STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KENT HARRISON ROBBINS and ALTOS DEL MAR DEVELOPMENT CORP.,

Petitioners,

vs. Case No. 97-0754GM

DEPARTMENT OF COMMUNITY AFFAIRS and THE CITY OF MIAMI BEACH,

Respondents.

RECOMMENDED ORDER

A formal hearing was held in this case before Larry J. Sartin, a duly designated Administrative Law Judge of the Division of Administrative Hearings, on July 7 through 9, 1997, in Miami, Florida.

APPEARANCES

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and

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and

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STATEMENT OF THE ISSUE

The issue in this case is whether certain amendments to the City of Miami Beach Year 2000 Comprehensive Plan are "in compliance," as defined in Section 163.3184(1), Florida Statutes.

PRELIMINARY STATEMENT

On June 2, 1994, the City of Miami Beach adopted amendments to the City of Miami Beach Year 2000 Comprehensive Plan by Ordinance Number 94-2928. On July 28, 1994, the Department of Community Affairs issued a Notice of Intent finding the amendments not "in compliance," as defined in Section 163.3184, Florida Statutes.

On August 16, 1994, the Department of Community Affairs filed a Petition for Formal Administrative Hearing with the

Division of Administrative Hearings. The petition was designated Case Number 94-4509GM and was assigned to the undersigned. On August 25, 1994, Aaron J. Edelstein, Bernard S. Edelstein, Mark S. Edelstein, Craig L. Edelstein, Shepard Edelstein, Stortford N.V., Tierre Bay Apartments, and Lido Spa Hotel (hereinafter referred to as the "Edelstein Interests"), were allowed to intervene in Case Number 94-4509GM. Melvin Simonson was granted leave to intervene on November 10, 1994.

After the petition was filed, the parties were given an opportunity to negotiate a settlement of their dispute. On September 19, 1996, the City of Miami Beach and the Department of Community Affairs reached agreement and entered into a Compliance Agreement. The City of Miami Beach agreed to adopt remedial amendments adopting changes to the amendments consistent with the terms of the Compliance Agreement. The Edelstein Interests and Mr. Simonson did not enter into the Compliance Agreement.

On October 9, 1996, the City of Miami Beach adopted remedial amendments by Ordinance Number 96-3058. The remedial amendments were determined to be consistent with the Compliance Agreement by the Department of Community Affairs. On November 14, 1996, the Department of Community Affairs issued a Cumulative Notice of Intent finding the amendments to the City of Miami Beach Year 2000 Comprehensive Plan, as modified by the remedial amendments, "in compliance." The cumulative notice was filed with the Division of Administrative Hearings and the parties were

realigned to reflect that the Edelstein Interests and Mr. Simonson were Petitioners, and the City of Miami Beach and the Department of Community Affairs were Respondents.

On or about February 4, 1997, Kent Harrison Robbins and Altos Del Mar Development Corporation filed an Amended Petition for Section 163.3184 Proceedings with the Department of Community Affairs challenging the determination of the Department of Community Affairs that the plan amendments were "in compliance." The amended petition was filed with the Division of Administrative Hearings on February 17, 1997. The amended petition was designated Case Number 97-0754GM and was assigned to the undersigned. Case Number 97-0754GM was consolidated with Case Number 94-4509GM.

On June 26, 1997, Petitioners in Case Number 97-0754GM filed a Second Amended Petition.

On July 2, 1997, Martin W. Taplan, Demetra De Maris, and Laurie M. Swedroe filed a Petition to Intervene. The petition was subsequently withdrawn. On July 3, 1997, the Florida Department of Environmental Protection filed a Petition to Intervene. Counsel for the Department of Environmental Protection appeared at the formal hearing on the second day of the hearing. The petition was denied.

On July 3, 1997, the Edelstein Interests filed a Notice of Voluntary Dismissal. Mr. Simonson remained a Petitioner in Case Number 94-4509GM. Mr. Simonson did not, however, appear during

the formal hearing. Consequently, Mr. Simonson was dismissed on July 8, 1997. An order closing Case Number 94-4509GM was entered on July 21, 1997.

On July 7, 1997, the City of Miami Beach filed a Motion in Limine as to Petitioners' Irrelevant and Immaterial Evidence. The motion was directed to the Second Amended Petition filed by Petitioners in Case Number 97-0754GM. After hearing argument on the motion at the commencement of the formal hearing, the motion was granted. An order memorializing the ruling was entered on July 21, 1997.

On July 9, 1997, the City of Miami Beach filed a Motion for Sanctions, Attorney's Fees and Costs against Petitioners in Case Number 97-0754GM. An evidentiary hearing on the motion was conducted with the agreement of the parties at the conclusion of the hearing in Case Number 97-0754GM. Jurisdiction of this matter is reserved for the limited purpose of entering an order on the motion.

At the formal hearing Petitioners presented the testimony of William H. Carey, James H. Holland, Robert Schuler, William Ahern, Robert H. Baer, and Petitioner, Kent Harrison Robbins. Petitioners offered 37 exhibits. All were accepted into evidence, except Petitioners' Exhibit Number 16.

The City of Miami Beach presented the testimony of Dean Grandin, Brian Flynn, and Robert Swarthout. The City of Miami Beach offered 17 exhibits. All were accepted into evidence.

The Department of Community Affairs did not call any witnesses or offer any exhibits, other than Joint Exhibits.

Ten Joint Exhibits were offered by the parties and were accepted into evidence.

A transcript of the hearing was ordered. The transcript was not filed with the Division of Administrative Hearings until October 28, 1997.

The parties agreed to file proposed recommended orders on or before August 29, 1997. On August 20, 1997, Petitioners requested an extension of time to file proposed orders. The request was granted by an order entered August 29, 1997. Proposed orders were to be filed on or before September 12, 1997. Separate proposed orders were timely filed by all three parties. The proposed orders have been fully considered in preparing this Recommended Order.

FINDINGS OF FACT

A. The Parties.

1. Petitioner, Kent Harrison Robbins, is a resident of the City of Miami Beach. Mr. Robbins owns real property located within the boundaries of the City of Miami Beach.

2. Petitioner, Altos Del Mar Development Corporation (hereinafter referred to as the "Development Corporation"), is a corporation. The Development Corporation is owned by Mr. Robbins.

3. Respondent, the City of Miami Beach (hereinafter referred to as the "City"), is a political subdivision of the State of Florida. The City is located in Dade County, Florida.

4. Respondent, the Department of Community Affairs (hereinafter referred to as the "Department"), is an agency of the State of Florida. The Department is charged with responsibility for, among other things, the review of local government comprehensive plans and amendments thereto pursuant to Part II, Chapter 163, Florida Statutes (hereinafter referred to as the "Act").

B. Standing.

5. Mr. Robbins owns real property (hereinafter referred to as the "Robbins Property") in the City. The Robbins Property is located west of Collins Avenue between 76th Street and 77th Street. The Robbins Property is located across Collins Avenue from one of the areas which is the subject of this proceeding. The Robbins Property is also located a few blocks from other areas which are the subject of this proceeding.

6. Mr. Robbins made oral comments before the City at public hearings on the amendments which are at issue in this proceeding.

7. Development Corporation is owned by Mr. Robbins. Development Corporation is the contract-purchaser of the Robbins Property.

8. Mr. Robbins and Development Corporation have standing to institute this proceeding. The Department and the City have standing to participate in this proceeding.

C. General Description of the City and the North Shore Area of the City.

9. The City is a group of barrier islands located along the southeast coast of Florida. The City is 99 percent developed.

10. The City is bounded on the east by the Atlantic Ocean and on the west by Biscayne Bay.

11. The area at issue in this proceeding is located in an area of the City generally referred to as "North Shore." North Shore is heavily urbanized, as is the City generally.

12. Within North Shore are located North Shore Open Space Park, North Shore Park, Altos Del Mar Historic Preservation District, and the Harding Townsite/South Altos Del Mar Historic District. North Shore Open Space Park is located east of Collins Avenue, west of the Atlantic Ocean, north of 79th Street, and south of 87th Street. North Shore Park is located east of Collins Avenue, west of the Atlantic Ocean, north of 72nd Street and south of 73rd Street.

13. The Altos Del Mar Historic Preservation District (hereinafter referred to as "Altos Del Mar") is an area of the City that was designated an historic district in January 1987. Altos Del Mar consists of the area bounded on the west by Collins Avenue, on the east by the Erosion Control Line, on the north by 79th Street, and on the south by 77th Street. The Erosion

Control Line is a line that runs generally north-south along the eastern boundary of the City and the Atlantic Ocean. The Erosion Control Line marks the western boundary of the area of the shoreline in which efforts to stop or slow erosion of the beaches have been directed.

14. The Harding Townsite/South Altos Del Mar Historic District (hereinafter referred to as "Harding Townsite") was designated an historic district in October 1996. Harding Townsite is bounded on the west by Collins Avenue, on the east by the Erosion Control Line, on the north by 77th Street, and on the south by 73rd Street.

