STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE VIZCAYANS, INC., a Florida not-for-profit corporation; GROVE ISLE ASSOCIATION, INC., a Florida not-for-profit corporation; CONSTANCE STEEN; JASON E. BLOCH; and GLENCOE NEIGHBORHOOD ASSOCIATION, INC., a Florida not-for-profit corporation,	)	
Petitioners,	)	
vs.	)	Case Nos. 07-2498GM 07-2499GM
CITY OF MIAMI,	)	
Respondent,	)	
and	)	
TRG-MH VENTURE, LTD., and MERCY HOSPITAL, INC., a not-for-profit Florida corporation,	)	
Intervenors.	)	

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings (DOAH) by its assigned Administrative Law Judge, J. Lawrence Johnston, on January 22 through 25, 2008, in Miami, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this case are: (1) whether City of Miami Ordinance 12911, which amends the Future Land Use Map (FLUM) of the City of Miami Comprehensive Neighborhood Plan (MCNP), is a small-scale development amendment, as defined by Section 163.3187(1)(c), Florida Statutes; and (2) whether Ordinance 12911 is "in compliance," as defined by Section 163.3184(1)(b), Florida Statutes. (Statutes refer to the 2007 codification.)

PRELIMINARY STATEMENT

On April 26, 2007, Respondent City of Miami (City) adopted a comprehensive plan amendment (Ordinance 12911), which changed the future land use designation on the City's FLUM on a 6.72-acre parcel of land from Major Institutional, Public Facilities, Transportation, and Utilities (Major Institutional) to High Density Multifamily Residential (H/D Residential). The parcel is located approximately at 3663 South Bayshore Drive in the Coconut Grove area of Miami, Florida. The amendment was adopted under

the procedure for small-scale FLUM amendments described in Section 163.3187, Florida Statutes. The City's Mayor signed the Ordinance on May 7, 2007.

On June 4, 2007, The Vizcayans, Inc., Alvah H. Chapman, Jr., Betty B. Chapman, and Cathy L. Jones filed their Petition Challenging Compliance of a Small-Scale Comprehensive Plan Amendment with the Florida Growth Management Act. The petition was assigned DOAH Case Number 07-2498GM. Two days later, Grove Isle Association, Inc. (Grove Isle), Constance Steen, Jason E. Bloch, and Glencoe Neighborhood Association, Inc. (Glencoe) filed their Petition Challenging Compliance of Small-Scale Comprehensive Plan Amendment. The petition was assigned DOAH Case Number 07-2499GM.

On June 13, 2007, the two cases were consolidated and TRG-MH Venture, LTD. (TRG-MH), the contract vendee and proposed developer of the parcel, filed its Petition to Intervene in support of the challenged amendment. The Petition to Intervene was granted, as was the Petition to Intervene later filed by Mercy Hospital, Inc. (Mercy), the parcel's owner and contract vendor. Also in June, Cathy L. Jones voluntarily dismissed and was dropped as a party.

In July 2007, TRG-MH moved to strike portions of the petitions and moved for a continuance of the final hearing, which had been set for August 31 through September 2, 2007. After a

case status hearing was held on July 18, 2007, the final hearing was rescheduled to October 1 through October 4, 2007. Also in July 2007, Alvah and Betty Chapman voluntarily dismissed and were dropped as parties.

In August 2007, the State Attorney moved to intervene and to stay discovery pending a state criminal investigation. Following a hearing, the state's motion was granted and discovery was stayed for 30 days. On August 30, 2007, the Petitioners filed motions for summary disposition. In their motions, the Petitioners maintained that certain land use designations in the MCNP and the FLUM amendment at issue here were not "in compliance" with Florida's Growth Management Act. Specifically, the Petitioners based their argument on an alleged absence of intensity standards in the H/D Residential future land use category. After a hearing was held on September 14, 2007, the Petitioners' motions for summary disposition were denied. Later that month, after another hearing, the final hearing was rescheduled for January 22-25, 2008.

TRG-MH filed an Amended Motion to Strike on September 20, 2007. In its amended motion, TRG-MH sought to eliminate certain allegations in The Vizcayans' Petition regarding a purported inconsistency with certain provisions of the Miami-Dade County Comprehensive Plan, arguing that the question of consistency with the County's Plan was beyond the scope of compliance review as

defined in Section 163.3184(1)(b), Florida Statutes. The Vizcayans filed a Response in Opposition on September 27, 2007. The City joined in the Amended Motion to Strike.

A telephonic hearing on the Amended Motion to Strike was held on October 26, 2007. During the hearing, TRG-MH withdrew certain arguments (regarding the County's Shoreline Development Review Ordinance). On November 1, 2007, the rest of the Amended Motion to Strike was granted, and paragraphs 71 through 90 of The Vizcayans' Petition (concerning compliance with the County's Comprehensive Development Master Plan) were stricken.

The Petitioners filed several motions to compel production regarding, among other things, the contract for purchase and sale and any "covenant-in-lieu of unity of title" that may have been prepared or executed between Mercy and TRG-MH. Mercy and TRG-MH responded with motions for protective orders, arguing that portions of the contract were confidential and that no "covenant-in-lieu of unity of title" had been prepared or executed. After hearing the argument of counsel on January 2 and January 15, 2008, orders were entered on January 4 and January 18, 2008, regarding these discovery disputes. After Mercy submitted a copy of the contract and a draft of an unexecuted Declaration of Restrictions, Covenants, and Easements, which had been listed on Mercy's privilege log, to the court for in camera review, TRG-MH and Mercy were ordered to produce all drafts of the Declaration

of Restrictions, Covenants, and Easements and any drafts of other existing documents related to the transfer of interests in land in connection with TRG-MH's Project.

