

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

ROBIN CARTWRIGHT,
An Individual,

CASE NO.: 21-2718GM

Petitioner,
v.

CITY OF STUART, Florida,
a Florida municipality

Respondent.

PETITIONER’S PROPOSED RECOMMENDED ORDER

I. INTRODUCTION

The formal hearing in this matter was held via zoom hearing on November 15th and 16th, 2021. The issue to be determined is whether the Future Land Use Map (comprehensive plan) amendment as adopted by Ordinance 2466-2021 is “in compliance.” Petitioner Cartwright introduced the testimony of Mr. Charles Gauthier, an expert in comprehensive planning, and Greg Braun, an expert in wetland and upland ecological surveys and assessments. The following joint exhibits were accepted into evidence:

By stipulation

- Jt. Ex. 1, City of Stuart Future Land Use Map
- Jt. Ex. 2, Martin County Future Land Use Map
- Jt. Ex. 3, Department of Economic Opportunity Letter dated June 25, 2021.
- Jt. Ex. 4, Department of Economic Opportunity Letter dated October 12, 2021.
- Jt. Ex. 5, Ordinance 2466-2021 (adoption ordinance)
- Jt. Ex. 6, City of Stuart Comprehensive plan – Parties agree to ask Court to take Judicial Notice instead of placing entire comprehensive plan in the record. (On-line version found at - https://library.municode.com/fl/stuart/codes/comprehensive_plan [Tr., V. 1, p. 11])

Petitioner's Exhibits

Pet Ex. 1: *Application Review Proposed COSTCO CPUD Stuart Fla.* (G. Braun July 28, 2021) [Tr., V. 1 p. 39]
Pet. Ex. 2: Gauthier, *Preliminary Overview of Opinion* [Tr., V. 2 p. 187-188]
Pet. Ex. 3: (Costco site plan) (proffered) [Tr., V. 4 p. 477]
Pet Ex. 5: Resume of Greg Braun. [Tr., V. 1 p. 37]
Pet. Ex. 6: Resume of Charles Gauthier [Tr., V. 2 p. 187]
Pet. Ex. 7: City of Stuart Land Use Map [Tr. V. 3 p. 281]
City Ex. 9: City wetlands map [Tr. V. 3 p. 282]
City Ex. 11: Transcript of BOCC May 24 hearing. [proffered] [Tr. V. 3 p. 282-286; V. 4 p. 474]
City Ex. 12 A&B: (transcript of BOCC August 9th) [proffered] [Tr. V. 3 p. 282-286; V. 4 p. 474]
City Ex. 34: Staff Report (Proffered) [Tr. V. 4 p. 445]

Respondent

City Ex. 30 [Tr. V. 3 p. 300]
City Ex. 16 (not accepted for the truth of the matters asserted) [Tr., V. 3 pp. 336-339]
City Ex. 17 (not accepted for the truth of the matters asserted) [Tr., V. 3 pp. 341-342]
City Ex. 21 [Tr., V. 3 pp. 356]
City Ex. 36 (not accepted for the truth of the matters asserted) [Tr., V. 3 pp. 377]
City Ex. 37-A and 37-D. [Tr., V. 3 pp. 384]

II. FINDINGS OF FACT

Parties and Jurisdiction

1. Petitioner Robin Cartwright owns property and resides in the City of Stuart. [Jt. Amended Prehearing Stip. p. 5, ¶1]
2. Cartwright lives at 703 SE Hibiscus Avenue, about 2.6 miles driving distance from the property, which she drives by daily. [Tr., Cartwright V. 3 p. 274]
3. She and her husband, who commutes to Miami for his job, using Kanner Highway as part of his route, will be adversely affected by the increased traffic that will be generated by the FLUM amendment and project. [Tr., Cartwright V. 3 p. 275-277]
4. Cartwright also looks after her elderly in-laws, one of whom is under constant medical care, during the 3-4 day periods when her husband is out of town for work, and relies on the ability

to drive to their home on Kanner Highway in a reasonable amount of time in the event of a medical episode. [Tr., Cartwright V. 3 p. 278-279]

5. Cartwright's elderly in-laws live across the street from parcels which are the subject of the FLUM amendment. [Tr., Cartwright V. 3 p. 277]
6. Kanner Highway is a hurricane evacuation route. [Tr., Freeman, V. 3 p. 302]
7. Cartwright submitted oral or written comments, recommendations, or objections to the City, including at the May 24, 2021 and August 9, 2021 public hearings at which the City approved the Amendment ordinance. [Jt. Amended Prehearing Stip. p. 5, ¶2]
8. Cartwright's petition for administrative hearing was filed within thirty (30) days from the date of adoption of the subject comprehensive plan amendment. [Jt. Amended Prehearing Stipulation p. 5, ¶4]
9. Respondent, City, is a political subdivision of the State of Florida that is subject to the requirements of Chapter 163, Part II, Florida Statutes. [Jt. Amended Prehearing Stip. p. 5, ¶3]

The Property

10. The 48.099 acre property is located at 3153 S Kanner Hwy., Stuart, FL. [Jt. Amended Prehearing Stipulation p. 5, ¶5]
11. The property, consisting of four parcels, was annexed by the City in 2016 and 2017. [Tr., Freeman, V. 4 p. 398]
12. The property is owned by Nehme Holdings, LLC and Willoughby Group, LLC. [Jt. Amended Prehearing Stip. p. 6, ¶11], neither of whom appeared in this matter.
13. The prior land use designation was *Low Density Residential*, which designation was deemed in compliance by the state. That designation allows five residential units per acre. [Tr., Gauthier, V. 2 p. 194]

14. Prior to the challenged amendment, under the Martin County Plan, residential development on the site would have been limited to 200 - 245 residential units, with a limited amount of commercial development if developed as a traditional neighborhood development, all subject to a 40-foot height limit, a 50 percent open space requirement, and very strict limits on any wetland impacts. [Tr., Gauthier V. 2 p. 195 – 196; City Ex. 3]

The Surrounding Lands

15. The site is adjacent to the east of Lychee Tree Nursery, at 3151 S. Kanner Highway. The nursery is not within the City limits; it is in unincorporated Martin County and is zoned *Agricultural* and has a future land use designation of *Low Density*. [Jt. Amended Prehearing Stip. p. 6, ¶6]

16. There are two homes on the nursery property – one occupied by the owners of the land and nursery, and the other occupied by their son. [Tr., Freeman, V. 4 p. 395]

Nearby Natural Areas

17. The subject property is proximate to several natural areas with similar habitat types.

18. Immediately adjacent to the site to the south is a residential complex called *The Crossings at Indian Run* which, when it was subject to review, was required to avoid and minimize habitat impacts and preserve certain wetlands and uplands for their environmental values. [Braun., V.1 p. 48; Tr., Freeman, V. 4 p. 394 – 396; City Ex. 30]

19. There is a continuous natural habitat adjacent to the property on the west side of Kanner Highway. which extends down to the South Fork of the St. Lucie River. [Braun., V.1 p. 47]

20. The site is close to the Kiplinger parcel, a several hundred-acre parcel owned by Martin County that includes a landside parcel with a mix of uplands and wetlands, with mangrove

wetlands along the shore, and a peninsula extending north to the South Fork of the St. Lucie River. [Braun., V.1 p. 47; City Ex. 30]

