STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANTONIA MEDINA, SANFORD BOSEM, BEN FRIED, JOHN DURANTE, IRWIN BEITCH, JACK TELLERMAN, ERIC PFEFFER, DAVID BITTON, EDEED BEN-JOSEF, DAVID BULVA, JOSEPH BETEL, PHILIP VOSS, TOWN OF GOLDEN BEACH, SCOTT SCHLESINGER, and MURIEL SCEMLA,	)	
Petitioners,	)	
vs.	)	Case No. 04-0002GM
DEPARTMENT OF COMMUNITY AFFAIRS and CITY OF SUNNY ISLES BEACH,	)	
Respondents,	)	
and	)	
LA MANSION, LLP,	)	
Intervenor.	)	

SUMMARY FINAL ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on July 20, 2004. The hearing was conducted by telephone, with counsel being located in Miami, Fort Lauderdale, Sunny Isles Beach, and Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether the land development regulations (LDRs) adopted by Respondent, City of Sunny Isles Beach (City), by Ordinance No. 2002-165 on December 10, 2002, as amended, are in compliance.

PRELIMINARY STATEMENT

This matter began on December 10, 2002, when the City adopted Ordinance No. 2002-165, which established new land development regulations (LDRs), including a Zoning Map, for the City.

On June 19, 2003, or within 12 months after the adoption of the LDRs, Petitioners filed with the City their challenge of the LDRs under Section 163.3213(3), Florida Statutes (2003).[1] In their filing, Petitioners alleged that the LDRs were not in compliance. On July 23, 2003, the City filed a response to Petitioners' filing. On August 25, 2003, Petitioners filed a Petition with Respondent, Department of Community Affairs (Department), again contending that the LDRs were not in compliance. A supplemental filing was made by Petitioners with the Department on September 29, 2003.[2]

On October 2, 2003, the Department conducted an informal hearing with the parties pursuant to Section 163.3213(4), Florida Statutes, to investigate Petitioners' allegations. On November 26, 2003, the Department issued its Determination of Consistency of a Land Development Regulation (Determination). That Determination found that the City's LDRs, as later amended by Ordinance Nos. 2003-171 and 2003-173, "[were] consistent with the City's Comprehensive Plan."

On December 16, 2003, Petitioners filed their Request for

Hearing with the Department seeking a formal hearing to challenge the LDRs. The Request for Hearing was forwarded to the Division of Administrative Hearings on January 2, 2004, with a request that an administrative law judge conduct a hearing. On January 16, 2004, Motions to Dismiss the Request for Hearing filed by the City and Intervenor, La Mansion, LLP, were granted on the grounds that the two-page Request for Hearing failed to comport with Florida Administrative Code Rule 28-106.201(2) or contain allegations that Petitioners were substantially affected persons, as required by Section 163.3213(2)(a), Florida Statutes. Such dismissal, however, was without prejudice to Petitioners' refiling an amended petition. On January 30, 2004, Petitioners filed their Amended Request for Hearing.

By Notice of Hearing dated February 10, 2004, a final hearing was scheduled on March 17, 2004, in Sunny Isles Beach, Florida. Based on a scheduling conflict, Petitioners' request for a continuance was granted, and the final hearing was rescheduled to July 20 and 21, 2004, at the same location.

On July 1, 2004, the parties filed a Joint Request for Telephonic Oral Argument in Lieu of Final Hearing, in which they advised that there were no genuine issues as to any material facts. (In that filing, the parties agreed that the Findings of Fact contained in the Department's Determination

are not in dispute.) On the same date, the City filed a Motion for Summary Final Order (Motion) under Section 120.57(1)(h), Florida Statutes. A Memorandum of Law and Response to Motion for Summary Final Order was filed by Petitioners on July 16, 2004. (No documents were attached to Petitioners' Response.) For purposes of disposing of this matter in an efficient manner, and with the agreement of the parties, that filing has been treated as a Cross-Motion for Summary Final Order (Cross-Motion). On July 19, 2004, Intervenor filed a Notice of Joinder, in which it joined in the City's Motion. Finally, on July 21, 2004, the Department filed a Notice of Joinder in the City's Motion.

On July 20, 2004, a telephonic hearing on the City's Motion and Petitioners' Cross-Motion was conducted. All parties participated in the hearing by telephone.