The Petitioners filed a Unilateral Pre-Hearing Stipulation on January 10, 2008, and on January 11, 2008, the Respondent and the Intervenors filed a joint Unilateral Pre-Hearing Statement.

The final hearing took place in the Miami-Dade County Courthouse from January 22 through January 25, 2008. At the outset of the final hearing, The Vizcayans filed a Motion for Summary Recommended Order, which was argued and denied.

In the presentation of their cases, the Petitioners presented the non-expert testimony of: Jason Bloch; Constance Steen; Timothy Moore, an officer and director of Grove Isle Association, Inc.; and John Hinson, the corporate representative for the Vizcayans, Inc.; Dr. Joel Hoffman, the Executive Director of Vizcaya Museum and Gardens; Dan Fortin, Jr., a land surveyor and mapper; Orlando Toledo, Senior Director of Building, Planning, and Zoning for the City; and Chloe Keidaish, the corporate representative of Arquitectonica International Corporation, an architecture firm. They also presented the expert witness testimony of: Arva Moore Parks, a local historian and consultant; Richard Heisenbottle, an architect; Rocco Ceo, an architect and professor of architecture; Subrata Basu, Interim

Director of Planning and Zoning for Miami-Dade County; Arturo Sosa, a land surveyor; and Henry Iler, an urban planner.

The Vizcayans had the following Exhibits admitted in evidence for all purposes: 1, 7, 11, 12, 15, 21, 32, 33, 35, 56, 61, 63, 66, 91, 92, 94, 95, 98, 100, 101, 103, 104, 106, 110, 111, 115, 119, 122, 134, 137A, 138, and 139. The Vizcayans' Exhibits 47, 53, 118, 127, 130, and 131 were admitted over objection, but not for the truth of matters asserted. Exhibit 37 was admitted for the limited purpose of providing historical context. Exhibit 93 was admitted exclusive of handwritten notes. Ruling was reserved on objections to Vizcayans' Exhibits 23, 55, 74, 117, 128, 129, 132, and 133. It is now ruled that the objections are overruled, and these exhibits are admitted in evidence.

The following Grove Isle and Glencoe exhibits, introduced by the other Petitioners, were admitted into evidence: 11NN, 15, 21, 23, and 25.

In lieu of presenting live testimony, the Petitioners jointly designed portions of the deposition transcripts of: William Thompson, Vice-President of the Related Group; City of Miami employees, Ana Gelabert and Lourdes Slazyk; John Matuska, President and CEO of Mercy Hospital, Inc.; and Jason Uyeda, the corporate representative of EDAW, Inc. The City and Intervenors filed objections and cross-designations conclusion of the final

hearing on February 4, 2008. The Petitioners filed responses to the objections and their own objections to the cross-designations on February 14, 2008. All of the deposition designations and cross-designations are admitted in evidence over the objections.

At the final hearing, the City presented the testimony of Lourdes Slazyk, the City Zoning Administrator and the former Assistant Director of the City's Planning Department. TRG-MH presented the testimony of: J. Thomas Beck, a state land use planning expert; and Jack Luft, the City's former Director of Planning and local land use planning expert. TRG-MH's Exhibits 1 through 10 were admitted in evidence. TRG-MH's Exhibit 11 was proffered.

In addition to the exhibits introduced at the final hearing, the parties agreed to make the Legistar application files for the FLUM amendment, a related zoning change, and a major use special permit (MUSP)--all of which are available on the City's website (http://egov.ci.miami.fl.us/legistarweb/frameset.html)--part of the record of this proceeding.

The multi-volume hearing Transcript (Volumes 1A, 1B, 2A, 2B, 3A, 3B, and 4A) was filed on March 3, 2008, and the exhibits were filed on March 5, 2008. Proposed recommended orders (PROs) were initially due April 2, 2008. An unopposed two-week extension was granted, making the PROs due on April 18, 2008. The Petitioners

timely filed separate PROs, and the Respondent and Intervenors timely filed a Joint PRO.

On May 12, 2008, The Vizcayans filed a copy of a circuit court order quashing the City's zoning change and MUSP approvals for the property subject to the FLUM amendment at issue. TRG-MH and the City moved to strike, and The Vizcayans responded in opposition on May 20, 2008. On June 26, 2008, The Vizcayans filed copies of circuit court orders denying rehearing. Based on the filings, although the relevance of the circuit court's orders is marginal, the motion to strike is denied.

FINDINGS OF FACT

Based on all of the evidence, the following facts are determined:

The Property Subject to the FLUM Amendment

1. TRG-MH Venture, LTD. (TRG-MH), is a Florida limited partnership formed for the purpose of purchasing and developing a parcel of property in the southeast corner of a larger, 40-acre parcel owned by Mercy Hospital, Inc. (Mercy). TRG-MH and Mercy have executed a purchase and sale agreement for this corner parcel, which is located at approximately 3663 South Bayshore Drive in the Coconut Grove area of Miami, Florida (the Site). TRG-MH hired an architectural firm, Arquitectonica, to design on the Site a proposed residential development named 300 Grove Bay Residences (the Project). The Site, which currently

serves as a paved parking lot for Mercy Hospital employees, measures 6.72 acres.

2. The Site is abutted on the north, northwest, and northeast by the rest of the 40-acre parcel owned by Mercy and used for its hospital, professional offices, and patient and visitor parking. The tallest of these buildings is 146 feet. To the north of Mercy's property and medical complex is another 30-plus acre parcel owned by the Catholic Diocese of Miami and used for La Salle High School and a religious facility, Ermita de la Caridad.