21. South of that is a peninsula owned by the local Audubon chapter and maintained as a preserve. [Braun., V.1 p. 47; City Ex 30]
22. To the east of Kanner Highway, on the southeast area of Indian Street and Kanner Highway, lies an extensive preserve for the “Willoughby” development, which was required to be preserved in perpetuity. [Braun., V.1 p. 47-48; Tr., Freeman, V. 4 p. 395 – 396; City Ex 30]
23. To the southwest is the *Bridgeview* project, which, when approved by the City, was required to preserve habitats on the side of the property adjacent to the South Fork of the St. Lucie River. [Tr., Braun, V.1 p. 48; Freeman, V. 3 p. 304 – 305, V. 4 p. 395 – 396; City Ex. 30]
24. As these developments were applied for and approved, they were required to analyze the environmental attributes of the property and develop a site plan that preserves the most environmentally valuable of those properties and allows development on the portions that have lesser environmental sensitivity. [Braun., V.1 p. 49, 53-54]
25. The site contains the same habitat types that are found on the Bridgeview and Kiplinger parcels. [Tr., Braun V. 1 p. 62].

The Plan Amendment Analysis and Adoption Ordinance

26. Throughout the consideration and adoption process, the FLUM, rezoning and site plan were discussed together as a unified project. [Tr., Freeman, V. 4 p. 403]
27. All staff analysis for the Amendment treated the amendment and the concurrent zoning change and site plan as one unified project and decision. [Tr., Freeman, V. 4 p. 403-404; City Ex. 34 (Proffered)]

28. The Kanner CPUD staff analysis, dated March 2, 2021, addresses both the FLUM and the zoning change and is labelled “Kanner CPUD – Costco w/Residential Rezoning”. Under the heading “The *Project Description SUMMARY*” it states “Assigning a Commercial Planned Unit Development and a Neighborhood Special District” [Land Use City Ex. 34, p. 1 (Proffered)]
29. The memo includes a map of the proposed zoning designation and the proposed FLUM amendment. [*Id* at pp. 4, 6]
30. It described the “Zoning - Landscaping & Site Design” details for the Costco project. [*Id* at p. 8; Tr., Freeman, V. 4, p. 404]
31. It included both a “Land Use Plan Amendment Traffic Analysis” and a “Site Specific Traffic Impact Analysis” specifically for the Costco project. [*Id*, p14; Tr., Freeman, V. 4, p. 404]
32. The adoption public hearing was a quasi - judicial proceeding, as required by Florida law only for the adoption of development orders¹. City Commissioners were required to identify persons with whom they had spoken to about the project, formal parties were recognized, including the applicant and three residents identified as Intervenors, and witnesses were sworn to an oath and subject to cross examination. [Tr., Cartwright V. 3 p. 280; Freeman, V. 4 p. 403]
33. Not only did the Respondent treat the Amendment, concurrent zoning change, and site plan as one unified project and decision, but in fact decided, in part at least, to approve the Amendment because “Costco’s been looking in our community in Martin County for some

¹ See, e.g. *Snyder v. Board of County Commissioners of Brevard County*, 627 So. 2d 469 (Fla. 1993); *Carillon Community Residential v. Seminole County*, 45 So.3d 7, 9 (Fla. 5th DCA 2010); *Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991)

time...” and it was “our shot at having Martin County have Costco.”² [Resp. Ex. 12a p. 226 (proffered)]

34. After hearing all testimony and discussing the Costco project, specifically, at length, the City Commission adopted Ordinance 2466-2021 that approved, concurrently, a FLUM Amendment to *Special Neighborhood District*, a Zoning change to *Commercial Planned Unit Development* - establishing the Kanner Commercial Planned Unit Development (CPUD), and a Master Site Plan approving 162,020 square feet of retail, bulk merchandise, and automobile repair services building with a stand-alone kiosk and fuel facility, 378 residential apartment units and retail and restaurant pads. [Jt. Amended Prehearing Stip. p. 6, ¶9; Jt. Ex. 5; Tr., Gauthier, V. 2 p. 200-201]

35. Prior to the FLUM change, the future land use designation was “Low Density”, which allowed a maximum density of 5 dwelling units per acre, and the zoning district was Agriculture (A1). [Jt. Amended Prehearing Stip. p. 6, ¶9; Tr., Gauthier, V. 2 p. 194]

36. The inclusion of each of these approvals in one ordinance is unusual and created an ambiguity which, all facts considered, is most reasonably interpreted to mean that the adoption ordinance approved a specific development project, consisting of the FLUM change, the rezoning and the Costco site plan. [Tr., Gauthier, V. 2 p. 196, 201-202]

2. “**Costco's been looking in our community in Martin County for some time.** They've looked at various sites. I don't want to -- I mean, I don't think it's our duty to do whatever it takes to get them here, but we clearly -- I mean, we've been working with them, but they're bringing a lot to the table here in this case as well. You know, I'd like -- I'd like the jobs, I'd like the tax revenue, it's not the only thing I'm thinking about. Could it potentially be in a better place, sure, **but I think on the whole, this -- this is our -- this is our shot at having Martin County have Costco.**” [Resp. Ex. 12a p. 226 (proffered)] (emphasis added). “...**Costco is a best-in-class company** with the opposite end of the spectrum of a big-box store like Walmart. All right.” [*Id* at p. 230 (proffered)](emphasis added)

37. The adoption Ordinance included the following operative provisions:

“SECTION 1: The following documents are on file as public records of the City, at the office of the City Clerk in City Hall and are attached hereto as Exhibit "D", hereinafter the "Development Documents”, shall be deemed a part of this ordinance:

1. Drainage and Utility Statement, by Engineering Design and Construction Engineers, last revised June 16, 2021.
2. Tree Replacement - Innovative Stormwater Treatment, by Engineering Design and Construction Engineers, last revised June 16,2021.
3. Traffic Analysis for Kanner CPUD, by O'Rourke Engineering and Planning, Pages 1-52, dated December 16,2020, April 21,2021 and last revised on June 25,2021.
4. Land Use Plan Amendment Traffic Analysis, by O'Rourke Engineering and Planning, Pages 1-36, dated December 18, 2020, February 18, and last revised on April 21,2021.
5. Signal Warrant Analysis for Kanner CPUD, Pages 1-23, by O'Rourke Engineering and Planning, dated February 18, 2021, March 16, 2021, April 22,2021 and last revised on June 25, 2021.
6. Environmental Assessment Report, by EW Consultants, Inc. Pages 1-41, dated March, 2021
7. Proposed Retail Buildings and Proposed Restaurant Buildings: Stuart Retail Center, by EP Design Services, Sheets A-001 thru A-004, dated March 3, 2021.
8. Residential Multifamily Plans and Elevations and proposed Retail Buildings, by Forum Architecture & Interior Design, Inc. Pages A5.11, AS.21, A5J1, AS.41, AS.51, AS.61, A6.11, A6.51 and A6.61 all dated 12.14J1 and last revised on 7.13.21.
9. Costco Building Elevations, by MG2, Pages 1-9, dated December 16, 2020 and last revised on 5.12 2021.
10. Master Site Plan, Sheet 1 of 1, By Lucido and Associates Dated March 16,2021 and last revised on 7.02.2021.
11. Phasing Plan, by Engineering Design and Construction Engineers Sheet 1 of 1, dated 07 July 2021.
12. Boundary, Topographic & Tree Survey, by Engineering Design and Construction Engineers, Sheets 1-9. dated February 26,2021
13. Landscape plan. By Lucido and Associates, Sheets CV-1 & LA1-LA16, dated December 17, 2020, 03.19.2021, 04.21.2021, 05.13J1 and last revised on 7.1.2021
14. Preliminary Engineering Plans and Specifications, by Engineering Design and Construction Engineers, Pages 1-9, dated. July 07,2021
15. Kanner CPUD Garbage Truck Turning Exhibit, by Engineering Design and Construction Engineers, Sheet 1 of 1, dated 12 May 2021.
16. Kanner CPUD Fire Truck Turning Exhibit, by Engineering design and Construction Engineers Sheet 1 of 1; dated 19 March 2021.
17. Photometric plans, sheets EO.1, E1.1, E1.10, E1.11, E1.2 E1.9, By Lucido and Associates, dated 8.21.2020 and 12.18.2020.

