STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF COMMUNITY AFFAIRS, Petitioner, vs. LEE COUNTY, Respondent, and LEEWARD YACHT CLUB, LLC, Intervenor.	)	Case No. 06-0049GM

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on April 25 and 26, 2006, in Ft. Myers, Florida, before Bram D. E. Canter, Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether the amendment to the Lee County Comprehensive Plan adopted by Ordinance No. 05-20 is "in compliance," as that term is defined in Section 163.3184(1)(b), Florida Statutes (2005),[1] for the reasons set forth in the Petition for Formal Administrative Hearing and Statement of Intent filed by the Department of Community Affairs ("the Department").

PRELIMINARY STATEMENT

On October 12, 2005, Lee County ("the County") amended its comprehensive plan through the adoption of Ordinance No. 05-20, which made changes to the Future Land Use Map (FLUM). After reviewing the amendment, the Department determined that it was

not in compliance and issued a Notice of Intent and a Statement of Intent on December 19, 2005. This proceeding was initiated when the Department filed a petition with DOAH on January 5, 2006, which incorporated the issues identified in the Statement of Intent. Leeward Yacht Club, LLC (Leeward), was granted leave to intervene in support of the amendment.

In addition to contesting the Department's determination that the County's amendment was not in compliance, Leeward initially challenged the validity of certain Department rules and an alleged "unadopted rule." Prior to the final hearing, however, Leeward withdrew these rule challenges.

Leeward filed a Motion to Strike or, in the Alternative, Motion in Limine in opposition to certain citations in the Department's Statement of Intent as not having been raised previously in the Department's Objections, Comments, and Recommendations (ORC) Report. The motion was denied. Leeward's unopposed motion for official recognition of the final order in Dubin v. Lee County, Final Order No. DCA00-GM-005 (2000), was granted.

At the final hearing, Joint Exhibits 1 through 7 were admitted into evidence. The Department presented the testimony of Paul O'Connor, Gerald Campbell, Bernard Piawah, Matt Noble,

and Dan Trescott. The Department's Exhibits 1 through 9, 12, and 13 were admitted into evidence. Leeward presented the testimony of Paul O'Connor, Gerald Campbell, Matt Noble, Dan Trescott, Ned Dewhirst, Michael Roeder, and Pat Riley. Leeward's Exhibits 11, 12, 22, 24, 26, 29, 31, 40, and 41 were admitted into evidence. The County presented no witnesses or exhibits. Official recognition was taken of portions of Florida Administrative Code Chapter 9J-5, as it existed in September 1991.

The three-volume Transcript of the final hearing was prepared and filed with DOAH. The parties twice moved to extend the time for filing their post-hearing submittals and were ultimately granted a deadline of June 19, 2006. The Department and Leeward timely filed Proposed Recommended Orders that were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. The Department is the state land planning agency and is statutorily charged with the duty of reviewing comprehensive plans and their amendments, and determining whether a plan or

amendment is “in compliance,” as that term is defined in Section 163.3184(1)(b), Florida Statutes.

2. Lee County is a political subdivision of the State of Florida and has adopted a comprehensive plan that it amends from time to time pursuant to Section 163.3167(1)(b), Florida Statutes.

3. Leeward is a Florida limited liability company that owns a portion of the real property that is the subject of the amendment at issue.

The Amendment

4. The amendment would change the future land use designation for 41.28 acres in the northeast quadrant of the Interstate 75 (I-75)/State Road 80 (SR 80) interchange from General Commercial Interchange to Urban Community, as shown on the FLUM.

5. The General Commercial Interchange land use is described in the County Plan as “intended primarily for general community commercial land uses: retail, planned commercial districts, shopping, office, financial, and business.” It does not allow residential development.

6. The Urban Community land use provides for a mix of residential, commercial, public, quasi-public, and limited light

industrial uses. The standard density range for residential uses in the Urban Community category is one to six dwelling units per acre (du/a).

7. The 41.28 acres affected by the amendment ("the amendment site") consist of 19.28 acres of lands along the Orange River owned by Leeward, a platted subdivision known as Dos Rios of approximately 11 acres, and the remaining acreage consists of right-of-way for SR 80 and I-75.

8. Currently operating on Leeward's property is a vessel repair facility, a marina with wet and dry slips, and an ecotourism company. Leeward also has its office on the site.