Besides the pleadings filed in this matter, the record consists of Exhibits A-H, which are attached to the City's Motion. Those Exhibits include a copy of the Department's Determination of Consistency of a Land Development Regulation (Exhibit A); City Ordinance Nos. 2000-105 and 2002-147 (Exhibit B); City Ordinance No. 2002-165 (Exhibit C); City Ordinance Nos. 2003-167, 2003-171, 2003-173, and 2003-178 (Exhibit D); the City's Comprehensive Plan (Exhibit E); the City's Intergovernmental Coordination Element (Exhibit F); and

a copy of the decision in Town of Golden Beach, et al. v. City of Sunny Isles Beach et al., Case No. 03-473AP (Fla. 11th Cir.Ct., Appellate Division, June 15, 2004) (Exhibit G). (That case involved an unsuccessful challenge by Petitioners to a City Resolution granting Intervenor's application to construct a 42-story condominium. It is fair to conclude that the underlying issue driving this dispute is Intervenor's proposed construction of a high-rise condominium within the City.)

A Transcript of the hearing was filed on August 2, 2004. The parties waived their right to file proposed findings of fact and conclusions of law.

FINDINGS OF FACT

Based upon the record presented by the parties, the following undisputed findings of fact are determined:

1. The City sits between the Intracoastal Waterway and the Atlantic Ocean in northern Dade County just south of the Town of Golden Beach (Town) and just north of the City of Bal Harbour. It was incorporated in 1997. As required by Section 163.3161, Florida Statutes, on October 5, 2000, the City adopted its first Comprehensive Plan. See Exhibit E. The Plan was amended by Ordinance No. 2002-147 on January 17, 2002. See Exhibit B.

2. The Plan's Future Land Use Map contains a land use

category known as Mixed Use-Resort/High Density (MU-R), which is "designed to encourage development and redevelopment within the area east of Collins Avenue for resort style developments catering to tourists and seasonal residents (hotel, hotel/ apartments, vacation resorts and resort style apartments) as well as high quality residential apartments." The category also allows associated retail uses such as restaurants and conference facilities that are internal and accessory to hotel/resort development.

3. Pertinent to this dispute is Policy 15B of the Future Land Use Element (FLUE), which establishes density and intensity standards for the MU-R land use category. More specifically, the policy provides the following standards:

> This category allows an as-of-right density of a maximum one hundred (100) hotel-apartment units per acre and fifty (50) dwelling units per acre for apartments and a floor area ratio (FAR) intensity of 2.5. The allowable number of hotel rooms is controlled by floor area ratio. Additional residential density and FAR intensity may be permitted for developments that comply with bonus program requirements. Residential densities with bonuses may not exceed eighty (80) units per acre for solely apartments and one hundred twenty five (125) units per acre for hotel-apartments, exclusive of lockout units. (Emphasis added)

4. Under the foregoing policy, a maximum density of 100 units per acre is allowed for hotel-apartment units, a maximum

density of 50 units per acre is allowed for apartments, and a floor area ratio (FAR) intensity of 2.5 has been established. However, the underscored portion of the policy authorizes a bonus density and intensity program which allows a developer to exceed the prescribed density and intensity standards for developments "that comply with bonus program requirements."

5. If the bonus density program requirements are satisfied, the policy establishes a cap for the density bonus at 125 hotel-apartment units per acre and 80 residential units per acre. While the policy does not establish a similar cap for the intensity bonus, it essentially defers the amount of the intensity cap and the details of the bonus program to the LDRs, which are to be adopted at a later time.

6. Objective 8 of the Plan provides that the City "shall adopt, maintain, update and enhance development regulations and procedures to ensure that future land use and development in the City of Sunny Isles Beach is consistent with the Comprehensive Plan." Objective 15 of the Plan provides that the "land use densities, intensities and approaches [contained in Policy 15B] shall be incorporated in the Land Development Regulations." Finally, Section 163.3202(1), Florida Statutes, requires that local governments, within one year after submission of their comprehensive plans, "adopt or amend and enforce land development regulations that are consistent with

and implement their comprehensive plan."

7. On December 10, 2002, the City approved Ordinance No. 2002-165, which adopted a comprehensive set of LDRs to implement the Plan. See Exhibit C. In 2003, the LDRs were further amended in minor respects by Ordinance Nos. 2003-167, 2003-171, 2003-173, and 2003-178. See Exhibit D. In sum, the LDRs consist of more than one hundred pages of regulations, and except for one of these, Section 703.8.4(i)3, none of the other LDRs directly relates to this dispute.

