Agenda Item # 5B

PALM BEACH COUNTY
BOARD OF COUNTY COMMISSIONERS
AGENDA ITEM SUMMARY

Meeting Date: January 12, 2010 [ ] Consent [ ] Regular [X] Public Hearing

Department

Submitted By: **COUNTY ATTORNEY**

Submitted For: **COUNTY ATTORNEY**

I. EXECUTIVE BRIEF

Motion and Title: Staff recommends motion to adopt: 1) Ordinance rescinding Ordinance No. 2008-02 (which amended Ordinance No. 2006-029) and 2) Ordinance rescinding Ordinance No. 2006-28, consistent with the Administration Commission's Final Order in the administrative challenge styled, Department of Community Affairs, et al. vs. Palm Beach County et al., DOAH Case No. 06-4544GM, relating to the site-specific Comprehensive Plan Amendments adopted for the Balsamo property and the Lantana Farms property, respectively.

Summary: Palm Beach County adopted Comprehensive Plan Amendment Nos. LGA 2006-00002 ("Balsamo Amendment") by Ordinance No. 2006-028 and LGA 2006-00010 ("Lantana Farms Amendment") by Ordinance No. 2006-029 on August 21, 2006. The Balsamo Amendment re-designated approximately 97.55 acres of land located on the north side of Northlake Boulevard approximately 4,000 feet east of Coconut Boulevard from Rural Residential-10 ("RR-10") to Low Residential – 1 ("LR-1") and included the property within the Urban/Suburban Tier. The Lantana Farms Amendment re-designated approximately 26.23 acres of land located on Lantana Road and SR 7/US 441 from Rural Residential to Low Residential and included the property within the Urban/Suburban Tier. Both amendments were successfully challenged and the Administration Commission issued a Final Order on December 10, 2009, concluding that the amendments were "not in compliance." The Final Order directed the County to rescind both ordinances or face sanctions. District 6 (ATP)

Background and Justification: Palm Beach County adopted Comprehensive Plan Amendment No. LGA 2006-00002 ("Balsamo Amendment") by Ordinance No. 2006-028 on August 21, 2006. Balsamo Amendment re-designated approximately 97.55 acres of land located on the north side of Northlake Boulevard approximately 4,000 feet east of Coconut Boulevard from Rural Residential-10 ("RR-10") to Low Residential – 1 ("LR-1") and included the property in the Urban/Suburban Tier.
Continued on Page 3

Attachments:

1. Final Order
2. Ordinance
3. Ordinance

Recommended by: _____ 12/21/09
County Attorney **Date**

Approved by: N/A
Date

II. FISCAL IMPACT ANALYSIS

A. Five Year Summary of Fiscal Impact:

Fiscal Years	2010	2011	2012	2013	2014
Capital Expenditures	____	____	____	____	____
Operating Costs	____	____	____	____	____
External Revenues	____	____	____	____	____
Program Income (County)	____	____	____	____	____
In-Kind Match (County)	____	____	____	____	____
NET FISCAL IMPACT	____	____	____	____	____
# ADDITIONAL FTE POSITIONS (Cumulative)	____	____	____	____	____

Is Item Included in Current Budget? Yes____ No____

Budget Account No.: Fund_____ Department_____ Unit_____ Object_____

Reporting Category_____

B. Recommended Sources of Funds/Summary of Fiscal Impact:

C. Departmental Fiscal Review: _____

III. REVIEW COMMENTS

A. OFMB Fiscal and/or Contract Development and Control Comments:

1/4/10 12-22-09 11/5/10

OFMB Contract Development and Control

B. Legal Sufficiency:

Assistant County Attorney

C. Other Department Review:

_____
Department Director

THIS SUMMARY IS NOT TO BE USED AS A BASIS FOR PAYMENT.

Background (con.)

Palm Beach County adopted also Comprehensive Plan Amendment No. LGA 2006-00010 ("Lantana Farms Amendment") by Ordinance No.2006-029 on the same date. The Lantana Farms Amendment re-designated approximately 26.23 acres of land located on Lantana Road and SR 7/US 441 from Rural Residential to Low Residential and included the property within the Urban/Suburban Tier. The Department of Community Affairs ("DCA") issued a notice of intent to find both amendments "not in compliance," and initiated the administrative case styled, Department of Community Affairs, et al. vs. Palm Beach County et al., DOAH Case No. 06-4544GM. 1000 Friends of Florida, Inc., and Rosa Durando intervened on behalf of the DCA, and Salvatore J. Balsamo and Lantana Farms Associates, Inc., intervened on behalf of the County.

After negotiation, the County entered into settlement agreements on both the Balsamo Amendment and the Lantana Farms Amendment and amended the Lantana Farms Amendment through the passage of Ordinance 2008-02 consistent with the settlement agreement. The parties realigned, and a hearing was held on the amended Plan Amendments in October, 2008. After the hearing, the Administrative Law Judge issued a recommended final order that the Plan Amendments should be found "not in compliance." DCA submitted a Recommended Order on September 15, 2009, to the Administration Commission for final agency action. On December 10, 2009, the Administration Commission agreed with the Recommended Final Order and issued a Final Order concluding that the Balsamo and Lantana Farm Amendments were "not in compliance," and ordering the County to rescind both ordinances and to provide a report to the Commission within 45 days of the Final Order confirming that the ordinances have been rescinded. Failure to rescind the ordinances may result in the imposition of sanctions against the County.

STATE OF FLORIDA
ADMINISTRATION COMMISSION

1000 FRIENDS OF FLORIDA, INC.
and ROSA DURANDO,

Petitioners,

vs.

PALM BEACH COUNTY and
DEPARTMENT OF COMMUNITY AFFAIRS,

Respondents,

and

SALVATORE J. BALSAMO and
LANTANA FARM ASSOCIATES, INC.,

Intervenors.

