

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CAROL RUNYAN, ELIZABETH)
STEPHENS HAWKES, HEIDI)
SUMNER, LANCE LUBIN, MARY)
LUBIN, DENNIS JONES, MARY)
JONES, JOSEPH BAKER, GREG)
STANEK, PATRICIA WALTON,)
MARGUERITE WOOD, DONALD)
MOSHER, ROBERTA MOSHER,)
DOROTHY BUCKSHORN, HERMAN)
WELLS, GERI WELLS, EDITH JANE)
MOORE, BYRON BRASWELL, GLORIA)
BRASWELL, PAUL GRAY, TIM)
WEIGANDT, DIANE WEIGANDT,)
MAYBELLE ADAMS, CATHERINE)
BATMAN, MICHAEL NAZZARENO,)
CHRIS LAUBER, CAROL LACHANCE,)
JAMES LANDAY, and EAGLE CREST)
CIVIC ASSOCIATION, INC., A)
FLORIDA NOT-FOR-PROFIT)
CORPORATION,)
)
Petitioners,)
)
vs.)
)
DEPARTMENT OF COMMUNITY)
AFFAIRS,)
)
Respondent,)
)
and)
)
CITY OF ST. PETERSBURG and)
SEMBLER FLORIDA, INC.,)
)
)
Intervenors.

Case No. 07-2239GM

RECOMMENDED ORDER

A final administrative hearing was held in this case on August 8 and 9, 2007, in St. Petersburg, Florida, before J.

Lawrence Johnston, Administrative Law Judge ("ALJ"), Division of Administrative Hearings ("DOAH").

APPEARANCES

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For Respondent Department of Community Affairs:

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For Intervenor Sembler Florida, Inc.:

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STATEMENT OF THE ISSUE

The issue in this case is whether Ordinance 679-L of the City of St. Petersburg ("City"), which amended the Future Land Use Map ("FLUM") of the City's Comprehensive Plan on certain property generally located at the northeast corner of 9th Avenue North and 66th Street North within the boundaries of

the City (the "Subject Property") from Institutional to Residential Office Retail (R/O/R) land use on 2.98 acres, Residential Office General (R/OG) on 2.98 acres, and Residential Urban (RU) on 12.02 acres (the "Plan Amendment"), is "in compliance" as defined by Section 163.3184(1)(b), Florida Statutes,ⁱ notwithstanding Petitioners' contentions that the Plan Amendment is internally inconsistent and not based on data and analysis.

PRELIMINARY STATEMENT

On April 16, 2007, the Department published its Notice of Intent ("NOI") to find the City's Plan Amendment "in compliance."

On May 2, 2007, the Petitioners filed with the Department of Community Affairs ("Department") a Petition for Administrative Hearing ("Petition") contending that the Plan Amendment is not "in compliance."

On May 18, 2007, the Department referred the Petition to the DOAH, and the City filed its Motion to Intervene. On May 21, 2007, Sembler Florida, Inc. ("Sembler") filed its Motion to Intervene. On May 22, 2007, both interventions were granted.

On July 24, 2007, a Voluntary Dismissal was filed by some of the original Petitioners--Elizabeth Stephens Hawkes, Joseph Baker, Greg Stanek, Patricia Walton, Edith Jane Moore, and

Michelle Nazzareno. A subsequent Voluntary Dismissal was filed on July 26, 2007, by more of the original Petitioners-- Donald Mosher, Roberta Mosher, Herman Wells, and Geri Wells.

On July 26, 2007, the remaining Petitioners filed an Unopposed Motion for Leave to Amend their Petition, which was granted on August 6, 2007. On August 2, 2007, the parties filed their Joint Pre-Hearing Stipulation.

The final hearing was held on August 8 and 9, 2007, at the Judicial Building in St. Petersburg, Florida.

After opening statements, Petitioners called the following witnesses: Rick MacAulay, the City's Acting Manager of Urban Design, who was a Planner III when the Plan Amendments were considered by the City; John Hixenbaugh, the former City Zoning Official; David Sobush, a former employee in the City's Economic Development Department; Julie Weston, the City Director of Development Services; David Goodwin, City Economic Development Director; and Brenda Winningham, the Department's Regional Planning Administrator, who was qualified as an expert in comprehensive planning. In addition, Petitioners' Exhibits A through H, J, K, and M through T were received in evidence.

In its case-in-chief, Sembler called the following witnesses: Craig Sher, Chief Executive Officer of Sembler Florida, Inc.; and Sue Murphy, who was qualified as an expert

in land use planning. In addition, Sembler's Exhibit A was received in evidence.