SECTION 2: The Future Land Use designation in the City's Comprehensive Land Use Plan shall be established as "Neighborhood Special District".

SECTION 3: The Land Development (Zoning) District designation on the ...Official Zoning Map shall be established as "CPUD" Commercial Planned Unit Development."

[Jt. Amended Prehearing Stip. p. 7, ¶ 13; Jt. Ex. 5]

38. The WHEREAS clause finding that the applicant showed by substantial competent evidence that the application is consistent with the Land Development Code is further evidence that the approval is for a unified FLUM and zoning change and site plan. [Jt. Ex. 5]

The FLUM Designation Allows a Costco, Under the Amendment

39. The *Neighborhood Special District* is a high-intensity designation, allowing a higher level of residential development and a very high intense level of commercial development. [Tr., Gauthier V. 2 p. 195]

40. The Neighborhood/Special Future Land Use is defined in the City's Comprehensive Plan in Policy 1.A7.1.J.

Neighborhood/Special District: Mixed-use category allowing residential, commercial, and recreation land uses such that a functional vertical or horizontal mix of uses is achieved. Developments shall include a mix of residential and commercial or office. Uses may be mixed within a single building and on a single site provided that impacts from differing uses are mitigated through urban design techniques. Also, public facilities and electric distribution substations are allowed.

Uses within the Neighborhood/Special District are limited such:

- Residential minimum 30% to maximum 90%
- Commercial minimum 10% to maximum 70%

41. The FLUM designation allows 15 residential units per acre, and under some instances, up to 30 units per acre in a residential planned development. [Tr., Gauthier, V. 2 p. 207]

42. The NSD category allows a regional - scale retail establishment, such as a Costco store. [Tr., Freeman, V. 4 p. 417]

43. A Costco or other regional - scale retail establishment is a large - scale discount store, which features bulk buying in large loads, with a regional trade area, attracting overwhelmingly vehicular, and not pedestrian, trips from a multi-county area. [Tr., Freeman, V. 4 p. 418 - 419]

The City's Plan Amendment Analysis

44. At the adoption public hearing, the City planner's presentation was completely about landscaping plan and infrastructure – all about conditions of approval, limiting herbicides and such. [Tr., Freeman, V. 4 p. 402 - 404]
45. City staff failed to conduct any written analysis of the character of the land relative to the statutory factors that govern Future Land Use Map decisions, despite these statutory requirements. [Tr., Freeman, V. 4 p. 402]

Not Based Upon Data and Analysis of the Maximum Development Potential.

46. The Department of Economic Opportunity ("DEO") review of the proposed amendment expressed comment that because the development requested by the applicant is less dense and intense than the maximums allowed by the requested Future Land Use Map designation, if the City was relying on the proposed development densities requested in the Comprehensive Plan amendment for planning purposes, the City should either limit the allowed densities and intensities within the comprehensive plan or, in the alternative, provide an analysis contemplating the maximum allowable densities and intensities permitted by the FLUM Amendment, as required by State law. [Jt. Amended Prehearing Stip. p. 6, ¶8; Tr., Gauthier, V. 2 p. 198-199]
47. The City, however, did not analyze the maximum development impacts relative to traffic generation under the FLUM change, which, as a result, it under-projected. [Tr., Gauthier, V. 2 p. 204- 207, 245-246]
48. The City's traffic impact analysis was based on and limited to the specific development proposal as approved by the site plan and CPUD zoning, which is 162,000 - 192,928 SF of commercial building, and 378 -398 dwelling units [Tr., Gauthier, V. 2 p. 209-210]

49. The analysis assumed commercial development that is approximately only 13 percent of what the FLUM development potential actually is, which is an unreasonable and not professionally acceptable under-count of development potential. [Tr., Gauthier, V. 2 p. 210-211, 215-216, 245-246]
50. The Staff's build-out analysis specifically analyzed the impacts of a Costco store, as ultimately approved by the site plan. It was based upon what actually "had already been submitted and designed" for the Costco project. [Tr., Freeman, V. 3 pp. 365-366; Resp. Ex. 21]
51. The City's impact analysis assumed that development constraints included only in the land development code, and not in the comprehensive plan, would apply, with no variances granted, to reduce the amount of development ultimately allowed by the FLUM designation. [Tr., Freeman, V. 3 pp. 363-366, 368. V. 4 p. 408-409]
52. If this FLUM amendment becomes effective, the City can simply change the zoning to allow for an increase in the densities and intensities – all the way up to the maximum allowed by the new FLUM designation, because that would be consistent with the comprehensive plan as amended. That is why failing to analyze the maximum densities and intensities allowed by the FLUM designation is not professionally acceptable and inconsistent with Ch. 163, Part II. [Tr., Gauthier, V. 2 p. 199 – 200, 205-207, 215-216]
53. As admitted by the City planner, the future land use amendment is not intended to be restricted by the densities and intensities of the development approval. [Tr., Freeman, V. 3 p. 354]

The Density and Intensity Allowed By the New FLUM Designation

54. The *Neighborhood Special District* is a mixed-use category; it allows up to 70% of the site (34.3 acres) to have Commercial development. [Tr., Gauthier, V. 2 p. 208]

55. Specifically:

Policy 1.A7.1. The City of Stuart has designated the following land use categories and allowed uses for all land within the City of Stuart: ...

*J. Neighborhood/Special District: Mixed-use category allowing residential, commercial, and recreation land uses such that a functional vertical or horizontal mix of uses is achieved. Developments shall include a mix of residential and commercial or office. Uses may be mixed within a single building and on a single site provided that impacts from differing uses are mitigated through urban design techniques. Also, public facilities and electric distribution substations are allowed. ****

Policy 1.A7.2. Gross densities, gross intensities and proportional use amounts for each land use category are established in the "Table of Land Use Densities and Intensities" that is adopted as part of this element. In order to promote the efficient use of land and to provide an attainable housing stock (Policy 3.A2.6. Housing opportunities), the City's Land Development code shall provide adjustment, through the urban planned unit development process, to accommodate smaller residential units and allow smaller housing units to be calculated at 0.5 density per unit for units less than 900 sq.ft and 0.75 density per units for units less than 1100 sq.ft.

TABLE OF LAND USE DENSITIES AND INTENSITIES

Neighborhood/Special District = 10—70% can be non-Residential

Objective 1.F1. - [Development standards for Neighborhood/Special District land use category.]

