STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHELLY W. SUTTERFIELD, WILLIAM E. SUTTERFIELD, BECKY KOSHER, and JAMES KOSHER,	)	
Petitioners,	)	
vs.	)	Case No. 02-1630GM
CITY OF ROCKLEDGE and DEPARTMENT OF COMMUNITY AFFAIRS,	)	
Respondents,	)	
and	)	
FOUNTAIN DEVELOPMENT, L.L.P.,	)	
Intervenor.	)	

RECOMMENDED ORDER

Notice was given and on May 29-30, 2002, a final hearing was held in this case. Authority for conducting the hearing is set forth in Sections 120.569, 120.57(1), and 163.3184(9)(b), Florida Statutes. The hearing was conducted at the Brevard County Library, 219 Indian River Drive, Second Floor, Cocoa, Florida, by Charles A. Stampelos, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: James P. Beadle, Esquire
Spira, Boyd, Beadle, McGarrell
& Marks, L.L.C.
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For Respondent Department of Community Affairs:

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Department of Community Affairs
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For Respondent City of Rockledge:

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City of Rockledge
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For Intervenor Fountain Development, L.L.P.:

Michael S. Minot, Esquire
319 Riveredge Boulevard, Suite 218
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STATEMENT OF THE ISSUE

The general issue for determination in this administrative proceeding is whether Ordinance No. 1266-2002, adopting Amendment 02-1 (Plan Amendment) to the City of Rockledge's Comprehensive Plan, is not "in compliance" within the meaning of Section 163.3184(1)(b), Florida Statutes, as alleged in the Petition for Administrative Hearing, as amended.

PRELIMINARY STATEMENT

On February 6, 2002, the City of Rockledge (City) adopted Amendment 02-1 by Ordinance No. 1266-2002, which amended the

City's Comprehensive Plan. The Plan Amendment consists of a Future Land Use Map (FLUM) redesignation of approximately 9.16 acres from Planning District 8 to Planning District 5. The Plan Amendment also amends the City's FLUE, Appendix A, Planning District Guidelines, adding subparagraph 5.A. to the text of Planning District 5. (The City has eight existing planning districts with "Guidelines" which appear in Appendix A to the Future Land Use Element (FLUE, Chapter 1.)

The Plan Amendment was forwarded to the Department of Community Affairs (Department) and, on March 29, 2002, the Department published a Notice of Intent, finding the Plan Amendment "in compliance."

On April 18, 2002, Petitioners, Shelly W. Sutterfield, William E. Sutterfield, Becky Kosher, and James Kosher (Petitioners) filed a Petition for Administrative Hearing (Petition) with the Department to challenge the Plan Amendment pursuant to Section 163.3184, Florida Statutes. (The Petition includes Petitioners' letter of April 18, 2002, to the Department adding paragraph e., an additional statement of ultimate fact.)

On April 23, 2002, the Department referred the Petition to the Division of Administrative Hearings (Division) for the assignment of an administrative law judge.

On April 26, 2002, the City filed a Notice of Demand for Expedited Hearing pursuant to Section 163.3189(3)(a), Florida Statutes.

On April 26, 2002, the Department filed a Motion to Strike the Petition. The Department moved to strike from the Petition all references to zonings, rezonings, spot-zoning, spot planning districts, development order, and proposed development. The Department also requested Petitioners to elaborate on their allegation on page 4, paragraph 5, of the Petition that "[t]he City failed to provide proper notice as required by law."

The City adopted the Department's Motion to Strike.

On April 29, 2002, Intervenor, Fountain Development, L.L.P. (Fountain), filed a Petition for Leave to Intervene in this administrative proceeding, which was granted. Fountain also filed a Notice of Demand for Expedited Hearing.

On May 3, 2002, the parties participated in a pre-hearing conference by telephone. The parties agreed to have the matter set for final hearing for May 29-30, 2002, and, accordingly, an Amended Notice of Hearing was entered on May 6, 2002, advising of the date, time, and location of the final hearing.

On May 8, 2002, Petitioners filed a response to the Motions to Strike.

On May 15, 2002, the undersigned considered oral argument on the Motions to Strike and the Response and granted the Motions to Strike, concluding that

> [c]onsideration of these concepts are outside the scope of this proceeding. However, this ruling is without prejudice to Petitioners being afforded the opportunity to argue whether case law interpreting these concepts should have a bearing on the determination of whether the proposed Plan Amendment is "in compliance" pursuant to the applicable provisions of Chapter 163, Florida Statutes, and Rule 9J-5, Florida Administrative Code. Further, this ruling does not preclude Petitioners from offering relevant and material "data" which was in existence at the time the City approved the Plan Amendment. Also, this ruling does not prohibit Petitioners from offering relevant and material evidence regarding historical facts related to other related actions taken by the City.

Order May 15, 2002 (citation omitted). The undersigned deferred ruling regarding whether the "notice" issues raised in the Petition should be considered in this proceeding. The "notice" issues have been considered and decided adversely to Petitioners. See Conclusions of Law 100-104. Petitioners were also authorized to file an amended petition on or before May 20, 2002.

On May 20, 2002, Petitioners filed an Amendment to Petition Regarding Textural Amendment.

On May 27, 2002, Petitioners filed a Motion to Amend their Petition to include reference to Rule 9J-11, Florida

Administrative Code. A hearing on the Motion to Amend was held at the outset of the final hearing on this matter. After hearing argument, the Motion to Amend regarding the requested addition of Rule 9J-11, Florida Administrative Code, was denied.

On May 28, 2002, the Department filed a Pre-Hearing Stipulation, which was later joined by the City.

During the final hearing, Petitioners called the following witnesses: Donald Robert Griffin, the City's Director of Planning and Grants; Roger A. Wilburn, one of the Department's community program administrators and planning experts; Shelly W. Sutterfield and Becky Kosher, original Petitioners; and Henry P. Iler, a qualified expert in land use planning and comprehensive planning. Petitioners' Exhibits 1 through 12 were admitted into evidence.

The Department called Roger A. Wilburn, who was qualified as an expert in comprehensive planning and land use planning. The Department's Exhibits 1 through 10 were admitted into evidence.

The City called the following witnesses: Betsi B. Moist, City Clerk; Rochelle W. Lawandales, A.I.C.P., of Lawandales Planning Affiliates, who was qualified as an expert in land use planning and comprehensive planning; and James P. McKnight, City Manager. The City's Exhibits 1 (composite of photographs) through 4 were admitted into evidence.

There were also four joint exhibits 1 through 4 admitted into evidence.

