown USDs – has been adequately addressed above. As also explained above, Respondent's decision to change the methodology for calculating demand and capacity by merging the Eastern USDs and Indiantown USDs requires data and analysis.

Respondent's exception should be rejected.

Response to Exception 16 (Paragraph 211)

Respondent reiterates its previous arguments, addressed above, all of which should be rejected as noted. So too, this exception should be rejected.

Respectfully submitted, this 29th day of June,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following by email only on this 29th day of June, 2015. The original of this document will be retained in my office for the duration of this case and of any subsequent appeal or subsequent proceeding.

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