The City shall allow mixed-use and traditional neighborhood development, pedestrian accessibility, and innovative planning and land use techniques that strengthen the small-town character of Stuart through the application of the Neighborhood/Special District land use category. Policy 1.F1.1. Of the developable acreage of the site, not less than 30 percent shall consist of residential use and not less than ten percent shall consist of non-residential and non-recreational land uses.

56. Beyond the uses and intensities allowed by the approved zoning district and master site plan, the *Neighborhood Special District* land use designation allows the following uses:

- a. Mixed use – proportionality standards for residential and non-residential land use – pursuant to Plan Policy 1.A7.2.
- b. Non-residential for at least 10% of the property but not more than 70%. [Tr., Gauthier, V. 2 p. 208]

57. Assuming the maximum 70% commercial under NSD, the maximum density and intensity allowable is 735 dwelling units, and 1,494,108 SF commercial floor area. [Pet. Ex. 2, Gauthier Report, Table 2 and 4 on pp. 19 & 25; Tr., Gauthier, V. 2 p. 210]

58. For commercial development, the *NSD* designation allows a floor/area ratio of 2.0, which is considered high. That means for every square foot of commercial site area, two square feet of commercial building area is permissible. [Tr., Gauthier, V. 2 p. 208]

The Traffic Analysis Did Not Consider the Maximum Traffic Generation Allowed by the FLUM Designation

59. The traffic analysis, upon which the Amendment was approved, analyzed only the traffic allowed by the CPUD zoning and not the more traffic intense uses allowed by the *NSD* designation. [Pet. Ex. 2, Gauthier Report, p. 23]

60. The City's impact analysis severely under-counted the vehicular trips that could be created by the Amendment, as revealed by the City planner's admissions that the analysis upon which the amendment is based did not analyze the impacts of the most traffic – intensive uses allowed by the *NSD* FLUM category, but instead, was based on the specific mix of uses allowed by the Costco site plan that was also approved as part of the Amendment adoption ordinance.

61. The traffic analysis was based specifically on a 157,531 square foot Discount Club – the approved Costco development. [Tr., Freeman, V. 4 pp. - 431]

62. Although the analysis assumed no waivers of parking, buffer, or landscaping requirements, such waivers are common. [Tr., Freeman, V. 4 pp. 408-409]

63. Further, mechanisms exist, such as elevated parking garages, waivers of parking space requirements, and joint use parking as a means to lower land consumption for parking and increase commercial floor area. [Tr., Gauthier V. 2 p. 252; Freeman, V. 4 pp. 408-409]

64. In fact, the adoption ordinance in this case granted such waivers for the Costco site. [Tr., Freeman, V. 4 p. 409-410] The project is so intense that several waivers were required and granted from several code requirements, allowing the project to proceed without providing the full amount of otherwise required parking spaces, shopping cart storage spaces, interior landscaped islands. [Tr., Freeman, V. 4 p. 409-410]

65. Next, the *NSD* FLUM category allows “Super convenience/market commercial” uses, but the traffic analysis did not analyze or assume any super convenience/market commercial uses on the property. [Tr., Freeman, V. 4 pp. 429 - 431]

66. Also, the traffic analysis was done during the Fall of 2020 when, due to the COVID pandemic, vehicular traffic was unnaturally suppressed, as substantial numbers of students, workers and shoppers remained largely at home and schools and businesses were operating in full or partial lockdown and thus at less than full capacity. [Tr., Freeman, V. 4 pp. 406-407]

68. Even the City’s traffic under-count reveals that the amount of traffic that will be generated from the parcel will increase by thousands of trips per day as a result of the land uses allowed by the FLUM amendment. [Tr., Freeman, V. 4 p. 414-415]

69. The new road required by the project approval will not alleviate existing traffic; it simply moves the traffic generated by this project, and the result of the land uses allowed by the FLUM change is that traffic on Willoughby Road and Kanner Highway will be much more congested. [Tr., Freeman, V. 4 p. 415 - 416]

The FLUM Designation is Not Based Upon Character Of The Land Nor the Parcel’s Habitat Value

70. The City’s analysis of this issue was based upon hearsay documents not placed into evidence for the truth of the matters asserted and opinions of persons who did not testify and are thus not supported by competent substantial evidence. The only competent substantial evidence

about the habitat value and importance of the property is that of Cartwright's expert Greg Braun, which this ALJ finds credible and persuasive.

71. The City did not consider the environmental character of the land as a factor upon which the use and intensity should be based. Relying entirely on the development order and permitting processes to consider the habitat values of the parcel, it conducted no planning analysis at all as to whether the proposed type and intensity of development was suitably based on the habitat and other functions of the natural ecosystems on site. [Tr., Freeman, V. 3 p. 329, 346, V. 4 p. 434 - 435]. While the City planner's interpretation of the City's plan may be that it does not require consideration of the habitat values of the parcel at the FLUM stage, Chapter 163 obviously does require this analysis at the FLUM stage. [Pet. Ex. 2, Gauthier Report, p. 4]

72. Failing to consider the parcel's habitat value in determining the FLUM category – the approach taken here by the City - fails to respond and react appropriately to the data and analysis, and is not based upon surveys, studies nor relevant and appropriate data and analysis regarding the land. [Tr., Gauthier, V. 2 p. 192-194; Pet. Ex. 2, Gauthier Report, pp. 10-11]

73. The South Fork of the St. Lucie River is a particularly significant ecosystem that runs through the City. The City neither performed nor received an analysis of the potential impact of the natural habitats on the site as they might interact with the South Fork of the St. Lucie River; [Tr., Freeman, V. 4 p. 396].

The Data and Analysis Regarding the Character of the Undeveloped Land Is Not Professionally Accepted - The Consultant's Report

74. The Amendment is not supported by a professionally acceptable analysis of the parcel's habitat value. [Tr., V. 1, Braun p. 86-87]

75. The City approved the project in reliance on a biological assessment submitted by a consultant on behalf of the applicant. [Tr. Freeman, V. 3 p. 329-331, 334]

76. The City's witness, a planner, was not qualified as an expert in upland or wetland habitat assessment, and could not testify as to the soundness of professional acceptability of the consultant's report. While he testified that the City had an outside consultant review the applicant's consultant's report, he could not explain whether the outside consultant performed any independent assessment of the applicant's report, and the outside consultant to not testify at the hearing. [Tr., Freeman, V. 3, p. 333, V. 4 p. 438-439]
77. The "data and analysis' upon which the City relied to assess the character of the property is hearsay, placed into evidence only to prove that the City relied on the report of a consultant for the applicant, but not for the truth of the matters asserted in the report. [Tr., V. 3 pp. 336-339]
78. Its author did not testify. Thus, there is no competent substantial evidence to support a claim that the Amendment is appropriately based upon such data and analysis.
79. The biological assessment relied upon by the City contained several flaws in its data and analysis rendering its conclusions not professionally acceptable. [Tr., V. 1, Braun, pp. 86-87]
80. The report failed to report the presence of *Tillandsia balbisiana*, *Conradina grandiflora*, *Lechea*, Royal Fern and other plants which are identified on state or federal endangered or threatened species lists, or of blue heron which have been seen foraging in the wetlands as well as other protected wildlife. The consultant's report, while apparently purporting to constitute a thorough, valid ecological assessment, apparently found no evidence of the presence of these protected plant and animal species that even a limited site inspection and a review of available data bases by a qualified expert, Cartwright's expert, Greg Braun, documented to exist and likely exist on the site. [Tr., V. 1, Braun, pp. 86-88; Pet Ex. 1: Braun Report pp. 6 - 11]