9. The Dos Rios subdivision includes 26 single-family lots. Apparently, only a few of the lots (the number was not established in the record) have been developed. Because residential land uses are not allowed in the General Commercial Interchange category, the Dos Rios lots were non-conforming uses.

Maximum Allowed Density

10. The County Plan provides residential density bonuses to promote various County objectives, such as the provision of affordable housing. With density bonuses, lands designated

Urban Community can boost their density to a maximum of ten du/a.

11. There was testimony presented by Leeward that the County has not often approved applications for density bonuses. Even if the practice of the County in approving density bonuses were relevant, the practice can change. It is reasonable for the Department to consider the maximum intensity or density associated with a future land use designation when determining whether a FLUM amendment is in compliance. Therefore, in this case, it is reasonable to consider the Urban Community land use designation as allowing up to ten du/a.

12. The Department asserts that the amendment would allow the 41.2 acres affected by the amendment to have a total of 412 dwelling units (41.2 acres x 10 du/a). Leeward disputed that figure because the 41.2 acres includes road right-of-way and the Dos Rios subdivision.

13. A hearing officer appointed to review a Lee County development order recently determined that right-of-way external to a development should not be included in calculating allowable units, and the County accepted the hearing officer's recommendation based on that determination. The definition of "density" in the County Plan supports the determination.[2]

Therefore, for the purposes of this case, the right-of-way in the northeast quadrant should not be included in calculating the maximum residential density that would result from the amendment.

14. On the other hand, Leeward's argument that the Dos Rios subdivision acreage should not be included in the ten du/a calculation is rejected. For the purposes of an "in compliance" determination, it is reasonable for the Department to apply the maximum potential densities to all developable and re-developable acreage.

15. Using 29 acres as the approximate acreage affected by the amendment when road right-of-way is subtracted, the amendment would create the potential for 290 residences in the northeast quadrant of the interchange.

Adoption of the Amendment

16. The amendment was initiated as part of the County's reexamination of the existing land use designations in the four quadrants of the I-75/SR 80 interchange. Following the County planning staff's completion of a study of the entire interchange, it recommended several changes to the County Plan, but no change was recommended for the northeast quadrant. Apparently, the amendment at issue was urged by Leeward, and, at

a public hearing held on June 1, 2005, the Board of County Commissioners voted to adopt the amendment.

17. Pursuant to Section 163.3184(6), Florida Statutes, the proposed amendment was forwarded to the Department for an "in compliance" review. Following its review, the Department issued its ORC Report on August 19, 2005. In the ORC Report, the Department objected to the proposed amendment based upon what it considered to be inappropriate residential densities in the coastal high hazard area (CHHA) and floodplain. The Department recommended that the County not adopt the proposed amendment.

18. On October 12, 2005, another public hearing was held before the Board of County Commissioners to consider adoption of the amendment. At the public hearing, the County planning staff recommended that the land use designation in the northeast quadrant not be changed to Urban Community "due to the potential increase in density in the Coastal High Hazard Area." Nevertheless, the Board of County Commissioners approved the amendment.

19. Representatives of Leeward appeared and submitted comments in support of the amendment at the public hearings before the Board of County Commissioners.

20. On December 16, 2005, the Department issued its Statement of Intent to Find Comprehensive Plan Amendment Not in Compliance, identifying three reasons for its determination: (1) inconsistency with state law regarding development in the CHHA and flood prone areas, (2) internal inconsistency with provisions of the County Plan requiring the consideration of residential density reductions in undeveloped areas within the CHHA, and (3) inconsistency with the State Comprehensive Plan regarding subsidizing development in the CHHA and regulating areas subject to seasonal or periodic flooding.

21. On January 5, 2006, the Department filed its petition for formal hearing with DOAH.

Coastal High Hazard Area

22. The Florida Legislature recognized the particular vulnerability of coastal resources and development to natural disasters and required coastal counties to address the subject in their comprehensive plans.

> [I]t is the intent of the Legislature that 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.

§ 163.3178(1), Fla. Stat. The statute also requires evacuation planning.

23. Until 2006, the CHHA was defined as the "category 1 evacuation zone." § 163.3178(2)(h), Fla. Stat. In 2006, the CHHA was redefined as "the area below the elevation of the category 1 storm surge line as established by the Sea, Lake, and Overland Surges from Hurricanes (SLOSH) computerized storm surge model."[3] Ch. 2006-68, § 2, Laws of Fla.

