STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DUNN CREEK, LLC,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-3539GM
	)	
CITY OF JACKSONVILLE and DEPARTMENT OF COMMUNITY AFFAIRS,	)	
	)	
Respondents,	)	
	)	
and	)	
	)	
VALERIE BRITT,	)	
	)	
Intervenor.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on October 5, 2009. The hearing was conducted by telephone with the parties being present in Jacksonville and Tallahassee, Florida.

APPEARANCES

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For Intervenor:
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STATEMENT OF THE ISSUES

The issues are whether the City of Jacksonville's (City's) Ordinance No. 2008-628-E adopted on September 9, 2008, which remediates Ordinance No. 2007-383-E, is in compliance, and whether Chapter 2009-96, Laws of Florida, renders this proceeding moot, as alleged by Petitioner, Dunn Creek, LLC (Dunn or Petitioner).

PRELIMINARY STATEMENT

On May 14, 2007, the City adopted Ordinance No. 2007-383-E, which changed the land use designation on the Future Land Use Map (FLUM) of the Comprehensive Plan (Plan) for an 89.52-acre parcel located on the south side of Starratt Road from Low Density Residential (LDR) to Residential-Professional-Institutional (RPI). The property is owned by Petitioner. On the same date, the City adopted numerous other changes to the FLUM by separate ordinances. After issuing a Notice of Intent

which determined that most of the map changes were not in compliance, on August 1, 2007, Respondent, Department of Community Affairs (Department), filed its Petition for Formal Administrative Hearing (Petition) with the Division of Administrative Hearings (DOAH) alleging that seventeen amendments to the FLUM, including the amendment adopted by Ordinance No. 2007-383-E, were not in compliance. The Petition was assigned DOAH Case No. 07-3539GM. Of the seventeen map amendments that were challenged, only the Dunn amendment remains at issue. All others have been settled by the parties or resolved by formal hearing. As to Ordinance No. 2007-383-E (and the other amendments), the Department generally alleged that the amendment lacked sufficient transportation impact data and analysis to support the change in land use.

On July 16, 2007, Intervenor, Valerie Britt (Britt), filed with the Department a Petition to Intervene in support of the Department's position. On August 9, 2007, Dunn filed a Petition to Intervene aligned with the City. Intervention was authorized for both parties.

The case was abated for a period of time pending efforts to reach a settlement. Eventually, all parties entered into a settlement agreement to resolve the matter, which generally called for the adoption of a remedial amendment capping the

amount of development on the property through an asterisk to the Plan. The proposed agreement was presented to the City in September 2008 as Ordinance No. 2008-627, while the remedial amendment was presented as Ordinance No. 2008-628. After consideration of the matter, the City voted to revise the proposed settlement agreement and adopt a remedial amendment that changed the land use on the property back to its original LDR designation. Although Dunn objected to these changes, the City adopted Ordinance Nos. 2008-627-E and 2008-628-E approving the revised compliance agreement and a new remedial amendment. On December 18, 2008, the Department issued a Cumulative Notice of Intent finding Ordinance No. 2007-383-E, as remediated by Ordinance No. 2008-628-E, to be in compliance.

On January 8, 2009, Dunn filed a Motion to Amend Petition to Intervene pursuant to Section 163.3184(16)(f), Florida Statutes (2009)[1], for the purpose of challenging the remedial amendment. The parties were then realigned, as required by Section 163.3184(16)(f)1., Florida Statutes.

By Notice of Hearing dated July 10, 2009, a final hearing was scheduled for October 5 and 6, 2009, in Jacksonville, Florida. During a prehearing conference on September 29, 2009, the parties agreed to conduct the final hearing by telephone on

October 5, 2009. A Pre-Hearing Stipulation was filed by the parties on October 1, 2009.