D. The City's Comprehensive Plan.

15. The City adopted the City of Miami Beach Year 2000 Comprehensive Plan (hereinafter referred to as the "Plan"), on September 7, 1989.

16. The Plan was found to be "in compliance" as defined in the Act in December 1992.

17. Part II of the Plan establishes goals, policies, and objectives of the Future Land Use Element. Objective 1, Policy 1.2 of the Future Land Use Element of the Plan establishes, in relevant part, the following land-use categories, land-use intensities, and land-use densities:

a. Recreation and Open Space, including Waterways, or "ROS," which is described as:

Purpose: To provide development opportunities for existing and new recreation and open space facilities, including waterways.

Uses which may be Permitted: Recreation and open space facilities, including waterways.

b. Single Family Residential, or "RS," which is described as:

Purpose: To provide development opportunities for and to enhance the desirability and quality of existing and new single family residential development.

Uses which may be Permitted: Single family detached dwellings.

Density Limits: 7 residential units per gross acre.

c. Parking, or "P," which is described as:

Purpose: To provide development opportunities for existing and new parking facilities.

Uses which may be Permitted: Parking facilities and commercial uses when located on frontage opposite a land use category that permits commercial use.

d. Public Facility, or "PF," which is described as:

Purpose: To provide development opportunities for existing and new government uses including convention center facilities.

Uses which may be Permitted: Government uses and convention facilities.

e. Low Density Multi Family Residential, or "RM-1," which is described as:

Purpose: To provide development opportunities for and to enhance the desirability and quality of existing and/or new low density multi family residential areas.

Uses which may be Permitted: Single family detached dwellings, single family attached dwellings, townhouse dwellings and multiple family dwellings.

Base Density Limits: 34 dwelling units per gross acre.

Large Lot and Urban Design Bonus Density Limits: 90 dwelling units per gross acre, inclusive of base density.

f. Medium Density Multi Family Residential, or "RM-2," which is described as:

Purpose: To provide development opportunities for and to enhance the desirability and quality of existing and/or new medium density multi family residential areas.

Uses which may be Permitted: Single family detached dwellings, single family attached dwellings, townhouse dwellings, multiple family dwellings, apartment hotels and hotels.

Other uses which may be permitted are adult congregate living facilities, day care facilities, nursing homes, religious institutions, private institutions, public institutions, schools, commercial parking lots and garages and non-commercial parking lots and garages.

Base Density Limits: 56 dwelling units per gross acre.

Large Lot and Urban Design Bonus Density Limits: 136 dwelling units per gross acre, inclusive of base density.

18. The Plan contains all of the elements required by the Act, including a Future Land Use Element, a Recreation and Open Space Element, and a Conservation/Coastal Zone Management Element.

19. The Plan also contains a Future Land Use Map.

E. Adoption and Review of the Plan Amendments.

20. On or about January 21, 1994, the City transmitted amendments to its Plan to the Department for review.

21. The amendments were adopted generally to "down-plan" the City and to encourage the redevelopment of the Altos Del Mar neighborhood. In an effort to "down-plan" the City, the amendments provided for a reduction of the overall amount of residential development allowed in the City pursuant to the Plan. In an effort to promote redevelopment of the Altos Del Mar neighborhood, the amendments replaced the dual single-family residential and recreation and open space land-use classifications of property in Altos Del Mar and classified the area as single-family residential; and reclassified under-utilized parking areas and medium density multi-family properties as low density multi-family.

22. The Department designated the amendments as Amendment 94-1, reviewed the amendments, and issued its Objections, Recommendations, and Comments Report on April 1, 1994.

23. On June 2, 1994, the City enacted Ordinance Number 94-2928 adopting the amendments (hereinafter referred to as the "Proposed Amendments"). The Proposed Amendments were submitted to the Department for review under the Act.

24. The Department reviewed the Proposed Amendments and found that they were not "in compliance." The Department issued

a Notice of Intent to find the Proposed Amendments not in compliance on July 28, 1994.

25. The Department filed a Petition for Formal Administrative Hearing challenging the Proposed Amendments with the Division of Administrative Hearings on August 16, 1994.

26. Following negotiations between the City and the Department, a Compliance Agreement was entered into on September 19, 1996. Pursuant to the Compliance Agreement, the City adopted remedial amendments.

27. On December 5, 1996, the Department published a Cumulative Notice of Intent finding the amendments, as modified by the remedial amendments (hereinafter referred to as the "Adopted Amendments"), "in compliance" with the Act.

F. Petitioners' Challenge.

28. Petitioners filed a Petition for Administrative Hearing with the Department challenging the determination that the Adopted Amendments were "in compliance." On January 16, 1997, the Department dismissed the petition by Order Dismissing Petition with Leave to Amend.

29. Petitioners filed an Amended Petition with the Department on February 4, 1997. The Amended Petition was filed by the Department with the Division of Administrative Hearings on February 14, 1997.

30. On June 9, 1997, Petitioners moved to further amend the Amended Petition. Petitioners' request was granted.

G. <u>The Challenged Amendments</u>.

31. There are three changes to the Plan in the Adopted Amendments that have been challenged in these proceedings. Those changes involve modifications to the Future Land Use Map (hereinafter referred to as the "FLUM"), and textual changes pertaining to the geographic areas at issue in this proceeding.

32. The relevant changes to the FLUM were designated FLUM Changes 14, 16a, 16b, and 16c (the areas which are the subject of changes 14, 16a, 16b, and 16c are hereinafter referred to respectively as "Area 14," "Area 16a," "Area 16b," and "Area 16c"; the areas are collectively referred to as the "Subject Areas"). Petitioners have challenged Changes 14, 16a, and 16b (hereinafter referred to as the "Challenged Amendments").

33. The Subject Areas are located within Altos Del Mar and/or the Harding Townsite.

34. With regard to Change 14, Petitioners have alleged generally that the amendment is not "in compliance" because the amendments are inconsistent with the requirements of the Act and the rules promulgated thereunder concerning future land use, conservation, coastal management, and recreation and open space elements. Petitioners have argued generally that Area 14 may only be used for recreation and open space because the area is in effect a park or open space; there is a dune located on the property; the use of the property for single-family residential will negatively impact wildlife and plant life; and the use of

the property for single-family residential will negatively impact historic resources.

35. With regard to Changes 16a and 16b, Petitioners have alleged generally that the amendments are not "in compliance" because the amendments are inconsistent with the requirements of the Act and the rules promulgated thereunder concerning the coastal management, recreation and open space, and housing elements. Petitioners have argued generally that Changes 16a and 16b will negatively impact public access to beaches and inappropriately reduce public parking.

36. In Petitioners' proposed recommended order, Petitioners attempted to raise issues which were not alleged in their Second Amended Petition. Petitioners contended that the Department's original notice that the Proposed Amendments were not in compliance was defective; that the Adopted Amendments were not necessary to meet projected demands for residential land uses in the City; and that the Adopted Amendments were not consistent with coastal planning objectives. These issues were not properly raised is this case. The City and Department had no opportunity to present evidence to address these issues because Petitioners had not raised the issues until they filed their proposed order. Nor, to the extent these issues may have been properly raised before this forum, did the evidence support Petitioners' allegations.

H. Area 14 and FLUM Change 14.

37. Area 14 is bounded on the south by 76th Street, on the north by 79th Street, on the west by Collins Avenue, and on the east by the Atlantic Ocean. The Robbins Property is located adjacent to Area 14, on the west side of Collins Avenue between 76th Street and 79th Street. Area 14 is bounded on the north by North Shore Open Space Park.

38. Area 14 consists of Blocks 5, 6, 7, 10, 11, and 12.

39. Area 14 is located in Altos Del Mar or Harding Townsite.

40. There are 36 individual platted lots in Area 14. Twenty-two of the lots are currently owned by the State of Florida. The rest are in private ownership.

41. Area 14 consists of approximately 11 total acres.

42. Area 14's designated land-use classification on the FLUM prior to the adoption of the Challenged Amendments was "Recreation and Open Space" and "Single Family Residential." This dual land-use classification is identified on the FLUM as "ROS/RS."

43. Pursuant to the dual land-use classification of Area 14, property located within Area 14 could be permitted for single-family dwellings or it could be used for recreation and open space.

44. Petitioners' have alleged that FLUM Change 14 "change[s] the designation of [Area 14] from recreational open

space to single family residential." This allegation is not supported by the evidence in this case.

45. FLUM Change 14 eliminates the dual land-use classification of Area 14. Pursuant to FLUM Change 14, Area 14 is designated for use as Single Family Residential only.

46. The dual land-use classification was eliminated to encourage reinvestment of single-family residential development in the area.

I. <u>Current Use of Area 14</u>.

47. Area 14 currently includes vacant lots, lots with boarded-up structures, and several single-family residences. There are more vacant and unused lots than there are lots with single-family residences.

48. The 22 lots owned by the State are not all contiguous. The largest area of contiguous state-owned lots is located between 76th and 77th Streets. This area is located adjacent to the Robbins Property.

49. Eleven of the twelve lots between 76th and 77th Streets are owned by the State. There is one privately-owned lot located just north of 76th Street. The State also owns two lots just north of 77th Street.