24. The County Plan defines the CHHA as "the category 1 evacuation zone as delineated by the Southwest Florida Regional Planning Council." Map 5 of the County Plan, entitled "Lee County Coastal High Hazard Area (CHHA)," shows the entire amendment site as being within the CHHA. Nothing on Map 5, however, indicates it was produced by the Regional Planning Council.

25. Daniel Trescott, who is employed by the Southwest Florida Regional Planning Council and is responsible for, among other things, storm surge mapping, stated that the Category 1 evacuation zone is the storm surge level for the worst case scenario landfall for a Category 1 storm. He stated that the Category 1 storm surge for Lee County was determined by the SLOSH model to be 5.3 feet. Mr. Trescott stated that the 5.3

foot contour (shown on Plate 7 of the Regional Planning Council's "Hurricane Storm Tide Atlas - Lee County") more accurately delineates the CHHA than Map 5 of the County Plan. Although Mr. Trescott's testimony suggests a conflict between the County Plan's definition of the CHHA and Map 5's depiction of the CHHA, the two can be reconciled by a finding that Map 5 is a gross depiction of the CHHA for general public information purposes, but the precise location of the CHHA boundary is the one delineated by the Regional Planning Council, and the latter is controlling.

26. Using the 5.3 contour on the amendment site, Leeward's witness, Michael Raider, estimated that there are approximately 16 acres of the amendment site within the CHHA. Applying the maximum allowable residential density under the Urban Community land use designation (with bonuses) of ten du/a means the amendment would result in a potential for 160 dwellings in the CHHA.

27. Florida Administrative Code Rule 9J-5.012(3)(b)6. and Rule 9J-5.012(3)(c)7., respectively, require each local government’s coastal management element to contain one or more specific objectives that "[d]irect population concentrations away from known or predicted coastal high-hazard areas” and

limit development in these areas. The parties' evidence and argument regarding whether the amendment was "in compliance" focused on these rules and the following goal, objective, and policy of the County Plan related to the CHHA:

> GOAL 105: PROTECTION OF LIFE AND PROPERTY IN COASTAL HIGH HAZARD AREAS. To protect human life and developed property from natural disasters.
>
> OBJECTIVE 105.1: DEVELOPMENT IN COASTAL HIGH HAZARD AREAS. Development seaward of the 1991 Coastal Construction Control Line will require applicable State of Florida approval; new development on barrier islands will be limited to densities that meet required evacuation standards; new development requiring seawalls for protection from coastal erosion will not be permitted; and allowable densities for undeveloped areas within coastal high hazard areas will be considered for reduction.
>
> POLICY 105.1.4: Through the Lee Plan amendment process, land use designations of undeveloped areas within coastal high hazard areas will be considered for reduced density categories (or assignment of minimum allowable densities where ranges are permitted) in order to limit the future population exposed to coastal flooding.

28. In the opinion of Bernard Piawah, a planner employed by the Department, the amendment is inconsistent with the goal, objective and policy set forth above because these provisions only contemplate possible reductions of residential densities in the CHHA and there is no provision of the County Plan that

addresses or establishes criteria for increasing residential densities in the CHHA.

Population Concentrations

29. As stated above, Florida Administrative Code Rule 9J-5.012(3)(b)6. directs local governments to include provisions in their comprehensive plans to direct population concentrations away from the CHHA. The term "population concentrations" is not defined in any statute or rule. The term apparently has no generally accepted meaning in the planning profession.

30. The word "population" has the ordinary meaning of "all of the people inhabiting a specific area." The American Heritage Dictionary of the English Language (1981). The word "concentration" has the ordinary meaning of "the act or process of concentrating." Id. The word "concentrate" means "to direct or draw toward a common center." Id.

31. In the context of Florida Administrative Code Rule 9J-5.012, the term "population concentrations" suggests a meaning of population densities (dwelling units per acre) of a certain level, but the level is not stated.

32. Leeward argues that, because there is no state guidance on the meaning of the term "population concentrations,"

surrounding land uses should be examined to determine whether a proposed density would be "proportionate to its surroundings." According to Leeward, in order to be a population concentration, the density under review would have to be greater than the surrounding density. This comparative approach is rejected because the overarching Legislative objective is protection of life, which plainly calls for a straightforward consideration of the number of lives placed in harm's way.