At the final hearing, Dunn presented the testimony of Wayne T. Petrone, a professional engineer and accepted as an expert, and Bradley R. Coe, who is affiliated with Titan Land, LLC, a Dunn partner. Also, it offered Petitioner's Exhibits 1, 2, 6, 8, 9, 12, 13, 15-17, and 24, which were received in evidence. The City presented the testimony of William B. Killingsworth, Director of the City's Planning and Development Department and accepted as an expert. Also, the City offered City Exhibits 1-5, 7, and 8, which were received in evidence. The Department and Britt did not present any witnesses; however, they adopted the evidence presented by the City. Finally, the parties offered Joint Exhibits 1-3 and 5-10, which were received in evidence. Requests for Official Recognition by Dunn and the City were also granted.[2]

The Transcript of the hearing was filed on October 14, 2009. By agreement of the parties, proposed findings of fact and conclusions of law were due no later than November 20, 2009. They were timely filed and have been considered in the preparation of this Recommended Order.

Finally, on September 11, 2009, Dunn filed a Suggestion of Mootness and Motion to Dismiss Petition as to Ordinance 2007-

383-E contending that the Legislature's enactment of Chapter 2009-96, Laws of Florida, removed the Department's authority to review and challenge FLUM amendments in the City for maintenance of Level of Service (LOS) of affected roadways and therefore rendered this proceeding moot. Besides opposing Dunn's request for relief, on September 18, 2009, the Department and City jointly filed a Motion to Relinquish Jurisdiction arguing that there are no disputed issues of material fact and that the matter should be resolved by the Department in an informal proceeding. On September 25, 2008, the City filed a Notice of Supplemental Authorities. A ruling was reserved on those filings. At the final hearing, the undersigned authorized the parties to file extrinsic evidence regarding the legislative intent of Chapter 2009-96, Laws of Florida. On November 3, 2009, Dunn filed its Notice of Supplemental Evidence of Legislative Intent, with attached Appendices A through I. A Response was filed by the City on November 20, 2009.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

A. The Parties

1. Petitioner is the owner of a vacant 89.52-acre parcel of property in Council District 11, which is located in the

northern reaches of the City. More specifically, the property lies around four or five miles east of the airport and Interstate 95, just south of Starratt Road between Dunn Creek Road and Saddlewood Parkway, and within a "couple of miles of Main Street," a major north-south State roadway. Dunn submitted oral and written comments to the City during the plan amendment process. As such, it is an affected person and has standing to participate in this proceeding.

2. The City is a local government that is subject to the requirements of Chapter 163, Florida Statutes. It adopted the amendments being challenged by Dunn. Except for the challenged plan amendment, the City's current Plan is in compliance.

3. Intervenor Britt owns property and resides within the City. The parties have stipulated to the facts necessary to establish that she is an affected person and therefore has standing to participate in this matter.

4. The Department is the state land planning agency charged with the responsibility for reviewing plan amendments of local governments, including the City.

B. Background

5. On May 14, 2007, the City adopted Ordinance No. 2007-383-E, which amended the FLUM by changing the land use category on Dunn's property from LDR to RPI, which would allow an

increase in the density and intensity of use on the property. (The LDR land use allows up to seven dwelling units per acre, while RPI is a mixed-use category that allows up to twenty dwelling units per acre if built to the maximum development potential.) On July 9, 2007, the Department issued its Notice and Statement of Intent finding that the Ordinance was not in compliance on the ground the map change was not supported by adequate data and analysis to demonstrate that the City would achieve and maintain the adopted LOS standards for the roadways within its jurisdiction. The Department further determined that the traffic study submitted by the City was not based on the maximum development allowed under the RPI category.

6. On August 1, 2007, the Department initiated this case by filing a Petition, which tracked the objections described in its Notice and Statement of Intent. The City, Dunn, Department, and Britt later entered into settlement discussions. As part of the settlement discussions, Dunn submitted a revised traffic study and coordinated with other applicants for map changes to perform cumulative traffic impact studies.