Fountain cross-examined witnesses, but called no witnesses and offered no exhibits.

After the evidence was received, the parties agreed to submit their proposed recommended orders and memoranda of law 30 days after the transcript of hearing was filed with the Division. The five-volume transcript of the final hearing was filed with the Division on June 24, 2002. Petitioners submitted a Proposed Recommended Order, a Memorandum of Law, and a Motion for Reconsideration, requesting that the undersigned permit Petitioners to submit a supplemental proposed recommended order addressing the concepts of spot zoning and spot planning as they may relate to the facts of this case. The Motion was granted in part and Petitioners were permitted to and did file a supplemental proposed recommended order on August 5, 2002. Respondents and Fountain were permitted to file supplemental proposed recommended orders and responses.

The Department filed a Proposed Recommended Order and a Supplement to Proposed Recommended Order.

The City also filed a Proposed Recommended Order, adopting the Department's Proposed Recommended Order, and a Memorandum of Law, and also filed a Supplement to Proposed Recommended Order.

The Department adopted the City's Memorandum of Law. Fountain adopted the Department's and City's post-hearing submittals.

All of the parties' post-hearing submittals have been considered in preparing this Recommended Order.

FINDINGS OF FACT

The Parties

1. Petitioners, Shelly W. Sutterfield, William E. Sutterfield, Becky Kosher, and James Kosher, are residents of the City, who reside within Pine Cove Subdivision, which is east of Fountain's property. This subdivision is located in the City's Planning District 8.

2. Ms. Sutterfield stated that Petitioners want "to maintain the integrity of [their] planning district as low and medium-density in [their] neighborhood." Ms. Sutterfield also believed that the Plan Amendment "will add a high-density residential close to -- in close proximity to [their] neighborhood" and that "it will set a precedent for others to do the same thing." Ms. Kosher agreed.

3. Petitioners appeared at most, if not all, of the local government public hearings held regarding consideration of the Plan Amendment leading up to and including the adoption of Ordinance No. 1266-2002 by the City. Petitioners opposed the Plan Amendment during each hearing. See also Findings of Fact 35-40.

4. The Department is the state land planning agency responsible for reviewing local government comprehensive plans and plan amendments pursuant to Chapter 163, Part II, Florida Statutes (Act). This includes review of the proposed Plan Amendment adopted by the City, and a determination of whether the proposed Plan Amendment is "in compliance" with the Act. In this case, the Department reviewed the Plan Amendment submitted by the City and determined that it was "in compliance" with the Act.

5. The City is the oldest incorporated municipality in Brevard County. The City is located on the shoreline of the Indian River Lagoon south of the City of Cocoa and north of Palm Shores and Melbourne. The City is approximately 10 square miles with a population of 20,174 as of 2000.

6. The City is primarily a residential community, although it has some light, clean industry as well as a variety of commercial centers and institutional facilities, including a hospital, four public and three private schools, and churches of various denominations.

7. The City has adopted a Comprehensive Plan and a FLUM, which was amended last on July 19, 2000, excluding the Plan Amendment at issue in this case.

8. The City is divided into eight planning districts as reflected on the City's FLUM and in the text to the FLUE,

Chapter 1, Appendix A, Planning District Guidelines, of the Comprehensive Plan.

9. On May 19, 1999, the City adopted its Evaluation and Appraisal Report (EAR)-based amendments to its Comprehensive Plan pursuant to Ordinance No. 1182-99.

10. Fountain is incorporated under the laws of the State of Florida and owns all the property (located within the City of Rockledge) that is the subject of the Plan Amendment.

The Plan Amendment

11. On or about August 23, 2001, Fountain submitted an application to the City, requesting the Plan Amendment at issue in this proceeding. First, Fountain requested a change to the City's FLUM, removing their property from Planning District 8, and placing it in Planning District 5. The property consists of approximately 9.163 acres (site or subject property) and is located adjacent to the intersection of Huntington Lane, to the east, and Eyster Boulevard, to the north. The property has pine trees and open grass areas. The subject property has no significant historical value and no environmental concerns have been raised. See Findings of Fact 50-68 for a more complete description of the subject property in relation to existing, surrounding land uses.

12. As noted in Fountain's application:

> The applicant is proposing to build a high-rise apartment complex and needs additional density to meet the scale of economy for the project. The applicant also believes that with the FPL substation directly to the south and the property to the west being a large multi-family apartment project and the property to the north allowing manufacturing[,] [i]t would make more sense for the property to be in Planning District 5, instead of Planning District 8. The property to the east allows a mixture of low-density residential and single-family residential.

13. In its application, Fountain claimed that the maximum allowed development under the existing designation in the FLUM for the property site is 96 residential dwelling units. Petitioners dispute this number and claim that the error is material.

14. If the Plan Amendment is approved, the maximum allowable development under the proposed designation for the site is 118 dwelling units, i.e., 9.163 acres times a proposed maximum density of 13 dwelling units per acre. There is no dispute regarding this number. To this end, Fountain indicated that it "is willing to enter into a binding development agreement during the rezoning phase with the City to ensure adequate buffering to adjoining properties, where needed, as well as eliminate the possibility of the property to be used for commercial or manufacturing purposes." Fountain submitted a

draft agreement to the City. However, no agreement has been signed by Fountain or the City.

15. The subject property (without the Plan Amendment) is located in the northwest quadrant of Planning District 8. Planning District 5 is located immediately north of the subject property (across the street), and north of Eyster Boulevard, which runs east and west.

16. Planning District 5 is located on the FLUM as a mixed-use planning district.

17. The subject property, and the property to the west, south and east, are located in Planning District 8, which is designated as medium density residential on the FLUM.

18. As defined in the City's Comprehensive Plan, "[m]edium density residential land uses shall be at a density greater than three (3) dwelling units per acre and not exceeding fourteen (14) dwelling units per acre."

19. As provided in the Comprehensive Plan "Guidelines" for Planning District 5, the density for Planning District 5 for a new residential development "is limited to a maximum of fourteen (14.0) dwelling units per acre. . . ." With respect to Planning District 8, the "Guidelines" provide that the

> [m]aximum density allowed shall not exceed five (5) dwelling units per acre, current multi-family zoning districts shall be limited to existing densities. Any proposed zoning district changes shall be limited to

> a maximum of five (5) dwelling units per acre. Undeveloped areas west of Fiske Boulevard will be encouraged to be developed with a maximum of three (3) dwelling units per acre in order to protect the natural character of the land.