50. The lots in Area 14 north of 77th Street are primarily owned in a checker-board fashion. Some of the lots north of 77th Street have existing single-family residences located on them.

The rest of the lots are vacant or have boarded-up buildings located on them.

51. Because of the proximity of Area 14 to the Atlantic Ocean and the accessibility of the beach from the area, the public uses the open areas of Area 14 for recreational purposes from time to time.

52. The area is generally open, there is grass, pine trees, and sea grapes on some lots, and there is a public shower located at the east end of 77th Street. The trees and other vegetation offer shaded areas.

53. There is public parking available in the area on side streets off of Collins Avenue and a public parking lot just to the south of 76th Street. There are several access points to the beach along Area 14, including an access point at the east end of 77th Street.

54. There is a rock fence at the end of 77th Street. The rock fence is typical of fences that were placed at the ends of streets in the City that led to the beach. The fences were erected to prevent vehicular traffic entering the beach while allowing pedestrian access.

55. The public has used the open areas of Area 14 for some time for picnicking, walking their pets, playing games, barbecuing, and other outside recreational activities. The evidence failed to prove the extent of this use. The evidence

presented by Petitioners was not gathered in any organized fashion and was unconvincing.

56. The 22 lots owned by the State in Area 14 were originally acquired with the intent of creating a park at some time in the future. The State had intended to acquire all of Area 14 for this purpose. The lots were acquired by the State as part of the Save Our Coast Park Expansion Program. When the State's efforts to acquire all of Area 14 failed, the State decided not to acquire any more lands. The lots the State had acquired in Area 14 were designated as "excess lands." The State intends to sell the lots it owns in Area 14.

57. In 1994, after the State abandoned its plan to acquire all of Area 14, the City and State, through the Board of Trustees of the Internal Improvement Fund, entered into a lease (hereinafter referred to as the "Lease"). Pursuant to the Lease, the State leased North Shore Open Space Park and the publicly-owned lots in Area 14 to the City. Although the period of the Lease was twenty-five years, the Lease provided that it was entered into "upon an interim basis" while negotiations concerning transfer of fee title of the property to the City were ongoing. During this "interim" period, the Lease provides that the property is to be used exclusively for recreational purposes. The City agreed to manage the property as a public park. The City does manage North Shore Open Space Park as a public park.

58. Despite any requirement to the contrary under the Lease, the City has not created, or operated, a park in Area 14.

59. Neither the City or the State actually created a park out of any part of Area 14. Nor has the City or State used any part of Area 14 as a park.

60. Area 14 has not been included by the City in its Recreational and Open Space inventory. Consequently, Area 14 and any use by the public was not considered by the Department in the determination that the City's Recreation and Open Space Element of the Plan is in compliance.

J. Petitioners' Assertion that Area 14 Must be Used as a Park.

61. Petitioners attempted to prove that Area 14 must be used for recreational purposes or as open space. Petitioners based this argument on their assertion that the character of Area 14 is suitable for, and has historically been used as, a park or open space; the State and City planned and managed Area 14 as a park; the data and analysis relied upon by the City in adopting FLUM Change 14 contains an alleged incorrect statement concerning the current use of the area; and there is a need in the City for additional recreation and open space property. Petitioners have proposed a relatively large number of findings of fact to support this position. While those findings of fact are generally accurate when considered standing alone, they are not relevant to the determination of whether the Challenged Amendments are in

compliance and, therefore, have not been included in this Recommended Order.

62. Petitioners failed to prove that Area 14 is used as a "park." Even if they had, nothing in the Plan, the Act, or the rules of the Department requires that a comprehensive plan must provide that a geographic area can be developed only in a manner that is consistent with its historical use.

63. Nothing in the Plan, the Act, or the rules of the Department requires that a comprehensive plan must provide that a geographic area must be used only in the manner in which the property was used informally by the public.

64. Nothing in the Plan, the Act, or the rules of the Department requires that a comprehensive plan must provide that a geographic area must be used only in a manner that is consistent with a use which the State or local government may have considered appropriate for the area at some time in the past.

65. Finally, there are no provisions in the Plan, the Act, or the rules of the Department that require that a comprehensive plan be consistent with the terms of a lease agreement, especially where the lease agreement was expressly entered into on an interim basis.

K. Alleged Error in the Data and Analysis Concerning the Use of Area 14.

66. The data and analysis in support of the Adopted Amendments indicates that "[t]he area encompassed by Future Land Use Map 14 is NOT now used for recreational purposes and it is

not counted in the recreation facility inventory in the Recreation and Open Space Element."

67. Petitioners cited part of the foregoing sentence from the data and analysis, and argued that the statement is not accurate. The evidence failed to support Petitioners' position.

68. Petitioners' citation of part of the sentence quoted in finding of fact 66 fails to consider all of the data and analysis considered by the City in adopting the Challenged Amendments. Petitioners' argument is also based upon the unsupported conclusion that the common use of parts of Area 14 by the public constitutes "recreational purposes" as those terms are used in the data and analysis. When read in context, it is clear that the terms are being used in a technical, land-use planning sense. In their technical, land-use planning sense, the sentence is accurate.

69. The evidence failed to prove that the data and analysis relied upon by the City in adopting the Challenged Amendments are not professionally reliable or that the data and analysis do not support the Challenged Amendments.

L. <u>The Need for Additional Recreation and Open Space</u>.

70. Petitioners have asserted generally that the amendments relating to Area 14 are not in compliance because of the need for additional recreation and open space in the City. Petitioners failed to prove this assertion. The evidence failed to prove that the Challenged Amendments relating to Area 14 somehow will

cause a deficit in the Recreation and Open Space inventory of the City or that such a deficit already exists. Further, had Petitioners been able to prove that there is a need for additional parks in the City, such proof would only support a finding that the Recreation and Open Space Element of the Plan is inadequate. It would not, however, necessarily follow that the City would be required to correct the inadequacy through the use of Area 14 as a park. Finally, Petitioners have failed to prove how FLUM Change 14, which does not authorize any use of Area 14 that is not already authorized without the change, will have the suggested effect on the City's recreation and open space inventory.

71. The National Recreation and Park Association's minimum level of service standard for recreation and open space is ten acres per one thousand permanent and seasonal residents. The City has adopted this level of service for recreation and open space in the City. The City meets this standard without consideration of Area 14 or any part thereof.

72. Data and analysis, unrefuted by credible evidence from Petitioners, indicates that FLUM Change 14 will not adversely effect the level of service standard for recreation facilities:

> [R]emoval of the ROS designation will not <u>per se</u> reduce the recreation level of service. The re designation [sic] of site to Single Family Residential will create a small additional residential development potential, thus putting more demand on existing recreation facilities. However, the additional demand will not result in the city failing to meet its recreation level of

service since it is an inconsequential amount and since it will be more than balanced by the net reduction in permitted residential development which will result from the cumulative effect of all of the proposed Future Land Use Map changes.

The recreation level of service is established by Policy 2.1 of the Recreation and Open Space Element at ten (10) acres of recreation and open space per one thousand permanent and seasonal residents with 20 percent of seasonal residents counted. The Recreation space inventory shown in Table VIII-1 of the Recreation and Open Space element will still have the 1,156 acres shown therein after the 94-1 Future Land Use Map change (including change number 14) is effectuated. The 2002 population projection reported in Tables I-2 and I-3 of this element will remain at 98,965 permanent and 70,000 seasonal because it is based on trend lines not individual development sites. The 98,965 permanent population plus 20 percent of the 70,000 seasonal population produces a population of 112,965 for purposes of the recreation level of service standard. Then, 1,156 acres of existing recreation land/(112,965 people/1,000 people) equals a level of service of 10,233 acres per 1,000 population.

73. The evidence failed to prove that FLUM Change 14 will adversely impact the City's ability to meet its adopted recreational level of service.

74. The City has made commitments to upgrade existing recreational facilities, including improvements to North Shore Open Space Park.

75. Included in the City's inventory of Recreational and Open Space property is La Gorce Country Club. La Gorce Country Club makes up 144.28 acres of the total 1,156 acres of recreational property relied upon by the City to meet its level of service standard.

76. The La Gorce Country Club's inclusion in the Recreational and Open Space inventory was reviewed and approved in 1992. It played no part in the Challenged Amendments.

77. Petitioners attempted to prove that the La Gorce Country Club should not be included in the Recreational and Open Space inventory. The evidence in this case failed to prove Petitioners' assertion. The La Gorce Country Club is a private country club. It is, however, available to the public for some recreational activities. It is, therefore, acceptable to include it as recreational property under the Department's rules.

78. Additionally, even if the evidence had proved that La Gorce Country Club should not be considered in determining whether the City's level of service standard has been met, there is no requirement in the Act, the Department's rules, or the Plan that Area 14 must be included to make up the resulting deficit. Even if there were such a requirement, the inclusion of the 11 acres of Area 14 in substitution for the 144.28 acres of the La Gorce Country Club would not correct the deficit.

79. Petitioners also suggested that Area 14 is qualitatively better recreational property than La Gorce County Club. This argument, and the facts offered to support it, are not relevant.