7. The parties eventually entered into a proposed settlement agreement which would limit development of the property to 672 condominiums/townhomes and 128,000 square feet of non-residential uses through an asterisk to the Plan. See

Petitioner's Exhibit 1, p. 25. Also, the proposed settlement agreement noted that the data and analysis confirmed that certain future road improvements in the Capital Improvement Element (CIE) of the Plan would offset the traffic impacts of the new RPI land use. These were improvements to the East-West Connector (U.S. Highway 17 to New Berlin Road) and Starratt Road. Id. Finally, Dunn agreed to pay $4.3 million in "fair share money" to the City to offset the proportionate share of the development's traffic impacts. See Petitioner's Exhibit 6. The proportionate share agreement was intended to match the trip count anticipated from the RPI development.

8. On September 3, 2008, the proposed settlement agreement and remedial amendment were presented to the City Council Land Use and Zoning Committee (Committee) for approval as Ordinance Nos. 2008-627 and 2008-628, respectively.[3] At that meeting, the Committee heard comments from several members of the public who opposed the amendment, a Dunn attorney, and the City's Director of Planning and Development, William B. Killingsworth. The City Council member who represents District 11 and is a member of the Committee also spoke in opposition to the proposal. Based primarily upon data in a new traffic study prepared on August 28, 2008, by a member of Mr. Killingsworth's staff, and the opposition of the District 11 Council member, the Committee

voted unanimously to revise the proposed settlement agreement and remedial amendment by changing the land use designation on the property back to LDR, its original classification. The revised settlement agreement was approved by Ordinance No. 2008-627-E, while the remedial amendment changing the land use was approved by Ordinance No. 2008-628-E. The two Ordinances were then forwarded to the full City Council, which approved them on September 9, 2008. The revised settlement agreement was later executed by the City, Department, and Britt, but not by Dunn, and is known as the Sixteenth Partial Stipulated Settlement Agreement. See Petitioner's Exhibit 2. The essence of the revised agreement was that by changing the land use back to its original designation, the potential adverse impacts to transportation facilities would be resolved. Id.

9. The remedial amendment package was transmitted by the City to the Department for its review. On December 18, 2008, the Department issued a Cumulative Notice of Intent to Find Ordinance Nos. 2007-383-E and 2008-628-E in compliance.

10. On January 8, 2009, Dunn filed a Motion to Amend Petition to Intervene pursuant to Section 163.3184(16)(f)1., Florida Statutes. Because Dunn objected to the revised settlement agreement and challenged the remedial amendment, the parties were realigned, as reflected in the style of this case.

11. On June 1, 2009, Senate Bill 360, engrossed as Chapter 2009-96, Laws of Florida, became effective. That legislation amends Chapter 163, Florida Statutes, in several respects. Among other things, it designates the City as a Transportation Concurrency Exception Area (TCEA).[4] See § 163.3180(5), Fla. Stat. The new law also provides that plan amendments for land uses of a local government with a TCEA are deemed to meet the LOS standards for transportation. See § 163.3177(3)(f), Fla. Stat. Therefore, after a TCEA becomes effective, the Department no longer has the authority to review FLUM amendments in the TCEA for compliance with state-mandated transportation concurrency requirements. However, Senate Bill 360 contains a savings clause, which provides that "this subsection does not affect any contract or agreement entered into or development order rendered before the creation of the [TCEA] except as provided in s. 380.06(29)(e)." See § 163.3180(5)(f), Fla. Stat. The City, Department, and Britt contend that this provision "saves" the Sixteenth Partial Stipulated Settlement Agreement executed by them in November 2008, and that the Department still retains jurisdiction to consider the remedial amendment. Conversely, Dunn contends that the savings clause does not apply to the revised agreement, that the Department no longer has jurisdiction to review the challenged amendment, that the

remedial amendment was not authorized, and that because the remedial amendment never became effective, the Department's Petition should be dismissed as moot.