AC Case No. ACC-09-004
DOAH Case No. 06-4544GM

_____/

FINAL ORDER

This cause came before the Governor and Cabinet, sitting as the Administration Commission ("Commission"), on December 8, 2009, on the Recommended Order entered pursuant to section 163.3184, Florida Statutes (2009)[1], in the Division of Administrative Hearings ("DOAH"), Case No. 06-4544GM ("Recommended Order"). This proceeding is the result of a challenge, brought pursuant to section 163.3184(10), Florida Statutes, to two separate comprehensive plan amendments adopted by the Palm Beach County Commission ("County").

BACKGROUND

On August 21, 2006, the County adopted two Future Land Use Map ("FLUM") amendments (collectively "Amendments"). Ordinance 2006-28 ("Balsamo Amendment") would

[1] All citations to Florida Statutes will be to the 2009 edition, unless otherwise noted.

change a 97.55-acre parcel ("Balsamo Property") from Rural Residential (one unit per ten acres, referred to as "RR-10") to Low Residential (one unit per acre, referred to as "LR-1"). Likewise, Ordinance 2006-29, as amended by Ordinance 2008-02 ("Lantana Farms Amendment"), would change a 26.23-acre parcel from RR-10 to LR-1. Both Amendments would also change the applicable tier designation for the parcels from "Rural" to "Urban-Suburban."

On November 13, 2006, the Department of Community Affairs ("Department" or "DCA") filed a petition at DOAH challenging the Amendments. Salvatore J. Balsamo and Lantana Farms Associates, Inc., 1000 Friends of Florida, Inc., and Rosa Durando ("Intervenors") successfully petitioned to intervene in the proceeding. Later, on February 7, 2007, the case was placed in abeyance for purposes of negotiation. Thereafter, the Department and the County executed compliance agreements, pursuant to section 163.3184 (16), Florida Statutes. On March 4, 2008, and March 14, 2008, respectively, the Department issued a Cumulative Notice of Intent and an Amended Notice of Intent to find the Lantana Farms Amendment and the Balsamo Amendment "in compliance," as defined in section 163.3184 (1)(b), Florida Statutes. 1000 Friends of Florida, Inc., and Rosa Durando ("1000 Friends" and "Durando", or collectively "Petitioners") filed and were permitted to intervene in the DOAH proceeding. The Administrative Law Judge ("ALJ") realigned the parties accordingly. As the only parties still challenging the Amendments, 1000 Friends and Durando, became the Petitioners, and the Department became a Respondent alongside the County.

A final hearing was conducted October 6-8, 2008, in West Palm Beach, and October 23-24, 2008, in Tallahassee, Florida. On January 23, 2009, the ALJ entered a Recommended Order, recommending that the Department enter a final order determining that the Balsamo and Lantana Farms Amendments are not "in compliance" ("Recommended Order"). Subsequently, on

September 15, 2009, the Department submitted the Recommended Order, accompanied by its Amended Determination of Non-Compliance, to the Commission for final agency action pursuant to section 163.3184(9)(b), Florida Statutes. This Final Order serves as final agency action in this proceeding.

COMPLIANCE DETERMINATION

The Commission is authorized to take final agency action and determine whether the Amendments to the County's Plan are "in compliance;" and, if an Amendment is found not "in compliance," to specify remedial actions which would bring that Amendment into compliance. § 163.3184(10)(b) & (11)(a), Fla. Stat.

STANDARD OF REVIEW FOR RECOMMENDED ORDER AND EXCEPTIONS

The Administrative Procedure Act provides that the Commission will adopt the ALJ's Recommended Order except under certain limited circumstances. The Commission has only limited authority to reject or modify the ALJ's findings of fact:

> The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.
>
> § 120.57(1)(*l*), Fla. Stat.

When fact-finding functions have been delegated to an ALJ, as is the case here, the Commission must rely upon the record developed before the ALJ. See Fox v. Treasure Coast Reg'l Planning Council, 442 So. 2d 221, 227 (Fla. 1st DCA 1983). As the ALJ in an administrative proceeding is the trier of fact, he or she is privileged to weigh and reject conflicting evidence. See Cenac v. Fla. State Bd. of Accountancy, 399 So. 2d 1013, 1016 (Fla. 1st DCA 1981). Therefore, "[i]t is the hearing officer's function in an agency proceeding to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw

permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." Bejarano v. State of Fla., 901 So. 2d 891, 892 (Fla. 4th DCA 2005)(quoting Heifetz v. Dep't of Bus. Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) (citing State Beverage Dep't v. Ernal, Inc., 115 So. 2d 566 (Fla. 3rd DCA 1959))).

The Commission cannot reweigh evidence considered by the ALJ, and cannot reject or modify findings of fact made by the ALJ if those findings of fact are supported by substantial competent evidence in the record. Heifetz, supra. Competent substantial evidence means "such evidence as will establish a substantial basis of fact from which a fact at issue can be reasonably inferred," and evidence which "should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

The Commission may modify or reject conclusions of law in the Recommended Order over which it has substantive jurisdiction, and the standard for review is well settled. See § 120.57(1)(*l*), Fla. Stat. When rejecting or modifying a conclusion of law, the Commission must state with particularity its reasons for rejecting or modifying such conclusion of law. Any substituted conclusion of law must be as or more reasonable than the conclusion of law provided by the ALJ in the recommended order. Id.

The label assigned a statement is not dispositive as to whether it is a finding of fact or conclusion of law. See Kinney v. Department of State, 501 So. 2d 1277 (Fla. 5th DCA 1987). Conclusions of law labeled as findings of fact, and findings labeled as conclusions, will be considered as a conclusion or finding based upon the statement itself and not the label assigned.

RULINGS ON EXCEPTIONS

The Recommended Order is 67 pages long. The parties filed 122 pages of exceptions and responses to exceptions. In some cases, multiple challenges are presented under the guise of a single exception. The exceptions or portions thereof will be ruled on in corresponding fashion where appropriate and in approximate sequence as the numerical ordering provided by the parties. Where appropriate, related exceptions or portions thereof will be ruled on together. Technical and procedural exceptions will be addressed first, followed by the substantive exceptions. Where an exception contains several distinct assertions, the Commission will rule on exception by paragraph or part. Any portion of an exception not separately ruled on is denied.