20. In addition to requesting a change in the FLUM designation for the site, from Planning District 8 to Planning District 5, Fountain also proposed, and the City ultimately adopted, a textural Plan Amendment to the Planning District 5 "Guidelines," including paragraph 5.A., which provides:

> Those areas located on the west side of Huntington Lane and south of Eyster Boulevard and north of the Florida Power and Light sub-station, may develop residential at a maximum of thirteen (13.0) dwelling units per acre (appropriate zoning districts include R2A, R3, TH). No principal structure shall be constructed within 225 feet of the right-of-way of Huntington to a distance of 425 feet from the south boundary of the described property, and not closer than 50 feet to Huntington Lane beyond the 425 feet. Other conditions include the submittal of a binding site plan, building height limited to a maximum of 38 feet; deceleration lane to any point of ingress and egress, traffic calming techniques will be used at entrances, and sidewalk along Huntington Lane for the entire length of the property.

21. Paragraph 5.A. was adopted as a site-specific addition within the Planning District 5 "Guidelines." Petitioners claim that this provision, when read with other provisions discussed in Planning District 5, allows Fountain to develop authorized land uses on the subject property, other than the development of

only residential dwelling units. When read in its entirety, and based on the weight of the evidence, the text Plan Amendment authorizes only residential dwelling units and no other land use. The inclusion of only residential zoning districts and the clear language that the property may be developed "at a maximum of thirteen (13.0) dwelling units per acre" bolster this finding.

22. Further, it is not uncommon for local governments to include various restrictions, such as maximum height restrictions and setback requirements, in plan amendments. These restrictions are not considered land development regulations within the context of the Comprehensive Plan. Rather, they are plan policies which define the parameters for future development within the planning districts, including Planning District 5.

23. There is a body of "land development regulations" which are intended to implement comprehensive plans and are subject to independent scrutiny. See, e.g., Section 163.3202, Florida Statutes. However, the restrictions noted in the Plan Amendment are not land development regulations within the context of this "in compliance" review proceeding.

24. Donald Robert Griffin of the City prepared a report consisting of two pages. Prior to preparing the report, Mr. Griffin reviewed the properties surrounding the subject property

and also analyzed the potential impacts of the Plan Amendment on roads, sewer, and water, for example. In analyzing paragraph 5.A., City staff also considered in part setbacks and reducing the zoning on the site to ensure compatibility. The staff report includes input from City department heads, the City Manager, and other staff. Staff recommended approval.

25. Staff indicated that the change in the residential land use classification for the approximate 9.163 acres would be consistent with the City's allocation percentages in its Comprehensive Plan. (The "need" for this Plan Amendment is not at issue in this proceeding.) Staff further noted:

> It would be staff's opinion that if the Brevard County enclave: (east of Fiske Blvd.; north of Howard Blvd. and south of Eyster Blvd.) was annexed into the city it would probably be put into Planning District 5, since it has a combination of mixed land uses. In addition, those properties immediately to the west of the subject property are identified as Woodhaven Apartments (799 Eyster Blvd.) a multi-family complex and the BCARC Group Home (951 Eyster Blvd.) a multi-family complex. Immediately to the south of the subject property is an FPL electrical substation. Immediately east of the subject property is Huntington Lane, a 50-foot road right-of-way, and property zoned either R-2A or R-2 on the east side of Huntington Lane. Immediately to the north of the subject property is Eyster Boulevard, a 100-foot-right-of-way and vacant M-1 industrial property. At the eastern terminus of Howard Boulevard, Florida Power and Light has a 100-foot wide easement, where power lines are currently in place. The easement limits the additional expansion

> of buildings into this 100-foot area. The property on the east end of Pine Cove, has a mixture residential and commercial uses adjacent to it, as part of Planning District 5.
>
> If this Comprehensive Plan Amendment is approved to allow the proposed change into Planning District 5, staff would recommend that when the property goes for rezoning, based on compatibility and consistency issues, that only residential land uses be allowed on the 9.163 acres. In addition, if the Amendment is approved, it should be suggested to the City Council that the area between Howard Boulevard and FPL Easement to the South; Fiske Boulevard to the west; Huntington Lane to the East; be incorporated into Planning District 5 at a future date. The Applicant does not have control over any other property beyond the 9.163 acres, noted in the application.

26. Fountain's planner, Rochelle W. Lawandales, prepared a planning report dated October 2001. This document was submitted to the City for its consideration. This planning report provides technical information to support the proposed textural addition to the "Guidelines" (5.A.) for Planning District 5 and change to the FLUM.

27. Ms. Lawandales describes the subject property, including the existing density for the approximate 9.163 acre site, as follows: "Approximately <u>6</u> acres [of the 9.163 acres] are zoned R-3 with a density of <u>13</u> units per acre. The remaining approximate <u>3</u> acres are designated as R-2 and R-2A. R-2A is medium density multi-family district allowing up to <u>8</u>

units per acre and the R-2 allows up to 5 units per acre." (emphasis added.) (In 2001, the City approved a rezoning request for the six-acre parcel, changing the zoning from R-2A to R-3. According to the Comprehensive Plan, an R-3 designation authorizes a maximum density of 14 units per acre, not 13. It is uncertain why Ms. Lawandales used 13 units per acre.)

28. The multiplication of approximate 9.163 acres times the noted (by Ms. Lawandales) densities per acre, yields a specific density of 96 residential units, which is the same number used in item 19 of Fountain's application.

29. When this number (96) is subtracted from the maximum allowable development under the proposed designation (Plan Amendment) for the subject property, i.e., 118 units (9.163 X 13), the difference is 22, which purports to be the number of additional units which would be authorized if the proposed Plan Amendment is approved. Petitioners assert this number is incorrect and the record supports Petitioners' position in part.

30. Prior to the EAR-based amendments to the City's Comprehensive Plan adopted in 1999, it appears that the zoning for the approximate north six acres of the subject property was R-2A, with a density of eight units per acre, which yields 48 units. The density for one acre was R-2A, which yields an additional eight units per acre. The remaining two acres were assigned a designation of R-2, which yields a density of five

units per acre, or ten total units per acre for the two acres. When added together, the approximate 9.163-acre parcel yields a maximum allowable development for the subject property, pre-EAR-based amendment, of 66 units per acre, not 96 units per acre. This means that the maximum allowable additional development on the subject property under the existing land use designation, within the Planning District 8 pre-EAR-based amendments is 52, or 118 minus 66, not 22.