C. Objections to the Remedial Amendment

12. Besides the contention that the proceeding is moot, Dunn raises three issues in its challenge to the amendment. First, it contends that the amendment is not supported by relevant and appropriate data and analysis related to traffic impacts and therefore is not in compliance. Second, Dunn contends that the amendment does not address the concerns raised in the Department's original Notice and Statement of Intent regarding the City's achieving and maintaining the adopted LOS of affected roadways. See § 163.3184(16)(f)2., Fla. Stat. Third, Dunn contends that due to procedural errors in the amendment adoption process, it was unduly prejudiced.

a. Data and analysis

13. Because almost all of the unresolved FLUM amendments in this case involved "traffic issues," on September 4, 2007, a Department employee, Melissa Hall, sent an email to counsel for a number of applicants, including Dunn, describing "what the department would be looking for in terms of traffic analysis." See Petitioner's Exhibit 12, p. 1. The email required those applicants to submit revised traffic studies. Id. Among other

things, the applicants were advised that the revised traffic impact analysis for each amendment had to use "a professionally acceptable traffic impact methodology." Id. Dunn followed the requirements of the email in preparing its revised traffic study.

14. At the time Ordinance No. 2007-383-E was adopted, based on total background traffic, which includes existing traffic plus reserve trips for approved but not-yet-built developments, eight road segments in the study area already failed to meet LOS standards. (LOS E is the adopted passing standard on those roadways.) The study area includes affected roadways within a two-mile radius of the boundaries of the proposed project site where project traffic consumes more than one percent of the service volume. If the Dunn project is built, six segments impacted by the development will continue to fail. According to the City's expert, as a general rule, an applicant for a land use amendment is not required to bring a failing segment back up to its adopted LOS. Rather, it is only required to pay its proportionate share of the improvements for bringing it up to compliance. The unique aspect of this case is that the City has simply reclassified the property back to what it was, LDR, when Ordinance No. 2007-383-E was adopted. At that time, the Plan was in compliance.

15. In response to Dunn's contention that Ordinance No. 2008-628-E is not supported by relevant and appropriate data and analysis, the City, joined by the Department and Britt, first contends that, given the unique circumstances presented here, no data and analysis were required. Alternatively, it contends that there are sufficient relevant and appropriate data and analysis to support maintaining the LDR land use designation. The data and analysis include the traffic study prepared by Dunn's consultant in October 2007, the additional traffic analysis performed by the City staff just before the Committee meeting, and the testimony provided at the Committee meeting on September 3, 2008.

16. At hearing, the City first pointed out that the RPI designation was never determined to be in compliance, Ordinance No. 2007-383-E never became effective, and the property has remained LDR throughout this proceeding. See § 163.3189(2)(a), Fla. Stat. ("[p]lan amendments shall not become effective until the [Department] issues a final order determining the adopted amendment to be in compliance in accordance with s. 163.3184(9), or until the Administration Commission issues a final order determining the adopted amendment to be in compliance"). Therefore, the City takes the position that Ordinance No. 2008-628-E did not need to be supported by data and analysis because

the LDR category was the land use designation on the property at the time of the adoption of Ordinance No. 2008-628-E. In the same vein, it argues that the remedial amendment is the equivalent of a repeal of the prior ordinance (2007-383-E), which would not require any data and analysis support. While at first blush these arguments appear to be plausible, the City could not cite any provision in Chapter 163, Florida Statutes, or Florida Administrative Code Rule Chapter 9J-5[5] that relieves a local government from the requirement that a plan amendment be supported by data and analysis.