8. Section 703.8.4(i)3 implements Policy 15B by outlining the criteria and requirements necessary to qualify for additional intensity or FAR through the bonus program. It also establishes a cap on FAR intensity. If the bonus program requirements are satisfied,[3] the regulation allows a maximum intensity bonus of 1.5 FAR, or a potential total FAR of 4.0, which exceeds the 2.5 FAR contained in Policy 15B. (Intensity bonuses to increase the FAR can also be obtained through the transfer of development rights under Section 515 of the LDRs. However, those bonuses are not in issue here.)

9. Petitioners include a group of twelve City residents; the Town, which lies adjacent to, and just north of, the City; and two Town residents. There is no dispute that Petitioners will be substantially affected by the LDRs and thus they have standing to bring this challenge.

10. In their Cross-Motion, which essentially tracks the allegations in their Amended Request for Hearing, Petitioners assert that they, and not the City, are entitled to a summary final order in their favor for three reasons. First, they argue that it is beyond fair debate that all of the LDRs, including Section 703.8.4(i)3, are inconsistent with Policies 4A and 4C of the Intergovernmental Coordination Element of the Plan because the City failed to solicit comments from the Town prior to the adoption of the LDRs. Second, they argue that it is beyond fair debate that the City violated Florida Administrative Code Rule 9J-5.005(2)(g) when it adopted Section 703.8.4(i)3. Finally, they contend that it is beyond fair debate that in order to achieve consistency with the Plan, the LDR must not establish a FAR that is beyond the intensity standard (2.5) established in the Plan.

11. Policies 4A and 4C of the Intergovernmental Coordination Element provide as follows:

> 4A. The City will notify and solicit comments from adjacent jurisdictions and the School Board of any requests for land use amendments, variances, conditional uses or site plan approvals which impact property within 500 feet of a public school or within 500 feet of the boundaries of an adjacent jurisdiction.
>
> 4C. The City will notify and solicit comments from adjacent jurisdictions and the School Board of its existing standards or proposed regulations being considered

for problematic or incompatible land uses.

12. Nothing in the two policies requires that the City solicit comments from adjacent jurisdictions when adopting the LDRs being challenged here. Rather, these policies specifically address notice and comments as to "land use" changes, not the adoption of LDRs, or to "regulations being considered for problematic or incompatible land uses." Even assuming arguendo that the two policies require some type of prior notice, Petitioners do not dispute the fact (as set forth in the Department's Determination) that prior to the adoption of the LDRs, "the City notified the Town both in writing and orally". (Determination, Finding of Fact 6).

13. Florida Administrative Code Rule 9J-5.005(2) contains general data and analyses requirements for comprehensive plans. Paragraph (2)(g), which Petitioners assert was violated by the City when it adopted Section 703.8.4(i)3, provides as follows:

> (g) A local government may include, as part of its adopted plan, documents adopted by reference but not incorporated verbatim into the plan. The adoption by reference must identify the title and author of the document and indicate clearly what provisions and edition of the document is being adopted. The adoption by reference may not include future amendments to the document because this would violate the statutory procedure for plan amendments and frustrate public participation on those amendments. A local government may include

> a provision in its plan stating that all documents adopted by reference are as they existed on a date certain. Documents adopted by reference that are revised subsequent to plan adoption will need to have their reference updated within the plan through the amendment process. Unless documents adopted by reference comply with paragraph 9J-5.005(2)(g), F.A.C., or are in the F.S., the F.A.C., or the Code of Federal Regulations, copies or summaries of the documents shall be submitted as support documents for the adopted portions of the plan amendment.

14. This rule sets forth the manner in which local governments may adopt and incorporate by reference documents into their comprehensive plans. If they choose to do so, they must identify the title and author of the document being incorporated by reference, the edition of the document, and the specific portion of the document relied upon. Whenever an amendment or change to the incorporated document occurs at a future time, the local government must readopt those changes in order for them to be valid and effective. On its face, the rule applies exclusively to the use of incorporated documents in comprehensive plans, or plan amendments, and has no application to LDRs.