3. Abutting the northern boundary of the La Salle High School property is Vizcaya Museum and Gardens.

4. To the west of the Site are a small convent, an administration building, and a modest-sized assisted living facility. To the west of these buildings is South Bayshore Drive, which is a four-lane road. Single-family residential neighborhoods are west of South Bayshore Drive.

5. The Site is abutted on the southwest, south, southeast and east by Biscayne Bay. Grove Isle, a three-building, 18-story condominium/hotel/marina complex, is located on a small, man-made island (Fair Isle) in the Bay to the south of the Site. It is located approximately 1,300 feet from the Site and is separated from the Site by Bay water. Grove Isle has a future land use designation of Medium Density Multifamily Residential

(M/D Residential) and is zoned Medium-Density Residential (R-3). However, Grove Isle is a legal nonconformity because it exceeds the densities allowed in M/D Residential and R-3.

6. To the southwest of the Site, but separated from the Site by Bay water, are single-family and medium-density dwellings, including several multifamily structures. Petitioners Bloch and Steen reside in this neighborhood. No property zoned single-family residential (R-1) abuts the Site.

7. Currently a paved parking lot, the Site has no archeological, environmental, or historical significance.

8. Miami-Dade County had designated all of the City as an "Urban Infill Area." This designation is made in the County's Comprehensive Plan and is implemented in Policy LU-1.1.11 of the Future Lane Use Element (FLUE) of the City's Comprehensive Neighborhood Plan.

The Parties

9. The Vizcayans, Inc. (The Vizcayans), is a not-for-profit Florida corporation of volunteer members and a paid staff consisting of: an executive director, a membership director, and a controller. The purpose of the organization is to support the Vizcaya Museum and Gardens (Vizcaya), a publicly-owned and operated museum, through contributions and fundraising events. The Vizcayans' office at 3251 South Miami Avenue is located on the grounds of Vizcaya. The Vizcayans submitted comments in

opposition to the proposed FLUM Amendment and appeared in person and through lawyers at the City Commission hearings. The Respondent and Intervenors stipulated that The Vizcayans have standing as affected persons under Sections 163.3187(3)(a) and 163.3184(1)(b), Florida Statutes, to challenge the small-scale development amendment in this proceeding based on allegations that The Vizcayans operate a business in the City.

10. Miami-Dade County owns Vizcaya. By contract, The Vizcayans provides funds annually to Miami-Dade County for use in maintaining Vizcaya's properties and conducting educational programs. Any funds in excess of those owed to the County under the contract are used to pay staff and host fundraisers or are invested for future use. Vizcaya is governed by the County through the Vizcaya Museum and Gardens Trust, which is an agency of Miami-Dade County.

11. Jason Bloch and Constance Steen reside in the City and own properties to the southwest of the Site. Glencoe is a not-for-profit corporation of homeowners in the Glencoe neighborhood to the southwest of the Site. Mr. Bloch formed the corporation during the pendency of the application proceedings for the primary purpose of opposing the proposed development of the Site. Bloch, Steen, and Glencoe submitted comments in opposition to the proposed FLUM amendment.

12. Grove Isle is a not-for-profit Florida corporation of condominium owners. Grove Isle submitted comments in opposition to the proposed FLUM amendment. The City and Intervenors stipulated to Grove Isle's standing in these proceedings.

13. The City is a political subdivision of the State of Florida. The City adopted its Comprehensive Neighborhood Plan, including its FLUM, in 1989. The Comprehensive Plan and the FLUM have been amended from time to time as allowed by law.

14. TRG-MH is a joint venture limited partnership. Its direct and indirect participants include Ocean Land Equities, Ltd., and The Related Group. TRG-MH contracted to purchase the Site from Mercy and applied to the City for the FLUM Amendment at issue in this proceeding. TRG-MH also submitted applications for a change of zoning and MUSP on the Site. The zoning and MUSP applications, and the resulting City ordinance and resolution arising from their approval, are not at issue in this proceeding.

15. Mercy is a not-for-profit Florida corporation that owns and operates Mercy Hospital. Mercy has contracted to sell the Site to TRG-MH.

The FLUM Amendment

16. In June 2007, TRG-MH applied to the City for a small-scale development amendment to change the Site's land use designation on the City's Future Land Use Map (FLUM) from Major

Institutional, Public Facilities, Transportation and Utilities (M/I) to High Density Multifamily Residential (H/D). TRG-MH submitted its application concurrently with its applications for a zoning change from G/I to R-4 and for a MUSP.

17. According to the FLUM Amendment application, TRG-MH was seeking a map amendment for a 6.723-acre parcel of real property.

18. With its FLUM Amendment application, TRG-MH submitted a survey prepared and certified by surveyors Fortin, Leavy & Skiles. The survey depicted: the Site, as a parcel with a "net lot area" of 6.723 acres; a Proposed Road, measuring 1.39 acres, that wrapped around the Site on its west and north sides (the Perimeter Road); and a Private Road, also known as Tract "C" or Halissee Street, measuring .95 acres, which accesses the Site and Perimeter Road from South Bayshore Drive.

19. Accompanying the survey was a legal description for the Site, which included a description for the proposed new Perimeter Road abutting the Site. The legal description covered an area comprising 8.11 acres.

20. Also accompanying the application was a traffic analysis showing the impact to existing road networks of traffic resulting from the proposed MUSP application, which sought to build 300 residential units on property currently having no existing residential units.

21. TRG-MH's applications were reviewed by the City's Planning Department and its Planning Advisory Board (PAB). The City's Planning Department recommended approval of the land use designation change. The PAB's 3-3 tie vote operated as to deny the request for a change of the land use designation recommendation.

