STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
AC Case No. ACC-23-001
DOAH Case No. 22-3021GM

DONNA SUTTER MELZER,

Petitioner,

vs.

MARTIN COUNTY, FLORIDA,

Respondent,

and

BECKER B-14 GROVE, LTD.,

Intervenor.
_____/

RESPONDENT'S AND INTERVENOR'S EXCEPTIONS TO RECOMMENDED ORDER

Respondent, Martin County (the "County"), and Intervenor, Becker B-14 Grove, LTD ("Intervenor"), pursuant to Rule 28-106.217, Florida Administrative Code and Section 120.57, Florida Statutes, file these Exceptions to the Recommended Order entered by the Administrative Law Judge ("ALJ") on March 17, 2023. Ordinance 1185, a text amendment to Martin County's Comprehensive Growth Management Plan ("Comprehensive Plan"), is under review and is attached as **Exhibit A**. Chapter 4 of the Comprehensive Plan, the Future Land Use Element, is attached as **Exhibit B.**

I. INTRODUCTION

Ordinance 1185 is a text amendment to the Comprehensive Plan that creates the Rural Lifestyle future land use designation which provides for self-supporting, self-contained and rural communities, including affiliated recreational amenities with an emphasis on maintaining and

enhancing natural and manmade open space, and promoting sustainability and stewardship of the land and water ("Text Amendment"). The issue for consideration by the ALJ was whether the Text Amendment was "in compliance" within the meaning of Section 163.3184(1)(b), Florida Statutes. Petitioner advanced a multitude of arguments challenging Ordinance 1185 asserting that it was not in compliance because of alleged internal inconsistencies with several provisions of the Comprehensive Plan; that it was not supported by relevant and appropriate data and analysis; and that it did not provide meaningful and predictable standards.

In the Recommended Order, the ALJ ruled in favor of the County and the Intervenor on all of Petitioner's arguments except for one.[1] The only issue the ALJ found that the Petitioner proved beyond fair debate related to a very small component of the Text Amendment, specifically, the ability to have a self-supporting "community store" that would be "restricted to utilization by only residents, guests and employees of the PUD" and would be further restricted to "not exceed 6,000 feet." The ALJ found the community store component of the Text Amendment is a commercial use and is therefore, internally inconsistent with Policy 4.7A.2 of the Comprehensive Plan, which requires commercial uses to be located within the Primary Urban Service District. Based on that finding alone, the ALJ concluded that the Text Amendment was "not in compliance."

The ALJ committed multiple errors in her conclusion regarding the community store component by (1) disregarding the restrictions on the use of the community store; (2) ignoring that the community store is an "accessory" or "incidental" use to support the residential units within the PUD; (3) ignoring provisions in the Comprehensive Plan that specifically allow incidental commercial uses to support residential units within PUDs "throughout the County;" (4)

[1] The ALJ found the Petitioner failed to prove 13 of her arguments.

disregarding the testimony of the County's Comprehensive Planning Administrator who processed the Text Amendment; (5) disregarding the testimony of the Intervenor's planner who assisted in drafting the Text Amendment; and (6) improperly focusing on isolated phrases in one policy of the Comprehensive Plan instead of contextually reviewing the Comprehensive Plan *in pari materia*.

The ALJ took an improper and overly simplistic approach to analyzing the community store component by relying on a Black's Law Dictionary definition of "commercial use." In doing so, the ALJ concluded that if a community store "furthers a profit-making activity," it must be a commercial use and therefore inconsistent with Policy 4.7A.2 of the Comprehensive Plan. The ALJ committed further legal error by failing to respect the "highly deferential" standard applicable to the County in its interpretation of its own Comprehensive Plan, its analysis of accessory and incidental uses within a PUD, and the County's conclusion that the Text Amendment is consistent with its Comprehensive Plan. By ignoring the "fairly debatable" standard, the ALJ exceeded the scope of her judicial authority which resulted in an erroneous legal conclusion regarding the community store component.

As more fully discussed below, the Administration Commission should issue a final order that reverses the ALJ's conclusion as to the community store component and finds that the Text Amendment is "in compliance."