80. The evidence failed to prove that the City has not adopted an adequate level of service in its Recreation and Open

Space Element, or that the City is not meeting its level of service.

81. The evidence also failed to prove that FLUM Change 14 is inconsistent with City's Recreation and Open Space Element Goal:

> Develop and Maintain a Comprehensive System of Parks and Recreational open Spaces to Meet the Needs of the Existing and Future Population by Maximizing the Potential Benefits of Existing Facilities and Open Space While Encouraging the Preservation and Enhancement of the Natural Environment.

82. In light of the fact that Area 14 has never been treated as a park by the City, the evidence failed to prove that the City is not meeting its Recreation and Open Space Element Goal without regard to the land-use classification of Area 14.

M. Archaeology of Area 14.

83. Prior to March of 1927 there was a United States Federal Life Saving Station, known as the "Biscayne House of Refuge," located somewhere in the vicinity of Area 14. The Biscayne House of Refuge was one of six similar buildings located on the east coast of Florida. The buildings were used to provide refuge for shipwrecked sailors. The original Houses of Refuge were authorized by President Ulysses S. Grant in the late 1800's.

84. The Biscayne House of Refuge was stocked with provisions and was managed by a keeper. The keeper's duties included, among others, burying bodies that washed up along the coast. Several of the keeper's children were also buried

somewhere near the Biscayne House of Refuge. The evidence failed to prove, however, where any bodies are buried.

85. It is believed that the Biscayne House of Refuge was destroyed following damage to the structure during a hurricane in March of 1927.

86. The exact location of the Biscayne House of Refuge has not been determined. The best information available indicates it was located east of Collins Avenue, and either between 73rd and 77th Streets, or between 72nd and 76th Streets.

87. There is also some information to suggest that the Biscayne House of Refuge was located on a site that is already developed for the City's library.

88. The Florida Department of State, Division of Historical Resources, reported that its Historical Preservation Review of the Adopted Amendments had determined that the 22 proposed changes to the City's FLUM "should have no adverse effects on the city's historic resources since the areas appear to contain no sites listed on the Florida Site Files or the national Register of Historic Places."

89. The evidence concerning the location of the Biscayne House of Refuge presented by Petitioners was speculative, at best. The evidence failed to prove that the Challenged Amendments will have any impact on the Biscayne House of Refuge or any significant archaeological resources.

90. The evidence also failed to prove that FLUM Change 14 is inconsistent with the historic designations of Altos Del Mar or Harding Townsite.

N. Natural Dunes.

91. In its original state, the beaches of the City may have had extensive barrier reef dune systems along the Atlantic Ocean. To the extent that such systems existed, however, they have been radically altered by development and the impact of tides and winds on the dunes.

92. The natural dune system of the City today has essentially been destroyed or so altered as to no longer be considered a significant dune system. The protection normally afforded by a dune system is now provided, not by a natural dune system, but by the man-made dunes east of the Erosion Control Line.

93. Petitioners attempted to prove that there is an existing dune system in Area 14. The evidence failed to support Petitioners' contention.

94. The evidence proved that, at best, there may be remnants of dunes along the eastern boundary of Area 14. One such feature is approximately four feet to four and a half feet in height, twenty feet wide, and a hundred to one hundred fifty feet in length.

95. The evidence failed to prove, however, whether the piles of sand that do exist along Area 14 should be considered as

dunes. The character of the coastline of the City, including Area 14, has been drastically altered by hurricanes, including the 1927 hurricane that destroyed the Biscayne House of Refuge. Erosion has eliminated much of the City's shoreline, in some cases eroding the beach to bulk heads.

96. The construction of the dunes east of the Erosion Control Line also may have impacted any existing dune system in Area 14. The construction of the dunes involved a significant amount of grading. The evidence failed to prove what impact, if any, construction of the dunes had in forming the piles of sand that now exist along Area 14.

97. The evidence also proved that, to the extent that any remnants of natural dunes may exist near Area 14, their function as a dune system has been substantially, if not completely, replaced by the man-made dune system along the Erosion Control Line.

98. The Erosion Control Line was established as part of a beach renourishment project of the United States Army Corps of Engineers. The project lasted from 1975 through 1981 and cost approximately $60 million.

99. The efforts of the United State Army Corps of Engineers included the expansion of the beach and the construction of a dune system that runs the entire length of the City's Atlantic Ocean shoreline. The constructed dunes have also been vegetated through a separate grant of approximately $4.5 million.

100. The Erosion Control Line is owned by the State of Florida, managed by Metro-Dade County, and protected by the City.

101. The evidence also failed to prove that, if a dune system did exist along Area 14, the Challenged Amendments allow any different impact on the dunes than was already allowed under the Plan. The Challenged Amendments do not authorize the development of Area 14 in a manner that was not allowed without the Adopted Amendments.

102. Petitioners relied upon a United States Department of Agriculture, Soil Conservation Service, Soil Survey for Dade County prepared in 1957; a 1914 historical map of the City; and aerial photographs and contour maps prepared in 1975 by the United States Army Corps of Engineers to support their argument that significant dunes exist in Area 14. They attempted to bring these documents up-to-date largely through recent visual observations of the area. This evidence was not persuasive. The evidence proved that Area 14 is typical of the City's shoreline before extensive development. The evidence also proved that the remaining piles of sand may very well be a remnant of a dune system that existed at some time in the past. What the evidence failed to prove, however, is that the piles of sand are in fact part of a dune system that once existed in the area or that, if they are in fact part of a former dune system, the piles of sand should still be considered to be functioning as a dune system.

103. Petitioners also have argued that the City mischaracterized the type of soils in Area 14 in the data and analysis as "fill." Petitioners argue that, had the City properly characterized the soils in Area 14, the City would have known that there was a natural dune. The evidence failed to support this argument. What the City actually indicated in the data and analysis is that "[t]he entire island is essentially 'madeland' except for the sand along the ocean beach." Petitioners' argument concerning this statement is not persuasive. First, the statement relied upon by Petitioners recognizes that there are areas that are not "made-land." What the data "along the ocean beach" means could be clearer or more precise, but the statement does not support a finding that the City simply dismissed the possibility that a dune may exist along Area 14. Additionally, Petitioners have simply taken a statement intended to apply to the entire City, and attempted to apply it to an 11-acre area.

104. Petitioners have also argued that the City mischaracterized the nature of soils by stating in the data and analysis that "[t]he entire island consists of fill (shell and muck) together with sand." Petitioners argue that this statement is incorrect and that, if the City had properly taken into account the nature of the soils in Area 14, the City would have recognized that there were dunes. Again, Petitioners have taken the statement out of context. Petitioners have only considered

the use of the term "fill," ignoring the fact that the statement also specifically states that the City is an "island" and that the fill exists "together with sand."

105. Finally, the evidence failed to prove that provisions of the Plan and the City's Land Development Regulations dealing specifically with the protection of dunes are not adequate to protect any dunes that may exist in Area 14:

a. Objective 1, Policy 1.4 of the Future Land Use Element provides for compatibility of uses of property adjacent to dunes and provides for the conservation of beach lands designated on the FLUM and the Conservation Element;

b. Objective 1, Policy 1.2 of the Future Land Use Element designates dune locations on the Atlantic Coast as Conservation Protected "C" and permits only open space uses of these areas. It also provides for protection of such areas from the encroachment of development;

c. Objective 1 of the Conservation/Coastal Zone Management Element provides that there will be "zero man-made structures which adversely impact beach or dune system(s)";

d. Objective 1, Policy 1.2 of the Conservation/Coastal Zone Management Element requires vegetation of, and elevated footpaths over, dunes to minimize pedestrian impacts;

e. Objective 1, Policy 1.4, and Objective 10, Policy 10.1 of the Conservation/Coastal Zone Management Element discourage non-water oriented activities and development on beach-front

parks, new beach areas, and dunes by designating the beach as a Conservation Protected Area on the FLUM;

f. Objective 3, Policy 3.4 of the Recreation and Open Space Element provides that the City will inform Metro-Dade County and the United States Army Corps of Engineers when maintenance or renourishment of the beach is necessary; and

g. The City's Land Development Regulations provide protection through the Dune Overlay Regulations.

106. The evidence failed to prove that the alleged dune in Area 14 has "archeological significance."

O. Impact on Wildlife and Vegetative Communities.

107. The evidence presented by Petitioners concerning the use of Area 14 by birds and vegetative communities was anecdotal and unpersuasive.

108. Practically the entire length of the City's boundary with the Atlantic Ocean is used for nesting by the Atlantic Loggerhead Turtle, Leatherback Turtles, and Green Turtles. All are threatened or endangered species. Nesting of turtles in the immediate vicinity of Area 14 has been moderate to low. Greater nesting activity takes place along the more urbanized South Beach area.

109. Coastal development has contributed to the endangered status of sea turtles. A number of factors, some related to development, may influence whether a turtle will nest in an area, including the amount of artificial light and noise, how hard the

sand is, and the presence of people. These factors may cause turtles to abandon attempts to nest after coming ashore.