22. On April 26, 2007, the City Commission voted to approve the FLUM amendment application and, with modifications, the accompanying zoning and MUSP applications. (The City Commission approved the zoning change and MUSP subject to the condition that the size and scale of the Project be reduced by 25 percent across the board. Thus, for example, the height of the tallest of the three condominium buildings was reduced from approximately 411 feet to 310 feet.) The FLUM change was adopted by Ordinance 12911, which the Mayor signed on May 7, 2007.

23. Ordinance 12911 amended the FLUM by changing the land use designation "for the property located at approximately 3663 South Miami Avenue, Miami, Florida, more particularly described in Exhibit A attached and incorporated." Exhibit A to the ordinance was the legal description included on the Fortin, Leavy, Skiles survey.

24. The section of the MCNP entitled "Interpretation of the Future Land Use Plan Map" describes the various future land

use categories in the Plan. It describes the Major Institutional future land use category as follows:

> **Major Institutional Public Facilities, Transportation and Utilities:** Areas designated as "Major Institutional, Public Facilities, Transportation and Utilities" allow facilities for federal, state and local government activities, major public or private health, recreational, cultural, religious or educational activities, and major transportation facilities and public utilities. Residential facilities ancillary to these uses are allowed to a maximum density equivalent to "High Density Multifamily Residential" subject to the same limiting conditions.

Miami Comprehensive Neighborhood Plan (MCNP) at 21 (June 2006).

25. The same section describes the H/D Residential, in pertinent part, as follows:

> Areas designated as "High Density Multifamily Residential" allow residential structures to a maximum density of 150 dwelling units per acre, subject to the detailed provisions of the applicable land development regulations and the maintenance of required levels of service for facilities and services included in the City's adopted concurrency management requirements.

MCNP at 20 (June 2006). (By way of comparison, M/D Residential is described similarly except that the maximum density is 65 dwelling units per acre.)

26. According to the MCNP, the FLUM land use designations "are arranged following the 'pyramid concept' of cumulative

inclusion, whereby subsequent categories are inclusive of those listed previously, except as otherwise noted."

27. Ordinance 12911 was not reviewed by the Department of Community Affairs (DCA), as required for text changes and large-scale FLUM changes to a comprehensive plan.

28. On June 4 and 6, 2007, Petitioners filed their petitions challenging the FLUM Amendment. Generally, the Petitioners alleged that the FLUM Amendment did not qualify for treatment as a "small-scale" development amendment; was internally inconsistent with other provisions of the City's Comprehensive Neighborhood Plan; was not supported by adequate data and analysis; and was not "in compliance" with Florida's Growth Management Act and its implementing regulations.

Scale of the FLUM Amendment

29. A small-scale development amendment may be adopted if the "proposed amendment involves a use of 10 acres or fewer." § 163.3187(1)(c)(1), Fla. Stat.

30. According to the survey and architectural plans on file with the City, the "net lot area" of the Site measures 6.72 acres. The City Zoning Code defines "net lot area" as "[t]he total area within the lot lines excluding any street rights-of-way or other required dedications." § 2502, City Zoning Code.

31. In determining how large (in square feet of floor area) the planned Project could be, the architects were

permitted, under the City's zoning regulations, to multiply the "floor area ratio" (FAR) for the High Density Multifamily Residential zoning classification by an area larger than the "net lot area." See § 401, City Zoning Code. The Zoning Code allows the maximum square footage to be calculated using the Site's "gross lot area." Id.

32. The City Zoning Code defines "gross lot area," in pertinent part, as "[t]he net area of the lot, as defined herein, plus half of adjoining street rights-of-way and seventy (70) feet of any other public open space such as parks, lakes, rivers, bays, public transit right-of-way and the like." § 2502, City Zoning Code.

33. If the "gross lot area" to be used to calculate the maximum square footage involves properties under different ownership, either the owners must apply jointly for a MUSP, or they must enter a covenant-in-lieu of unity of title. Properties joined by a covenant-in-lieu of unity of title need not have the same land use designation or zoning classification. If a covenant-in-lieu of unity of title is required, it need not be submitted to the City until building permits are sought. At present, no covenant-in-lieu of unity of title has been prepared or executed for the Site.

34. The "gross lot area" used to calculate the Project's maximum square footage of floor area measured 11.44 acres.

Thus, the Petitioners argued that the FLUM Amendment "involved a use" of more than 10 acres. But the application requested a land use designation change on only 6.72 acres of land. Because High-Density Multifamily Residential use will not be made of the proposed Perimeter Road, the access road known as Halissee Street, or the proposed Bay Walk, a land use designation change was not required for that acreage. Indeed, according to the amended FLUM, there is no land use designation applied to Halissee or to the northern part of the Perimeter Road. Moreover, use of Halissee Street, the Perimeter Road, and the Bay Walk is not exclusive to the 6.72 acres but will remain shared with Mercy Hospital, its patients and employees, as well as with the public.

35. The Petitioners attempted to prove that a marina was planned to serve the development, which would involve a total use of more than ten acres for residential purposes. Even if a marina was initially contemplated, the application on file with the City does not include one, and there are no approved plans for a marina to be incorporated into the proposed residential development. No marina is required to be developed in connection with the 300 Grove Bay project. Moreover, there was unrebutted evidence that it is highly unlikely that a marina would ever be permitted under the statutes now regulating Biscayne Bay. There is no evidentiary support for including any

part of Biscayne Bay in the acreage subject to the small-scale FLUM Amendment because of a possible marina so as to support the Petitioners' claim that Ordinance 12911 should not have been processed as a small-scale amendment.

Suitability and Compatibility of FLUM Amendment

36. The Site is a parking lot. It is not environmentally sensitive and has no significant natural or archeological resources that would make it unsuitable for High Density Multifamily Residential future land use.