81. The applicant's consultant report apparently claimed that the site was not used by wading birds for nesting. But, as explained by Mr. Braun, "[i]t is not surprising that no nesting sites were observed when the surveys were performed ... as they were conducted during the non-nesting season for most bird species. However, the presence of waterfowl and wading birds mentioned above during the nesting season, suggests that more comprehensive surveys that would be conducted during the nesting season may yield different results." [Pet Ex. 1: Braun Report p. 15; Tr. Braun V. 1 pp. 76, 87-88].
82. Drawing conclusions about a lack of nesting based on surveys not taken during the nesting season is not professionally accepted. [Tr., Braun V. 1 p. 76, 87-88].
83. The applicant's consultant's apparent claim that the site's wetlands had low environmental value, because they were isolated and degraded, was belied by Mr. Braun's testimony as to observations about wading bird usage of the site. The presence of a male and a female wood duck during the nesting season suggests the likely nesting of this species, which offers further evidence that these wetlands are productive. Yet, the applicant's consultant report apparently concluded no such usage by this species of the property. [Tr. Braun V. 1 p. 77; Pet Ex. 1: Braun Report pp. 15 -16]
84. Wood storks are listed by both the federal and state government as threatened. The applicant's consultant report apparently concluded that the site is not suitable foraging habitat for wood storks. This was refuted by the testimony of Mr. Braun, who testified that the site's wetlands are in the middle of the Core Foraging Areas of two separate wood stork colonies, making the site particularly important ecologically. [Tr., Braun V. 1 p. 78 – 81; Pet Ex. 1: Braun Report pp. 15 -16]

85. The presence of threatened tri-colored heron, observed on the site by Mr. Braun, was not disclosed in the applicant's consultant's report. [Tr., Braun V. 1 p. 67; Pet Ex. 1: Braun Report pp. 5 - 6]
86. The applicant's consultant report apparently failed to survey the site for plant and animal species designated by the State of Florida or the federal government as endangered or threatened identified, and the potential presence of 20 additional species, including a variety of plants, birds, and reptiles as potentially present on the site by the Florida Natural Areas Inventory (FNAI), which notes the presence of scrub within the site. The failure to search for these species is not professionally acceptable. [Pet Ex. 1: Braun Report p. 4; Tr., V. 1, Braun pp. 87-88].
87. The Environmental Assessment report erroneously suggests that because these wetlands have been degraded due to the establishment of invasive pest plant species, they are expendable and that the City should allow them to be mitigated through the purchase of credits at a mitigation site in St. Lucie County. [Pet Ex. 1: Braun Report p. 12]
88. That study included no photographs of the property. [Tr., Braun V. 1 p. 142; Freeman, V. 4 p. 439]
89. The applicant's consultant report relied upon by the City was inaccurate, incomplete, not conducted using professionally acceptable survey methods and otherwise not professionally acceptable. The result is that it greatly exaggerated the disturbance and the extent to which the property has been altered. [Tr., V.1, Braun pp. 87-89].
90. Among other fundamental flaws, the applicant's consultant's claim that other than gopher tortoises and wading birds, no other wildlife used the property, is not a professionally acceptable conclusion, as the assessment failed to include any surveys for amphibians, reptiles

or anything else, wholly demonstrating an inaccurate, incomplete, nonprofessionally acceptable survey method. [Tr., V.1, Braun p. 88].

The Habitat Value of the Property Based on the Preponderance of the Evidence

91. The habitat value of the site is very similar to that on the nearby Kiplinger and Bridgeview sites described above. [Braun, V. 1 p. 59]
92. The site is comprised of wetlands, wet prairies, open water, and uplands, including pine flatwoods and scrub. [Tr. Braun V. 1 p. 62; Gauthier, V. 2, p. 191, 220]
93. It remains largely undeveloped. [Tr., Gauthier, V. 2, p. 191]
94. The property is home to a variety of plant (including endangered species) and animal species, making it a thriving and biologically productive, good quality habitat. [Tr., Braun V. 1 pp. 74-75; Pet Ex. 1: Braun Report]
95. The natural habitats included on the site include approximately 6 acres of wetlands, and 15-16 acres of natural native upland communities, covering a total of about 44% of the property. [Tr., Gauthier, V. 2 p. 220]
96. The City wetlands map shows this is one of the few wetlands areas in the City. [Tr., Braun, V. 1 p. [Tr., Braun, V. 1 p. 62]
97. A variety of threatened and endangered plants have been observed on the site. [Braun Tr. V. 1 p. 62; Pet Ex. 1: Braun Report]
98. The site contains a population of gopher tortoises, revealed the presence of two species of birds that are designated by the State as threatened, populations of at least four plant species that are designated by the State of Florida as Endangered or Threatened, and one plant species that is designated as “Commercially Exploited”. [Pet Ex. 1: Braun Report p. 4; Braun Tr. V. 1 p. 136]

99. This condition is evidenced by the presence of a variety of high trophic-level species, including foraging wading birds, including the little blue heron and tricolored heron previously described and shown in Photos 1 and 2, and great egrets (Photo 8), great blue herons (Photo 9) and black-crowned night herons (Photo 10). [Pet Ex. 1: Braun Report p. 12]
100. Little Blue Heron, designated threatened by the State of Florida, have been documented to forage in wetlands on the subject property, which offers suitable habitat for this species. [Tr., Braun V. 1 p. 66; Pet Ex. 1: Braun Report p. 5]
101. Little blue herons and other wading birds consume aquatic organisms (e.g., small fish, crayfish etc.) on the site, forage in the wetlands that provide habitat for small fish and other prey items, and often nest near the wetlands that provide reliable sources of prey. [Tr., Braun V. 1 p. 66 – 67; Pet Ex. 1: Braun Report p. 5]
102. Tricolored herons, designated by Florida as Threatened, have been documented to forage in wetlands on the subject property. [Tr., Braun V. 1 p. 67; Pet Ex. 1: Braun Report p. 5]
103. Tricolored blue herons also consume aquatic organisms (e.g., small fish, crayfish etc.). They forage in wetlands that provide habitat for small fish and other prey items and often nest in locations near wetlands that provide reliable sources of prey. [Tr., Braun V. 1 pp. 67 -68; Pet Ex. 1: Braun Report p. 5]
104. Populations of *Tillandsia utriculate*, designated by the State of Florida as Endangered, were observed in the portion of the site mapped as scrub. [Tr. Braun V. 1 p. 70, 74; Pet Ex. 1: Braun Report pp. 6-7]
105. Its presence was not revealed to the City of Stuart, so when City planners and commissioners analyzed the project, they were relying on information that was inaccurate or incomplete. [Pet Ex. 1: Braun Report p. 6]