The City and Department cross-examined Petitioners' witnesses and, without objection, extended their cross-examination of the witnesses they would have called in their cases-in-chief beyond the scope of direct examination. No other witnesses were called. In addition, the Department's Exhibits A through E were received in evidence.ⁱⁱ

After presentation of evidence, Petitioners requested a transcript of the final hearing, and the parties were given ten days from the filing of the Transcript in which to file proposed recommended orders (PROs). The Transcript was filed in two volumes on August 29, 2007. Notices of corrections of errors in the Transcript were filed on September 6 and 21, 2007. The parties timely filed PROs, which have been duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. Parties

1. Each Petitioner submitted oral and/or written comments, recommendations and/or objections to the City regarding the disputed land use amendments that are the subject of this case between the day of the transmittal hearing (July 18, 2006) and the day of the adoption hearing (February 15, 2007).

2. Each individual Petitioner owns and/or resides on property within the boundaries of the City.

3. The Eagle Crest Civic Association, Inc., f/k/a Eagle Crest Neighborhood Association, Inc., is a Florida not-for-profit corporation conducting business within the boundaries of the City.

4. The Eagle Crest Civic Association, Inc., collects dues from membership, conducts monthly business and

informational meetings at the St. Petersburg College Gibbs Campus Library in the City, and advocates interests on behalf of its membership before the St. Petersburg Council of Neighborhood Associations and various City and County governmental boards, commissions and councils.

5. The Department is the state land planning agency that 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.

6. The City is a municipality and 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.

7. Sembler is a Florida corporation headquartered and conducting business in the City; by virtue of a contract for the purchase of the property that is the subject of this dispute, Sembler is an equitable owner of the property that is affected by the challenged FLUM Amendment in this case.

B. Background

8. The Subject Property has been owned by the Catholic Diocese of St. Petersburg since 1952.

9. Notre Dame High School, a Catholic girls-only high school, was constructed on the Subject Property in the early 1960's.

10. In 1977, Notre Dame High School merged with Bishop Barry High School (a Catholic boys-only high school to the east of the Subject Property) and the improvements on the Subject Property were used for various Catholic diocesan offices and other administrative purposes.

11. Notre Dame High School was eventually demolished, and the only improvements remaining on the Subject Property are a former field house used for storage purposes and a former convent used for a multi-purpose building. The Subject Property is otherwise currently completely vacant.

12. Since 1977 the Subject Property has had a FLUM designation of Institutional.

13. In January of 2006, Sembler applied to the City for a change in the FLUM designation on the Subject Property from Institutional to Commercial General for an approximately 13.25 acre portion of the Subject Property fronting predominately along the west side 66th Street North between 9th Avenue North and 13th Avenue North.

14. On March 7, 2006, Sembler requested a deferral of its pending application to consider a modification of the

development plan to less intensive commercial uses. The deferral was granted by the City Planning Commission.

15. On March 29, 2006, Sembler submitted a new application, abandoning the prior request to change the FLUM designation for the approximately 13.25-acre portion from Institutional to Commercial General.

16. The new application (March 29, 2006) by Sembler requested a change to the Future Land Use designation for an approximate 6.19-acre portion of the Subject Property from its existing Institutional designation to Residential Office Retail ("R/O/R"). This new application was assigned City File Number PC-700 ("PC-700").

17. The intention of the PC-700 application was to develop multifamily residential units on approximately 11.8 acres of the Subject Property and to develop neighborhood commercial uses on the approximate 6.19-acre portion of the Subject Property.

18. The PC-700 application included a Development Agreement proposed by Sembler which, among other things, limited the actual commercial development of the 6.19 acre portion to 26,000 square feet of space, and required that a quarter, or 25 percent, of that space be developed under the zoning regulations for Residential Office General ("R/OG"), instead of R/O/R.

19. On May 2, 2006, the City's Planning Commission (the "LPA") conducted a public hearing to consider the PC-700 Application, and voted 6-2 to recommend approval of the PC-700 application to the St. Petersburg City Council (the "City Council").

20. On July 18, 2006, the City Council conducted a public hearing for the First Reading of the PC-700 application, and unanimously adopted a resolution approving the transmittal of a proposed ordinance adopting PC-700 to the Department, among others, for review and comment pursuant to Chapter 163, Florida Statutes and Chapter 9J-5, Florida Administrative Code.