31. Petitioners claim that the post-EAR based amendment zoning would allow five units per acre for the north six acres or approximately 31 units. (Presumably, this is based on Petitioners' contention that the density authorized for Planning District 8 for "post-EAR based amendment zoning" is five dwelling units per acre based on the following Planning District 8 statement regarding density: "Maximum density allowed shall not exceed five (5) dwelling units per acre, current multi-family zoning districts shall be limited to existing densities.") The zoning for the remaining three acres remained the same, which yields 18 units, for a total of 49 units, which would be allowed on the subject property without the Plan Amendment. According to Petitioners, this means that the Plan Amendment will authorize an additional 69 units, i.e., 118 minus 49, not the 22 units disclosed by Fountain.

32. Fountain's representation that approval of the Plan Amendment would yield only an additional 22 dwelling units on the subject property was carried over to the Department's two (2) staff analyses, which were prepared in response to the proposed Plan Amendment. See Finding of Fact 43.

33. Whether this revelation would have changed the City's, or the Department's, decisions is unknown, although the City Council and the Department were advised that the Plan Amendment authorized a maximum of 118 units.

34. It is persuasive that the Department, in assessing whether the Plan Amendment is "in compliance," in part, considered the total maximum theoretical density, or 118 residential dwelling units, which may be authorized by the Plan Amendment on the subject property. Importantly, the maximum density of the proposed land use is expressly stated in the textural Plan Amendment, which was approved by the City, and found to be "in compliance" by the Department.

Local Government Hearings Regarding the Plan Amendment

35. On September 17, 2001, the Citizen's Advisory Committee (Committee) met to consider the Plan Amendment. The minutes reflect that the staff report mentioned in Finding of Fact 25 was presented to the Committee; that the Committee had several questions, which are noted in the minutes along with the responses; that Fountain gave a brief presentation using Ms.

Lawandales' planning document referred to herein; and that several residents, including Ms. Kosher and Ms. Sutterfield, spoke in opposition. A motion to approve the request failed by a vote of four to two.

36. On October 2, 2001, the Planning Commission (Commission) met to consider the proposed Plan Amendment. Fountain presented its position. (The Commission is the land planning agency for the City.) Ms. Lawandales also gave a presentation on behalf of Fountain. Several persons who are identified as having Cocoa and Rockledge addresses, appeared before the Commission. While some persons from Cocoa and Rockledge favored the proposal, the majority of the persons with Rockledge addresses opposed the project. Mr. McKnight, the City Manager, stated that the hearing before the Commission "did not require advertisement in the newspaper, as previously done; therefore, this too, was not an issue of concern, but that the property had been posted and all property owners within 500 feet were mailed a notice." Ms. Kosher and Ms. Sutterfield opposed the Plan Amendment. The Commission unanimously approved the Plan Amendment.

37. On October 17, 2001, the City Council conducted a public hearing "to consider the request for Comprehensive Plan Amendment and cause the scheduling of a Transmittal Hearing." Ms. Kosher, Ms. Sutterfield and others opposed the Plan

Amendment. Others supported the request. In response to concerns raised by Ms. Sutterfield regarding advertisements for this meeting and the Planning Commission meeting on October 2, City Manager McKnight responded that a newspaper advertisement is not required until the Transmittal Hearing. By unanimous vote, a motion to authorize a public hearing before the Commission on November 6, 2001, and a transmittal hearing before the City Council on November 7, 2001, was passed.

38. On November 1, 2001, the City had published a "Notice of Change of Land Use" in "Florida Today," a newspaper of general circulation, published in Brevard County. This "Notice" advised the public of hearings to be held on November 6, 2001, before the Planning Commission and on November 7, 2001, before the City Council. Ms. Sutterfield received notice of the transmittal hearings by U.S. Mail prior to the hearings.[1]

39. On November 6, 2001, the Commission met once again to consider the Plan Amendment. The minutes of this public hearing reflect that "this was a transmittal public hearing." Local residents, including Ms. Kosher and Ms. Sutterfield, voiced their opposition to the Plan Amendment. The Commission voted in favor of the Plan Amendment by a vote of six to one.

40. On November 7, 2001, the City Council met to consider the Plan Amendment. This transmittal hearing was held six days, not seven days, after the notice was published. Once again Ms.

Kosher and Ms. Sutterfield opposed the Plan Amendment along with two other persons giving a Rockledge address. By unanimous vote, the City Council approved a motion to authorize transmittal of the Plan Amendment to the Department. This was the first of two transmittal hearings conducted by the City. The second was conducted on February 6, 2002, after timely notice was advertised. On February 6, 2002, the City adopted Ordinance No. 1266-2002, incorporating the Plan Amendment.

Notice

41. The City did not comply with the seven-day advertising requirement set forth in Section 163.3184(15)(b)1., Florida Statutes. See Conclusions of Law 101-102. It is concluded, however, that the "due public notice" procedures set forth in the City's Land Development Code do not apply. See Conclusion of Law 101. This is not fatal. Ms. Sutterfield and Ms. Kosher attended the November 6 and 7, 2001, transmittal hearings, as well as other hearings, both before and after these transmittal hearings, furnishing the City with their comments and objections at each hearing. Also, Ms. Sutterfield received notice of the transmittal hearings by U.S. Mail prior to the hearings. Ms. Kosher has been involved with this matter since November of 1999. Petitioners have shown no prejudice arising out of the City's non-compliance with the advertising/notice requirement for the transmittal hearings.

The Department's Review of the Plan Amendment

42. On November 15, 2001, the Department received the City's letter of transmittal with supporting documentation, including the proposed Plan Amendment. By Memorandum dated January 4, 2002, the Department "[s]taff has identified no potential objections or comments with the proposed amendments." With respect to the textural Plan Amendment to Planning District Policy 5.A., the Department staff stated: "The addition of this policy to Planning District 5 limits the potential growth of the parcel to 13 dwelling units per acre from the 14 now allowed in the Planning District. This is consistent with District 5 Mixed Use and Medium Density Residential Land Uses. Additionally the lower dwelling unit concentration in combination with the specific building set back regulations will work to buffer District 8 from the non-residential land uses in District 5."

43. With respect to moving the approximate 9.163 acres subject property from Planning District 8 to Planning District 5, the Department staff noted:

> Moving the tract of land from Planning District 8 to Planning District 5 will allow for an additional 22 dwelling units to be developed on the land. The applicant is willing to enter into a binding development agreement during the rezoning phase with the City to ensure adequate buffering to adjoining properties, as well as eliminating the possibility of the property being used for commercial or manufacturing purposes.

> The analysis of existing public facilities provided shows the infrastructure is adequate to support the additional 22 dwelling units the proposed land use change would allow. The site is not home to any significant historic resources nor is it home to any endangered, threatened or species of special concern.