II. STANDARD OF REVIEW

A. The Fairly Debatable Standard

The sole issue to be determined is whether the Text Amendment is "in compliance." In order to be "in compliance", the Text Amendment must be internally consistent with the County's Comprehensive Plan, supported by relevant and appropriate data and analysis, and consistent with

the other statutory criteria in Sections 163.3184(1)(b), Florida Statutes, that Petitioner has raised. Section 163.3184(5)(c)1, Florida Statutes, requires that the "plan amendment shall be determined to be in compliance if the local government's determination of compliance is fairly debatable."

The Board of County Commissioner's determination that the Text Amendment is "in compliance" with the Comprehensive Plan is presumed to be correct and must be sustained if the determination of compliance is fairly debatable. *See* § 163.3187(5)(a), Fla. Stat.; *Coastal Dev. of N. Fla. Inc., v. City of Jacksonville Beach*, 788 So. 2d 204, 210 (Fla. 2001). The "fairly debatable" standard applies to all aspects of the compliance analysis, including, as dispositive here, determinations of internal consistency and determinations as to whether the amendment is supported by data and analysis. *See, e.g.*, *The Sierra Club v. St. Johns Cty.*, No. 01-1852GM, 2002 WL 1592234, at *26–28 (Fla. Div. Admin. Hrgs. May 20, 2002). The "fairly debatable" standard derives from the separation of powers doctrine of judicial deference to the legislature. *Kuvin v. Coral Gables*, 62 So. 3d 625, 632–33 (Fla. 3d DCA 2010) (citation omitted). It is a "highly deferential" standard of review that "requir[es] approval of a planning action if reasonable persons could differ as to its propriety." *Martin Cty. v. Yusem*, 690 So. 2d 1288, 1295 (Fla. 1997). If a legislative decision, such as the adoption of a plan amendment, is open to fair debate, then "the courts should not ordinarily substitute their judgment for that of the legislative body." *Dade Cty. v. United Res., Inc.*, 374 So. 2d 1046, 1049–50 (Fla. 3d DCA 1979).

B. <u>Findings of Fact, Conclusions of Law and Policy Determinations</u>

Pursuant to Section 120.57(1)(*l*), Florida Statutes, "[t]he agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction," provided that the agency's reasons are stated "with particularity" and the agency "make[s] a finding that its substituted conclusion of law . . . ***is as or more reasonable*** than that which was rejected or

modified." (emphasis added). The agency may reject or modify findings of fact if "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." *Id.*

The Administration Commission is not bound by the ALJ's labels as to what is a finding of fact and what is a conclusion of law. *See Battaglia Props., Ltd. v. Fla. Land & Water Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1993) ("[N]either the agency nor the court is bound by the labels affixed to findings of fact and conclusions of law. If a conclusion is improperly labeled as a finding of fact, the label is disregarded and the item is treated as though it were properly labeled."). The Administration Commission has the ability and discretion to determine for itself whether any given finding is a finding of fact, a conclusion of law, or a policy-infused finding, and then to review that finding accordingly.

Findings interpreting the Comprehensive Plan are conclusions of law because the Comprehensive Plan is a body of law. *See Nassau Cty. v. Willis*, 41 So. 3d 270, 278-70 (Fla. 1st DCA 2010).("[U]nder the Plan, the entire Coastal Area is considered environmentally sensitive, and yet, '[f]uture development' of this environmentally sensitive area is expected. Thus, when all of the pertinent provisions of the Plan are considered *in pari materia*, the mere fact that an area has environmental limitations is not a basis to prohibit development as long as the development is carried out in accordance with the limitations provided by the Plan . . ."). Because the Administration Commission has substantive jurisdiction over comprehensive planning, the Commission can reject the ALJ's interpretations of the Comprehensive Plan provisions and conclusion of law and instead provide substitute interpretations and conclusions that are as or more reasonable than that of the ALJ. *See* 120.57(l), Fla. Stat.