110. Artificial light may also disorient hatchlings, causing them to head away from the ocean.

111. Despite the possible impact of artificial light on turtle nesting and hatchlings, turtles continue to successfully nest in developed areas, including the highly developed South Beach area.

112. Data and analysis relied upon by the City in support of the Challenged Amendments identified the status, habitat, and reasons for concern for turtles.

113. Turtles usually nest within 50 feet of the ocean's edge. Therefore, the evidence failed to prove that it is likely that turtles will enter the portion of Area 14 where single-family structures may be built. Petitioners failed to prove that turtles are likely to cross over the dunes constructed east of the Erosion Control Line to reach Area 14.

114. The City is involved in efforts to protect nesting turtles. The area which turtles use to nest in is owned by the State of Florida. Metro-Dade County manages the area for the State of Florida. Metro-Dade County maintains a staffed facility at 79th Street and Collins Avenue for the maintenance and protection of turtle nests. The City has also designated the area where turtles generally nest as a Conservation Protection Area.

115. Protections are also provided for wildlife and vegetative communities which may exist west of the Erosion Control Line. Land Development Regulation 15, Dune Overlay Regulations, provides protection for wildlife and vegetative communities west of the Erosion Control Line and east of the edge of the pool deck, if one exists, or the old Miami Beach Bulkhead Line by limiting permanent structures other than pedestrian crossovers of dunes.

116. The evidence in this case failed to prove that the modification of the land use classification of Area 14 will have a negative impact on wildlife, including turtles, or vegetation. First, Petitioners failed to prove that single-family use of Area 14 will in fact result in an adverse impact or that potential adverse impacts cannot be mitigated. Additionally, Petitioners failed to prove that FLUM Change 14 allows any use of Area 14 which is not already allowed. Prior to the adoption of FLUM Change 14, Area 14 could be used for recreational or open space and/or for single-family development.

117. The evidence also failed to prove that the Plan's Conservation Element, Recreation and Open Space Element, or Coastal Management Element, are not in compliance as a result of Challenged Amendments relating to Area 14.

118. Finally, the evidence failed to prove that the Challenged Amendments cause the City's inventory of existing coastal uses, habitat, vegetative communities, and wildlife to be

inadequate. Neither the Act nor the Department's rules require a separate inventory map for each parcel of property impacted by a plan amendment.

P. Required Use of Funds from the Sale of Lots in Area 14.

119. Included in the data and analysis in support of the FLUM Change 14 is the following statement: "It is envisioned that proceeds from the sale of lots will be allocated to a fund for the enhancement of North Shore Open Space Park." In the Second Amended Petition, Petitioners challenged this statement as lacking commitment.

120. Petitioners ignore the amendment to Policy 7.2 of the Conservation/Coastal Zone Management Element which provides that "the proceeds from the sale are reserved for the enhancement of adjacent and/or nearby public shoreline." This amendment imposes a mandatory requirement for the use of any funds that may be realized, and it has not been challenged by Petitioners.

121. Whether there will in fact be any proceeds from the sale of the lots in Area 14 that are publicly owned is not relevant to the question of whether FLUM Change 14 is in compliance. There is no requirement in the Act or the rules of the Department that mandates that the proceeds from the sale of the lots be used for recreation purposes.

Q. Municipally-Owned Shoreline.

122. Policy 7.2 of the Conservation/Coastal Zone Management Element of the Plan provides that the City will "not decrease the

amount of municipally-owned shoreline available for public use" except under certain specified circumstances. Petitioners have asserted that FLUM Change 14 is inconsistent with this provision because the Area 14 property owned by the State is "essentially 'municipally owned' land."

123. Petitioners argument is rejected. First, Petitioners failed to raise this argument in the Second Amended Petition. Secondly, even if the argument had been properly raised, the evidence failed to prove that any of Area 14 is "municipally-owned." In fact, none of the property in Area 14 is owned by the City.

124. Finally, Policy 7.2 of the Conservation/Coastal Zone Management Element was amended to add the following exception to the prohibition against the City decreasing the amount of municipally-owned shoreline:

> 2) where municipal or other public acquisition is incomplete and there is not possibility for complete public acquisition of a usable portion of shoreline, or 3) in order to upgrade other public shoreline sites and facilities.

125. Petitioners have not challenged the newly adopted exceptions to Policy 7.2's prohibition against decreasing municipally-owned shoreline. Petitioners have also failed to prove that the exceptions do not apply in this case. More precisely, Petitioners have failed to prove that, should the City acquire ownership of any of the State-owned Area 14 shoreline, that the exceptions will not apply.

126. The City also added the following language to Policy 7.2:

> The development of the Altos del Mar area for single family residential use rather than for Recreation and Open Space as designated on the previous Future Land Use Map is specifically identified hereby as conforming to this policy (Policy 7.2) subject to the following conditions: a) the sites now owned by state agencies are sold for private single family residential development in a coordinated manner based on an overall neighborhood plan and a private development agreement that enhances the quality of life for those existing privately owned residences which are interspersed throughout the publicly owned sites; and 2) the proceeds from the sale are reserved for the enhancement of adjacent and/or nearby public shoreline.

127. Petitioners did not challenge the provision quoted in Finding of Fact 126. Nor did Petitioners prove that the provision will not apply.

R. <u>Areas 16a and 16b, and the Changes Thereto</u>.

128. Area 16a consists of approximately 11 acres. Area 16b consists of approximately 2 acres. Areas 16a and 16b are bounded on the south by 79th Street, on the north by 87th Street, and on the east by Collins Avenue. Area 16b is located between 81st and 82nd Streets. To the east of Collins Avenue and Areas 16a and 16b is the North Shore Open Space Park.

129. Area 16a consists of blocks 12 through 17 and 19 through 20. Area 16b consists of block 18.

130. Areas 16a and 16b are part of Altos Del Mar.

131. Blocks 12 and 18 are owned by the City. The remaining blocks are owned by the State.

132. Located to the west of Areas 16a and 16b is Area 16c. Although FLUM Change 16c has not been challenged, the FLUM changes to Areas 16a, 16b, and 16c are related.

133. The designated land use of Area 16a on the FLUM prior to the adoption of the Challenged Amendments was "Parking." This designation is identified on the FLUM as "P."

134. The designated land use of Area 16b prior to the adoption of the Challenged Amendments was "Public Facility." This designation is referred to on the FLUM as "PF."

135. The designated land use of Area 16c prior to the adoption of the Challenged Amendments was "Medium Density Multi Family Residential." This designation is identified on the FLUM as "RM-2."

136. FLUM Changes 16a and 16b changes the current designations of Areas 16a and 16b to "Low Density Multi Family Residential." This designation is referred to on the FLUM as "RM-1." FLUM Change 16c changes the current designation of Area 16c to "Low Density Multi Family Residential."

137. The modification of Area 16 to Low Density Multi Family Residential classified land is part of the City's overall plan to "Down Plan" the City. The Adopted Amendments include several FLUM changes which, when considered together, result in a net reduction in the allowable residential densities in the City.

These modifications were intended to reduce the intensity of development allowed under the Plan in the City, help the City to meet its level of service standards for public facilities and services, and maintain the character of the City. FLUM Changes 16a, 16b, and 16c are part of that overall effort.

S. Current Use of Areas 16a and 16b.

138. Areas 16a and 16b are currently used as public parking lots. The parking lots are sparsely used, however.

139. A fee of twenty-five cents per fifteen minutes is charged for parking in the lots.

140. The State has declared the lots that it owns as excess lands. The lots are to be sold.

141. The parking lots are used for access to the North Shore Open Space Park, a/k/a, the North Shore State Recreational Area (hereinafter referred to as the "Park"). The Park consists of approximately thirty-seven acres. The Park is surrounded by a fence. Access to the Park is through an entrance gate.

T. Availability of Parking in the City and Public Beach Access.

142. The data and analysis utilized by the City in support of the Adopted Amendments indicates that there are "numerous access points to the ocean." The City recognizes, however, that the "principal constraint [on access] is not the number of access points but the parking to serve them as well as nearby commercial and residential uses."

143. The impact of FLUM Changes 16a and 16b will eliminate the parking lots and the parking spaces now available at those lots. This will result in a loss of approximately 270 paved and metered parking spaces, and other potential spaces that are not now used for parking on some of the lots.

144. There will also be an increase in residential use of Area 16, which will require parking.

145. Data and analysis in support of FLUM Changes 16a and 16b provides the following committment:

> These two changes contain a total of eight blocks devoted to surface parking, two owned by the City of Miami Beach and six owned by the State of Florida. The parking is sparsely used even though it is available for the general public, including visitors to North Shore Open Space Park. The Department of Environmental Protection, Division of State land has determined that the state-owned blocks should be sold to Miami Beach which will make them available for a combination of public parking and private residential development. These uses may be accommodated by placing parking at grade on some or all of the blocks and constructing residential units in air rights above or they may be accommodated by placing public parking structures on one or more of the blocks of the blocks and developing the others for residential use. To the extent necessary, the public parking will be sized to accommodate beach access via North Shore Open Space Park and/or other functions which might be appropriate. . . .