44. The Department did not receive any negative comments from the Florida Department of Transportation, the Florida Department of State, the Florida Department of Environmental Protection, or the East Central Florida Regional Planning Council. The Department received several letters from citizens, objecting to the proposed Plan Amendment and summarized them as follows: "The residents state the high density residential development would be incompatible with the existing low density residential neighborhood. The residents opposing the amendment state it is spot zoning and will set a negative precedent for other developers. Several residents also mention the increase in traffic and how this would impact the safety of school children. The residents question the ability of the existing infrastructure will [sic] be adequate to serve the increased population. They also mention the insufficient notice given for the LPA meeting."

45. On February 6, 2002, the City approved the Plan Amendment during a public hearing and, thereafter, sent the Department Ordinance No. 1266-2002, with supporting documents.

Notice of this public hearing was published in the January 24, 2002, edition of The Reporter, published weekly in Brevard County, and a newspaper of general circulation.

46. On March 11, 2002, the Department staff conducted a review of the Plan Amendment in order to prepare its notice of intent. The staff analysis reflects no comments or objections from the Department with respect to the Plan Amendment.

47. On March 29, 2002, the Department had published "notice of its intent to find the Amendments to the Comprehensive Plan for the City of Rockledge adopted by Ordinance No. 1266-2002 on February 6, 2002, IN COMPLIANCE, pursuant to Sections 163.3184, 163.3187 and 163.3189, F.S."

48. Thereafter, Petitioners filed a timely challenge to the Department's Notice of Intent.

Petitioners' Challenges

49. Petitioners contend that the Plan Amendment is not "in compliance," as defined in Chapter 163, Part II, Florida Statutes, because the Plan Amendment is not supported by adequate data and analysis; is not compatible with surrounding land uses; and is inconsistent with the City's Comprehensive Plan. Petitioners also argue that the Plan Amendment approves spot zoning or spot planning. Petitioners further contend that the City did not comply with statutory and City notice

requirements prior to its transmittal hearing and, as a result, that the Plan Amendment is void ab initio.

Data and Analysis

Description of the Subject Property and Surrounding Area

50. Fountain's property, approximately 9.163 acres, is rectangular in shape and is bounded on the north by, and directly abuts, Eyster Boulevard. This site is located in the geographic center of the City.

51. Eyster Boulevard, abutting and to the north of the site and between Fiske Boulevard and Murrell Road, is a two-lane urban collector road (between Fiske Boulevard and Murrell Road), with a right-of-way width of 100 feet, and with a current Level of Service (LOS) of C, with a minimum acceptable LOS of E. (There are no traffic/transportation-related issues raised in this proceeding. Also, there is no evidence that the Plan Amendment will cause any reduction or deficiencies in the LOS for utilities.)

52. Across Eyster Boulevard to the north of the site and extending west from Huntington Lane in Planning District 5, are industrial uses, mobile homes, apartment complexes, some commercial uses and Kennedy Middle School.

53. The subject property is bounded on the west by an existing two-story, multi-family development, developed to eight units per acre, known as Woodhaven Apartments. The development

of these apartments pre-dates the adopted EAR-based amendments. The apartments are located in Planning District 8, and will continue to be located in Planning District 8 if the Plan Amendment is approved.

54. The Brevard County Association for Retarded Persons (BCARC), located west of Woodhaven, is a group home multi-family complex also located in Planning District 8, which has been developed at more than 25 units per acre. Development of this facility pre-dates the EAR-based amendments.

55. A Brevard County enclave, consisting of a wide variety of uses, including commercial and manufacturing, is located east along Eyster Boulevard and west to Fiske Boulevard, and west of the BCARC. This enclave does not have a land use designation on the FLUM (nor is it within Planning District 8) because it is outside the jurisdiction of the City. (Objective 8.2 of the Comprehensive Plan states in part: "Any proposed development will be evaluated for its impact on adjacent local governments. . . .")

56. The subject property is also bounded on the south by a Florida Power and Light (FPL) substation, within planning District 8, which has a R-2 zoning classification, five units per acre. There is a 100-foot FPL easement which runs east and west, directly south of the substation. This substation was in existence at the time of the adoption of the EAR-based

amendments. Also, church property is located south of the 100 foot easement.

57. The subject property is bounded on the east by, and directly abuts, Huntington Lane. Huntington Lane runs perpendicular north and south of Eyster Boulevard. Huntington Lane, south of Eyster Boulevard, which abuts the subject property, apparently carries no designation in the City's Comprehensive Plan, and is considered to be a local two-lane road. (Huntington Lane north of Eyster Boulevard is designated by the City in its Comprehensive Plan as a local road.) The right-of-way width for Huntington Lane adjacent to and east of the subject property is 50 feet.

58. Immediately east of the site and adjacent to the Huntington Lane right-of-way, is vacant property of an approximate depth of 175 feet. This vacant land runs south to north and then east, abutting Eyster Boulevard to the south. For the most part, this vacant land has a density under the Comprehensive Plan of R-2A, which authorizes a density of eight units per acre. There is also vacant land to the east of the site and abutting the Huntington Lane right-of-way, which is due south of the rectangular vacant land, which has a density of R-2, which permits five units per acre. The single-family subdivision (Pine Cove) is located to the east of the vacant land which abuts Huntington Lane. Petitioners reside in this

single-family subdivision. (The maximum potential density for the subdivision allowed multi-family residential units, with eight units per acre. However, the developer opted to build single-family residential homes instead.)

59. The predominant land use character of Planning District 8 is single-family residential. This includes the subdivision where Petitioners reside.

60. The subject property has approximately 900 feet of frontage on Huntington Lane.

61. The subject property is approximately 1,500 to 2,000 feet east of Fiske Boulevard, which is a roadway designated in the City's Comprehensive Plan as a four-lane divided minor arterial. (It is contemplated that Eyster will ultimately have five lanes. There are also existing intersection improvements at the corner of Huntington and Eyster.)

62. The subject property is approximately one mile west of Murrell Road, which is a roadway designated in the City's Comprehensive Plan as a four-lane divided minor arterial. Both Fiske Boulevard and Murrell Road have a center turn lane with no islands.

63. Prior to the proposed Plan Amendment, all the property within the City located south of and along Eyster Boulevard, between Fiske Boulevard and Murrell Road, was included in Planning District 8, except for the several parcels (referred to

in this proceeding as "incursions") east of the subdivision, abutting Murrell Road. Also, prior to the proposed Plan Amendment, all of the property within the City located north of and along Eyster Boulevard, between Fiske Boulevard and Murrell Road, was included in Planning District 5.