III. EXCEPTIONS

A. Paragraph 2

As a preliminary matter, the ALJ committed legal error and exceeded the scope of her judicial authority by drawing improper (and unsupported) legal conclusions about Petitioner's prospective standing to pursue an appeal. The only conclusion the ALJ is authorized to make regarding Petitioner's standing to bring an administrative proceeding is whether she is an "affected person" pursuant to Section 163.3184(1)(a), Florida Statutes. It is premature to draw legal conclusions regarding Petitioner's standing to seek appellate review later or whether she is "adversely affected" pursuant to Section 120.68, Florida Statutes.[2]

In the parties' Joint Pretrial Stipulation, the parties stipulated that Petitioner owns property and resides within the boundaries of the County, submitted oral or written comments, recommendations, or objections to the Text Amendment, and otherwise is an "affected person" pursuant to Section 163.3184(1)(a) for purposes of the administrative proceeding only. However, the ALJ exceeded the scope of her judicial authority by concluding that Petitioner "*would be adversely affected by any increased traffic from the Text Amendment.*" (Recommended Order, ¶ 2). While Petitioner is free to make a factual record for a potential appeal in the future, which she did, it is not the ALJ's role to draw legal conclusions as to whether a Petitioner has satisfied the standard under Section 120.68, Florida Statutes. That issue is a matter for an appellate court to decide. *See Martin Cty. Conservation All. v. Martin Cty.*, 73 So. 3d 856, 858 (Fla. 1st DCA 2011) (the appellate court finding that, while appellants were afforded broad standing to raise all issues

[2] On appeal, it is not sufficient that Petitioner merely be 'affected,' as required to establish standing in the administrative proceeding at issue here, but instead must be 'adversely affected.' *O'Connell v. Fla. Dept. of Comm. Affairs*, 874 So. 2d 673, 675 (Fla. 4th DCA 2004). The fact that a person may have the requisite standing to appear as a party before an agency de novo proceeding does not mean that the party automatically has standing to appeal. *Id.*

before an administrative law judge and the agency, appellants failed to factually establish how an adverse ruling harmed their interest and were therefore not afforded further appellate review).

In addition to the ALJ's determination in Paragraph 2 being outside the scope of her authority, the legal conclusion reached by the ALJ regarding adverse impacts to Petitioner based on an alleged increase in traffic was also not based on any competent substantial evidence. Instead, it was based on the speculative, lay opinion testimony of Petitioner regarding her personal views as to potential increases in traffic impacts in the future. Petitioner was not qualified as an expert to speak to potential future traffic impacts resulting from the Text Amendment, nor did she call any expert witness to testify as to any adverse traffic impacts. In *Katherine's Bay, LLC v. Fagan*, 52 So. 3d 19, 30 (Fla. 1st DCA 2010), the court held it was error for the ALJ to rely on lay witness testimony regarding adverse traffic impacts. "Lay witnesses' speculation about ***potential traffic problems***, light and noise pollution, and general unfavorable impacts of a proposed land use are not, however, considered competent substantial evidence." *Id.* (emphasis added).

Thus, not only did the ALJ improperly draw a legal conclusion about Petitioner's potential standing to bring an appeal in the future, which was outside the scope of the ALJ's authority, but the legal conclusion was also improper because it was not based on competent substantial evidence.

Therefore, Paragraph 2 must be amended as follows:

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

B. Paragraphs 37, 39, 40, 41, 102, 103, 104, 105

The sole basis for the ALJ's finding of "not in compliance" was based on the ALJ's interpretation of the community store component of the Text Amendment as being a "commercial use" and the resulting conclusion that it allegedly created an internal inconsistency with Policy 4.7A.2 of the Comprehensive Plan. As noted above, the ALJ erred in her analysis by (1) disregarding the restrictions on use of the community store; (2) ignoring that the community store is an accessory or incidental use to support the residential units within the PUD; (3) ignoring provisions in the Comprehensive Plan that specifically allow incidental commercial uses to support the residential units within PUDs "throughout the County;" (4) disregarding the testimony of the County's Comprehensive Planning Administrator who processed the Text Amendment; (5) disregarding the testimony of the Intervenor's planner who assisted in drafting the Text Amendment; and (6) improperly focusing on isolated phrases in one policy of the Comprehensive Plan instead of contextually reviewing the Comprehensive Plan provisions *in pari materia*.