37. Major Institutional accommodates the Vizcaya Museum and Gardens and the Mercy Hospital complex, which are compatible with and actually part of Coconut Grove. However, as pointed out by the City and the Intervenors, Major Institutional also allows future land uses that could be less compatible with the surrounding land uses, including the Vizcaya Museum and Gardens and the residential neighborhoods of Coconut Grove. While a lower density residential future land use would be appropriate and compatible with the surrounding uses, the issue in this case is the density allowed by H/D Residential--up to 150 residential units per acre, which Petitioners contend is incompatible with the surrounding land uses and inconsistent with previous efforts to protect Vizcaya and Coconut Grove from the intrusion of high-density residential development. The Petitioners also contend that the FLUM Amendment is not suitable on the bayfront.

(a) Suitability on the Bayfront

38. The Petitioners contend that H/D Residential is not suitable on the bayfront for reasons related mostly to aesthetics and views. While it certainly would be possible and reasonable for a community to decide not to allow dense and intense development on significant water bodies, it was not proven by a preponderance of the evidence that the City has done so, or that H/D Residential is unsuitable on the Site for that reason.

(b) 2005 Evaluation and Appraisal Report

39. The City's 2005 Evaluation and Appraisal Report ("2005 EAR") focused on two citywide issues relevant here: (1) the preservation and enhancement of historic and similar resources; and (2) neighborhood integrity and the need to protect existing neighborhoods from incompatible development.

(c) Vizcaya Museum Gardens

40. Industrialist James Deering built Vizcaya in 1916 as a winter home. The land Deering purchased in the early 1900s was developed into a 180-acre estate that included his Mediterranean-style home, Italianate gardens, farms, orchards, and lagoons. The mansion and gardens were designed by three well-known architects and designers and constructed using local materials.

41. When Deering died nine years later in 1925, Vizcaya was left to his heirs, who eventually sold the south gardens and western agricultural fields to the Catholic Diocese. The southern acreage (which included the Site) was later developed into a church (Ermita de la Caridad), a school (La Salle), and medical and hospital facilities (Mercy). The Diocese sold the western acreage, which was eventually developed into single-family-home subdivisions.

42. In the 1950s, the Deering heirs sold the remaining property, consisting of the mansion, gardens, and farm buildings, to Dade County.

43. In 1952, Dade County opened Vizcaya to the public. Since then, the County has operated Vizcaya as a museum, which has welcomed thousands of visitors annually and is a popular site for tourists, social functions, and photo shoots.

44. The Vizcaya mansion and gardens have historical, architectural, and botanical significance. The mansion is an "architectural masterpiece" and an "outstanding example of Italian Renaissance Revival architecture." Vizcaya has been on the National Register of Historical Places since 1977; it was designated as a City Heritage Conservation District in 1984; and, in 1994, it was designated a National Historical Landmark--one of only three in Miami-Dade County.

45. The southernmost part of Vizcaya's gardens is approximately 1,600 feet from the FLUM Amendment Site, and the mansion is approximately 2,300 feet from the Site.

46. For the specific purpose of objecting to the 300 Grove Bay project, The Vizcayans commissioned the Vizcaya Viewshed Impact Assessment, which is referred to as the "balloon" study, and the Vizcaya View Corridor Study. According to the balloon study, the 300 Grove Bay condominiums would be visible from the balcony on the south side of the mansion. Although the balloon study was based on the original Project building heights and not re-done using the reduced heights in the zoning and MUSP approvals, the Petitioners' witnesses said that the Project would still be visible through the existing landscape, even at the reduced height. The Petitioners' witnesses opined that the development of 300 Grove Bay would "overpower and overshadow" the gardens on the south side of the mansion.

47. No federal, state, or local statutes, rules or ordinances, including those relevant to this proceeding, protect the view corridors of Vizcaya's gardens.

(d) Coconut Grove

48. The area known as Coconut Grove was settled in the late 1800s and was considered "off the beaten path" from the City which was incorporated in 1896. Coconut Grove was incorporated as a separate municipality in 1919, but in 1925 it

was annexed to the City, as were five other municipalities. Petitioners' witnesses observed that Coconut Grove is the only one of these towns that has continued to retain a unique and recognizable character. Vizcaya and Mercy Hospital, including the parking lot site, are located in the northern area of Coconut Grove.

49. Coconut Grove is primarily, but not entirely, a residential community. Coconut Grove has an active "downtown" business, commercial, and hotel district. The Petitioners maintained that the northern area of Coconut Grove is primarily single-family residential. However, it also includes a non-conforming high-density development (Grove Isle), medium-density residential, Mercy Hospital and its professional buildings, an assisted living facility, a school, a church, and governmental office buildings, as well as two museums (Vizcaya and the Museum of Science).

50. A Coconut Grove Planning Study was commissioned and printed in 1974, but the City never adopted it; therefore, it has no official status.

(e) The Coconut Grove Neighborhood Conservation District

51. In 2005, the City adopted by ordinance the Coconut Grove Neighborhood Conservation District (NCD-3). See § 803.3, City Zoning Code. According to the Code, a Neighborhood Conservation District is an "umbrella land use designation

overlay," which allows for the tailoring of a master plan or of design guidelines for any area that meets certain criteria. See § 800, City Zoning Code.

52. The intent of the Coconut Grove Neighborhood Conservation District is to "[p]reserve the historic, heavily landscaped character of Coconut Grove's residential areas and enhance and protect Coconut Grove's natural features such as tree canopy and green space." § 803.1, City Zoning Code.