64. The incursions along Murrell Road are authorized by the City in its Comprehensive Plan. The incursions are contiguous to the residential dwellings and not separated by a 50 foot road right-of-way, as in the case of Huntington lane. However, these incursions are approximately one mile from the subject property and Petitioners' residences.

65. These incursion areas along Murrell Road allow for Planning District 5 and Planning District 6 land uses pursuant to specific textural provisions set forth in the Comprehensive Plan for each of these planning districts. These textural provisions restrict Planning District 5 and Planning District 6 incursions in that area to a maximum depth of 630 feet west of Murrell Road, as well as provide other limitations on the types and intensities of development. (According to the Comprehensive Plan, the first 300 feet of the 630 feet can be developed at 14 units per acre, and the next 330 feet at eight units per acre. Also, "[r]esidential uses may be allowed to locate on the west side of Murrell Road to a depth of six hundred thirty (630)

feet. Commercial uses may also be allowed to a depth of three hundred (300) feet.")

66. The provisions for Planning District 6 incursions west of Murrell Road, as to densities and depth of development, are the same as those recited for Planning District 5 incursions on the west side of Murrell Road. The Planning District 5 and Planning District 6 incursions along Murrell Road predate the EAR-based amendments.

67. Other than the incursions along Murrell Road, there have been no incursions of Planning District 5 into Planning District 8 until the Plan Amendment.

68. The existing provisions covering Planning Districts 5 and 8 were the result of EAR-based amendments to the City's Comprehensive Plan adopted by the City in mid-1999. Planning District 8 was created by splitting the area from a then larger existing planning district.[2]

The City's Comprehensive Plan Planning Districts

69. In its Comprehensive Plan, the City created eight planning districts. The boundaries and policies in the planning districts are fluid. Planning District 8, in which the subject property was located prior to the proposed Plan Amendment, is designated as the Central Rockledge Area. The "Area Objective" of this planning district is

> [t]o maintain and improve this area as a low and medium density residential area and insure that future development will not substantially alter or depreciate the existing character of the area.

This planning district also authorizes, in part, the following types of land uses:

> 1. Development within the district will be limited primarily to single-family detached dwellings and directly related land uses such as parks, schools, utilities, streets and other such activities whose primary purpose is to serve residents of the district. . . .
>
> 2. Limited commercial, professional, and multi-family residential uses will be considered in appropriate locations based on severe compatibility and consistency tests. After due consideration by the city other zoning district [sic] shall be limited to existing use which range from R2A, R-3, TH, P1, C1, to C2, which may be changed and approved only if consistent with, and compatible to the intent or [sic] criteria of this district.

70. The maximum density allowed in Planning District 8 "shall not exceed five (5) dwelling units per acre, current multi-family zoning districts shall be limited to existing densities. Any proposed zoning district changes shall be limited to a maximum of five (5) dwelling units per acre. Undeveloped areas west of Fiske Boulevard will be encouraged to be developed with a maximum of three (3) dwelling units per acre in order to protect the natural character of the land."

71. Planning District 5 is designated as the Barton Boulevard Area. The "Area Objective" for this planning district is

> [t]o guide development in this area toward the establishment of a mixed-use area consisting of highly intensive mixed uses while maintaining compatibility with regional thoroughfares, local roads, municipal systems, and adjacent land uses.

In part, "[d]evelopment in this district wall be limited to retail trade, business and professional offices, multiple family attached dwellings, public and semi-public service, . . . and other such activities that are compatible with and support the intent of this district."

72. The density of new residential development in the Planning District 5 "is limited to a maximum of fourteen (14.0) dwelling units per acre. . . ." "Compatibility" is discussed in the Planning District 5 "Guidelines" as follows:

> 7. Urban design guidelines shall be developed which address appropriate scale, materials, building orientation, signing, landscaping, detailing, and other physical features within the district.
>
> 8. Adherence to the design guidelines shall be required to insure orderly development of the area and compatibility of uses within and adjacent to the district.
>
> 9. Adequate vegetation, constructed buffers (fences, walls, berms, etc.) and/or open space will be used between different land uses.

Compatibility, Suitability, and Urban Infill

73. The Plan Amendment proposes the development of a maximum of 118 residential units, with a maximum density of 13 units per acre for the 9.163 acres. The site and the surrounding property to the east, south, and west are designated as "medium density residential" land uses on the FLUM. According to the Comprehensive Plan, a low density residential land use is restricted to a "density not exceeding three (3) dwelling units per acre." A medium density residential land use would include "a density greater than three (3) dwelling units per acre and not exceeding fourteen (14) dwelling units per acre." The site (as proposed) and the surrounding property are within the parameters of these measuring sticks, with the site (as proposed) at the upper end and the apartments (to the west) and the subdivision (to the east), as developed, at the lower end of the density spectrum. Yet both areas are within the medium density residential definition.

74. In reviewing the Plan Amendment, the Department considered whether the uses proposed in the Plan Amendment in Planning District 5 were compatible with surrounding property, including the subdivision east of the site. In support, Mr. Wilburn testified in part: "We look at the surrounding area based on internal compatibility or compatibility in [sic] any

other internal policies they may have as far as the movement or restriction of a planning district."

75. Whether a proposed land use is compatible with surrounding land uses is a question of degree, rather than black and white. To this end, the Department examines what the comprehensive plan allows from a standpoint of maximum proposed density. On the other hand, the Department does not ignore the reality as to actual build-out on surrounding property.

76. Consistency with the authorized land uses in Planning District 5 was also considered. As noted by Mr. Wilburn, "in this case Planning District 5 allows residential, industrial, commercial. Commercial or heavy industrial might be inconsistent next to residential, but as part of the plan amendment, they have limited it strictly to residential." However, the Department did not review the Plan Amendments for consistency with the Goals, Objectives, and Policies for Planning District 8 because the City is proposing to change the boundaries and make-up of Planning District 5, not Planning District 8.

77. Here, as noted above, the issue of whether the proposed development as contemplated by the Plan Amendment is "compatible" with the surrounding property is largely a question of degree. For example, a nine-story high-rise, with 50 units per acre, next to a single-family residential area would most

likely present compatibility problems. In this vein, Henry B. Iler, Petitioners' expert planner, opined that the proposed (by the Plan Amendment) three-story multi-family housing project would not be compatible with the single-family subdivision to the east of the site. Mr. Iler believes that going from five or eight units per acre to 13 units per acre takes the proposed development out of the existing character of the subdivision. Stated otherwise, Mr. Iler believes that with a density of eight units per acre, the land could be developed with single-family homes and "a few simple townhouses," whereas, with 13 units per acre, the land use would "move into the apartment/attached-housing product." For Mr. Iler, it is the latter described development which makes the proposed development "out of character" with the existing subdivision. The Department's expert planner, Mr. Roger Wilburn, and other experts, opined to the contrary. For Mr. Wilburn, compatibility is one of degree.