. . .

Technical and Scrivener's Errors

Certain exceptions take issue with the Recommended Order's incomplete references to "Ordinance 2006-29" on pages 2 and 3. As the record reflects, the adoption of Ordinance 2006-29 prompted negotiations with the Department concerning the compliance of the original Lantana Farms amendment. The resulting remedial plan amendment, which the County adopted as Ordinance 2008-002, is the Lantana Farms Amendment that is now the subject of this proceeding. These exceptions also take issue with the Recommended Order's incorrect references to the Department's "Amended Notice of Intent," when in fact the Department issued a "Cumulative Notice of Intent."

DCA Exception 1 and Intervenors Exception 1 are granted, so that the aforementioned references to "Ordinance 2006-29" are revised in favor of "Ordinance 2006-29, as amended by Ordinance 2008-002."

DCA Exceptions 1, 2 and 5, and Intervenors Exception 1 are granted, so that the second sentence of the third paragraph of the Preliminary Statement is rejected and replaced with the following sentence:

> On March 14, 2008, following the Department's execution of a compliance agreement with the County and the adoption of a remedial amendment, the Department issued a Cumulative Notice of Intent to find Ordinance 2006-28, as amended by Ordinance 2008-002, "in compliance."

Paragraph 17 of the Recommended Order is rejected and replaced with the following sentence:

> On March 14, 2008, the Department issued a Cumulative Notice of Intent to find Ordinance 2006-29, as amended by Ordinance 2008-002, "in compliance," and the parties were subsequently realigned as they now appear in the case style.

Other exceptions take issue with various technicalities, characterizations, and phraseology found in the Recommended Order. While technical or factual corrections to the Recommended Order are permissible and proper, the Commission is not at liberty to revisit or supplement the substance of the ALJ's findings of fact unless there is a lack of supporting evidence. See, e.g., Heifetz, 475 So. 2d at 1281. Much of the exception taken above fails to make such an assertion.

As such, Petitioners Exception 3 and 4; Intervenors Exception 3, 4 and 5; County Exception 1; and DCA Exception 3, 4 and 11 (second) are granted only to the following extent and effect, and otherwise denied:

- The reference in Paragraph 91 to "LR-10" is changed to "LR-1";
- The quotation in Paragraphs 55 and 135 from Future Land Use Policy 1.1-b is changed to "to respond to changing conditions.";
- Footnote 8 to Paragraph 131 is stricken;
- The reference in Paragraph 190 to "Balsamo" is replaced with "Lantana Farms".

Finally, the reference in Paragraph 210 to "Balsamao" is replaced with "Balsamo".

Standard of Proof

The Petitioners take issue with the "fairly debatable" standard applied by the ALJ in this proceeding. This case commenced as a "not in compliance" case, and if the case had proceeded to final hearing as a "not in compliance" case, the appropriate standard of proof would have been "preponderance of the evidence." Section 163.3184(10)(a), Florida Statutes. However, DCA executed compliance agreements, as authorized by Section 163.3184(16), and issued new notices of intent to find the Amendments "in compliance." Section 163.3184(16)(f)1. directs that, after publication of the new notices of intent,

> ... the administrative law judge shall realign the parties in the pending proceeding under ss. 120.569 and 120.57, which shall thereafter be governed by the process contained in paragraphs (9)(a) and (b), including provisions relating to challenges by an affected person, burden of proof, and issues of a recommended order and a final order, except as provided in subparagraph 2.

The burden of proof mandated by paragraph (9)(a) is "fairly debatable," and the ALJ concluded that the appropriate standard of proof for this case was "fairly debatable." ¶ 203 and ¶ 204.

The Petitioners contend that the ALJ's conclusion of law ignored the phrase "except as provided in subparagraph 2." Section 163.3184(16)(f)2. states:

> 2. If any of the issues raised by the state land planning agency in the original subsection (10) proceeding are not resolved by the compliance agreement amendments, any intervenor in the original subsection (10) proceeding may require those issues to be addressed in the pending consolidated realigned proceeding under ss. 120.569 and 120.57. As to those unresolved issues, the burden of proof shall be governed by subsection (10).

The Petitioners contend that the ALJ was required to make "a specific determination as to whether and to what extent each initial objection by the DCA was in fact resolved by the agreement." Petitioners' Exception, page 6, emphasis in original. The Petitioners assert that if the ALJ determined that DCA dropped any issues without fully resolving those issues, the

Petitioners would be entitled to the "preponderance of the evidence" standard of proof for those unresolved issues.

The ALJ addressed the Petitioners' legal argument in detail in an Order On Standard Of Proof issued before the final hearing. In that Order, the ALJ concluded that,

> Section 163.3184, Florida Statutes, focuses on the position taken by the Department regarding a local government's comprehensive plan amendment. If the Department determines that the amendment is "in compliance," one set of procedures is followed; if the Department determines that the amendment is "not in compliance," a different set of procedures is followed. The position taken by the Department also affects the standard of proof to be applied (except with respect to internal consistency, which is subject to the fairly debatable standard). Therefore, it is logical to look to the position taken by the Department to determine what issues have been "resolved," as that term is used in Section 163.3184(16)(f)2, Florida Statutes.
>
> Petitioners' interpretation of the statute would make the standard of proof in a Subsection (9) "in compliance" proceeding different from the standard of proof applicable in a Subsection (16) "in compliance" proceeding, which the Legislature is unlikely to have intended. It is also unlikely that the Legislature intended to give greater scrutiny to the Department's cumulative notice of intent than its original notice of intent.
>
> Therefore, an issue is "resolved" if the issue was initially raised by the Department in its statement of intent as a basis for its determination that a plan amendment is not in compliance, the Department and the local government subsequently enter into a compliance agreement, the local government adopts remedial amendments consistent with that compliance agreement, and the Department subsequently issues a notice of intent finding the remedial amendment in compliance.
>
> Petitioners contend that this interpretation of the statute renders Section 163.3184(16)(f)(2), Florida Statutes, "superfluous and a nullity." However, the role of that provision remains clear and intact. Section 163.3184(16)(a), Florida Statutes, provides that a compliance agreement can "resolve one or more of the issues raised in the proceedings." Section 163.3184(16)(f)(2), Florida Statutes, preserves the preponderance of the evidence standard for the issues that were not resolved by the compliance agreement.