53. NCD-3 does not specify the High-Density, Multifamily Residential (R-4) zoning classification. But that does not mean that NCD-3 does not allow R-4. NCD-3 is enabling legislation that imposes greater restrictions within a geographic "overlay" for the zoning classifications addressed in Section 803.3. So far, NCD-3 has not addressed G/I and R-4 but only Single-Family Residential (R-1) and Commercial Districts. See § 803.3, City Zoning Code. For that reason, the ordinance does not apply to the Site.

(f) The "Grovenor Ordinance"

54. The so-called Grovenor Ordinance was the City's response in July 2004 to the construction of a high-density residential project on property in Coconut Grove zoned "G/I Government and Institutional." The Grovenor Ordinance amended subsection of Section 401 of the City's Zoning Code to provide in pertinent part:

> G/I Government and Institutional
>
> Intent and Scale:
>
> The government/institutional category allows the development of facilities for federal, state and local government activities, major public or private health, recreational, cultural, religious, or educational activities, major transportation facilities, public utilities, and public and private cemeteries. Uses ancillary to these uses are allowed to a maximum density and intensity equivalent to the least intense abutting zoning district, subject to the same limiting conditions.
>
> Intensity:
>
> For residential uses: As for the least intense abutting zoning district. . . .
>
> * * *
>
> Permitted Principal Uses:
>
> Governmental and institutional uses as described in the City of Miami Comprehensive Development Plan designation of "Major Institutional, Public Facilities, Transportation and Utilities", . . . however for accessory non-governmental or institutional uses-only such uses as may be permitted as principal uses in the least intense abutting zoning district . . . .

§ 401, City Zoning Code.

55. The Grovenor Ordinance applies to property that is zoned G/I. The City's and Intervenors' witnesses testified that it applies only if G/I-zoned property ceases to be used for governmental or institutional purposes and is used instead for residential purposes. However, from the language of the

ordinance itself, it is beyond fair debate that it also applies to G/I-zoned property that is used both for government or institutional uses and for ancillary residential uses. Clearly, without a FLUM change to a higher-density residential zoning category, in Coconut Grove the residential use on the Site would be restricted to the zoning classification of the "least intense abutting zoning district."

56. Since it pertains to zoning, the Grovenor Ordinance does not directly apply to the issue of whether a FLUM amendment is "in compliance." However, it has some bearing on the proper interpretation and application of the "pyramid concept" of the MCNP's future land use designations, which is important to the issues for determination in this case.

(g) The Pyramid Concept

57. The City and the Intervenors rely heavily on their interpretation of the MCNP's pyramid concept of cumulative future land use designations to support the FLUM Amendment in this case. According to them, the FLUM Amendment is compatible with surrounding land uses because high-density multi-family residential use already is a permitted use as a matter of right for land designated "Major Institutional." Similarly, they maintain that, under the "pyramid" concept, high-density multi-family residential use is permitted as a matter of right in all of the commercially designated land in Coconut Grove. But it is

beyond fair debate that their interpretation of the "pyramid concept" is incorrect.

58. As indicated, the "'pyramid concept' of cumulative inclusion" applies "except as otherwise noted." In the Major Institutional future land use category, it is noted that residential facilities with densities equivalent to "High Density Multifamily Residential" (i.e., up to 150 units per acre) are permitted only if "ancillary" to the listed major institutional uses. Similarly, in the General Commercial future land use category, it is noted that high-density residential uses "are allowed by Special Exception only, upon finding that the proposed site's proximity to other residentially zoned property makes it a logical extension or continuation of existing residential development and that adequate services and amenities exist in the adjacent area to accommodate the needs of potential residents." If the "pyramid concept" authorized high-density multi-family residential use as a matter of right on land designated either Major Institutional or General Commercial, there would be no reason to limit those uses by notation.

59. Under the correct interpretation of the "pyramid concept" in the MCNP, free-standing high-density multi-family residential use of up to 150 units per acre is not already

permitted as of right in either the Major Institutional or the General Commercial land use categories.

(h) Compatibility

60. Notwithstanding the correct interpretation of the "pyramid concept" in the MCNP, the Petitioners failed to prove by a preponderance of the evidence that High Density Multi Family Residential future land use on the Site is incompatible with the surrounding uses or is inappropriate. The lower density residential and other less intense future land uses in the MCNP are buffered from the Site by Biscayne Bay and by Medium Density Multifamily Residential future land use. Vizcaya is buffered from the Site by Mercy Hospital and related medical facilities and by La Salle High School. The compatibility of a specific density of residential development on the Site with less dense residential use in Coconut Grove and with Vizcaya, including issues regarding building height and intrusion into Vizcaya's view corridors, can be addressed through zoning and MUSP proceedings.

Data and Analysis

61. Data and analysis is another matter. Because of their incorrect interpretation of the "pyramid concept" in the MCNP, the City and the Intervenors took the position that the FLUM Amendment constitutes "down-planning" and that the City was not required to perform the same level of analysis as it would have

if the amendment sought a designation that permitted uses of greater impact, density, and/or intensity.

62. The experts disagreed on whether "down-planning" is a concept in land use planning that can eliminate or minimize the requirement for data and analysis. In any event, the FLUM Amendment in this case could not be characterized as "down-planning." See Findings 57-59, supra. The MCNP's pyramid concept does not dispense with the need for data and analysis, and the data and analysis in this case was minimal and inadequate.

63. The primary data and analysis in this case was the "Analysis for Land Use Change Request" (Analysis) that resulted from the City staff's review. After identifying the proposed land use designation and the uses permitted on it the Analysis recommended "Approval" of the FLUM Amendment and made four findings in support of "the position that the existing land use pattern in this neighborhood should be changed. These findings are as follows:

> It is found that the subject property is part of the Mercy Hospital and do [sic] not front South Miami Avenue.
>
> It is found that the "Major Institutional, Public Facilities, Transportation & Utilities" category allows **150 residential units per acre** and the requested "High Density Multifamily Residential" designation will allow a maximum density of **150 residential units per acre**.