146. Policy 3.1 of the Conservation/Coastal Zone Management Element of the Plan provides following:

> Those public access areas including street ends, municipal parking facilities and municipal parks along coastal waters will be maintained (See Figures VII-2 and VII-5 in the Recreation and Open Space Element) or redesigned to provide

greater public access to Biscayne Bay and the Atlantic Ocean beach area regardless of the land use designation of those areas. An example of the type of redesign envisioned is that planned for the parking lost on blocks located to the west of the North Shore Open Space Park. It is envisioned that there blocks will be redeveloped with public access beach parking at grade level and residential in air rights above and/or with parking decks on one or more blocks and with residential on the other blocks.

147. While the specific manner in which the parking spaces now available in Areas 16a and 16b will be replaced are not established, Policy 3.1 specifically requires that all municipal parking "be maintained." The Policy then provides an example of when existing parking will "be maintained" and that example is the modification of Areas 16a and 16b. This policy is sufficient to prevent the elimination of parking that Petitioners argue will occur as a result of FLUM Changes 16a and 16b.

148. The evidence failed to prove that access to beaches or the Park will be reduced as a result of FLUM Changes 16a or 16b.

149. The evidence also failed to prove that FLUM Changes 16a and 16b are dependent upon use of the proceeds from the sale of land in these areas to enhance the Park. See findings of fact 119 through 121.

CONCLUSIONS OF LAW

A. Jurisdiction.

150. The Division of Administrative Hearings has jurisdiction of the parties to, and the subject matter of, this

proceeding. Sections 120.57(1) and 163.3184, Florida Statutes (Supp. 1996).

B. Standing.

151. Any "affected person" may participate in proceedings challenging proposed plan amendments under the Act. Sections 163.3184(9) and (10), Florida Statutes.

152. The terms "affected person" are defined in Section 163.3184(1)(a), Florida Statutes:

> (a) "Affected person" includes the affected local government; persons owning property, residing, or owning or operating a business within the boundaries of the local government whose plan is the subject of the review . . . . Each person, other than an adjoining local government, in order to qualify under this definition, shall also have submitted oral or written comments, recommendations, or objections to the local government during the period of time beginning with the transmittal hearing for the plan or plan amendment and ending with the adoption of the plan or plan amendment.

153. Petitioners meet the definition of an "affected person" under Section 163.3184(1)(a), Florida Statutes.

154. The evidence also proved that Respondents have standing to participate in these proceedings.

C. Burden and Standard of Proof.

155. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue in the proceeding. Young v. Department of Community Affairs, 625 So. 2d 831 (Fla. 1993); Antel v. Department of Professional Regulation, 522 So. 2d 1056 (Fla. 5th DCA 1988); and

Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

156. Sections 163.3184(9) and (10), Florida Statutes, impose the burden of proof on the person challenging a plan amendment. Therefore, Petitioners have the burden of proof in this proceeding.

157. Two standards of proof are established under the Act. Which standard applies depends upon whether the proceeding arises after a determination of the Department that a plan amendment is, or is not, "in compliance." If the Department determines that a plan amendment is not in compliance, Section 163.3184(10), Florida Statutes, establishes the following standard of proof:

> The local government's determination shall be sustained unless it is shown by a preponderance of the evidence that the comprehensive plan or plan amendment is not in compliance.

If the Department determines that a plan amendment is in compliance and another party challenges the Department's determination, Section 163.3184(9), Florida Statutes, establishes the following standard of proof:

> [T]he local plan or plan amendment shall be determined to be in compliance if the local government's determination of compliance is fairly debatable.

158. The Department initially determined that the Adopted Amendments were not in compliance and filed a petition with the Division of Administrative Hearings. The Department and the City then entered into negotiations intended to resolve their dispute.

Those negotiations were successful. As authorized in Section 163.3184(16), Florida Statutes, the Department and City entered into a compliance agreement resolving their dispute. The City ultimately adopted remedial amendments consistent with the compliance agreement.

159. The Department subsequently issued a cumulative notice of intent finding the Adopted Amendments in compliance. Petitioners filed their petition in response to this determination.

160. Pursuant to Section 163.3184(16)(f), Florida Statutes, this proceeding is governed by Section 163.3184(9), Florida Statutes. Petitioners were, therefore, required to prove beyond fair debate that the Challenged Amendments are not in compliance.

161. The terms "fairly debatable" are not defined in the Act or the rules promulgated thereunder. The Supreme Court of Florida recently opined, however, that the fairly debatable standard under the Act is the same as the common law "fairly debatable" standard applicable to decisions of local governments acting in a legislative capacity. In Martin County v. Yusem, 690 So. 2d 1288, at 1295 (Fla. 1997), the Court opined:

> The fairly debatable standard of review is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety.

Quoting from City of Miami Beach v. Lachman, 71 So. 2d 148, 152 (Fla. 1953), the Court stated further:

> An ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity.

690 So. 2d at 1295. The Court cautioned, however:

> even with the deferential review of legislative action afforded by the fairly debatable rule, local government action still must be in accord with the procedures required by chapter 163, part II, Florida Statutes, and local ordinances.

Id.

D. The Ultimate Issue.

162. The ultimate issue in this case is whether the Challenged Amendments are "in compliance."

163. The terms "in compliance" are defined in Section 163.3184(1)(b), Florida Statutes (Supp. 1996), as follows:

> (b) "In compliance" means consistent with the requirements of ss. 163.3177, 163.3178, and 163.3191, with the state comprehensive plan, with the appropriate strategic regional policy plan, and with chapter 9J-5, Florida Administrative Code, where such rule is not inconsistent with chapter 163, part II.

164. A determination of whether a plan amendment is "in compliance" must be based upon a consideration of the comprehensive plan in its entirety, including any amendments thereto. Department of Community Affairs v. Lee County, 12 FALR 3755 (Fla. Admin. Comm. 1990).

165. Petitioners alleged that the Challenged Amendments are not consistent with a number of specific portions of Sections 163.3177 and 163.3178, Florida Statutes, and Chapter 9J-5,

Florida Administrative Code. Petitioners did not allege that the Challenged Amendments were not consistent with the state comprehensive plan or the appropriate strategic regional policy plan.

166. Petitioners attempted to raise issues concerning alleged inconsistencies with the City's Charter and other matters which the Department has no jurisdiction to consider. Those issues were struck.

167. Petitioners also attempted in their proposed recommended order to raise issues which were not alleged to be at issue in their Second Amended Petition. For example, Petitioners argued in their proposed recommended order that the City failed to give adequate notice of its adoption of the Challenged Amendments. Petitioners failed to put Respondents on notice before or during the hearing that there was any dispute as to the notice given by the City. The City, therefore, was effectively precluded from presenting evidence concerning this issue. This issue and others raised by Petitioners in their proposed recommended order, but not in their Second Amended Petition, have been given no consideration in this Recommended Order.

E. Petitioners' Challenge to FLUM Change 14.

168. In the Second Amended Petition filed by Petitioners, they raised the following challenges to FLUM Change 14:

a. FLUM Change 14 is contrary to the policies and objectives of the Plan and the Act, "both of which have the goal

and objective of fostering the public availability of scarce public resources, such as the beach front park at issue in this case." In support of this argument, Petitioners alleged that FLUM Change 14 violates the City's Charter. Related to this allegation were alleged facts concerning a referendum vote concerning Area 14 and its use. These allegations were struck as irrelevant to this proceeding;

b. FLUM Change 14 is contrary to the requirements of the Act concerning a coastal management element. In particular, Petitioners alleged that the change is contrary to Sections 163.3178(2)(a), (b), and (e), Florida Statutes, and Rules 9J-5.012(2)(b) and (f), and (3)(b)4, Florida Administrative Code;

c. FLUM Change 14 is contrary to the requirements of the Act concerning a recreation and open space element. In particular, Petitioners alleged that the change is contrary to Section 163.3177(6)(e), Florida Statutes;

d. FLUM Change 14 is contrary to the requirements of the Act concerning a conservation element. In particular, Petitioners alleged that the change is contrary to Sections 163.3177(6)(d), and 163.3178, Florida Statutes, and Rules 9J-5.013(1)(a)5 and (2)(b)3 and 4, Florida Administrative Code; and

e. FLUM Change 14 is contrary to the requirements of the Act concerning a future land use element. In particular, Petitioners alleged that the change is contrary to Section

163.3177(6)(a), Florida Statutes, and Rule 9J-5.006(2)(b), Florida Administrative Code.

169. Petitioners have alleged that FLUM Change 14 is inconsistent with the foregoing provision because the data and analysis relied upon by the City in adopting FLUM Change 14, and by the Department in finding FLUM Change 14 in compliance, was inadequate.

F. Data and Analysis.

170. Section 163.3177(8), Florida Statutes, requires that each element of a comprehensive plan, whether mandatory or optional, be based upon data appropriate for the element.

171. The data and analysis in support of an element is not subject to compliance review by the Department. Section 163.3177(10)(e), Florida Statutes. But goals, objectives, and policies of an element must be "clearly based on appropriate data." Id.