A similar conclusion of law was reached by another ALJ in Board of County Commissioners of Palm Beach County v. Department of Community Affairs, 20 FALR 2722,

DOAH Case No. 95-5930GM, Admin. Comm. Final Order AC-97-010 (1997). The Commission is aware of no Recommended or Final Orders reaching a different conclusion.

The legal theory advanced by the Petitioners is not as or more reasonable than the ALJ's conclusion of law. **Petitioners' Exception 2 is denied.**

The Tier System

Future Land Use Element Policy 1.1-b.1.a) states,

> 1. The County shall not approve a change in tier boundaries unless each of the following conditions are met:
>
> > a) The area to be reassigned to another tier must be contiguous to the tier to which it would be assigned;

The Balsamo Amendment would change the Tier designation of the Balsamo parcel from Rural to Urban/Suburban. However, the Balsamo parcel does not border the Urban/Suburban Tier. ¶ 40; Joint Exhibit 51, Map LU 1.1. The Balsamo parcel is separated from the nearest boundary of the Urban/Suburban Tier by a parcel within the jurisdiction of the City of Palm Beach Gardens. That municipal parcel is shown as "Rural" on the County Tier Map.

The County's Tier Map assigns Tier designations to all land within Palm Beach County, including land situated within municipalities. ¶ 22; Joint Exhibit 51, Map LU 1.1. No party objects to the ALJ's statement in paragraph 22 that, "the municipal governments are not subject to the tiers and their land use decisions do not have to be consistent with the provisions of the Palm Beach County Comprehensive Plan related to tiers." He did not conclude that the County itself is not bound by its own Tier designations. Yet, the County, the Intervenors and DCA contend that the ALJ erred regarding the significance of the Tier designations on land situated

within municipal boundaries as a factor in the County's decisions to change Tier designations on non-municipality lands.

There is some disagreement among the parties over the meaning of "the area...must be contiguous." There is varying testimony in the record regarding the relevant meaning of the word "contiguous," and how that term applies to the Balsamo property. T. 210-216; 675-677. To overcome this concern, the County advances the concept of "functional" contiguity. The ALJ's description of the County's rationale for the proposed Tier change, is as follows:

> 43. The County used a "functional contiguity" analysis in determining that the Balsamo property was contiguous to the Urban/Suburban Tier. The County concluded that, because the property was separated from the tier boundary by land within a municipality (Palm Beach Gardens) and the intervening municipal land use is suburban in character (municipal golf course), the Balsamo property was functionally contiguous to the Urban/Suburban Tier.

The pertinent issue is whether FLUE Policy 1.1-b.1.(a) permits the County to ignore municipality land that interrupts the geographic contiguity of its tiers. The ALJ rejected the "functional" contiguity concept, determining of the "functional" theory that "its application to the Balsamo amendment is inconsistent with the Managed Growth Tier System." ¶ 44. This conclusion is supported by competent, substantial evidence. T. 337-338; 673-677.

The Intervenors, the County and DCA contend that the ALJ reached an erroneous conclusion of law when he concluded that the Rural Tier designation of the municipal golf course prevented the use of the "functional" contiguity analysis. However, the ALJ's legal conclusion is more reasonable than the theory advanced in the exceptions:

> 45. Respondents emphasize that the County has no regulatory jurisdiction over the municipal golf course. They suggest, therefore, that its Rural Tier designation can be ignored or discounted. However, that is not how the County's Tier System was designed. The County chose to recognize and account for land uses on adjacent municipal lands as part of the Tier System, not because the County could thereby control the future uses of municipal lands, but because recognizing adjacent uses within the municipalities furthered the

> purpose of the Tier System to "allow for a diverse range of lifestyle choices, and livable, sustainable communities." Therefore, the tier assignments given to municipal lands cannot be ignored or discounted.

Moreover, it was not established at hearing that the prospective Tier map would pass muster even under a "functional" contiguity standard. The ALJ rejected the contention that the golf course is necessarily suburban in character, finding that "the golf course is in the Rural Tier and is not incompatible with rural land uses." ¶ 46. This finding of fact is supported by testimony. T. 337, 341 – 342, 435 – 436.

The argument advanced in the exceptions is not as or more reasonable than the ALJ's conclusion of law. **Intervenors Exceptions 2, 4, and 6(¶ 40 - ¶ 41); County Exceptions 2, 3, 7 and 10; DCA Exceptions 6, 7, 8, 9, 10, 15 and 18 are denied.**

Tier Change Study

Future Land Use Element Policy 1.1-b.1.b) states,

> 1. The County shall not approve a change in tier boundaries unless each of the following conditions are met:
>
> b) A Study must be conducted to determine the appropriate tier designation of the area and its surroundings, in order to avoid piecemeal or parcel-by-parcel redesignations.

Policy 1.1-b.2 states in pertinent part:

> If any property not within a Sector Plan is removed from an assigned tier through the future land use amendment process, as allowed for under this policy, the Planning Division shall conduct a Study to determine the property's impact on the tier system, the appropriate tier designation for the property and if and how tier boundaries need to be further adjusted in the area of the property.

The ALJ found that both the study for the Balsamo Amendment (¶ 52 – 54) and the study for the Lantana Farms Amendment (¶ 132 – 134) did not comply with these standards. The ALJ found that both studies focused on the parcels themselves, and did

> ... not adequately address the appropriateness of other land use designations in the area, how other land uses in the area have been affected by changed

> conditions, how other land uses in the Rural Tier would be affected by the [Balsamo or Lantana Farms] amendment, and whether other tier re-designations are justified for the area. ¶ 52 & ¶ 132.