106. Populations of *Conradina grandiflora* (Largeflower False-rosemary), designated by the State of Florida as Threatened, were observed in the portion of the site mapped as scrub. [Tr. Braun V. 1 p. 70, 74; Pet Ex. 1: Braun Report pp. 7-8]
107. Its presence was not revealed by the applicant's consultant's report. So when City planners and commissioners analyzed the project, they were relying on information that was inaccurate or incomplete. [Tr. Braun V. 1 p. 70; Pet Ex. 1: Braun Report p. 7]
108. Populations of *Tillandsia balbisiana* (Northern Needleleaf), designated by the State of Florida as Threatened, were observed in the portion of the site mapped as scrub. [Tr. Braun V. 1 p. 71, 74; Pet Ex. 1: Braun Report p. 8]
109. Its presence was not revealed to the City of Stuart, so when City planners and commissioners analyzed the project, they were relying on information that was inaccurate or incomplete. [Pet Ex. 1: Braun Report p. 8]
110. Populations of *Lechea cernua* (Scrub Pinweed), designated by the State of Florida as Threatened, were observed in the portion of the site mapped as scrub. [Tr. Braun V. 1 p. 71, 74; Pet Ex. 1: Braun Report p. 9]
111. Its presence was not revealed to the City of Stuart, so when City planners and commissioners analyzed the project, they were relying on information that was inaccurate or incomplete. [Pet Ex. 1: Braun Report p. 9]
112. A population of one plant species, royal fern (*Osmunda regalis*), that is designated by the state of Florida as commercially exploited, has been observed on the site. That designation means the plant is vulnerable to loss from them being collected from the wild, [Tr. Braun V. 1 p. 72; Pet Ex. 1: Braun Report p. 9]
113. Great Blue Heron feed at the site. [Tr. Braun V. 1 p. 74]

114. Black-crowned night-heron nest at the site. [Tr., Braun V. 1 pp. 75-76]
115. Wood ducks have been documented on the site during that species' nesting season. The presence of these waterfowl provide further evidence that these wetlands provide habitat for the aquatic prey upon which these, and other wetland-dependent species rely, and is contradictory to the information relied on by the City. [Tr. Braun V. 1 p. 77; Pet Ex. 1: Braun Report pp. 15 -16]
116. For wading birds, woodstorks, tricolored herons, and the other species that use this site, the isolated nature of the wetlands makes them of equal or superior value. These wetlands tend to draw down during the dry season, concentrating the prey into smaller areas, allowing the birds to feed (forage) more effectively. The timing for the nesting season for most wading birds in Florida is such that during the end of the dry season when the prey is most easily accessible, is the time that the birds have babies in the nest that are begging to be fed. So the birds are able to come in, forage very efficiently and take that prey back to their young. [Tr., Braun V. 1 pp. 68-69]
117. The extent of the natural value of land is not an all or nothing thing. In Florida, not all land is either pristine or completely denuded of natural vegetation. Most land is in between and that must be taken into consideration when assigning allowable land use and intensity. [Tr., Gauthier, V. 2 p. 193-194]
118. Past degradation in fact makes the remaining habitat more important to preserve. Examples abound of restoration – including lands more impacted than this site. If degradation made all land suitable for development we'd be paving over most of what's left. There are sites so degraded and unimportant to regional ecosystems that they should be intensely developed –

but this is not one of them. Its degradation was seriously exaggerated by the applicant's consultant, as it contains substantial high quality habitat. [Tr. Braun V. 1 pp. 84-85, 89].

119. Over and above their ecological functions, a planner also assigns value to natural lands – in particular trees and shrubs – based on their aesthetic, open space, and community character value. [Tr., Freeman, V. 4 p. 393]

Wetlands

120. The City's comprehensive plan includes Policy 5.A5.5, which provides:

“Wetlands shall be protected and conserved by restricting direct and indirect development impacts according to Policies 5.A5.5, 5.A5.6, conservation land use designations, conservation easements, open space requirements and other goals, objectives and policies of this plan.”

121. Based upon the maximum development impacts this FLUM change to *NSD* allows across the entire property, the Amendment ordinance fails to protect wetlands and restrict direct and indirect development impacts. [Tr., Gauthier V. 2 p. 221 – 223; Tr., Pet Ex. 1: Braun Report pp. 11-13; Tr., Braun V. 1 pp.122-123, 145, 147]

122. Policy 5.A5.5.Aiii provides:

“land use planning and site design shall support development patterns that avoid or minimize the impact of development on wetlands”

123. The broad and indiscriminate application of *NSD* Category to the entire property, without applying a conservation or other appropriate designations to the important natural areas, does not support development patterns that avoid or minimize the impact of development on wetlands. The FLUM designation instead allows high intensity commercial development upon the entire property, including in all wetlands, regardless of their physical characteristics, wildlife, and habitat value. [Tr., Gauthier V 2 p. 221, 226-228; Pet Ex. 1: Braun Report pp. 11-13; Tr., Braun V. 1 pp.122-123, 145, 147]

124. These policies, including appropriate designations, such as conservation, have been applied to similar properties within the City to restrict the impacts on wetlands. Employing that same approach in this case would respond appropriately to the data regarding the physical characteristics of the land. [Tr., Gauthier V. 2 p. 225 - 227; Braun., V.1 p. 47-49, 53-54]

The Amendment is Inconsistent With Policy 5.A5.8 Preservation of Existing Native Vegetative Communities (Proffer)

125. The FLUM change and concurrent approvals allow all existing native vegetative communities to be built upon. The buffer areas required by the site plan do not preserve 25% of upland habitat in natural condition. [Pet Ex. 1: Braun Report pp. 11-13; Tr., Braun V. 1 pp.122-123, 145, 147; Gauthier V. 2 p. 233-234]

126. The March 2, 2021 Staff Memo finds that the “site plan provides no avoidance or minimization of wetlands or native upland habitat.” [City Ex. 34: Staff Report p. 11 (proffered)]. It found that it “does not appear that any native upland is being preserved, but instead the 25% is being achieved as perimeter buffers that are planted with native vegetation.” [Id. p. 13]

127. The Amendment ordinance instead allows the relocation of some of the vegetative habitat to a thin perimeter of the development site, which, as a result of mortality during attempted relocation, and the lack of proper conditions at the relocation site, will not preserve the sustainability of the habitat. [Pet Ex. 1: Braun Report pp. 11-13; Tr., Braun V. 1 pp.122-123, 145, 147; Gauthier V. 2 p. 233-234]

128. This is inconsistent with Plan Policy 5.A5.8, which requires that:

“The City shall protect native vegetative communities by requiring that existing native vegetation constituting up to 25% of a development site be preserved.”

[Tr., Gauthier V. 2 p.236; Braun, V. 2 p. 233, 236; Pet. Ex. 1: Braun Report, p. 10]³

Under the Amendment the Applied FLUM Designation is Not Based Upon the Natural Character of the Land

129. Based upon the character of the subject property, the maximum development impacts allowed by this FLUM change are not suitable, and are not based upon the best available data and analysis about character of the land, particularly given that the result of the concurrent approvals retains and protects virtually none of the on-site natural habitat. The uses allowed “are overly intensive and ... do not provide for the protection of those areas of the highest environmental value.” Ecologically, the site is not suitable for the intense uses allowed by the *NSD* FLUM category. [Tr., V. Braun p. 98; also pp. 85-86, 89, 91, 140; Tr., V. 2, Braun p. 176-177 (Proffered); Tr., Gauthier V 2 p. 221, 226-228, 230-231]

130. No testimony or competent substantial evidence was presented by the City to contradict the conclusions of the Petitioner’s expert witness, who testified under oath and whose testimony is found credible.