15. In the case of Town of Golden Beach et al. v. City of Sunny Isles Beach et al., No. 03-472AP (Fla. 11th Cir.Ct., Appellate Division, June 15, 2004), a copy of which has been submitted as Exhibit G, Petitioners unsuccessfully sought by

petitions for writ of certiorari to quash a City Resolution which granted Intervenor's application to construct a condominium at 19505 Collins Avenue, Sunny Isles Beach. The application sought approval of a site plan for the condominium and approval of the use of the property as a receiver site for the transfer of 38,847 square feet of transfer development rights in accordance with the City's LDRs.

16. In that proceeding, Petitioners contended that they were denied due process because the City failed to provide proper notice to neighboring property owners under Section 515.7 of the LDRs; and that the City violated the essential requirements of the law by improperly transferring development rights and additional floor area ratio through bonuses to the developer, in excess of the 2.5 FAR expressly permitted by the City's Plan and LDRs. The court ruled in favor of the City on both issues. The parties agree, however, that a motion for rehearing of that decision has been filed by Petitioners, and the decision is not yet final. Further, the decision does not clearly indicate whether the same consistency arguments raised here were adjudicated in that matter. The notice issue is not the same.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has

jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569, 120.57(1), and 163.3213, Florida Statutes.

18. Section 120.57(1)(h), Florida Statutes, provides in part that

> any party to a proceeding in which an administrative law judge of the Division of Administrative Hearings has final order authority may move for summary final order when there is no genuine issue as to any material fact. A summary final order shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order.

See also Fla. Admin. Code R. 28-106.204(4). Because the undersigned has final order authority in this proceeding under Section 163.3213(5)(b), Florida Statutes, summary disposition of the dispute is appropriate.

19. Where the Department has found an LDR to be consistent with the local comprehensive plan, the parties shall be "the petitioning, substantially affected person, any intervenor, the state land planning agency, and the local government." § 163.3213(5)(a), Fla. Stat. Here the parties do not dispute

that Petitioners are substantially affected persons and have standing to challenge the LDRs.

20. "The adoption of a land development regulation by a local government is legislative in nature and shall not be found to be inconsistent with the local plan if it is fairly debatable that it is consistent with the plan." § 163.3213(5)(a), Fla. Stat. This means that "if reasonable persons could differ as to its propriety," an LDR must be upheld. Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997). See also Martin County v. Section 28 Partnership, Ltd., 772 So. 2d 616, 621 (Fla. 4th DCA 2000)(where there is "evidence in support of both sides of a comprehensive amendment, it is difficult to determine that the County's decision is anything but 'fairly debatable.'").

21. Florida Administrative Code Rule 9J-5.023 also prescribes certain criteria for determining consistency of LDRs with the comprehensive plan. Relevant here are the criteria found in paragraphs (2) and (3) of the rule:

> (2) Whether the land development regulations are compatible with the comprehensive plan, further the comprehensive plan, and implement the comprehensive plan. The term "compatible" means that the land development regulations are not in conflict with the comprehensive plan. The term "further" means that the land development regulations take action in the direction of realizing goals or policies of the comprehensive plan.

> (3) Whether the land development regulations include provisions that implement objectives and policies of the comprehensive plan that require implementing regulations in order to be realized, including provisions implementing the requirement that public facilities and services needed to support development shall be available concurrent with the impacts of such development.

22. Petitioners' first contention that the City failed to solicit comments from the Town prior to the adoption of the LDRs is a procedural argument and does not affect whether the LDRs are consistent with the Plan. That is, procedural requirements are not compliance criteria, and absent a showing of prejudice, a plan amendment (or LDR) will not be set aside on the basis of a procedural error. See, e.g., Brevard County v. Department of Community Affairs et al., Case Nos. 00-1956GM and 02-0391GM, 2002 WL 31846455 at *16 (DOAH Dec. 16, 2002, DCA Feb. 26, 2003). In any event, the notice requirements in Policies 4A and 4C do not apply to the challenged LDRs, and Petitioners have conceded that the City gave notice to the Town "by oral and written notice" prior to their adoption. On this issue, then, the City is entitled to a favorable ruling.