172. Rule 9J-5.005(2)(a) and (c), Florida Administrative Code, provides the following with regard to the required data and analysis to support a plan or plan amendment:

> (a) All goals, objectives, policies, standards, findings and conclusions within the comprehensive plan and its support documents, and within plan amendments and their support documents, shall be based upon relevant and appropriate data and the analyses applicable to each element. To be based on data means to react to it in an appropriate way and to the extent necessary indicated by the data available on that particular subject at the time of adoption of the plan or plan amendment at issue. Data or summaries thereof shall not be subject to the

> compliance review process. However, the Department will review each comprehensive plan for the purpose of determining whether the plan is based on the data and analyses described in this Chapter and whether the data were collected and applied in a professionally acceptable manner.
>
> . . . .
>
> (c) . . . . The data used shall be the best available existing data, unless the local government desires original data or special studies.

173. The City's Plan was found "in compliance" by the Department in December 1992. The data and analysis in support of the Plan was determined to be sufficient. Much of that data and analysis supports the City's actions in this matter and may be relied upon to support the Challenged Amendments:

> Each proposed plan amendment must be supported by data and analysis in accordance with Rule 9J-5.005(2), Florida Administrative Code, and Rules 9J-11.006(1)(b)1. through 5., Florida Administrative Code. If the original plan data and analysis or the data and analysis of a previous amendment support and meet the requirements cited above for the amendment, no additional data and analysis are required to be submitted to the Department unless the previously submitted data and analysis no longer include and rely on the best available existing data. . . .

Rule 9J-11.007(1), Florida Administrative Code.

174. The evidence in this case failed to prove that the data and analysis in support of the Challenged Amendments are not adequate under the Act and rules. The evidence also failed to prove that the data and analysis in support of the Challenged Amendments were not professionally acceptable.

G. Consistency of FLUM Change 14 with the Coastal Management Element Requirements.

175. Section 163.3177(6)(g), Florida Statutes, requires that certain local governments, including the City, must adopt a coastal management element as part of their comprehensive plan. The coastal management element must meet the requirements of Section 163.3178(2) and (3), Florida Statutes.

176. Section 163.3178(1), Florida Statutes, explains the Legislature's intent in requiring a coastal management element:

> [T]hat local government comprehensive plans restrict development activities where such activities would damage or destroy coastal resources, and that such plans protect human life and limit public expenditures in areas that are subject to destruction by natural disaster.

177. Section 163.3178(2)(a), Florida Statutes, requires that the coastal management element include an "inventory map" of existing coastal uses, wildlife habitat . . . historic preservation areas . . . ." Section 163.3178(2)(b), Florida Statutes, requires that the element include an analysis of the environmental impact of development on the "natural and historical resources of the coast . . . ." Section 163.3178(2)(e), Florida Statutes, requires that the element include "principles for protecting existing beach and dune systems from human-induced erosion . . . ."

178. Rule 9J-5.012, Florida Administrative Code, sets out specific requirements concerning the coastal management element:

a. Rule 9J-5.012(2)(b), Florida Administrative Code, requires an inventory and analysis of "future land uses as required to be shown on the future land use map" on natural resources of the coastal planning area;

b. Rule 9J-5.012(2)(f), Florida Administrative Code, requires that beach and dune systems be inventoried and analyzed; and

c. Rule 9J-5.012(3)(b)4, Florida Administrative Code, requires that the element provide for the protection of beaches or dunes, "establish construction standards which minimize the impacts of man-made structures on beach or dune systems, and restore altered beaches or dunes."

179. Petitioners failed to prove that FLUM Change 14 violates any of the foregoing provisions relating to the coastal management element. The City has adopted a Conservation/Coastal Zone Management Element. The City has also prepared the necessary inventories and analysis required by Section 163.3178, Florida Statutes, and Rule 9J-5.012, Florida Administrative Code. Nothing in those provisions requires that a separate inventory be prepared for each and every FLUM amendment.

180. Petitioners failed to prove any of the facts which underlie its allegations concerning the impact of FLUM Change 14 on the City's Conservation/Coastal Zone Management Element. FLUM Change 14 does not authorize any use of Area 14 that is not already authorized. Therefore, there can be no impact on Area 14

that has not already been found in compliance. Additionally, the evidence failed to prove that the concerns about Area 14 raised by Petitioners are genuine or that if they were, those concerns cannot be addressed at the time of permit review.

181. Petitioners assertion that FLUM Change 14 violates Rule 9J-5.012(3)(b)4, Florida Administrative Code, because "it is not accompanied by an objective or policy which protects the natural dune" or because there is no "pre-existing policy" that provides such protection is without merit. Petitioners failed to prove that there is a dune or that existing protections in the Plan and the Land Development Regulations are not adequate.

182. Finally, the suggestion that the Challenged Amendments are inconsistent with the requirements of the Act and rules concerning the coastal management element because open space in the Coastal High Hazard Area is being "replaced" with single-family and multi-family residential structures is rejected for two reasons. First, Petitioners did not raise this allegation in the Second Amended Petition. They waited until filing their proposed recommended order to raise this issue. Secondly, the evidence failed to prove that FLUM Change 14 allows any use of Area 14 not already allowed.

H. Consistency of FLUM Change 14 with the Recreation and Open Space Element Requirements.

183. Section 163.3177(6)(e), Florida Statutes, requires that all plans include a recreation and open space element. This element is required to include a "comprehensive system of public

and private sites for recreation, including, but not limited to, natural reservations, parks and playgrounds, parkways, beaches and public access to beaches, open spaces, and other recreational facilities."

184. Petitioners have argued, in effect, that Area 14 is land that could be used for recreation and open space and, therefore, it must be used as recreation and open space. Nothing in the Act supports this argument.

185. Petitioners have also argued in their proposed recommended order that some of the property which the City relies on to meet its recreation and open-space level of service standard should not be counted and, therefore, Area 14 must be included to make up the deficit because it is suitable for use as recreation and open space. Again, there is nothing in the Act that supports this argument. Additionally, the evidence in this case failed to support Petitioners' assertion concerning the property the City counts as recreation and open space.

I. Consistency of FLUM Change 14 with the Conservation Element Requirements.

186. Section 163.3177(6)(d), Florida Statutes, requires that all plans include a conservation element "for the conservation, use, and protection of natural resources in the area, including . . . beaches, . . . wildlife, . . . and other natural and environmental resources."

187. Rule 9J-5.013(2)(b), Florida Administrative Code, requires that the conservation element include, among other things, objectives which:

> 3. Conserve, appropriately use and protect minerals, soils and native vegetative communities including forest; and
>
> 4. Conserve, appropriately use and protect fisheries, wildlife, wildlife habitat and marine habitat.

188. Rule 9J-5.013(1)(a), Florida Administrative Code, requires that the following natural resources be identified and analyzed, "where present within the local government's boundaries," as part of the conservation element:

> 5. Areas which are the location of recreationally and commercially important fish or shellfish, wildlife, marine habitats, and vegetative communities including forest, indicating known dominant species present and species listed by federal, state, or local government agencies as endangered, threatened or species of special concern.

189. Petitioners have argued that FLUM Change 14 is inconsistent with the foregoing provisions because wildlife and native vegetative communities were not identified and analyzed and because the change does not protect those communities. Petitioners' argument is without merit.

190. FLUM Change 14 does not authorize any use of Area 14 not already allowed. There cannot, therefore, be any impact on wildlife and native vegetative communities as a result of the change that is not already allowable. More importantly, the evidence failed to prove that wildlife or native vegetative

communities will be negatively impacted by single-family residential use of Area 14.

J. Consistency of FLUM Change 14 with Future Land Use Element and FLUM Requirements.

191. The Challenged Amendments in this case are limited to modifications to the FLUM. Section 163.3177(6)(a), Florida Administrative Code, requires the following element be included in all comprehensive plans:

> (a) A future land use element designating proposed future general distribution, location, and extent of the uses of land for residential uses, commercial uses, industry, agriculture, recreation, conservation, education, public buildings and grounds, other public facilities, and other categories of the public and private uses of land. . . .

192. As a part of the future land use element, plans are also required to include a land use map or maps:

> The proposed distribution, location, and extent of the various categories of land use shall be shown on a land use map or map series which shall be supplemented by goals, policies, and measurable objectives. . . .

Section 163.3177(6)(a), Florida Statutes.

193. The future land use element is required to be based upon the following:

> [S]urveys, studies, and data regarding the area, including the amount of land required to accommodate anticipated growth; the projected population of the area; the character of undeveloped land; the availability of public services; and the need for redevelopment, including renewal of blighted areas and the elimination of nonconforming uses which are inconsistent with the character of the community.

Section 163.3177(6)(a), Florida Statutes.

194. Rule 9J-5.006, Florida Administrative Code, sets out the minimum requirements of the future land use element:

> The purpose of the future land use element is the designation of future land use patterns as reflected in the goals, objectives and policies of the local government comprehensive plan elements. Future land use patterns are depicted on the future land use map or map series within the element.