As the court stated in *Katherine's Bay, LLC v. Fagan*, 520 So 3d 19, 28-29 (Fla. 1st DCA 2010), rules of statutory construction are applicable to the interpretation of comprehensive plans, including the rule that "all provisions on related subjects be read *in pari materia* and harmonized so that each is given effect." In *Katherine's Bay*, the appellate court found that the ALJ incorrectly focused on one isolated policy of the Comprehensive Plan to the exclusion of other polices in the Plan that provided more context. *Id.* at 28-30. In the present case, the ALJ likewise failed to look at the context of the entire Comprehensive Plan in determining whether the community store component of the Text Amendment was internally consistent.

The ALJ's finding of noncompliance was based on an improper and overly simplistic interpretation of the definition of "commercial use" in Black's Law Dictionary to broadly mean

anything "*that is connected with or furthers an ongoing profit-making activity*." (Recommended Order, ¶ 103). This interpretation of the community store as a general "commercial use" disregarded policies in the Comprehensive Plan itself that expressly provide for incidental or accessory uses, as well as the plain language of the Text Amendment that provides for restrictions on who would be permitted to utilize the community store. As such, the ALJ's analysis was improper and contrary to Florida law.

As discussed below, the community store component in Rural Lifestyle is an "incidental" or "accessory use" to the primary use of the rural community and is restricted to use "*by only the residents, guests, and employees of the PUD*." This is not the type of commercial use contemplated under Policy 4.7A.2,[3] but it is specifically contemplated by other provisions and policies of the Comprehensive Plan that address "incidental uses" in residential areas. Goal 4.9 of the Comprehensive Plan exists "to provide for appropriate and adequate lands for residential land uses to meet the housing needs of the anticipated population and provide residents with a variety of choices in housing types and living arrangements *throughout the County*." (emphasis added). Policies 4.9H.1 and 4.9H.2, which implement Goal 4.9, specifically address ancillary or incidental uses, and are not limited to areas within the Primary Urban Service District:

> *Policy 4.9H.1. Protect Residential from commercial uses*. *No commercial land uses shall be permitted in residential areas delineated on the Land Use Map* ***unless such uses are approved*** *by the County as a home occupation or* ***as an incidental commercial use that support residential units in a Residential PUD*** consistent with the Martin County Land Development Regulations. No industrial use may be permitted in any exclusively residential area as denoted on the Land Use Map. Inconsistent uses shall be eliminated consistent with the provisions of Goal 4.4.

[3] Policy 4.7A.2 provides "*Development in Primary Urban Service District.* Martin County shall require new residential development with lots of one-half acre or smaller, commercial uses and industrial uses to locate in the Primary Urban Service District."

> *Policy 4.9H.2. Protect Residential from nonresidential uses*. ***Any nonresidential use*** *proposed as part of a Residential PUD is to be* ***designed principally to support the residential units and shall be incidental to them***. Calculations of residential density shall not include land area used for commercial, industrial or other nonresidential purposes including parking, access ways, open space or utilities principally supporting the nonresidential development. The maximum size of the nonresidential use shall be determined by a formula provided in the Land Development Regulations. . .

(emphasis added). The purpose of Policy 4.9H.1, as stated in the title, is to protect residential from commercial uses. The provision is very restrictive in prohibiting commercial land uses in residential areas, but specifically allows incidental commercial uses. Policy 4.9H.2 provides clear guidance on what an incidental use is – a nonresidential use designed principally to support residential.

During the administrative hearing, two of the County and Intervenor's fact and expert witnesses, Clyde Dulin[4] and Morris Crady,[5] unequivocally testified that the community store, with its restrictions on who could use it, was incidental to and in support of the primary use of the residential community, and therefore, was not a general commercial use in its traditional sense.