23. Petitioners next contend that it is beyond fair debate that the City violated Florida Administrative Code Rule 9J-5.005(2)(g) when it adopted Section 703.8.4(i)3. As previously found in Finding of Fact 14, the cited rule applies

to documents incorporated by reference into comprehensive plans, and not LDRs, and has no application to this controversy. (Assuming arguendo that the rule did apply, and that it had been violated, it would be necessary to find Policy 15B not in compliance, rather than the LDR. However, a plan compliance issue cannot be raised in an LDR challenge.) Therefore, the contention is without merit.

24. Petitioners also argue that it is beyond fair debate that Section 703.8.4(i)3 is inconsistent with Policy 15B since it sets an intensity cap (4.0) beyond the 2.5 intensity standard established in the policy.

25. As previously found, Policy 15B establishes a FAR intensity standard of 2.5 for the MU-R land use category, but also provides that "[a]dditional . . . F.A.R. intensity may be permitted for developments that comply with bonus program requirements." In other words, the policy itself allows for developments in the MU-R category to qualify for additional FAR through a bonus program. Section 703.8.4(i)3 implements this provision by outlining the criteria and requirements necessary to qualify for additional intensity through the bonus program. It also establishes a cap on the total FAR intensity allowed through the bonus program. Obviously, it would have been more preferable for the intensity cap for MU-R development to be established in the policy itself (and the

Department says so in its Determination). However, the entire Plan, including Policy 15B, has been found to be in compliance. It is at least fairly debatable that Section 703.8.4(i)3 is consistent with, and follows the mandate of, Policy 15B by establishing "additional . . . F.A.R. intensity" as well as the details for complying with

the "bonus program requirements." Indeed, the LDR does exactly what Objectives 8 and 15 and Policy 15B call for.

26. Because Section 703.8.4(i)3 is compatible with the Plan, that is, it does not conflict with the Plan, it takes action in the direction of realizing the goals and policies of the Plan, and it implements a Plan policy that requires implementing regulations in order to be realized, it satisfies the criteria for determining consistency of an LDR under Florida Administrative Code Rule 9J-5.023. This being so, on this issue, the City is entitled to final disposition in its favor.[4]

27. Finally, the City contends that under the doctrine of estoppel by judgment, Petitioners should be prevented from relitigating issues previously decided between them. See, e.g., Gordon v. Gordon, 59 So. 2d 40, 44 (Fla. 1952)("the principle of estoppel by judgment is applicable where the two causes of action are different, in which case the judgment in the first suit only estops the parties from litigating in the second suit issues - that is to say points and questions - common to both causes of action and which were actually adjudicated in the prior litigation"). Specifically, the City argues that Petitioners have already litigated and had decided (in the City's favor) the issue of whether the Plan authorizes an increase in intensity over 2.5 FAR. Town of Golden Beach,

supra. While this may be true, that decision is not final, and there is no clear indication in the decision that the identical consistency issues argued here were specifically raised before that court. Therefore, invocation of that doctrine is not appropriate.

28. In summary, there is no genuine issue as to any material fact, and the City is entitled as a matter of law to the entry of a final order in its favor.

DISPOSITION

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

ORDERED that the City's Motion for Summary Final Order is granted, and the challenged land development regulations adopted by Ordinance No. 2002-165, as amended, are determined to be in compliance.

DONE AND ORDERED this 9th day of August, 2004, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of August, 2004.

ENDNOTES

1/ Unless otherwise noted, all references are to Florida Statutes (2003).

2/ Petitioners' filings with the City and Department, and the City's response, are not of record. However, in the Department's Determination of Consistency of a Land Development Regulation issued on November 26, 2003, the grounds for finding the LDRs not in compliance are restated, and they appear to be the same allegations raised here.

3/ The somewhat lengthy regulation provides that bonuses may be secured by a developer for beach access, access easements, beach access trust fund contributions, Collins Avenue public streetscape enhancements, Sunny Isles public parking, and public oceanfront park and open space enhancements.

4/ In support of their consistency argument, Petitioners have cited one line of cases which generally stands for the proposition that Florida Administrative Code Rule 9J-5.005(2)(g) should be strictly interpreted since the language in the rule is clear and unambiguous. While this is true, the rule does not apply here. The second line of cases cited by Petitioners generally holds that state agencies may adopt by reference regulations that are in effect at the time of adoption, but may not adopt by reference changes to those regulations that may occur at a future time. As previously noted, the underlying rule which codifies this principle does not apply, but even if it did, the City's adoption of LDRs does not violate this principle.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.