33. The Department, in its Proposed Recommended Order, states:

> By assigning either zero residential density to land by virtue of an Open Space land use designation, or a maximum density of one unit per acre by assigning a low density land use designation, the County Plan fulfills the mandates of State law that development be limited in and residential concentrations be directed away from the CHHA.

Thus, not surprisingly, the Department does not consider one du/a to be a population concentration.

34. A density of ten du/a is an urban density, as indicated by the fact that it is the maximum density allowed in the Urban Community land use designation and the highest density within the "standard density range" for the County's Central Urban land use designation. It is a generally known fact, of

which the undersigned takes notice, that urban areas are areas where populations are concentrated.

35. It is a another generally known fact, of which the undersigned takes notice, that ten dwelling units on one acre of land amounts to a lot of people living in a small space.

36. Leeward, itself, described the residential density allowed under the Urban Community designation as "relatively intense." Leeward's Proposed Recommended Order, at 7.

37. Whether measured by density alone (ten du/a) or by Leeward's estimate of 160 residences on 16 acres, the amendment places a population concentration in the CHHA.

Offsets in the CHHA

38. Leeward presented evidence that the County has been reducing residential densities, sometimes referred to as "down-planning," in other areas of the CHHA in Lee County. The reduction in dwelling units in the CHHA over the past several years may be as high as 10,000 units. The Department did not present evidence to dispute that there has been an overall reduction in dwelling units in the CHHAs of Lee County.

39. Leeward argues that these reductions "offset" the increase in dwelling units in the CHHA that would result from the amendment and this "overall" reduction in densities in the

CHHA must be considered in determining whether the amendment is "in compliance" with state law and with provisions of the County Plan related to directing population concentrations away from the CHHA.

40. At the hearing and in its Proposed Recommended Order, the Department argued that the consideration of offsets in the CHHA was improper and unworkable, but that argument conflicts with the Department's actual practice and official position as described in the January 2006 "Department of Community Affairs Report for the Governor's Coastal High Hazard Study Committee." In that report, the Department acknowledged there is no statutory or rule guidance regarding what the maximum density should be in the CHHA. The Report notes that some local governments have established maximum densities for the CHHA (e.g., Pinellas County, 5 du/a; Franklin County 1 du/a). The Department states in the report that it reviews amendments to increase density in the CHHA on a "case by case" basis, and explains further:

> When a Comprehensive Plan Amendment in the CHHA proposes a density increase, DCA's review considers the amount of the density increase, the impact on evacuation times and shelter space, and whether there will be a corresponding offset in density through "down planning" (generally accomplished through public acquisition).

41. One of the visual aides used in conjunction with the 2006 report to Governor's Coastal High Hazard Study Committee, entitled "Policy Issue #2 - Densities in High Hazard Areas," also describes the Department's practice:

> 4. Without locally adopted density limits, DCA conducts a case by case review of amendments without any defined numeric limit.
>
> 5. DCA considers amount of density increase, impact on evacuation times and shelter space, and whether there will be a corresponding offset in density through "down planning" in other areas of the CHHA.

42. These statements use the phrase "there will be a corresponding offset," which suggests that for an offset to be considered, it would have to be proposed concurrently with an increase in residential density on other lands within the CHHA. However, according to the director of the Department's Division of Community Planning, Valerie Hubbard, offsets in the CHHA do not have to be concurrent; they can include previous reductions. Furthermore, although the Department pointed to the absence of any criteria in the County Plan to guide an offset analysis, Ms. Hubbard said it was unnecessary for a comprehensive plan to include express provisions for the use of offsets.

43. To the extent that this evidence of the Department's interpretation of relevant law and general practice conflicts

with other testimony presented by the Department in this case, the statements contained in the report to the Governor's Coastal High Hazard Study Committee and the testimony of Ms. Hubbard are more persuasive evidence of the Department's policy and practice in determining compliance with the requirement that comprehensive plans direct population densities away from the CHHA and limit development in the CHHA.

44. As long as the Department's practice when conducting an "in compliance" review of amendments that increase residential density in the CHHA is to take into account offsets, the Department has the duty to be consistent and to take into account the County's offsets in the review of this amendment.