Mr. Dulin testified:

> Q. So Mr. Gauthier also indicated that the community store is a commercial use, the community store that is provided for in the Rural Lifestyle text amendment. Do you agree with that?
>
> A. No, ***the community store provided in the text amendment is an accessory to the residential – the residences in the property***, just like a golf course would be an accessory to the residences in the property. And it's not a commercial use in the same sense that our General Commercial, our Limited Commercial, our Commercial/Office/Residential and our Marine Waterfront General Commercial future land use designations ***are intended***

[4] Mr. Dulin is the Comprehensive Planning Administrator with the County's Growth Management Department and assisted in drafting the Text Amendment and determining its compliance with the Comprehensive Plan. (T., p. 197)

[5] Mr. Crady is a planner that represented the Intervenor in processing the Text Amendment and worked together with the County in drafting the Text Amendment. (T., p. 322).

to provide for an actual going concern, actual businesses such as doctors' offices or places of employment for industry or marinas or, you know, ***anything that you would walk in off the street to do, that's what those future land use designations are there for***, for 7-Elevens and for, you know, all manner of retail and commercial. And the Rural Lifestyle future land use designation doesn't provide for that. If you're not a member or a guest, you're not getting in the gate.

(T., p. 234, ll. 10-25, p. 235, ll. 1 - 8)

Q. And again, the community store, why is it not commercial?

A. It's an amenity to the residents within the community.

(T., p. 262, ll. 23-25, p. 263, l. 1)

Mr. Crady similarly testified as follows:

Q. Are the uses in Section 9(g) ***accessory uses*** to the rural community?

A. Yes. ***They're accessory and ancillary to the principal use, be it a golf course or a residential community.***

Q. Are these ***accessory uses*** available to the general public?

A. Not at all.

Q. Are these commercial uses?

A. ***They're not commercial uses.***

Q. ***Does the text amendment specifically restrict who can use the community store?***

A. ***Yeah, the residents and guests of the community***.

Q. ***So the community store would not be open to the general public?***

A. ***Not at all.***

(T., p. 332, ll. 2-12, 18-23). As demonstrated above, Mr. Dulin and Mr. Crady consistently testified that a self-supporting community store, that was restricted to use by the residents, guests, and employees of the PUD and designed to reduce traffic impacts, would *not* constitute a traditional

commercial use.[6] The ALJ improperly disregarded their testimony regarding the community store being an accessory or incidental use to the residential community.

Contrary to the ALJ's conclusions, several Florida cases have held that restrictions on the provision of services to residents or guests were critical in distinguishing between an "accessory use" and a "commercial use." For example, in *International Co. v. City of Miami Beach*, 90 So. 2d 906 (Fla. 1956), the Florida Supreme Court analyzed a zoning ordinance that permitted a hotel in a residential area to operate cocktail lounges and a coffee shop as "accessory uses" *if* used for tenants of the hotel. When the hotel began to display a sign in front of the hotel inviting persons who were not guests of the hotel to visit the cocktail lounges and coffee shop, the Court held that it transformed the "accessory uses" into principal uses as if they were independent commercial enterprises, in violation of the City's regulations. *Id.* at 907.

Similarly, in *City of Miami Beach v. Uchitel*, 305 So. 2d 281 (Fla. 3d DCA 1974), the City's zoning ordinance permitted a restaurant to be maintained in an apartment-residential district for the primary use and convenience of tenants, but such restaurant could not hold itself out as a commercial restaurant by advertising to the public. When the owner of the restaurant began television and newspaper advertising, the court concluded that the restaurant was transformed from an "accessory use" to a "commercial use." Once again, the restrictions on who could use the restaurant was significant in determining whether the restaurant was an accessory use or a commercial use.