195. In developing the future land use element and maps, Rule 9J-5.006(2), Florida Administrative Code, requires a consideration of, in relevant part, the following:

> (a) An analysis of the availability of facilities and services . . . to serve existing land uses included in the data requirements above and land for which development orders have been issued;
>
> (b) An analysis of the character and magnitude of existing vacant or undeveloped land in order to determine its suitability for use, including where available:
>
> 1. Gross vacant or undeveloped land area, as indicated in Paragraph (1)(b);
> 2. Soils;
> 3. Topography;
> 4. Natural resources; and
> 5. Historic resources;
>
> (c) An analysis of the amount of land needed to accommodate the projected population, including:
>
> 1. The categories of land use and their densities or intensities of use,
> 2. The estimated gross acreage needed by category, and

3. A description of the methodology used. . .

196. Petitioners have alleged that FLUM Change 14 is inconsistent with the foregoing provisions for the following reasons:

> The Amendment addresses vacant land at I-11. It recognizes the vacant land at issue here as "[a] series of tracts along Collins Avenue near the northern City line." The Amendment incorrectly states that the soils of the vacant land tare [sic] "[a]ll are filled land." In fact, there are natural dune systems on the property. The Amendment also incorrectly states that there are no natural resources involved. The Amendment is not supported by professionally acceptable data and analysis.

197. The evidence in this case failed to support Petitioners' argument. First, the Plan contains a Future Land Use Element and the FLUM. The Future Land Use Element and FLUM were found to be consistent with the Act and, in particular, Rule 9J-5.006, Florida Administrative Code. The FLUM changes at issue in this case involve a relatively small area of the City. The evidence in this case failed to prove that those changes cause the Future Land Use Element or the FLUM to be inconsistent with the Act.

198. The evidence also failed to support Petitioners' assertions concerning the alleged dunes in Area 14. The evidence failed to prove the existence of a dune system. Additionally, nothing in FLUM Change 14 allows the City to ignore provisions of the Plan and the Land Development Regulations that are designed to protect dune systems.

199. The evidence also failed to prove that the statements in the data and analyses concerning soils are incorrect. The City's statements concerning soils do not indicate that every inch of the City is "man-made" or "fill." The statement concerning "man-made" areas indicates that there are areas which are not "man-made" located "along the ocean beach." What "along the ocean beach" means could be clearer, but can be interpreted to include "sand" located in Area 14. The statement concerning "fill" also indicates there are areas of "sand." The City's statements do not support a conclusion that the City simply dismissed the possibility that a dune may exist along Area 14. Finally, Petitioners have simply taken statements intended to apply to the entire City, and attempted to apply them out of context to an 11-acre area.

200. The evidence also failed to prove that the City did not consider any factors which it should have considered, including "natural resources," in adopting FLUM Change 14.

201. Finally, the evidence failed to prove that the City did not consider the character of Area 14 when it adopted FLUM Change 14. Area 14 has always been a mixture of vacant lots and single-family residences. The FLUM, prior the adoption of the Challenged Amendments, allowed the use of all of Area 14 as single-family residential or as recreation and open space. Therefore, authorizing the use of Area 14 for only single-family

residential purposes is as consistent with the character of Area 14 as using Area 14 only for recreational purposes.

K. Petitioners' Challenge to FLUM Changes 16a and 16b.

202. In the Second Amended Petition filed by Petitioners, the following challenges were raised to FLUM Changes 16a and 16b:

a. FLUM Changes 16a and 16b are contrary to the requirements of the Act concerning a recreation and open space element. In particular, Petitioners alleged that the changes are contrary to Section 163.3177(6)(e), Florida Statutes;

b. FLUM Changes 16a and 16b are contrary to the requirements of the Act concerning a coastal management element. In particular, Petitioners alleged that the changes are contrary to Section 163.3178(2)(i), Florida Statutes and Rules 9J-5.012(2)(g) and (3)(b)9, Florida Administrative Code; and

c. FLUM Changes 16a and 16b are contrary to the requirements of the Act concerning a housing element. In particular, Petitioners alleged that the changes are contrary to Section 163.3177(6)(f), Florida Statutes.

L. Consistency of FLUM Changes 16a and 16b with the Recreation and Open Space Element.

203. Recreation and open space elements of plans are required to provide, among other things, "beaches and public access to beaches . . . ." Section 163.3177(6)(e), Florida Statutes.

204. Petitioners have argued that, by eliminating the public parking land-use classification of Areas 16a and 16b, FLUM

Changes 16a and 16b cause the Recreation and Open Space Element to be inconsistent with Section 163.3177(6)(e), Florida Statutes. In support of this argument, Petitioners point to the following language included in data and analyses in support of the Capital Improvement Element of the Plan: "the need for additional parking facilities is so critical to the City's continued revitalization . . . ." This language, however, is taken out of context. The full statement contained in the data and analyses provides the following:

> Because the need for additional parking facilities is so critical to the City's continued revitalization, the parking enterprise fund is particularly important and must be used only for parking.

205. The evidence in this case failed to prove that the modification of the land use designation of Areas 16a and 16b will cause the Recreation and Open Space Element of the Plan to be inconsistent with the Act or Chapter 9J-5, Florida Administrative Code. Petitioners failed to prove that there will be a reduction in beach access or, if there is a reduction, that the reduction will result in the elimination of adequate beach access in the City.

M. Consistency of FLUM Changes 16a and 16b with the Coastal Management Element.

206. Petitioners have alleged that FLUM Changes 16a and 16b are inconsistent with the following requirements of Rule 9J-5.012(2)(g), Florida Administrative Code:

> (2) Coastal Management Data And Analysis Requirements. The element shall be based upon the following data and analyses requirements pursuant to subsection 9J-5.005(2).
>
> . . . .
>
> (g) Public access facilities shall be inventoried, including: all public access points to the beach or shoreline through public lands, private property open to the general public, or other legal means; parking facilities for beach or shoreline access . . . . Public access facilities shall be shown on the map or map series required by Paragraph (2)(a) as water-dependent uses or facilities. These inventories and analyses shall be coordinated with the recreation and open space element and any countywide marina siting plan if adopted by the local government.

207. Petitioners do not argue that the City has not completed the "inventory" required by Rule 9J-5.012(2)(g), Florida Administrative Code. Petitioners have argued that the City's "inventory" and its analysis of the impact on the need for parking is inadequate. The evidence failed to support Petitioners' argument.

208. The City has recognized the need for parking in the City. Therefore, the City has committed to the replacement of all parking spaces lost as a result of Challenged Amendments. While the City had not committed to the manner in which the spaces will be replaced, the City has agreed, despite the lack of use of the parking in Areas 16a and 16b, to replace the spaces in a manner that will enhance beach access.

209. Petitioners have also argued that FLUM Changes 16a and 16b are inconsistent with the following provisions of Rule 9J-5.012(3)(b)9, Florida Administrative Code:

> (b) The element shall contain one or more specific objectives for each goal statement which address the requirements of Paragraph 163.3177(6)(g) and Section 163.3178, Florida Statutes, and which:
>
> . . . .
>
> 9. Increase the amount of public access to the beach or shoreline consistent with estimated public needs;

210. The evidence failed to support Petitioners' allegations concerning the failure of FLUM Changes 16a and 16b to comply with Rule 9J-5.012(3)(b)9, Florida Administrative Code. The Plan in fact contains a specific objective consistent with the foregoing requirement: Objective 3, Policy 3.1 of the Conservation/Coastal Zone Management Element of the Plan. FLUM Changes 16a and 16b do nothing to eliminate Objective 3 or Policy 3.1.

211. Finally, Petitioners alleged that FLUM Changes 16a and 16b are inconsistent with Section 163.3178(2)(i), Florida Statutes, which requires that the coastal management element contain the following:

> (i) A component which outlines principles for providing that financial assurances are made that required public facilities will be in place to meet the demand imposed by the completed development or redevelopment. Such public facilities will be scheduled for phased completion to coincide with demands generated by the development or redevelopment.

212. Petitioners failed to prove that the Challenged Amendments are inconsistent with Section 163.3178(2)(i), Florida Statutes. Petitioners failed to prove that, with the replacement of the lost parking provided for by the City, that FLUM Changes 16a and 16b will result in the failure to provide financial assurances that required public facilities (parking) will not be in place to meet demand.

N. Consistency of FLUM Changes 16a and 16b with the Housing Element.

213. Petitioners alleged that FLUM Changes 16a and 16b are inconsistent with the requirements of Section 163.3177(6)(f), Florida Statutes. This provision requires that comprehensive plans contain a housing element consisting of "standards, plans, and principles to be followed in . . . provision of adequate sites for future housing . . . with supporting infrastructure and public facilities." The evidence failed to support the assertion that FLUM Changes 16a and 16b are inconsistent with the requirements of the Act concerning a housing element.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Community Affairs enter a Final Order finding the Adopted Amendments in compliance and dismissing the Second Amended Petition.

DONE AND ENTERED this 30th day of October, 1997, in Tallahassee, Leon County, Florida.

____

LARRY J. SARTIN
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case. See Section 163.3184(9)(b), Florida Statutes (Supp. 1996).