45. The County planning director testified that he believed the applicable goal, objective, and policy of the County Plan are met as long as there has been a reduction in residential densities in the CHHAs of the County as a whole. The Department points out that the planning director's opinion was not included in the County planning staff's reports prepared in conjunction with the amendment. However, it necessarily follows from the Board of County Commissioners' adoption of the amendment that it does not interpret Objective 105.1 and Policy 105-1.4 as prohibiting an increase in residential density in the

CHHA. Although these provisions make no mention of offsets, the Department has not required offset provisions in a comprehensive plan before the Department will consider offsets in its determination whether a plan amendment that increases density in the CHHA is in compliance.

46. The wording used in Objective 105.1 and Policy 105-1.4 requiring "consideration" of density reductions in the CHHA can be harmonized with the County planning director's testimony and with the County's adoption of the amendment by construing these plan provisions consistently with the Department's own practice of allowing increases in the CHHA when the increases are offset by overall reductions in dwelling units in the CHHA. Seeking to harmonize the amendment with the provisions of the County Plan is the proper approach because, as discussed later in the Conclusions of Law, whether an amendment is consistent with other provisions of the plan is subject to the "fairly debatable" standard which is a highly deferential standard that looks for "any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction." Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997).

Shelter Space and Clearance Time

47. Prior to the hearing in this case, Leeward moved to strike certain statute and rule citations in the Department's petition related to shelter space and clearance time[4] because they were not included in the Department's ORC Report. The motion was denied because, although Section 163.3184(8)(b), Florida Statutes, limits the Department's petition to issues raised in the "written comments" in the ORC Report, the statute does not indicate that the Department is barred from citing in its petition, for the first time, a rule or statute that is directly related to the written comments.

48. The CHHA is defined in the County Plan as the category one "evacuation zone." It is the area most in need of evacuation in the event of a severe coastal storm. Shelter space and clearance time are integral to evacuation planning and directly related to the Department's comment in the ORC Report that the amendment would, "expose a substantial population to the dangers of a hurricane." Therefore, the Department was not barred from presenting evidence on shelter space and clearance time in support of this comment.

49. The Department's practice when reviewing an amendment that increases residential density in the CHHA, described in its

2006 report to the Governor's Coastal High Hazard Area Study Committee, is to consider not only dwelling unit offsets in the CHHA, but also the effect on shelter space and clearance time. That report did not elaborate on how shelter space and clearance time are considered by the Department, but evidence that a comprehensive plan amendment would have a significant adverse effect on shelter space or clearance time could presumably negate what would otherwise appear to the Department to be an acceptable offset of residential density in the CHHA. On this record, however, the Department did not show that a significant adverse impact on shelter space or clearance time would be caused by this particular amendment.[5]

Special Planning Areas

50. Leeward argues that, even if the amendment were determined to be inconsistent with Objective 105.1 and Policy 105-1.4, that inconsistency should be balanced against other provisions in the County Plan that are furthered by the amendment, principally the provisions related to the Caloosahatchee Shores Community Planning Area and the Water-Dependent Use Overlay Zone. There is no authority for such a balancing approach that can overcome an inconsistency with an objective or policy of the comprehensive plan. Therefore,

whether the amendment furthers the provisions of the County Plan related to the Caloosahatchee Shores Community Planning Area, Water-Dependent Use Overlay Zone, or other subjects is irrelevant to whether the amendment is consistent with Objective 105.1 and Policy 105-1.4.

51. On the other hand, the Department's contention that the amendment is inconsistent with the provisions of the County Plan related to the Caloosahatchee Shores Community Planning Area is contrary to the more credible evidence.

100-Year Floodplain

52. The amendment site is entirely within the 100-year floodplain. In its Statement of Intent, the Department determined that the amendment was not in compliance, in part, because the amendment site's location in the 100-year floodplain made it unsuitable for residential development. In addition, the Department determined that the amendment caused an internal inconsistency with the following policies of the County Plan related to development in the floodplain:

> POLICY 61.3.2: Floodplains must be managed to minimize the potential loss of life and damage to property by flooding.
>
> POLICY 61.3.6: Developments must have and maintain an adequate surface water management system, provision for acceptable programs for operation and maintenance, and

> post-development runoff conditions which reflect the natural surface water flow in terms of rate, direction, quality, hydroperiod, and drainage basin. Detailed regulations will continue to be integrated with other county development regulations.