78. In light of the nature of the surrounding property, and given the restrictions in the Plan Amendment, e.g., transition buffers (distance requirements in paragraph 5.A. and other provisions set forth in the Planning District 5 "Guidelines," and the restriction to residential use only, it is at least fairly debatable that the Plan Amendment, authorizing the development of the 9.163 acres as residential, with a maximum density of 13 units per acre, is "compatible" with the

surrounding property and is not otherwise inconsistent with the Comprehensive Plan.

79. It is also at least fairly debatable that the Plan Amendment is "suitable" to the area. (For example, there are no environmental, topographical, or soil factors at issue which might make the land unsuitable for its intended use.) The subject property may also be considered urban infill as it is in the middle of an urban area, served by existing urban services. The Plan Amendment seeks approval of residential development which is functionally related to surrounding property and is creating a compact development.

CONCLUSIONS OF LAW

Jurisdiction

80. The Division of Administrative Hearings has jurisdiction to conduct a hearing on the subject matter of this proceeding. Sections 120.569, 120.57(1), and 163.3184(9), Florida Statutes.

Standing

81. Petitioners and Fountain are "affected persons," as defined in Section 163.3184, Florida Statutes, and have standing in this proceeding.

Burden of Proof

82. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the

issue of the proceeding. Young v. Department of Community Affairs, 625 So. 2d 831 (Fla. 1993).

83. Section 163.3184(9)(a), Florida Statutes, imposes the burden of proof on the person, here Petitioners, challenging a plan amendment that has been determined by the Department to be "in compliance."

84. "In compliance" means consistent with the requirements of Sections 163.3177, 163.3178, 163.3180, 163.3191, and 163.3245, Florida Statutes, the state comprehensive plan, the appropriate strategic regional policy plan, and Chapter 9J-5, Florida Administrative Code. Section 163.3184(1)(b), Florida Statutes.

85. Because the Department initially issued a Notice of Intent to find the Plan Amendment, adopted by Ordinance No. 1266-2002, "in compliance," the Plan Amendment shall be determined to be "in compliance" if the City's determination of compliance is "fairly debatable." Section 163.3184(9)(a), Florida Statutes. Petitioners have the burden of demonstrating beyond fair debate that the Plan Amendment is not "in compliance."

86. The term "fairly debatable" is not defined in Chapter 163, Florida Statutes, or Chapter 9J-5, Florida Administrative Code. The Supreme Court of Florida has opined, however, that the fairly debatable standard under Chapter 163,

Florida Statutes, 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, 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." Id. at 1295 (citation omitted). Quoting from City of Miami Beach v. Lachman, 71 So. 2d 148, 152 (Fla. 1953), the Court stated further: "[A]n 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." Martin County v. Yusem, 690 So. 2d at 1295. Nevertheless, "local government action still must be in accord with the procedures required by Chapter 163, Part II, Florida Statutes, and local ordinances." Id. (citation omitted).

87. Petitioners are bound by the allegations in their Petition as to the alleged deficiencies in the Plan Amendments. Sections 120.569 and 120.57(1), Florida Statutes; Heartland Environmental Council, Inc. v. Department of Community Affairs, Case No. 94-2095GM, 1996 WL 1059751, at *18 (Fla. Div. Admin. Hrgs. Nov. 16, 1996).

Data and Analysis

88. Petitioners contend that the Plan Amendment is not based upon relevant and appropriate data and analysis.

89. Any amendment to a Comprehensive Plan must be based upon appropriate data. Such data need not be original data, and local governments are permitted to utilize original data as long as appropriate methodologies are used for data collection. Section 163.3177(8) and (10)(e), Florida Statutes.

90. Rule 9J-5.005(2)(a), Florida Administrative Code, requires that, in order for a plan provision to be "based" upon relevant and appropriate "data," the local government must "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." The data must also be the "best available existing data" "collected and applied in a professionally acceptable manner." Rule 9J-5.005(2)(a)-(c), Florida Administrative Code.

91. However, the data and analysis which may support a plan amendment are not limited to those identified or actually relied upon by a local government. All data available to a local government in existence at the time of the adoption of the plan amendment may be relied upon to support an amendment in a de novo proceeding. Zemel v. Lee County, et al., 15 F.A.L.R. 2735 (DCA June 22, 1993), aff'd, 642 So. 2d 1367 (Fla. 1st DCA

1994). See also The Sierra Club, et al. v. St. John County, et al., Case Nos. 01-1851 and 01-1852GM (Final Order July 30, 2002)("The ALJ need not determine whether the [local government] or the Department were aware of the data, or performed the analysis, at any prior point in time." (citation omitted)). Analysis which may support a plan amendment, however, need not be in existence at the time of the adoption of a plan amendment. See Zemel, supra. Data which existed at the time of the adoption of a plan amendment may be subject to new or even first-time analysis at the time of an administrative hearing challenging a plan amendment. Id.

92. The data and analysis which supports the Plan Amendment is largely recounted in Findings of Fact 25 through 68. In the past, the City has changed or redrawn several boundaries and planning districts. Apparently, the City has felt that these efforts, e.g., boundary changes resulting in a move from Planning District 6 to 5, offer the City more flexibility for new development and business, while maintaining the character of various areas.

93. Petitioners' expert offered an analysis of the adequacy of the data and analysis and concluded that the data and analysis was insufficient in light of the issues raised by Petitioners, including issues of "compatibility" and "consistency." But there are credible expert opinions which

differed with this conclusion and which are supported by credible evidence.

94. Petitioners did not prove, beyond fair debate, that the data and analysis to support the Plan Amendment, was not the best available, professionally acceptable, relevant and appropriate data and analysis in existence at the time of the adoption of the Plan Amendment.

Compatibility

95. "'Compatibility' means a condition in which land uses or conditions can coexist in relative proximity to each other in a stable fashion over time such that no use or condition is unduly negatively impacted directly or indirectly by another use or condition." Rule 9J-5.003(23), Florida Administrative Code.