The various exceptions ask the Commission to accept and favor the testimony of the County Planning Director, regarding his view of the Study requirements, over the evidence that the ALJ accepted. The ALJ had the opportunity to compare the actual Study materials for each Amendment with the Study requirements in the Comprehensive Plan, and had the benefit of the testimony of several experts regarding the contents for the Study materials for each Amendment. The Commission cannot reweigh the evidence and reach different findings of fact than the ALJ. **Intervenors Exception 3, County Exceptions 4, 12 and 13, and DCA Exceptions 11 (first), 20, and 21 are denied.**

Proximity to Urban Infrastructure and Services

The ALJ concluded that,

> If there is a deficit [of residential land uses in the County], it should be addressed comprehensively by the County rather than by the piecemeal granting of private applications to convert rural lands to allow for urban densities at the fringe of urban infrastructure and services. ¶ 53 and ¶ 133.

The County and DCA assert that it is factually incorrect that the Balsamo and Lantana Farms parcels are at the fringe of urban infrastructure and services. However, there is competent substantial evidence in the record to support the ALJ's finding that both parcels are located at the fringe of urban infrastructure and services. Both parcels are located outside the urban service area designated by the Comprehensive Plan. T. 403 – 404. The environmentally sensitive Vavrus parcel in Palm Beach Gardens lies to the north of the Balsamo parcel. T. 319. The areas to the west and south of the Lantana Farms parcel are rural in character. T. 517 – 518.

There is competent substantial evidence in the record to support the ALJ's findings of fact. The Commission cannot reweigh the evidence and reach different findings of fact than the ALJ. **County Exception 5 and DCA Exception 11 (first) are denied.**

Tier Redesignation: Availability of Sufficient Land

One of the factors which the County must consider in evaluating the merit of a potential Tier redesignation is:

> The availability of sufficient land to accommodate growth within the long range planning horizon, considering existing development approvals. Policy 1.1-b.2.a)

Expert testimony was offered concluding that there is a shortage of sufficient land to accommodate growth within the long range planning horizon. Some of those expert witnesses relied upon need analyses prepared for the Scripps Research Institute and for ancillary development on the Vavrus property in support of that proposition. The ALJ discounted the Scripps and Vavrus need analyses, partly because those projects "were substantially modified and are no longer being proposed in the vicinity of the Balsamo Amendment." ¶ 59. The Intervenors point out that the Scripps and Vavrus projects had not been modified or withdrawn on the date of adoption of the Balsamo Amendment. Rule 9J-5.005(2)(a), F.A.C, requires plan amendments must be based on data available at the time of adoption. As such, those statements in the Recommended Order that refer to subsequent events must be rejected. **The relevant portions of Intervenors Exceptions 6 (¶ 23 - ¶ 33) and 9(¶ 49 - ¶ 54) are granted,** as follows:

A. The last sentence of Paragraph 59 is rejected; and

B. The last two sentences of Paragraph 63 are rejected.

The ALJ made similar findings of fact for the Lantana Farms Amendment. However, the Lantana Farms Amendment was modified by a remedial amendment which was adopted after the Scripps and Vavrus projects were modified or withdrawn. Therefore, the facts regarding the

Scripps and Vavrus needs analyses and the modification of those projects was available at the time of adoption of the Lantana Farms Amendment, as modified by the remedial amendment. Therefore, the exception with regards to Lantana Farms is denied.

The ALJ expressed another, uncontested basis for rejecting the Scripps and Vavrus needs analyses:

> 62. The opinions expressed that the allowable density on the Balsamo property needs to be increased to accommodate an imminent housing deficit in the County are given little weight because there is insufficient supporting data in the record that can be reviewed to determine the credibility of the opinions. The opinions were not based on comprehensive need assessments conducted by the expert witnesses who expressed the opinions, but on need assessments they had seen that were produced by other consultants.

Therefore, granting this portion of the Exception with regard to the Balsamo Amendment does not change the conclusion of the Final Order.

The remainder of these exceptions asks the Commission to reweigh the evidence regarding the need analysis in the Evaluation and Appraisal Report ("EAR"). The remainder of Intervenors Exceptions 6 (¶ 23 - ¶ 33), and 9(¶ 49 - ¶ 54), and DCA Exception 13 is denied.

Lantana Farms Tier Redesignation: Inclusion of Two Other Parcels

In paragraph 122, the ALJ noted that two parcels to the east of the Lantana Farms parcel were placed in the Urban/Suburban Tier by the Lantana Farms remedial amendment, but that the parcels retained their RR-10 land use designation, which is not an allowed land use designation within the Urban/Suburban Tier. The ALJ then found that,

> There was no explanation given for why the land use designations for these two parcels were not changed as part of the Lantana Farms amendment. It was simply stated that these discrepancies would be corrected later.

The County, the Intervenors and the Department contend that an explanation was, in fact, offered at the hearing (T. 942-943). The cited testimony was that the County did not know what the ultimate use for the properties would be; that for the time being the parcels were to be "grandfathered into the tier;" and that the owners would be required to apply for a tier-compliant land use designation when and if they decided to seek a land use amendment. While this testimony may fall short of an adequate explanation, it is inaccurate to find that no explanation was given.

Intervenors Exception 5, County Exception 11, and DCA Exception 19 are granted to the following effect, and otherwise denied:

The last two sentences in Paragraph 122 are rejected.

Balsamo Tier Redesignation: Relevance of Study

The fourth tier redesignation factor is "the impact on the lifestyle and character of the Rural Tier." ¶ 71. The 1998 Western Northlake Corridor Land Use Study ("WNCLUS") examined this issue. ¶ 72. The ALJ found that,

> 73. Balsamo asserts that the WNCLUS is outdated and "inappropriate as data and analysis" because public water and sewer lines have been extended further west than they existed in 1998. Neither this change, nor the others noted by Balsamo, negate the general relevance of the findings and recommendations of the WNCLUS, which are still worth considering.

The County and DCA contend that the ALJ's finding that the WNCLUS is still worth considering is incorrect. County Exception 6 and DCA Exception 14 identify evidence in the record that supports the Balsamo assertion that the WNCLUS is outdated. However, other evidence in the record supports the ALJ's finding. T. 240; 369-370; 610-611 and 648-649.