53. According to Mike McDaniel, a growth management administrator with the Department, "we try to discourage increasing densities in floodplains and encourage that it be located in more suitable areas."

54. The policies set forth above are intended to aid in the achievement of Goal 61 of the Community Facilities and Service Element "to protect water resources through the application of innovative and sound methods of surface water management and by ensuring that the public and private construction, operation, and maintenance of surface water management systems are consistent with the need to protect receiving waters." Plainly, Goal 61 is directed to regulating construction and surface water management systems. There is no mention in this goal or in the policies that implement the goal of prohibiting all development or certain kinds of development in the 100-year floodplain.

55. The Department's argument in this case regarding development in the 100-year floodplain is rejected because it ignores relevant facts and law. First, substantial portions of Lee County and the State are within the 100-year floodplain. Second, there is no state statute or rule that prohibits

development in the 100-year floodplain. Third, the Department of Environmental Protection, water management districts, and local governments regulate development in the floodplain by application of construction standards, water management criteria, and similar regulatory controls to protect floodplain functions as well as human life and property. Fourth, there has been and continues to be development in the 100-year floodplain in Lee County and throughout the State, clearly indicating that such development is able to comply with all federal, state, and local requirements imposed by the permitting agencies for the specific purpose of protecting the floodplain and the public. Fifth, the Department "discourages" development in the floodplain but has not established by rule a standard, based on density or other measure, which reasonably identifies for local governments or the general public what development in the floodplain is acceptable to the Department and what development is unacceptable. Finally, the Department's practice in allowing offsets in the CHHA, as discussed previously, necessarily allows for development in the 100-year floodplain in that particular context.

CONCLUSIONS OF LAW

56. DOAH has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 163.3184(10), Florida Statutes.

57. Intervenor Leeward is an affected person with standing to participate in this proceeding pursuant to Section 163.3184(1)(a), Florida Statutes.

58. The term "in compliance" is defined in Section 163.3184(1)(b), Florida Statutes:

> "In compliance" means consistent with the requirements of ss. 163.3177, 163.3176, when a local government adopts an educational facilities element, 163.3178, 163.3180, 163.3191, and 163.3245, 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 this part and with the principles for guiding development in designated areas of critical state concern and with part III of chapter 369, where applicable.

59. When the Department determines that a local government's plan or plan amendment is not in compliance, administrative proceedings are conducted pursuant to Section 163.3184(10), Florida Statutes. These proceedings are conducted under Sections 120.569 and 120.57, Florida Statutes. Proceedings under Sections 120.569 and 120.57 are generally de novo, designed to "formulate final agency action, not to review action taken earlier and preliminarily." McDonald v. Florida Department of Banking and Finance, 346 So. 2d 81 (Fla. 1st DCA 1977). But the Legislature has chosen to treat administrative review of comprehensive plan and plan amendment cases differently:

> In the proceeding, the local government's determination that the comprehensive plan or plan amendment is in compliance is presumed to be correct. 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. The local government's determination that elements of its plans are related to and consistent with each other shall be sustained if the determination is fairly debatable.

§ 163.3184(10)(a), Fla. Stat.

60. The Department's Statement of Intent cites the following statutes and rules in support of its determination that the amendment is not in compliance: Sections 163.3177(2), 163.3177(6)(a), 163.3177(6)(g)7. and 8., 163.3178(1), 163.3178(2)(d) and (h), 187.201(8)(a), 187.201(8)(b) 3. and 6., 187.201(15)(a) and 187.201(15)(b)6., Florida Statutes, and Florida Administrative Code Rules 9J-5.003(17); 9J-5.005(5); 9J-5.006(2)(b); 9J-5.006(3)(b)1., 5., and 6.; 9J-5.006(3)(c)1.; 9J-5.006(4)(b)6.; 9J-5.012(3)(b)5. and 6.; and 9J-5.012(3)(c)7.

61. Florida Administrative Code Rule 9J-5.003(17) is the definition of CHHA. The Department did not meet its burden to prove by a preponderance of the evidence that the amendment is not "in compliance" with the definition.