21. On September 29, 2006, the Department published its Objections, Recommendations and Comments ("ORC") Report on the Plan Amendment contained in PC-700. The Department raised no objections to the proposed Plan Amendment.

22. Sometime between September 29, 2006, and December 14, 2006, Sembler modified its application PC-700. The modified application was intended to address some of the concerns raised by neighborhood associations representing citizens who owned property and resided in areas adjacent to the Subject Property. The modified PC-700 application requested a FLUM amendment for 2.98 acres of the Subject Property to be changed from Institutional to R/O/R, for 2.98

acres of the Subject Property to be changed from Institutional to R/OG, and for 12.02 acres of the Subject Property to be changed from Institutional to RU ("PC-700 Modified"). The PC-700 Modified application also included a proposed Development Agreement which, among other things, limited the actual development of the R/O/R acreage to a maximum of 13,000 square feet, and limited the total combined development of the R/O/R and ROG acreage to 26,000 square feet.

23. On December 14, 2006, the City Council conducted its First Reading of the PC-700 Modified application, approving the application and setting the Second Hearing for the application for February 15, 2006.

24. On February 6, 2006, the Pinellas County Commission, meeting as the County Planning Authority (the "CPA"), held a public hearing to consider the PC-700 Modified application. The CPA approved the PC-700 Modified application.

25. On February 15, 2007, the City Council conducted its Second Reading public hearing of the PC-700 Modified application and voted to adopt Ordinance 679-L, amending the FLUM designation of the Subject Property from Institutional to R/O/R on 2.98 acres, R/OG on 2.98 acres, and RU on 12.02 acres (the "Plan Amendment").

26. Petitioners do not challenge the FLUM amendment for the RU portion of the Subject Property.

27. On February 23, 2007, the City transmitted the adopted Ordinance 679-L, together with staff reports from the December 14, 2006, and February 15, 2007, public hearings and certain other pertinent information, to the Department for its review pursuant to Chapter 163, Florida Statutes, and Chapter 9J-5, Florida Administrative Code.

28. On April 16, 2007, the Department published in the St. Petersburg Times newspaper its NOI to find the City's Plan Amendment "in compliance."

C. Petitioners' Challenge

29. The Petitioners assert that the FLUM amendment adopted by the City in Ordinance 679-L is not "in compliance" pursuant to Section 163.3184(1)(b), Florida Statutes, because: (1) the FLUM amendment is not based on adequate data and analysis as required by Section 163.3177(8), Florida Statutes, and Florida Administrative Code Rule 9J-5.005(2)(a)ⁱⁱⁱ; and (2) the FLUM amendment is not internally consistent with specific objectives and policies of the City's Plan as required by Section 163.3177(2), Florida Statutes, and Rule 9J-5.005(5)(a) and (b).

30. The Petitioners' challenge is centered on three specific objectives and policies contained in the Future Land Use Element ("FLUE") of the City's Plan: Policy LU3.17, Objective LU4(2), and Objective LU18.^{iv} The Petitioners

assert that the challenged Plan Amendment is inconsistent with those objectives and policies and is not based on data and analysis. The Department and the Intervenors assert that those objectives and policies are not applicable, that the Plan Amendment is not inconsistent with those objectives and policies, and that the Plan Amendment is based on data and analysis. The Intervenors also assert that, even if the Plan Amendment were inconsistent with those objectives and policies, consistency with other goals, objectives, and policies in the plan should be "balanced" against the inconsistency and that the consistencies outweigh the inconsistencies, so that the Plan Amendment still would be "in compliance." The Petitioners and the Department do not subscribe to such a balancing of consistencies and inconsistencies, citing Dept. of Community Affairs v. Lee County and Leeward Yacht Club, LLC, AC-06-006, DOAH Case No. 06-0049GM, 2006 Fla. ENV LEXIS 158 (Admin. Comm'n Nov. 15, 2006).

D. Pertinent City Comprehensive Plan Provisions

31. The City's FLUE Policy LU3.17 states:

The City has an adequate supply of commercial land use to meet existing and future needs. Future expansion of commercial uses shall be restricted to infilling into existing commercial areas and activity centers, except where a need can be clearly identified.

32. The City's FLUE Objective LU4 states in pertinent

part:

The Future Land Use Plan and Map shall provide for the future land use needs identified in this Element:

* * *

2. Commercial - additional commercial acreage is not required to serve the future needs of St. Petersburg. An oversupply exists based upon the standard of 1 acre of commercial land for every 150 persons in the community.