The ALJ's finding of fact is supported by competent substantial evidence. The Commission cannot reweigh the evidence in the record in order to reach a different finding than

the ALJ. **County Exception 6, Intervenors Exceptions 6 (¶ 34 - ¶ 39) and 9(¶ 55 - ¶ 57), and DCA Exception 14 are denied.**

Weighing of Tier Factors

Future Land Use Policy 1.1-b.2. provides seven factors to be considered to evaluate the merit of a potential Tier redesignation.

The ALJ found that the Balsamo Amendment is not supported by the first, second, fourth and seventh factors; is neutral with respect to the third factor; is neutral or slightly positive with respect to the sixth factor; and is supported by the fifth factor. The ALJ found that the Lantana Farms Amendment is not supported by the first, fourth and seventh factors; is neutral with respect to the second and third factors; and is neutral or somewhat supported with respect to the fifth and sixth factors. The ALJ concluded that, "Overall, the tier designation for the [Balsamo and Lantana Farms properties] is not justified under the tier re-designation factors in Policy 1.1-b." ¶ 89 and ¶ 165.

The Intervenors take issue with the manner in which the ALJ weighed the tier factors. They argue that the tier redesignation factors in the Plan are an internal consistency issue, and that internal consistency does not require that a plan provisions further – that is, take action in the direction of realizing – every other goal, objective and policy in the Plan. Therefore, contend the Intervenors, the ALJ should have considered the neutral factors "in favor of redesignation since neutrality removes any potential that a 'conflict' exists between the proposal and the referenced policy in the comprehensive plan." Intervenors Exceptions, ¶ 42, emphasis in original.

Even if the Intervenors' theory is correct, that theory applies to policies in the comprehensive plan – not to sub-parts of policies. The Plan policy that was under consideration by the ALJ was Policy 1.1-b., which establishes certain standards that "the County shall apply"

when considering "the redesignation of a Tier to respond to changing conditions." The Plan itself directed the ALJ to consider the seven factors when determining whether the Amendments were consistent with Policy 1.1-b. There is nothing in Policy 1.1-b that required the ALJ to parse the various components of Policy 1.1-b, or treat a neutral factor as a factor in favor of redesignation.

The Commission cannot reweigh the evidence in the record to determine whether redesignation of the Balsamo and Lantana Farms properties is justified under the tier redesignation factors in Policy 1.1-b. **Intervenors Exception 6 (¶ 42-¶45), and Exception 9, (¶ 61 - ¶ 64), County Exceptions 8 and 15, and DCA Exceptions 16 and 23 are denied.**

Urban Sprawl Rule application to a Plan Amendment

The Petitioner asserts that paragraphs 110 and 208 appear to contain a conclusion of law that a future land use map amendment can only violate the urban sprawl rule if it resulted in the entire plan failing to discourage urban sprawl.

However, in both paragraphs, the ALJ is clearly addressing both the plan as a whole and the Amendments. It was appropriate for the ALJ to address both the plan and the plan amendments since the urban sprawl rule, Rule 9J-5.006(5), F.A.C., clearly addresses both situations. The Recommended Order does not conclude that the urban sprawl rule is only applicable to the plan as a whole.

Petitioners Exception 1 is denied.

Staff Knowledge of Previous Need Assessments

Paragraph 64 of the Recommended Order states,

> It is significant that the County's planning staff and the Department's planning staff, who were aware of these previous need assessments when they reviewed the Balsamo amendment, determined that there was no need to increase residential density on the Balsamo property.

Paragraph 142 makes the same finding for the Lantana Farms Amendment. DCA Exception 12 asserts that paragraphs 64 and 142, respectively, must be modified by adding the phrase, "at the proposed review stage of the amendments," in order to render those paragraphs factually correct.

DCA does not contend that there is no competent substantial evidence in the record to support paragraphs 64 and 142. The Commission has no authority to supplement the ALJ's findings of fact. Paragraphs 64 and 142 accurately reflect the record without the phrase demanded by DCA Exception 12. **DCA Exception 12 is denied.**

Demarcation of Tiers

One of the Tier re-designation factors is, "The presence or absence of natural or built features which currently serve as, or have the potential to serve as, logical demarcations between tiers." ¶161. Paragraph 163 of the Recommended Order states,

> In the vicinity of the Lantana Farm property, the tier boundaries are built features -- roadways and a canal. The Lantana Farm amendment would not make the tier boundary in this area more definite or more regular. It would make the boundary less clearly demarked and harder to maintain.

DCA, the County and the Intervenors contend that the existing Tier boundary in the vicinity of the Lantana Farms property is not demarked by a road, because the publicly owned Lantana Road ends at State Road 7 and does not extend west to the Lantana Farms property. However, the head of the County's Current Planning Division testified that a paved extension of Lantana Road has been built past State Road 7 to "approximately the center of the site," and that a dirt road extends further west along the northern boundary of the Lantana Farms parcel. T. 939-940, 971-973.

Paragraph 163 is supported by competent substantial evidence in the record. **DCA Exception 22, County Exception 14 and Intervenors Exception 9 (¶ 58 - ¶ 60) is denied.**

Standard and Burden of Proof on Demonstration of Need

Consistency with Policy 2.2-b

Paragraph 90 of the Recommended Order states,

90. FLUE Policy 2.2-b requires demonstration of need for any proposed future land use change:

> Before approval of a future land use amendment, the applicant shall provide an adequate justification and a demonstrated need for the proposed future land use, and for residential density increases demonstrate that the current land use is inappropriate.

Paragraph 91 of the Recommended Order states,

91. An adequate justification and demonstrated need for the land use change from RR-10 to LR-10 for the Balsamo property was not provided by Balsamo. The current RR-10 land use designation was not shown to be inappropriate for the property.