62. Florida Administrative Code Rule 9J-5.006(2)(b) requires that the coastal element be based on an "analysis" of the suitability of undeveloped or vacant land for use. The

Department did not meet its burden to prove by a preponderance of the evidence that the FLUM was not based on such an analysis. The Department simply disagreed with the result of the County's analysis.

63. Florida Administrative Code Rule 9J-5.006(4)(b)6. requires a FLUM to show the CHHAs. The Department did not dispute that the FLUM in the County Plan shows the CHHAs.

64. The following statutes and rules cited in the Department's Statement of Intent require a comprehensive plan to contain specified elements, objectives or policies: Sections 163.3177(6)(a), 163.3177(6)(g)7. and 8., and 163.3178(2)(d) and (h), Florida Statutes, and Florida Administrative Code Rules 9J-5.006(3)(b)1., 5., and 6.; 9J-5.006(3)(c)1.; 9J-5.012(3)(b)5; 9J-5.012(3)(b)5. and 6.; and 9J-5.012(3)(c)7. Leeward contends that these statutes and rules do not apply to FLUM amendments because the FLUM is neither an objective nor a policy. The Department responds that the definition of "in compliance" is applicable to FLUM amendments and requires consistency with all of Florida Administrative Code Chapter 9J-5.

65. The Department cites the following portion of the Supreme Court of Florida decision in Coastal Dev. of North Fla., Inc. v. City of Jacksonville Beach, 788 So. 2d 204, 209 (Fla. 2001), in support of its argument that the provisions of Florida

Administrative Code Chapter 9J-5 requiring comprehensive plans to contain certain objectives and policies are also applicable to FLUM amendments:

> The FLUM is part of the comprehensive plan and represents a local government's fundamental policy decisions. Any proposed change to that established policy is likewise a policy decision. The FLUM itself is a policy decision. A decision that would amend the FLUM requires those policies to be reexamined, even though that change is consistent with the textual goals and objectives of the comprehensive plan. Therefore, the scope of the proposed change is irrelevant because any proposed change to the FLUM requires a reexamination of those policy considerations and not an application of those policies.

66. The Department asserts that this reasoning of the Court "made clear that an amendment to the FLUM is a legislative decision that requires a reexamination of the entire plan and its policies." However, there is no dispute that the FLUM amendment at issue here is a legislative decision. Nor is it disputed that this amendment to the County Plan required the County to reexamine all of the related objectives and policies of the County Plan. The dispute is whether the provisions of Florida Administrative Code Chapter 9J-5 requiring that a comprehensive plan contain certain objectives and policies can be violated by a FLUM amendment. On that issue the Court had nothing to say because that issue was not before the Court.

67. In another important comprehensive planning case decided by the Supreme Court of Florida, Martin County v. Yusem, 690 So. 2d 1288 (Fla. 1997), the Court emphasized that FLUM amendments are legislative acts subject to the "fairly debatable" standard of proof. The argument that the Department makes in this case, that a FLUM amendment must comply with the provisions of Florida Administrative Code Chapter 9J-5 requiring comprehensive plans to contain certain objectives and policies, would mean that a local government's legislative act in adopting a FLUM amendment, after reexamining all related provisions of its comprehensive plan, would be subject to the lower preponderance of evidence standard of proof.

68. It is not helpful to argue, as the Department does, that a FLUM amendment is subject to all the requirements of Florida Administrative Code Chapter 9J-5 because many provisions of Florida Administrative Code Chapter 9J-5 are expressly limited to particular subjects. The plain meaning of a rule that requires a comprehensive plan to include "one or more objectives" or "one or more policies" addressing a particular subject is that compliance with the rule is achieved if, in fact, the comprehensive plan has one or more of the required objectives or policies.

69. An agency’s interpretation of its own rule is entitled to great weight. However, the undersigned is not required to

defer to an implausible or unreasonable interpretation. See Atlantis at Perdido Association, Inc. v. Dept. of Environmental Protection, 932 So. 2d 1206 (Fla. 1st DCA 2006). When an agency's construction contradicts the unambiguous language of the rule, the construction is clearly erroneous and cannot stand. Woodley v. Dept. of Health and Rehab. Services, 505 So. 2d 676, 678 (Fla. 1987). If a subject is not adequately addressed by an agency's rules, the solution is to amend the rules rather than contort their plain meaning.