* * *

4. Mixed Use - developments are encouraged in appropriate locations to foster a land use pattern that results in fewer and shorter automobile trips and vibrant walkable communities.

33. The City's FLUE Objective LU18 states:

Commercial development along the City's major corridors shall be limited to infilling and redevelopment of existing commercially designated frontages.

34. Section 1.2.2 of the General Introduction to the City's Plan describes the format of the elements of the Plan and includes the following pertinent sub-headings and language:

1.2.2.3 Goals, Objectives, and Policies

The Goals, Objectives, and Policies have been developed in response to and in accordance with the needs and directions of growth and determined levels of service requirements as identified within the Inventory and Analysis which can be found in the accompanying 1989 Technical Support Documents [TSDs] and the 1996 Evaluation and Appraisal Report [EAR].

All objectives are designed to identify the measurable achievements necessary to support the related goal. In those cases, where the Objective is not specific and/or measurable, but rather, the actual specificity and measurability is found in the supporting policy(ies), the policy(ies) shall be used for the purposes of monitoring and evaluation.

The policies are intended to act as implementation mechanisms identifying programs and procedures to be used to accomplish the related objective.

This Comprehensive Plan is intended to be utilized as a document in its entirety. It shall hereby be established that no single goal, objective or policy or minor group of goals, objectives or policies, be interpreted in isolation of the entire plan.

1.2.2.5 Status and Use of the TSD and the EAR

. . . . The 1989 TSD and the 1996 EAR are hereby referenced and established as the supporting data and analysis for this Comprehensive Plan.

The TSD and the EAR may be used to assist in the interpretation of this comprehensive plan and to aid in the review of proposed changes to this plan. It should be updated

as necessary to maintain the usability of the data and analysis as an interpretive and advisory aid.

* * *

1.3.1.2 Competing Policies

Where two or more policies are competing when applied to a particular set of factual circumstances, such conflict shall be resolved first by administrative interpretation of the Comprehensive plan policies. The objective of any such interpretation shall be to obtain a result which maximizes the degree of consistency between the proposed development or public sector activity and this Comprehensive Plan considered as a whole.

35. The City's Plan also includes the following pertinent definitions in Section 1.7:

Commercial Uses - Activities within land areas which are predominately connected with the sale, rental, and distribution of products, or performance of services.

* * *

Mixed Use - A site that has a combination of different land uses, such as residential, office and retail.

36. In addition, Policy LU3.1(B) of the City's FLUE defines "Commercial and Mixed Use Categories" to include:

1. Residential/Office General (R/OG) - allowing mixed use office, office park and medium density residential up to a floor area ratio of 0.5 and a net residential density of 15 dwelling units per acre.

. . .

2. Commercial General (CG) - allowing the full range of commercial uses including

retail, office, and service uses up to a floor area ratio of 0.55. . . .

3. Retail/Office/Residential (R/O/R) - allowing mixed use retail, office, service, and medium density residential uses generally up to a floor are ratio of 0.4 and a net residential density of 15 dwelling units per acre. . . .

37. Finally, FLUE Policy LU3.1(D) defines "Public/Semi-Public Categories" to include:

2. Institutional (I) - Limited to designation of federal, state and local public buildings and grounds, cemeteries, hospitals, churches, and religious institutions and educational uses. Residential uses having a density not to exceed 12.5 dwelling units per acre, are also allowed. Residential equivalency uses are not to exceed 3 beds per dwelling unit. Non-residential uses permitted in the land development regulations are not to exceed a floor area ratio of 0.55.

E. Consistency with Commercial Use Restrictions

38. The Petitioners proved beyond fair debate that the Plan Amendment at issue increases "the supply of commercial land use to meet existing and future needs." FLUE Policy LU3.17. This is clear not only from the potential for commercial use in the mixed use R/O/R and R/OG future land use categories, but also from the City's inclusion of nine-tenths of the former's and one-tenth of the latter's acreage in the inventory of commercial land use for purposes of determining the "supply of commercial land use to meet existing and future needs" in FLUE Policy LU3.17 and the ratio described in FLUE

Objective LU4.2. The question is whether the restrictions on commercial future land uses reflected in those Plan provisions apply to the mixed use categories of R/O/R and R/OG.