DCA and the County cite the County's expert planner's testimony that the County deems Policy 2.2-b to be satisfied simply when *a more appropriate* land use designation is identified. While this testimony appears to confuse tier designation with land use designation, the County planner's interpretation is clearly contrary to the wording of Policy 2.2-b. It requires a demonstration that the current land use is inappropriate – not *less* appropriate. The ALJ's application of the Policy is more reasonable than the interpretation advanced by DCA and the County.

In addition, the Respondents and Intervenors dispute the phrasing of the ALJ's determination that it "was not shown" that the existing land use was inappropriate. They claim the ALJ's characterization reflects a misplacement of the burden of proof. However, the Policy itself places the burden of demonstrating that the existing land use is inappropriate on the applicant. Incidentally, at least with regard to Balsamo property, the Petitioners did in fact

present evidence that the existing land use is not inappropriate: the County's planner testified to that effect on cross-examination. T. 908.

DCA Exception 17, County Exception 9, and Intervenors Exceptions 7 and 10 are denied.

Consistency with Policy 2.2-c

Paragraphs 93 and 94 of the Recommended Order relate to the Balsamo Amendment and state,

> 93. Petitioners claim that the Balsamo amendment is inconsistent with "Policy 2.2-c, FLUE Section 1-A – C," but sections A and B are not part of the County Directions, which are only in section C. Section C includes a statement that the County will direct the location, type, intensity, and form of development that respects the characteristics of a particular area, prevents urban sprawl, and provides public facilities and services in a cost-efficient manner.
>
> 94. For the reasons set forth above, the County's approval of the Balsamo amendment is inconsistent with Policy 2.2-c.

The Intervenors contend in Exception 8 that paragraph 94 should be rejected. However, paragraph 94 is a logical conclusion based on the preceding paragraphs.

Intervenors Exception 8 is denied.

Paragraphs 169 and 170 of the Recommended Order reach the identical determination with regard to the Lantana Farms Amendment. The Intervenors contend in Exception 11 that paragraph 170 should be rejected. However, paragraph 170 is a logical conclusion that flows from the preceding paragraphs.

Intervenors Exception 11 is denied.

CONCLUSION

The Commission hereby adopts the ALJ's findings of fact and conclusions of law in the Recommended Order except as modified herein.

Upon review of the entire record, the Recommended Order, the Determination of Non-Compliance, and after considering the parties' exceptions thereto, the Commission determines that Palm Beach County Ordinance 2006-28 (Balsamo Amendment) and Ordinance 2006-29, as amended by Ordinance 2008-02, (Lantana Farms Amendment) are not "in compliance." In accordance with Section 163.3189(2)(b), Florida Statutes, the Commission directs Palm Beach County to 1) rescind Palm Beach County Ordinances 2006-28 and 2006-29/2008-02; and 2) provide a report to the Commission on the status of Ordinances 2006-28 and 2006-29/2008-02 within 45 days of this Final Order.

SANCTIONS

Pursuant to Section 163.3189(2)(b), Florida Statutes, the County may elect to make the Balsamo and Lantana Farms Amendments effective notwithstanding the finding of not in compliance stated in this Final Order. In the event the Commission determines the County has failed to timely rescind Ordinances 2006-28 and 2006-29, as amended by Ordinance 2008-02, or the ordinances otherwise take or remain in effect, the County is subject to sanctions pursuant to section 163.3184(11), Florida Statutes. The Commission retains jurisdiction for the purpose of imposition of sanctions.

NOTICE OF RIGHTS

Any party to this Final Order has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Commission, Office of Policy and Budget, Executive Office of the Governor, the Capitol, Room 1801, Tallahassee, Florida 32399-0001; and by filing a copy of the Notice of Appeal, accompanied by the applicable filing fees, with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days of the day this Final Order is filed with the Clerk of the Commission.

DONE AND ORDERED this 10 day of December, 2009.

JERRY L. MCDANIEL, Secretary
Administration Commission

FILED with the Clerk of the Administration Commission on this 10th day of December, 2009.

Clerk, Administration Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was delivered to the following persons by United States Mail, facsimile, electronic mail, or hand delivery this 10th day of December, 2009.

Clerk, Administration Commission

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Attorney General
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ORDINANCE NO. 2009 -

AN ORDINANCE OF THE BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, FLORIDA, REPEALING ORDINANCE 2008-002, WHICH AMENDED THE 1989 COMPREHENSIVE PLAN AS ADOPTED BY ORDINANCE NO. 89-17, AS AMENDED; AMENDED THE FUTURE LAND USE ATLAS (FLUA) FOR THE **LANTANA/SR 7 RESIDENTIAL (LGA 2006-00010) REMEDIAL COMPREHENSIVE PLAN AMENDMENT**, MODIFIED PAGE **80** OF THE FLUA BY CHANGING THE FUTURE LAND USE DESIGNATION FOR APPROXIMATELY 26.23 ACRES, GENERALLY LOCATED ON THE SOUTH SIDE OF LANTANA ROAD, APPROXIMATELY 1,500 FEET WEST OF STATE ROAD 7 (US 441), FROM RURAL RESIDENTIAL, 1 UNIT PER 10 ACRES (RR-10) TO LOW RESIDENTIAL, 1 UNIT PER 1 ACRE (LR-1), AND THE **MAP SERIES** (TO MODIFY THE TIER & SERVICE AREA BOUNDARIES FROM THE RURAL TIER AND RURAL SERVICE AREA TO THE URBAN/SUBURBAN TIER AND URBAN SERVICE AREA FOR THE THREE PARCELS IDENTIFIED IN THE LANTANA/SR 7 SETTLEMENT AGREEMENT, INCLUDING THE SUBJECT SITE OF ORDINANCE 2006-029, TO AVOID PIECEMEAL TIER REDESIGNATIONS); AND AMENDED ALL ELEMENTS AS NECESSARY; PROVIDING FOR REPEAL OF LAWS IN CONFLICT; PROVIDING FOR SEVERABILITY; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, on August 31, 1989, the Palm Beach County Board of County Commissioners adopted the 1989 Comprehensive Plan by Ordinance No. 89-17;