70. The parties' pre-hearing stipulation included a stipulation that the County Plan, with the exception of the amendment at issue here, is in compliance. That equates to a stipulation that the County Plan contains all the objectives and policies required by Sections 163.3177 and 163.3178, Florida Statutes, and Florida Administrative Code Chapter 9J-5. The amendment does not delete or modify any of the objectives or policies of the County Plan. Therefore, the Department did not meet its burden to prove by a preponderance of the evidence that the amendment is not in compliance with the statutes and rules cited in paragraph 64, above, that require comprehensive plans to contain certain objectives and policies.

71. Section 163.3177(2), Florida Statutes, and Florida Administrative Code Rule 9J-5.005(5)(a) require the provisions of a comprehensive plan to be internally consistent. The gist

of the Department's case is that the amendment is internally inconsistent, that it conflicts with Goal 105, Objective 105.1, and Policies 105.1.4, related to limiting development in the CHHA, and Policies 61.3.2. and 61.3.6., related to regulating development in the floodplain.

72. A local government's determination that the elements of its comprehensive plan are related to and consistent with each other shall be sustained if the determination is fairly debatable. § 163.3184(10)(a), Fla. Stat.

73. The term "fairly debatable" is not defined in Chapter 163, Florida Statutes, or Florida Administrative Code Chapter 9J-5. 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, supra, at 1295, the Court stated, "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." Id.

74. When the County's previous reductions of dwelling units in the CHHA are taken into account, it is fairly debatable that the amendment is internally consistent with Goal 105, Objective 105.1, and Policies 105.1.4. Furthermore, because the County Plan does not prohibit development in the floodplain but, instead, requires "management" of such development through the application of design and construction standards, it is fairly debatable that the amendment is internally consistent with Policies 61.3.2 and 61.3.6.

75. The Department contends the amendment is inconsistent with provisions of the State Comprehensive Plan set forth in Sections 187.201(8)(a), 187.201(8)(b) 3. and 6., 187.201(15)(a), and 187.201(15)(b)6., Florida Statutes. These goals and policies of the State Comprehensive Plan address public safety in the coastal zone and the suitability of land for development, but are expressed in the same general terms as the parallel provisions of the County Plan. For the same reasons that the amendment was found to be internally consistent with the County Plan, it is determined to be consistent with the State Comprehensive Plan. The Department did not meet its burden to prove otherwise.

76. The Department failed to overcome the statutory presumption of correctness of the County's determination that the amendment is in compliance.

RECOMMENDATION

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

RECOMMENDED that a final order be issued by the Florida Land and Water Adjudicatory Commission determining that the amendment adopted by Lee County in Ordinance No. 05-10 is "in compliance" as defined in Chapter 163, Part II, Florida Statutes.

DONE AND ENTERED this 25th day of August, 2006, in Tallahassee, Leon County, Florida.

BRAM D. E. CANTER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of August, 2006.

ENDNOTES

1/ Unless otherwise indicated, all references to the Florida Statutes are to the 2005 codification.

2/ The definition includes the following statement:

> For the purpose of calculating gross residential density, the total acreage of a development includes those lands to be used for residential uses, and includes lands within the development proposed to be used for streets and street rights of way, utility rights of way, public and private parks . . . and existing man-made waterbodies within the residential development. (Emphasis added.)

3/ The 2006 amendment added new criteria to be used by the Department in determining whether a comprehensive plan amendment is "in compliance" with state coastal high-hazard provisions pursuant to Florida Administrative Code Rule 9J-5.012(3)(b)6 and 7. No party mentioned the new statutory criteria. The County adopted the amendment on October 12, 2005, prior to the effective date of the 2006 amendments to Section 163.3178, Florida Statutes.

4/ The term "clearance time" is defined as the time it takes all vehicles leaving the evacuation zone to get through the most restrictive portion of the evacuation route.

5/ For example, because the amendment site is located next to two major roads, I-75 and SR 80, it has a low clearance time. The calculations of shelter space demand and added traffic in the Department's Exhibit 2 was based on an assumption of 412 new units in the CHHA and is rejected as contrary to the more credible evidence. Furthermore, the amendment's effect on shelter space and clearance time must be considered in the context of offsetting reductions of dwelling units in the CHHA that reduce the demand for shelter space and improve clearance times.

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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.