39. Prior to adoption, the City's staff reports stated that the commercial restrictions do apply, and that the Plan Amendment at issue was inconsistent with those restrictions, but that the Plan Amendment was consistent with several other Plan provisions and "on balance, consistent with the goals, objectives and policies of the Comprehensive Plan." However, in this de novo proceeding, the staff reports are not controlling on the applicability of the commercial restrictions and the consistency of the FLUM amendments at issue with those restrictions. In the first place, in light of the contrary testimony of staff during the final hearing, the intent of staff in using the language in the reports is fairly debatable. Second, after the staff reports were prepared, significant testimony on need and demand for commercial land use at the particular location of the FLUM amendments at issue was presented during the final public hearing on the PC-700 Modified application on February 15, 2007, which could have changed staff's mind on at least some of the issues. Finally, the extent to which the City Council may have relied on the staff reports in determining that the Plan Amendment was "in compliance" is not clear from the evidence and is fairly debatable.

40. The City now takes the position, along with the Department, that the restrictions on commercial future land

use in FLUE Policy LU3.17 and Objective LU4.2 do not apply to R/O/R and R/OG because they are mixed use future land use categories, not commercial future land use categories. In support of this position, they point out that Objective LU4 treats "Mixed Use" and "Commercial" "future land use needs" differently and applies the restriction only to "Commercial" "future land use needs," while encouraging mixed use developments in appropriate locations. Several of the specific Plan provisions cited in the staff reports as being consistent with the Plan Amendment addressed the appropriateness of a mixed use development at the proposed location, including: FLUE Policy LU3.18, which states that "retail and office activities shall be located, designed and regulated so as to benefit from the access afforded by major streets without impairing the efficiency of operation of these streets or lowering the LOS [level of service] below adopted standards, and with proper facilities for pedestrian convenience and safety"; FLUE Policy LU3.4, which states that "[t]he Land Use Plan shall provide for compatible land use transition through an orderly land use arrangement, proper buffering, and the use of physical and natural separators"; FLUE Policy LU3.6, which states that "[l]and use planning decisions shall weigh heavily the established character of predominately developed areas where changes of use or

intensity of development are contemplated"; FLUE Policy LU3.8, which seeks to "protect existing and future residential uses from incompatible uses, noise, traffic and other intrusions that detract from the long term desirability of an area through appropriate land development regulations"; and FLUE Policy LU3.5, which states that "[t]he tax base will be maintained and improved by encouraging the appropriate use of properties based on their locational characteristics and the goals, objectives and policies within this Comprehensive Plan." There also was considerable testimony at the hearing concerning the appropriateness of a mixed use development at the proposed location.^v

41. Petitioners also contend that the Plan Amendment is inconsistent with FLUE Objective LU18 concerning commercial development along major corridors. In favor of Petitioners' position, 66th Street North, where the Subject Property is located, is a major north-south corridor in the City. However, the Department and the Intervenors argue that the objective does not apply because the policies under it only specify 4th Street and Central Avenue and do not mention 66th Street.

42. Taking all of the evidence and the City's Plan into consideration, including Sections 1.2.2.3, 1.2.2.5, and 1.3.1.2 of the General Introduction, it is found that

Petitioners did not prove beyond fair debate that FLUE Policy LU3.17, Objective LU4.2, or Objective LU18 apply to the FLUM amendments at issue; even if those Plan provisions applied, Petitioners did not prove beyond fair debate that the FLUM amendments at issue do not constitute "infilling into existing commercial areas" or "infilling . . . of existing commercially designated frontages," or that "a need can[not] be clearly identified."^{vi} All but one witness testified that, if those Plan provisions applied, the FLUM amendments would constitute commercial infill under the pertinent Plan provisions; the lone dissenter was using what he called a "narrow definition" of infill and agreed that the FLUM amendments would constitute commercial infill using the broader definition held by the majority view. There also was ample evidence that there was a clearly identified need for the FLUM amendments at issue, especially when considered along with the unchallenged RU FLUM amendment.

43. Based on the foregoing findings on internal consistency, which is the context of Petitioners' data and analysis argument, Petitioners also did not prove beyond fair debate that the Plan Amendment was not based on data and analysis.

CONCLUSIONS OF LAW

44. Section 162.3184(9), Florida Statutes, provides that

when the Department has given notice of intent to find a comprehensive plan amendment to be "in compliance," those provisions "shall be determined to be in compliance if the local government's decision is fairly debatable." Since the Department gave such notice as to the Plan Amendment at issue in this case, Petitioners bear the burden of proving beyond fair debate that the Plan Amendment is not "in compliance." See Young v. Department of Community Affairs, 625 So. 2d 831, 833-835 (Fla. 1993).