The City’s Purported Justifications are Unpersuasive

131. The City planner asserted a number of contradictory and unsupported justifications for finding the Amendment consistent with the City’s Plan. First, he claimed it fills a need for housing. But although Mr. Freeman claimed that the FLUM amendment addressed a shortage of residential units compared to need (Tr. Freeman, V. 3, p. 314), he then contradicted himself when, explaining why the parcel was not given a designation that would accommodate more

3. This issue was tried by consent. Braun, V. 2 p. 236

residential development than the minimum 30% required by the SND designation, stating that “we were concerned that at this time with other development applications that were coming into the City that we were exceeding where we would want to be in the housing supply...” [Tr., Freeman, V. 3, p. 315].

132. There is no projected deficit of projected residences during planning timeframe without the uses allowed by this FLUM change. [Tr. Freeman, V. 4, p. 432-433]

133. The Amendment is also not required to resolve a documented shortage of retail or commercial or employment uses to meet Stuart’s projected needs. There are substantial commercial/employment uses in immediate vicinity. [Tr., Tr. Freeman, V. 3, p. 303-304, 307; Freeman, V. 4, p. 431-432]

134. Mr. Freeman also claimed that the Amendment helped combat urban sprawl, but his claim was unpersuasive and failed to provide a legitimate basis as this would be achieved, nor did he conduct an urban sprawl analysis under the criteria in Chapter 163. [Tr., Freeman, V. 3, p. 321-322, 396-398]

135. The FLUM amendment does not inhibit urban sprawl that would otherwise be encouraged by the prior land use designation; it is a non-issue in this case. [Tr., Gauthier, V. 2 p. 255-256]

III. CONCLUSIONS OF LAW

Jurisdiction and Standard of Review

136. DOAH has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), 163.3184, and 163.3187, Florida Statutes.

137. Findings of fact are determined by a preponderance of the evidence, pursuant to Section 120.57 (1)(j), Fla. Stat., *Sierra Club and John Wade v. Department of Community Affairs* DCA06-GM-219 (Sept. 12, 2006) DOAH 03-0150GM (Rec. Order at ¶¶ 88–90) (fairly

debatable standard governs the legal determination of whether the amendment is in compliance; it is not to be used to find facts); *Fla. Dept. of Health v. Career Services*, 289 So.2d 412, 415 (Fla. 4th DCA 1974); *McDonald v. Dept. of Banking and Finance*, 346 So.2d 569 (Fla.1st DCA 1977) (The underlying facts - determined by a preponderance of the evidence - provide the basis for making the ultimate legal conclusion.).

138. The “fairly debatable” standard applies only to legal conclusions as to whether, under the facts of the case, the Amendment is in compliance. *Sierra Club and John Wade v. DCA*, DCA06-GM-219 (Sep. 12, 2006); Case No. 03-0150GM at ¶¶ 88–89 (DOAH 2006); *Cooper v. City of St. Petersburg Beach*, 14 F.A.L.R. 3589 (Admin. Comm. 1991) (1991 WL 833308) (“fairly debatable” test applies to the “compliance” legal conclusions”).

Standing

139. Petitioner, Cartwright, is an affected person as defined in §163.3184(1)(a), Fla. Stat..

140. Petitioner, as a matter of fact and law, meets the definition of an adversely affected party, pursuant to §§120.57 (3)(b), and 120.68, Fla. Stat.

Data and Analysis

141. All plan amendments shall be based upon professionally accepted, relevant, and appropriate data and analysis by the local government. §163.3177(1)(f), Fla. Stat.

142. “To be based on data means to react to it in an appropriate way and to the extent necessary indicated by the data available on that particular subject at the time of adoption of the plan or plan amendment issue.” § 163.3177 (1) (f), Fla. Stat.

143. The data and analysis here are inadequate for the same reasons that a plan amendment was found not in compliance in *Board of County Commissioners of Palm Beach County v.*

Department of Community Affairs, ER FALR 97:189 (Ad. Comm. 10/21/97),⁴ where the Town of Jupiter amended its plan to adopt a policy opposing an “intercounty thoroughfare” that was planned to run through four separate jurisdictions. *Id* at p.4. The amendment had been adopted to fulfill a promise the town had made (expressed in a Resolution) to a neighborhood it had sought to annex to oppose the planned roadway. *Id* at pp. 5-7. Finding the amendment not in compliance, the ALJ observed that:

While the position taken by Jupiter with the Intervenor prior to the adoption of the amendment ... does not conclusively prove that the amendment is not ‘in compliance’... due to the lack of adequate data and analysis to support the amendment, the evidence did prove that Jupiter had already decided to take a position similar to the position established in the amendment without determining whether adequate data and analysis for that position existed.

Id at p. 5, ¶51.

The ALJ found that the issues of whether and where to build a major roadway is a planning decision that “must be supported by the highest level of data and analysis” because it “directly reflect(s) land use and development activities as they relate to transportation”. *Id* at p. 8, ¶¶78-79. The ALJ found the lone study relied on by the Town to be inadequate to do so. *Id* at pp. 8-9, ¶¶82-90.

144. In this case, the City wanted to approve a Costco, and then embarked on the preparation of a comprehensive plan amendment to effectuate that desire.

The Amendment and Allowed Uses & Intensities are Not Based Upon or Supported by the Character of the Land

145. The Amendment is not supported by professionally accepted data and analysis, and thus violates §163.3177(1) (f), Fla. Stat.

4. The Admin. Comm.’s Final Order dismissed the case after the repeal of the amendment.

146. The Amendment is inconsistent with §§163.3177 (6) (a) (2) c and (8) b, Fla. Stat. because it is not supported by professionally accepted data and analysis regarding the character of the land. The City placed no analysis of this issue into the record, and its planner admitted the City did not take the environmental character or value of the property into consideration in assigning the challenged FLUM designation. The preponderance of evidence demonstrates that the analysis relied on by the City to approve the amendment was not professionally acceptable and that the Amendment does not react to the relevant data in an appropriate way. The preponderance of the evidence demonstrates that the uses and intensities allowed by the Amendment are significantly more intense than is suitable for the property based on the character of the natural land.

The City Failed to Analyze the Maximum Development Potential Under the Amendment, Specifically the Maximum Densities and Intensities

147. The failure to consider the maximum allowable densities and intensities allowed by the FLUM change violates the statutory data and analysis requirement. See *BG Mine, LLC v. City of Bonita Springs*, 2018 WL 6729122, Case No. 17-3871GM (DOAH 2019) at ¶¶ 70–71, 105-112; *Zemel v. Lee Cnty.*, 15 F.A.L.R. 2735 (FDCA 1993), aff'd, 642 So. 2d 1367 (Fla. 1st DCA 1994); *Martin Cnty. Conservation Alliance, Inc., et al. v. Martin Cnty., et al.*, Case No. 10-0913GM (DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011).

148. Compliance determinations must be made based on maximum impacts, in this case the maximum allowable density authorized by the Amendment terms, not speculation of a lesser impact. See *DCA v. Taylor County*, Case No: 10-001283GM at ¶ 26 (DOAH Dec. 13, 2010); see also e.g., *Sheridan v. Lee Cty, et al.*, Case No. 90-7791 (DOAH Jan. 27, 1992; DCA June 28, 1993; Admin. Comm. Feb. 15, 1994); *BG Mine*, Case No. 17-3871GM at ¶¶ 70–71

(DOAH 2019); *Martin Cnty. Conservation Alliance, Inc., et al. v. Martin Cnty., et al.*, Case No. 10-0913GM (Fla. DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011).