In *Belair v. City of Treasure Island*, 611 So. 2d 1285 (Fla. 2d DCA 1993), the City of Treasure Island argued that a rental office at a condominium was the "conduct of business" and

[6] This is distinguishable from the case of *Ashley v. State, Administration Commission*, 976 So. 2d 1130, 1133 (Fla. 1st DCA), relied on by the ALJ. In that case, the County's planner admitted that the subject land uses under consideration would allow for commercial uses. *Id*. at 1133-34.

therefore violated the zoning code, which prohibits commercial uses in a residential area. The court rejected the City's argument and found that the activities of a rental agent on residential property that *only* serves the residents is a valid accessory use and "is not the 'conduct of a business' in the traditional sense." *Id.* at 1290-91. The court further held:

> "The City's strict construction of the term 'conduct of business' would prohibit all of these activities. All of these examples are businesses which operate for a profit . . . However, ***because the business . . . serves only the residents of that particular property, the activities are permitted as <u>accessory</u> uses."***

Id. (emphasis added). In sum, the cases discussed above that distinguish "accessory uses" from "commercial uses" are more directly applicable to the facts and issues involving the Rural Lifestyle Text Amendment and the existing policies in the County's Comprehensive Plan and are more controlling than those cases cited by the ALJ.[7]

Despite being required to look at the Comprehensive Plan as a whole, the ALJ focused solely on the Black's Law definition of a "commercial use" and opined that <u>anything</u> that *"furthers an ongoing profit-making activity"* is prohibited outside the Primary Urban Service District. In doing so, and in addition to ignoring Policies 4.9H.1 and 4.9H.2 discussed above, the ALJ overlooked other Comprehensive Plan policies that are at direct odds with simply using a Black's Law definition. For instance, Policy 4.7A.5 provides:

> *Development options outside the urban service districts. Martin County shall provide reasonable and equitable options for development outside the urban*

[7] The cases referenced in Paragraph 103 of the Recommended Order were cited by the ALJ (not the Petitioner) and are inapposite or easily distinguishable. In *Keene v. Zoning Board of Adjustment*, 22 So. 3d 665, 670 (Fla. 5th DCA 2009), the code specifically defined a riding academy as a commercial use, and the owners previously admitted that the subject activities were, in fact, commercial. In *Baker v. Metropolitan Dade County*, 774 So. 2d 14 (Fla. 3d DCA 2000), the parking lot in question was to support a *commercial* self-storage facility, not a residential use. Finally, *Easton v. Appler*, 548 So. 2d 691, 695, n.5 (Fla. 3d DCA 1985) is not on point. The reference to commercial use was mere dicta and the court concluded that a country club that charges members a fee is *not* a commercial use.

> *service districts, including agriculture and small-scall service establishments necessary to support rural and agricultural uses.*
>
> *A small scale service establishment shall be defined as small, compact, low intensity development within a rural area containing uses and activities which are supportive of, and have a functional relationship with the social, economic and institutional needs of the surrounding rural areas.*

This Policy clearly contemplates the existence of these small-scale, profit-making businesses outside the urban service district. The Comprehensive Plan also contains Policy 4.12A.2, which similarly allows small scale service establishments outside the urban service district. Policy 4.12A.2 states:

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

Likewise, the ALJ disregarded Policy 4.13A.8(5), Rural Services Node, which allows a clustering of "low-intensity, small scale service establishments" to serve rural communities *outside* the Primary Urban Service District. The location of Rural Services Node is specifically delineated in Policy 4.13A.8(5)(a). Rural Services Node includes uses such as a general store offering groceries and other sundries and is specifically "*designed to reduce the distances County residents must travel for goods and services on the County's roadways, improve the quality of life for rural citizens, and reduce greenhouse emissions by reducing vehicle trips*." *See* Policy 4.13A.8(5) and (5)(b). As testified to by Mr. Crady, this is a similar premise behind the community store concept in Rural Lifestyle. When the Comprehensive Plan is viewed together as a whole, Policies 4.9H.1, 4.9H.2, 4.12A.2, 4.7A.5, and 4.13A.8(5) directly undercut the ALJ's erroneous conclusion that any "profit-making activity" is prohibited outside the Primary Urban Service District.