96. The subject property is designated as medium density residential on the FLUM, as are the surrounding areas, including the subdivision to the east of the site, which is predominantly single-family residential. It is understandable that Petitioners, residing in the nearby subdivision, do not want a three-story apartment complex in their neighborhood. While the density and intensity of the proposed land use as described in the Plan Amendment exceed that of the subdivision and the adjacent property to the west and south, the Plan Amendment is arguably compatible as defined by rule and as discussed by some of the credible experts. The textural additions to the FLUE

Planning District 5 "Guidelines," paragraph 5.A., which place conditions on the development of the subject property, arguably ensure that the subject property will be developed in a manner that is compatible with surrounding properties. The transitioning of densities supports this conclusion.

97. In sum, whether the Plan Amendment is compatible with the surrounding land uses is at least the subject of fair debate.

98. At Petitioners' request, the parties were permitted to brief the applicability of spot planning and spot zoning concepts in the proceedings. This is not a zoning case and the undersigned is not persuaded that these concepts apply here.

Consistency

99. "The required elements and any optional elements shall be consistent with each other." Rule 9J-5.005(5), Florida Administrative Code. Petitioners contend that the Plan Amendment is not "consistent" with the existing Comprehensive Plan Planning District 8 "Guidelines." The Department gave a reasonable explanation for assessing the consistency of the Plan Amendment and the proposed land use, with the "Guidelines" set forth in Planning District 5, the planning district to which the subject property is being changed, rather than with Planning District 8 "Guidelines."

Notice

100. Petitioners contend that the City's approval of the Plan Amendment is void ab initio because the City did not comply with the advertising of notice provisions set forth in Section 163.3184(15)(b)1., Florida Statutes, which requires that a public transmittal hearing be held by the local governing body "on a weekday at least 7 days after the first advertisement is published." (emphasis added.) Petitioners also contend that the City did not comply with the City's "due public notice" provisions in the City's Land Development Code, which require the publication of two separate notices for the "public hearings" or "hearings with due public notice," which are referenced in the Land Development Code.

101. Petitioners rely on several subsections of the City's Land Development Code. In particular, Subsections 25-332(b) and (c), require the Planning Commission and the City Council to hold public hearings after "due public notice," regarding changes of zoning classifications. The Code's definition of "due public notice", when used in connection with the phrase "public hearing" or "hearings with due public notice," requires publication of two notices of such hearing, 15 days and then five days prior to the date of the hearing. However, when read in pari materia, the publication requirement applies to requests for zoning or rezoning and not to transmittal hearings for

consideration of comprehensive plan amendments. Although a minimum requirement (see Subsection 163.3181(1)), Subsection 163.3184(15)(b)1., Florida Statutes, is the specific statutory provision dealing with the requirements for the publication of notice prior to the conduct of a local government transmittal hearing. Therefore, this subsection applies in this proceeding; not the Code provisions mentioned above.

102. The City did not comply with Subsection 163.3184(15)(b)1., Florida Statutes, because the November 7, 2001, City Council transmittal hearing was held six days after the notice was published on November 1, 2001, not after the required seven days. However, this procedural error is not jurisdictional in nature, but rather is a matter to be considered in determining whether the Plan Amendment as a whole is "in compliance." Caliente Partnership v. Johnston, 604 So. 2d 886 (Fla. 2d DCA 1991)(45-day time limit period for publishing a notice of intent prescribed by subsection 163.3184(15)(b) found to be non-jurisdictional). See also Edmond J. Gong and Dana L. Gong v. Department of Community Affairs and City of Hialeah, Case No. 94-3506GM, 1994 WL 1027737 (Fla. Div. Admin. Hrgs. November 28, 1994), and cases cited therein.

103. Contrary to Petitioners' claim, notwithstanding the City's non-compliance with Subsection 163.3184(15)(b)1., the City's transmittal hearing and later adoption of Ordinance No. 1266-2002 are not necessarily void. Rather, Petitioners must still demonstrate to the exclusion of fair debate that, when viewing the unsatisfied criterion with the Plan Amendment as a whole, that the Plan Amendment is not "in compliance." Id. At the same time, when a person asserts that statutory notice requirement has not been satisfied, he bears the burden of showing prejudice occasioned by the procedural error, a task made much more difficult when, as here, the Petitioners had actual notice of the relevant hearings and participated throughout the proceeding. Id. See also City of Jacksonville v. Huffman, 764 So. 2d 695 (Fla. 1st DCA 2000)(waiver of procedural error); Schumacher v. Town of Jupiter, 643 So. 2d 8 (Fla. 4th DCA 1994), rev. den., 654 So. 2d 919 (Fla. 1995)(where a person challenging statutory notice requirements read notice, attended hearing, and fully participated, he is estopped from asserting a defect in the notice).

104. Petitioners had actual knowledge of the transmittal hearings and attended and participated in the hearings. On this record, the Petitioners have not been prejudiced by the City's conduct of the transmittal hearing without timely publication of the required notice. Further, Petitioners did not prove that

the Plan Amendment is not "in compliance" based on Petitioners' claim of improper notice. This is not to say that under other circumstances, an interested person could not be prejudiced by not receiving timely or appropriate notice of proposed decision making by local government in the context of a plan amendment. See generally Benson v. City of Miami Beach, Department of Community Affairs, 591 So. 2d 942 (Fla. 3d DCA 1991)(failure to give notice by publication in an appropriate newspaper was reversible error).

RECOMMENDATION

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

RECOMMENDED that a final order be issued concluding that the Plan Amendment adopted by the City of Rockledge in Ordinance No. 1266-2002 is "in compliance" as defined in Chapter 163, Part II, Florida Statutes, and the rules promulgated thereunder.

DONE AND ENTERED this 16th day of September, 2002, in Tallahassee, Leon County, Florida.

CHARLES A. STAMPELOS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of September, 2002.

ENDNOTES

[1]/ Proposed Section 163.3184(15)(b), Florida Statutes, requires the local governing body to hold at least two advertised public hearings on the plan amendment. The first hearing is required to be held "at the transmittal stage" and "shall be held on a weekday at least 7 days after the day that the first advertisement is published." Subsection 163.3184(15)(b)1., Florida Statutes, (emphasis added). Nothing in these subsections or in Chapter 163, Part II, Florida Statutes, provide a remedy, or for that matter, a penalty if this advertisement and notice requirement is not complied with.

[2]/ Additional data and analysis includes the Comprehensive Plan, EAR-based amendment, the City and Department staff reports, and Ms. Lawandales' report, and the evidence adduced during the hearing. However, only data in existence at the time of the adoption of the Plan Amendment has been considered.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.