> It is found that the requested change to "High-Density Multifamily Residential" designation will allow greater flexibility in developing the property at the above described location and therefore should be changed as part of the MUSP.
>
> It is found that MCNP Goal LU-1 maintains a land use pattern that (1) protects and enhances the quality of life in the city's residential neighborhoods, and (5) promotes the efficient use of land and minimizes land use conflicts.

Id. (Emphasis in original.)

64. As to the City's third finding, a particular developer's flexibility is irrelevant to the determination of whether the land use change is consistent with the MCNP. To the extent that flexibility in general could be relevant to the inquiry, the finding was incorrect. While allowing a free-standing high-density residential project that would not otherwise be possible, the FLUM Amendment eliminates all of the non-residential uses permitted within the "Major Institutional" category.

65. The second finding was based on the City's incorrect interpretation of the "pyramid concept" of the MCNP, which led the City to wrongly equate a primary use with an ancillary use and to simply assume no population increase would result from the FLUM Amendment, and that the FLUM Amendment would result in "down-planning."

66. Attached to the City's Analysis was a separate "Concurrency Management Analysis," which addressed in summary form the data and analysis generated by the applicant and by the City's staff to address the "impact of [the] proposed amendment to land use map within a transportation corridor." The "Concurrency Management Analysis" also was predicated on the assumption that the FLUM change to HD Residential would not increase population. Essentially, it assumed without any data or analysis that infrastructure was available for 1,008 people living on the Site, even though the Site is being used as a parking lot at this time. This data and analysis was inadequate to support the FLUM Amendment.

67. As to transportation, there was additional evidence of a traffic analysis performed by the City in support of the Project's MUSP. This MUSP traffic analysis utilized a proper starting point of zero population on the Site at this time. It then projected the impact of the addition of 300 units. This was more than the 225 units ultimately approved in the MUSP but did not analyze the much larger potential increases in traffic that would be allowed under the FLUM Amendment, which is not limited to 300 units. There also was no data or analysis to show that limiting the analysis to 300 units was reasonable. It also only looked two years into the future. The MUSP traffic analysis also did not address the 2005 EAR finding that Bayshore

Drive will be at level of service F by year 2025, without even any development on the Site. In short, the MUSP traffic analysis was inadequate to support the FLUM Amendment.

68. The City and Intervenor took the position that the designation of the entire City as an urban infill area meant that every parcel is appropriate for high-density multi-family residential development. This is not correct. It is still necessary to look at comprehensive plan to determine which areas are appropriate for that kind of future land use and to have data and analysis to support it. See Payne et al. v. City of Miami et al., 32 Fla. L. Weekly D1885, *10-13 (Fla. 3d DCA Aug. 8, 2007) (on motion for rehearing).

69. For these reasons, the Petitioners proved by a preponderance of the evidence that the data and analysis supporting the FLUM Amendment were inadequate.

Inconsistency with City's Comprehensive Plan

70. The Petitioners failed to prove beyond fair debate that the FLUM Amendment is inconsistent with any MCNP goals, objectives, or policies.

State Comprehensive Plan

71. Petitioners did not prove that the FLUM Amendment at issue is inconsistent with the State Comprehensive Plan.

CONCLUSIONS OF LAW

Small-Scale Amendment

72. A small-scale development amendment may be adopted if the "proposed amendment involves a use of 10 acres or fewer." § 163.3187(1)(c)(1), Fla. Stat.

73. The word "use" in that statute refers to the property that is the subject of the FLUM Amendment and is to be developed--here, the Site to be developed for residential use. It does not refer to adjoining property that will not be developed for residential use and on which the land use designation will not be changed. Therefore, "gross lot area" under the City Code is not relevant to the determination whether a "proposed amendment involves a use of 10 acres or fewer." Id.

74. The FLUM Amendment at issue involves the use of the Site and, at most, the Perimeter Road, and Halissee Street, which totals less than ten acres. For that reason, it qualified for processing as a small-scale amendment under Section 163.3187(1)(c)1., Florida Statutes.

75. Petitioners contend that the decision in St. George Plantation Owners' Ass'n, Inc. v. Franklin County, et al., Case No. 96-5124GM, 1997 Fla. ENV LEXIS 37 (Admin. Comm'n Mar. 25, 1997), requires a different result. In St. George, the site was a 9.6-acre piece of a 58-acre parcel, know as the Resort Village Property, which was owned by the intervenors. The 58-acre

parcel was the subject of a Development of Regional Impact (DRI), which the intervenor planned to develop in phases. Phase I involved developing the 9.6 acres into four hotels, commercial and retail space, a beach club, a conference center, recreational facilities, and a wastewater treatment plant. Development of the planned wastewater treatment facility required an additional five acres for subsurface absorption beds. The County and intervenors acknowledged that the absorption beds were integral to the design and successful operation of the wastewater treatment plant, which was required to serve the Phase I development. In determining that the proposed amendment was not "small-scale," the ALJ concluded that "the beds and plant are a single, interrelated system," and that the County could not "change the land use designation for a portion of the facility while ignoring the remainder." Id. at *17.

76. The FLUM Amendment at issue here is not analogous to the amendment in St. George. Here, there is no phased project; TRG-MH has not purchased more than the 6.72-acre parcel; and there is no planned facility, a portion of which requires the development of adjoining property.

The Compliance Criteria

77. Section 163.3184(1)(b), Florida Statutes, states:

> "In compliance" means consistent with the requirements of ss. 163.3177, 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.