Well-established rules of comprehensive plan interpretation dictate that specific provisions control over general ones and that one provision should not be read in such a way that renders another provision meaningless. *Katherine Bay, LLC*, 52 So. 3d at 29. The ALJ's legal conclusion that the community store makes the Text Amendment inconsistent with Policy 4.7A.2 completely disregards numerous other provisions in the Comprehensive Plan and renders them meaningless. By failing to read the Comprehensive plan *in pari materia* and ignoring well-established principles of comprehensive plan interpretation, the ALJ committed legal error.

Based on the foregoing, and pursuant to Section 120.57(1)(l), Florida Statutes, the Administration Commission should make the following substituted conclusions of law which are as or more reasonable than those made by the ALJ.

Accordingly, Paragraphs 35, 37, 40, 41, 103, 104, 105 must be amended as follows:

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

37. ~~**However, even though t**~~**T**he community store**, based on the restrictions of who can utilize it and the self-supporting language in the Text Amendment**, is different from the existing commercial uses in the Comprehensive Plan**.**~~**, it still may constitute a commercial use. Nowhere in the text of the Comprehensive Plan does it say that the phrase "commercial use" refers to the existing commercial FLU designations. Absent such a reference, the plain and ordinary meaning of "commercial use" includes the community store.**~~

38. ~~**Second,** Mr. Dulin testified that the community store would likely be located within a gated community,~~ **Both Mr. Dulin and Mr. Crady testified that, based on the restrictions of who could use the community store, as set forth in the language of Rural Lifestyle, the community store would be an "accessory use" to the residential units in the community – not a commercial use**. ~~**However, the Text Amendment does not require a community store to be within a gated community. Mr. Dulin's assumption that the development would be gated is based on assumptions regarding hypothetical developments and "high-end customer[s]." Such assumptions lack evidentiary support in this record.**~~ **The County and Intervenor's interpretation is supported when read *in pari materia* with other provisions of the Comprehensive Plan (see e.g., Policies 4.9H.1, 4.9H.2, 4.12A.2 and 4.7A.5) and existing Florida law. *International Co. v. City of Miami Beach*, 90 So. 2d 906 (Fla. 1956); *City of Miami Beach v. Uchitel*, 305 So. 2d 281 (Fla. 3d DCA 1974); *Belair v. City of Treasure Island*, 611 So. 2d 1285 (Fla. 2d DCA 1993).**

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

41. Based on the foregoing, Petitioner **failed to** prove~~d~~ beyond fair debate that the community store**, as restricted** ~~**permitted**~~ by Rural Lifestyle**,** ~~is~~ **constitutes** ~~a~~ commercial use **that**~~**and, as such,**~~ is inconsistent with Policy 4.7A.2.

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

103. ~~**The phrase "commercial use" means "[a] use that is connected with or furthers an ongoing profit-making activity." Commercial use, BLACK'S LAW DICTIONARY (11th ed. 2019). The word "commercial" simply means "[o]f, relating to, or involving the buying and selling of goods." Commercial, BLACK'S LAW DICTIONARY (11th ed. 2019). These definitions are not consistent with how Florida courts have analyzed the phrase "commercial use" in land use cases. *See, e.g.*, Keene v. Zoning Bd. of Adjustment, 22 So. 3d 665, 670 (Fla. 5th DCA 2009) (explaining that a horseback riding school is a commercial use because it charges money for the riders to attend); Baker v. Metro. Dade Cnty., 774 So. 2d 14, 21 (Fla. 3d DCA 2000) (explaining that parking lots are a commercial use if they collect money from customers to park there or support a commercial structure); Easton v. Appler, 548 So. 2d 691, 695 n.5 (Fla. 3d DCA 1989) (stating that the test for commercial use "is whether the purpose is primarily for profit"). A community store unquestionably furthers a profit-making activity. Clearly, the community store is a commercial use.**~~