The Relevance of the Zoning and Site Plan Approvals

149. Because the plan amendment, zoning change and site plan approval were applied for, reviewed, treated, and voted upon as part and parcel of a specific development project, it is appropriate to consider the zoning change and site plan in this compliance review.

150. In *Payne v. City of Miami*, 52 So. 3d 707 (Fla. 3d DCA 2010), the applicant applied for and obtained an amendment to the City's Future Land Use Map, a zoning change, and a Major Use Special Permit, thereby allowing the construction of a multi-family development project. The ordinance approving the FLUM Amendment, and a separate ordinance approved the rezoning, were adopted on the same day. In the subsequent DOAH FLUM Amendment challenge, the ALJ refused to allow the petitioners to challenge issues related to the zoning and special use permit.

The Court reversed, ruling that:

“[i]t is thus clear that: (1) the FLUM Amendment, zoning change, and special use permit all traveled together and were decided together; (2) the City did not make a legislative decision to reformulate its policy regarding the marine industry and land use along the Miami River and in fact, the City decided to leave that decision for another day; (3) the City's decision to approve the FLUM Amendment was, instead, based on its decision to approve the proposed mixed use project which required a zoning change from SD-4 water dependent/water related Industrial to non-water dependent/water related Restricted Commercial, which in turn necessitated the FLUM Amendment, *not* the other way around. Id at 723. (emphasis added).

The Court concluded “that because both requests were tied together, dependent on the other, and the zoning amendment was the driving force and was essential to obtaining the land use amendment, the zoning amendment cannot be ignored in this case. 52 So.3d 721, 722. Just as in the present case, the *Payne* decision observed “the land use (FLUM Amendment) was approved for the specific purpose to allow the proposed development.” Id.

The decision criticized the dissenting opinion which, it said:

“ignores the record in this case and pretends that Balbino's land use amendment application was presented and considered in a vacuum and on its own merits. The record is the record. We cannot ignore it.” Id at 723. (emphasis added).

The *Payne* situation is clearly present in this case, where the Future Land Use Map plan amendment, rezoning and site plan were all approved in one ordinance after having been processed and analyzed specifically as a proposal for a Costco and related development project, as demonstrated above by statements of the Respondent's City Commissioners. Additionally, the staff reviews clearly demonstrate, just like in *Payne*, each of these approvals traveled together and were granted to achieve the objective of obtaining a Costco store in the City of Stuart.

Thus, the impacts allowed by the site plan approved as part of the FLUM Amendment Ordinance are relevant to the compliance determination in this case. This situation directly impacts and is probative to the issue of internal consistency.

The Amendment is Internally Inconsistent with the City's Comprehensive Plan

151. Section 163.3187(4), Florida Statutes requires that amendments to comprehensive plans preserve the internal consistency of the plan pursuant to §163.3177(1), Fla. Stat. Section 163.3177(1) requires comprehensive plans to “guide future decisions in a consistent manner”

152. Section 163.3177(2) mandates “[t]he several elements of the comprehensive plan shall be consistent.”

153. The Act emphasizes the particular importance of a plan's Future Land Use Map, to determine whether local plans will become reality, placing an affirmative requirement that:

Each map depicting future conditions ... **must reflect the principles, guidelines, and standards within all elements.....**”

154. The “internal consistency” requirement is one of the fundamental mandates governing comprehensive plans. Its violation is dispositive of a plan amendment’s compliance with the Act. See, *Payne v. City of Miami*, 52 So. 3d 707 (Fla. 3d DCA 2010) (invalidating land use amendments for inconsistency with plan provisions concerning the Miami River), and *SCAID v. DCA and Sumter County, et al*, 730 So. 2d 370 (Fla. 5th DCA 1999) (land use change violated the internal consistency requirement because it conflicted with policies in the county’s comprehensive plan).
155. A substantial body of administrative law exists finding plans and amendments out of compliance when map amendments conflict with plan policies. See, e.g., *Dep’t of Comm. Affairs v. Miami Dade County*, 2009 Fla. ENV Lexis 139, 2010 ER FALR 2 (2009), aff’d *Miami Dade County v. DCA*, 54 So.3d 633 (Fla. 3d DCA 2011) (land use change inconsistent with the plan’s urban development boundary policy); *DCA v. St. Lucie County*, 1993 WL 943708, 15 FALR 4744 (Admin. Comm. 1993) (Map amendment failed to reflect policies discouraging urban sprawl, and promoting agricultural protection, land use compatibility and other objectives); *Kelly v. City of Cocoa Beach et al.*, 1990 WL 749217, 12 FALR 4758 (1990) (increased density failed to reflect objective to direct population away from the coastal hazard area).
156. A 1989 Administration Commission Final Order explained that a plan’s adopted maps are “a critical component of the Plan”, as they “provide[] an essential visual representation of the commitment to uphold ... goals, objectives, and policies,” *Austin et al .v. City of Cocoa and DCA*, 1989 WL 645182, ER FALR 89:0128 (Admin. Comm. 1989).
157. This Future Land Use Map Amendment violates section 163.3177(2), Fla. Stat., because it fails to reflect the principles, guidelines, and standards within all elements of the

Comprehensive Plan.

158. Comprehensive Plan Policy 5.A5.1 provides that environmentally sensitive lands, which are afforded the greatest degree of protection are “viable and functioning wetlands as determined by the SFWMD and native upland vegetative communities that provide wildlife habitat necessary for the survival of Listed Species as determined by the Florida Fish and Wildlife Conservation Commission (FFWCC) and/or U.S. Fish and Wildlife Service (USFWS).” As a result of the factual findings above, based on testimony of Mr. Braun, the Amendment Ordinance is inconsistent with and fails to reflect this policy.

159. The City’s comprehensive plan includes Policy 5.A5.5, which provides:

“Wetlands shall be protected and conserved by restricting direct and indirect development impacts according to Policies 5.A5.5, 5.A5.6, conservation land use designations, conservation easements, open space requirements and other goals, objectives and policies of this plan.”

As a result of the factual findings above, based on the testimony of Mr. Braun and the site plan approved by the Amendment Ordinance, the ordinance is inconsistent with and fails to reflect this policy; it fails to protect the onsite wetlands by allowing direct and indirect development impacts to all on-site wetlands.

160. As a result of the factual findings above, based on testimony of Mr. Braun and the site plan approved by the Amendment Ordinance, the ordinance is inconsistent with and fails to reflect Policy 5.A5.5 (B)(iii), which states that “[n]ew development shall not be allowed in wetlands... except as indicated in v and vi below, or in the exceptions listed in Policy 5.A5.6.” No exceptions found in Policy 5.A5.6 are applicable to this FLUM amendment.

161. Policy 5.A5.5.(A) iii provides:

“**land use planning** and site design shall support development patterns that avoid or minimize the impact of development on wetlands” (Emphasis added).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing Notice of Filing has been filed through the Division of Administrative Hearings eALJ e-Filing Portal and served on all counsel of record or pro se parties identified on the attached Service list on this 18th day of January 2022.

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