Section 163.3177(2), Florida Statutes, and Florida Administrative Code Rule 9J-5.005(5)(a) require that a comprehensive plan be internally 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).

Burden and Standard of Proof

78. Since this is a small-scale amendment, Section 163.3187(3)(a), Florida Statutes, applies and provides:

> In the proceeding, the local government's determination that the small scale development 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 amendment is not in compliance with the requirements of this Act.

However, in a "noncompliance" proceeding under Section 163.3184(10), Florida Statutes (where DCA has preliminarily reviewed a comprehensive plan or plan amendment and found it not "in compliance"), the statute provides, in pertinent part: "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." Section 163.3187(3)(a) omits the sentence regarding internal consistency contained in Section 163.3184(10). But it would be illogical not to extend the same deference to the local government in a small-scale amendment proceeding. For that reason, the fairly debatable standard is applied to the Petitioners' allegations of internal inconsistency.

79. "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." Martin v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997). If the internal consistency of an amendment with other provisions within a comprehensive plan is open to dispute on logical grounds, the local government's determination that the amendment does not create an internal inconsistency within the comprehensive plan must prevail. See Hussey, et al. v. Collier County, et al., DOAH Case Nos. 02-3795GM and 02-3796GM, Recommended Order, 2003 Fla. Div. Adm. Hear. LEXIS 304, at *56 (DCA Jul. 22, 2003; DOAH

Apr. 29, 2003), quoting Yusem at 1295. See also Martin County v. Section 28 Partnership Ltd., 772 So. 2d 616, 621 (Fla. 4th DCA 2000) (if there is "evidence in support of both sides of a comprehensive plan amendment, it is difficult to determine that the County's decision was anything but 'fairly debatable'"). A plan amendment creates an internal inconsistency only when it conflicts with other provisions in the comprehensive plan.

Suitability and Compatibility

80. The Petitioners did not prove by a preponderance of the evidence that High Density Multifamily Residential future land use on the Site is incompatible with surrounding land uses. (A fortiori, they did not prove beyond fair debate that the FLUM Amendment was internally consistent with MCNP provisions requiring compatibility of land uses.) Cf. Conclusion 84, infra.

Data and Analysis

81. Section 163.3177(8), Florida Statutes, states: "All elements of the comprehensive plan . . . shall be based upon data appropriate to the element." The implementing rule states:

> All goals, objectives, policies, standards, findings and conclusions within the comprehensive plan and its support documents, and within plan amendments and their support documents, shall be based upon relevant and appropriate data and the analysis 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.

82. As pointed out by the City and the Intervenors, the Site was studied and analyzed at the time of the adoption of the MCNP and through certain amendment cycles. Data and analysis supporting earlier comprehensive plans may support a subsequent amendment. See Wilson v. City of Cocoa, DOAH Case No. 90-4821GM, (DOAH, Aug. 8, 1991; DCA, Sept. 11, 1991), cited in Geraci v. Hillsborough County, DOAH Case No. 95-0259GM, 1999 Fla. ENV LEXIS 11 (DOAH Oct. 14, 1998; DCA, Jan. 12, 1999). Nothing about the Site has changed, and it does not possess any environmental or archeological significance that would require a different analysis. However, the FLUM change to High Density Multifamily Residential was significant and necessitated more data and analysis.

83. Petitioners proved by a preponderance of the evidence that the FLUM Amendment was not based on adequate data and analysis primarily because of the City's incorrect interpretation of the "pyramid concept" of the MCNP, which led the City to simply assume that no population increase would result from the FLUM Amendment.

Internal Consistency

84. Petitioners failed to prove beyond fair debate that the FLUM Amendment is inconsistent with any MCNP goals, objectives, or policies.

State Comprehensive Plan

85. The State Comprehensive Plan establishes general goals and policy rather than the type of minimum criteria that are set forth in Chapter 9J-5. Many of the provisions of the State Comprehensive Plan apply to the State of Florida and its agencies in planning on the state level, as opposed to local governments. As a consequence, before a comprehensive plan amendment can be found inconsistent with the State, careful consideration has to be given to the entirety of that more general plan, as well as to the entirety of the local comprehensive plan. See § 163.3177(10)(a), Fla. Stat. (State Comprehensive Plan "shall be construed as a whole and no specific goal and policy shall be construed or applied in isolation from the other goals and policies in the plans.")

86. Section 163.3177(10)(a), Florida Statutes, also states: "[F]or the purpose of determining whether local comprehensive plans are consistent with the state comprehensive plan and the appropriate regional policy plan, a local plan shall be consistent with such plans if the local plan is "compatible with" and "furthers" such plans. The term

"compatible with" means that the local plan is not in conflict with the state comprehensive plan or appropriate regional policy plan. The term "furthers" means to take action in the direction of realizing goals or policies of the state or regional plan."

87. In this case, the Petitioners proved that the data and analysis were insufficient to support the FLUM Amendment at issue. However, the Petitioners did not prove that the FLUM Amendment was inconsistent with the MCNP or the State Comprehensive Plan.

Disposition

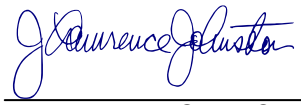
88. Section 163.3187(3)(b)1., Florida Statutes, provides in pertinent part: "If the administrative law judge recommends that the small scale development amendment be found not in compliance, the administrative law judge shall submit the recommended order to the Administration Commission for final agency action."

RECOMMENDATION

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

RECOMMENDED that the Administration Commission enter a final order that the FLUM Amendment adopted by City of Miami Ordinance 12911 is not "in compliance," as defined by Section 163.3184(1)(b), Florida Statutes.

DONE AND ENTERED this 10th day of July, 2008, in Tallahassee, Leon County, Florida.



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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.