104. ~~**Contrary to Mr. Dulin's testimony, the community store is a commercial use since it serves the community despite being restricted to residents and guests. In Ashley v. State, Administration Commission, 976 So. 2d 1130, 1133 (Fla. 1st DCA 2007), the court analyzed the adoption of a new land use element that permitted residential as well as "free-standing non-residential, commercial uses intended to serve residents and their guests." Ashley, 976 So. 2d at 1133. The court in Ashley held that those uses constituted commercial use, even though they were designed to serve residents and guests. Id. at 1134. Thus, the community store does not become a non-commercial use merely by limiting their service to residents and guests.**~~

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

127. Petitioner **failed to** prove~~d~~ by preponderance of the evidence, and beyond fair debate, that the Text Amendment is ~~not~~ internally **in**consistent with ~~the~~ **the Comprehensive Plan, Policy** ~~**4.7A.2**~~ and thus **the Text Amendment complies** ~~does not comply~~ with section 163.3177(2).

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

C. Paragraphs 79, 81-83, 124 and 125

Based on the ALJ's erroneous conclusion that the community store was a commercial use, the ALJ incorrectly concluded that Rural Lifestyle was a mixed-use development. Nevertheless, the ALJ still concluded that Rural Lifestyle was not in violation of section 163.3177(6)(a)3.h. because of the limits on the size of the community store and who can use the community store. As demonstrated above, the community store is only an incidental or accessory use to the residential community. Therefore, Rural Lifestyle is not a mixed-use development as defined by the Comprehensive Plan.

Based on the foregoing, and pursuant to Section 120.57(1)(l), Florida Statutes, the Administration Commission should make the following substituted conclusions of law which are as or more reasonable than those made by the ALJ.

Accordingly, Paragraphs 79, 81-83, 124, and 125 must be amended as follows:

79. Rural Lifestyle undoubtedly contains residential uses. Moreover, as previously discussed, the community store in Rural Lifestyle **is an accessory or incidental use to the rural community – and not** ~~**constitutes**~~ a commercial use. Because Rural Lifestyle is **not** a mix of residential and commercial uses, it would **not** constitute a mixed-use development. ~~if it were "in the form of a mixed-use pattern or a mixed use project."~~

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

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

83. ~~While it is true that Rural Lifestyle lacks a "percentage distribution," that phrase in the statute is followed by "or other standards." Rural Lifestyle includes several other standards that guide the implementation of mixed-use development. For example, the limit on the size of the community store and the limit on who can use the community store, both guide the density and intensity of the use. Thus, failing to include a percentage distribution is not a violation of section 163.3177(6)(a)3.h.~~

124. The Findings of Fact establish that Rural Lifestyle is **not** a mixed-use development that must comply with section 163.3177(6)(a)3.h. Petitioner's proposed recommended order argues that Rural Lifestyle fails to provide "percentage of distributions for each use and consideration of the public facility needs."

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

IV. CONCLUSION

Based on the foregoing, the Administration Commission should reject the ALJ's recommendation that the Rural Lifestyle Text Amendment be found "not in compliance," and should instead enter a final order determining the Rural Lifestyle Text Amendment to be "in compliance" in accordance with these Exceptions.

Dated this 3rd day of April 2023.

Respectfully submitted,

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CERTIFICATION OF FILING BY ELECTRONIC TRANSMISSION

I HEREBY CERTIFY that on this 3rd day of April 2023, I have electronically filed the foregoing Exceptions with the Clerk to the Administration Commission at: AC.Clerk@LASPBS.STATE.FL.US and I represent that the original signed document will be retained by the undersigned for the duration of the proceeding and of any subsequent appeal or subsequent proceeding in this cause, and that the undersigned shall produce it upon the request of other parties.

/s/ Elysse A. Elder
ELYSSE A. ELDER, ESQ.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 3, 2023, a true and correct copy of the foregoing was served via email to Petitioner and Attorney, **Donna Sutter Melzer, Esq.** (DonnaSMelzer@gmail.com), 2286 SW Creekside Drive, Palm City, FL 34990 and **Christopher P. Benvenuto, Esq**. (cbenvenuto@gunster.com) and **S. Kaitlin Guerin, Esq.** (kguerin@gunster.com), Counsel for Intervenor, 777 S. Flagler Drive, Suite 500 East, West Palm Beach, FL 33401.

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