WHEREAS, the Palm Beach County Board of County Commissioners amends the 1989 Comprehensive Plan as provided by Chapter 163, Part II, Florida Statutes; and

WHEREAS, Palm Beach County adopted an amendment to the Comprehensive Plan on August 21, 2006, in Ordinance No. 2006-029; and

WHEREAS, the Department of Community Affairs issued a statement of intent to find the Comprehensive Plan amendment in Ordinance 2006-029 Not in Compliance on October 23, 2006; and

WHEREAS, The Department of Community Affairs filed a Petition on November 13, 2006, for an administrative hearing on its allegations that Ordinance 2006-029 did not comply with state statute and administrative rule; and

WHEREAS, third parties intervened in the administrative challenge, both in opposition and in support of the Plan Amendment; and

WHEREAS, Palm Beach County and the Department of Community Affairs entered into a settlement agreement, and a remedial Plan

Amendment was passed through the adoption of Ordinance 2008-002, pursuant to that settlement agreement; and

WHEREAS, the administrative challenge was heard before an Administrative Law Judge in October, 2008; and

WHEREAS, the Administrative Law Judge entered a Recommended Final Order finding Ordinance 2008-002 "not in compliance;" and

WHEREAS, the Administration Commission issued a Final Order finding Ordinance 2008-002 "not in compliance," which represented final agency action on the matter; and

WHEREAS, the Administration Commission ordered the Palm Beach County Board of County Commissioners to rescind Ordinance 2008-002, or face sanctions;

WHEREAS, this Ordinance repeals Ordinance No. 2008-002, as adopted on January 15, 2008, that amended Palm Beach County's Comprehensive Plan; but never became effective, as a result of the pending administrative challenge;

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, FLORIDA, that:

Part I. Repeal of Ordinance 2008-002

Ordinance 2008-002 is hereby repealed.

APPROVED AND ADOPTED by the Board of County Commissioners of Palm Beach County, on the _____ day of _____, 2009.

ATTEST:
SHARON R. BOCK, CLERK
& COMPTROLLER

PALM BEACH COUNTY, FLORIDA,
BY ITS BOARD OF COUNTY COMMISSIONERS

By:_____
Deputy Clerk

By_____
Burt Aaronson, Chairperson

APPROVED AS TO FORM AND LEGAL SUFFICIENCY

_____
COUNTY ATTORNEY

Filed with the Department of State on the _____day of

_____, 2009.

ORDINANCE NO. 2009 -

AN ORDINANCE OF THE BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, FLORIDA, REPEALING ORDINANCE 2006-028; WHICH AMENDED THE FUTURE LAND USE ATLAS (FLUA) FOR PRIVATELY INITIATED AMENDMENT **NORTHLAKE RESIDENTIAL/COCONUT NE II (LGA 2005-0034)**, MODIFIED PAGE 29 OF THE FLUA BY CHANGING THE FUTURE LAND USE DESIGNATION FOR APPROXIMATELY 97.55 ACRES, GENERALLY LOCATED ON THE NORTH SIDE OF NORTHLAKE BOULEVARD, APPROXIMATELY ¾ MILE EAST OF COCONUT BOULEVARD, FROM RURAL RESIDENTIAL, 1 UNIT PER 10 ACRES (RR-10) TO LOW RESIDENTIAL, 1 UNIT PER 1 ACRE (LR-1) AND INCLUSION INTO THE URBAN/SUBURBAN TIER; PROVIDED FOR INCLUSION IN THE 1989 COMPREHENSIVE PLAN; PROVIDING FOR REPEAL OF LAWS IN CONFLICT; PROVIDING FOR SEVERABILITY; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, on August 31, 1989, the Palm Beach County Board of County Commissioners adopted the 1989 Comprehensive Plan by Ordinance No. 89-17;

WHEREAS, the Palm Beach County Board of County Commissioners amends the 1989 Comprehensive Plan as provided by Chapter 163, Part II, Florida Statutes; and

WHEREAS, Palm Beach County adopted an amendment to the Comprehensive Plan on August 21, 2006, in Ordinance No. 2006-028; and

WHEREAS, the Department of Community Affairs issued a statement of intent to find the Comprehensive Plan amendment in Ordinance 2006-029 Not in Compliance on October 23, 2006; and

WHEREAS, The Department of Community Affairs filed a Petition on November 13, 2006, for an administrative hearing on its allegations that Ordinance 2006-028 did not comply with state statute and administrative rule; and

WHEREAS, third parties intervened in the administrative challenge, both in opposition and in support of the Plan Amendment; and

WHEREAS, Palm Beach County and the Department of Community Affairs entered into a settlement agreement providing for additional data and analysis in support of the Plan Amendment; and

WHEREAS, the administrative challenge was heard before an Administrative Law Judge in October, 2008; and

WHEREAS, the Administrative Law Judge entered a Recommended Final Order finding Ordinance 2006-028 "not in compliance;" and

WHEREAS, the Administration Commission issued a Final Order finding Ordinance 2006-028 "not in compliance," which represented final agency action on the matter; and

WHEREAS, the Administration Commission ordered the Palm Beach County Board of County Commissioners to rescind Ordinance 2006-028, or face sanctions;

WHEREAS, this Ordinance repeals Ordinance No. 2006-028, as adopted on August 21, 2006, that amended Palm Beach County's Comprehensive Plan; but never became effective, as a result of the pending administrative challenge;

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, FLORIDA, that:

Part I. Repeal of Ordinance 2006-028

Ordinance 2006-028 is hereby repealed.

APPROVED AND ADOPTED by the Board of County Commissioners of Palm Beach County, on the _____ day of _____, 2009.

ATTEST:
SHARON R. BOCK, CLERK
& COMPTROLLER

PALM BEACH COUNTY, FLORIDA,
BY ITS BOARD OF COUNTY COMMISSIONERS

By:_____ By_____
Deputy Clerk Burt Aaronson, Chairperson

APPROVED AS TO FORM AND LEGAL SUFFICIENCY

_____
COUNTY ATTORNEY

Filed with the Department of State on the _____day of

_____, 2009.