45. In recognition of the local nature of legislative land use decisions, the Florida Supreme Court has held that an amendment subject to the "fairly debatable" standard must be upheld "if reasonable persons could differ as to its propriety." Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997). See also B & H Travel Corp. v. Department of Community Affairs, 602 So. 2d 1362 (Fla. 1st DCA 1992), appeal dismissed and rev. denied, 613 So. 2d 1 (Fla. 1992). In effect, the "fairly debatable" standard defers not only to the City's determination, but also the Department's determination that the Plan Amendment is "in compliance."

46. Section 163.3184(1)(b), Florida Statutes, defines "in compliance" as:

Consistent with the requirements of ss. 163.3177, 163.31776 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.

Out of these compliance criteria, only Section 163.3177, Florida Statutes, and Florida Administrative Code Rule Chapter 9J-5 are pertinent to this case.

47. Section 163.3177(2), Florida Statutes, provides that the several elements of a comprehensive plan must be coordinated and consistent. Any amendment to the FLUM must be internally consistent with the other elements of the comprehensive plan. See Coastal Development of North Fla., Inc. v. City of Jacksonville, 788 So. 2d 204, 208 (Fla. 2001).

48. As found, Petitioners failed to prove to the exclusion of fair debate that the Plan Amendment is inconsistent or not coordinated with the several elements of the City's Plan.

49. The requirement for data and analysis in support of comprehensive plan and plan amendments is set forth in Florida Administrative Code Rule 9J-5.005(2)(a):

All goals, policies, standards, findings and conclusions within the comprehensive plan and its support documents, and within plan amendments and their support documents, shall be based upon relevant and appropriate data and analyses applicable to

each element. To be based on data means to react to it in an appropriate way and to the extent necessary indicated by the data available on that particular subject at the time of adoption of the plan or plan amendment at issue.

50. This rule requires only that data exist at the time the plan amendment is adopted. It does not even require that such data be submitted by the local government to the Department. In a de novo proceeding such as this one, the question is not whether the local government submitted sufficient data and analysis to the Department, but rather whether the data in existence at the time of adoption support the plan amendment. If the data existed at the time of adoption, analysis of that data may be made at the compliance hearing. Zemel, et al., v. Lee County and Dept. of Community Affairs, DOAH CASE NO. 90-7793GM, 1992 Fla. Div. Adm. Hear. LEXIS 5927, at *71-76 (DCA June 22, 1993), aff'd, 642 So. 2d 1367 (Fla. 1st DCA 1994).

51. As found, Petitioners failed to prove to the exclusion of fair debate that the Plan Amendment is not based on data and analysis.

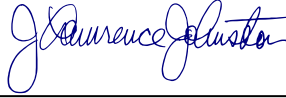
RECOMMENDATION

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

RECOMMENDED that the Department of Community Affairs enter a final order determining that the City's Ordinance 679-

L is "in compliance."

DONE AND ENTERED this 5th day of October, 2007, in
Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of October, 2007.

ENDNOTES

^{i/} Unless otherwise indicated, all statutory citations are to the 2007 codification of the Florida Statutes.

^{ii/} The City's exhibits were noted on the record as being received, but they duplicated other exhibits and, after an off-the-record discussion of the duplication, were withdrawn.

^{iii/} Unless otherwise indicated, all rule citations are to the current version of the Florida Administrative Code.

^{iv/} In October 2006, the City adopted a new Chapter 2, the Vision Element of its Comprehensive Plan, and changed the numbers of the plan provisions previously numbered Chapter 2 and higher. For example, old Policy LU2.17 is now LU3.17; old Objective LU3(2) is now LU4(2); old Objective LU17 is now LU18. This Recommended Order uses the new numbering system although some of the evidence in the record preceded the adoption of the Vision Element and used the old numbers.

^v/ The Department's staff analysis of the Plan Amendment, prepared at a time when only R/O/R and no R/OG was proposed, stated under the topic "Need/Internal Inconsistency":

The City's Comprehensive Plan restricts expansion of commercial uses to infilling of existing commercial areas except where a need can be clearly identified. However, the Residential Office Retail land use category does not require that retail be included as a use on a site with having the designation. Thus, staff has identified no potential objections related to this issue.

While this might sound like a failure to consider the maximum development potential allowed by the Plan Amendment, it actually appears to have been intended to distinguish mixed use from purely commercial future land use categories.

^{vi}/ The Plan Amendment clearly is not "infilling into existing commercial . . . activity centers" or "redevelopment of existing commercially designated frontages."

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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.