17. The City also argues that even if Ordinance No. 2008-628-E is deemed to be a change in the land use (from LDR to LDR), the net impact of the change would be zero. This argument is based on the accepted testimony of Mr. Killingsworth, who stated that the City, Department, and Florida Department of Transportation (FDOT) agreed upon a methodology which entitled the City to give "credit" for uses permitted under the existing land use category.[6] Under that methodology, the City subtracts the number of trips that the existing land use (LDR) generates from the additional trips generated by the proposed land use (LDR). Therefore, the net transportation impact of a change from LDR to LDR, in effect, would be zero. The methodology is described in Petitioner's Exhibit 15, a memorandum authored by

Mr. Killingsworth and sent on October 4, 2007, to Dunn and other parties seeking map changes in this case. The memorandum stated that the methodology described therein was "developed in coordination [with] FDOT District 2" and "is the suggested methodology for use in determining traffic impacts of proposed land uses for the City." See Petitioner's Exhibit 15, p. 1.

18. Mr. Killingsworth could not cite any provision in Chapter 163, Florida Statutes, or Chapter 9J-5 allowing for such a credit for traffic generated by a prior permitted land use in the data and analysis required for a FLUM amendment. At the same time, however, Petitioner could not cite any rule or statute that prohibits the Department from allowing this type of methodology when deemed to be appropriate. Even though it differed from the methodology described in Ms. Hall's earlier email by allowing credit for the existing land use, it was nonetheless "a professionally acceptable traffic impact methodology" approved by the Department and FDOT and could be used as data and analysis to support a change back to the property's original land use classification. Therefore, it constitutes relevant and appropriate data and analysis to demonstrate that the net traffic impact of the change in land use from LDR to LDR is zero.

19. The City further argues that if it was required to provide other data and analysis, the traffic impacts of the new ordinance are offset by the two roadway improvements negotiated with the Department in the proposed settlement agreement for Ordinance No. 2008-627. See Finding 7, supra. Based upon the City staff's analysis, which is found in City Exhibit 3, the LDR land use generates less trips than the RPI land use. (This study was prepared a few days before the Committee meeting in response to an inquiry from a Committee member.) More specifically, page 3 of that exhibit reflects that there are 169 less afternoon peak hour trips for LDR than RPI with the development cap of 672 dwelling units and 128,000 square feet of non-residential uses. It is fair to infer, then, that if the proposed mitigation in the original settlement agreement offsets the impacts of the more intense RPI land use, the mitigation also offsets the impacts of the less intense LDR land use.

20. City Exhibit 3 is a comparative calculation of the difference in vehicle trips generated by development of the property under the LDR category approved by Ordinance No. 2008-628-E and the development of the property under the RPI category approved by Ordinance No. 2007-383-E. Dunn points out, however, that the exhibit does not show how the trips generated are distributed on affected roadways or how those trips, as they may

be distributed, affect LOS of any roadways. Despite the fact that the data in Exhibit 3 are limited to trip generation data, and establish no facts relating to the LOS of affected roadways, they support a finding that more trips will be generated under the RPI designation than the existing LDR designation. Also, they provide further support for a finding that if the proposed road improvements offset the impacts of the RPI use, the mitigation will offset the impacts, if any, of the original LDR use.

21. For data and analysis relating to the LOS of affected roadways, the City, joined by the Department and Britt, rely upon a traffic study performed by Dunn's traffic consultant, King Engineering Associates, Inc. (King). That firm prepared a transportation analysis dated November 19, 2007, for the purpose of supporting a mixed-use development on the property under the RPI category. See Petitioner's Exhibit 8. This study, however, does not apply to development of the property under the LDR category because it was based upon a mixed-use project which would allow for credit based upon the internal capture of some trips. (In other words, a portion of the new trips will be internal to the site, that is, trips between the residential and commercial land uses on the property.) Because of this, any reference to the King study and proposed mitigation therein was

deleted from the revised settlement agreement. In this respect, the study does not support the amendment.

22. The King study addresses impacted roadway segments, existing and background traffic, proposed traffic generated by the development, and LOS for the impacted roadways, as suggested by Ms. Hall in her email. Dunn's traffic engineer established that in the impacted study area, six out of eight roadway links will continue to fall below adopted LOS standards based upon existing traffic and that generated by the RPI development (segments 174, 372, 373, 374, 377, and 543). See Table 4, Petitioner's Exhibit 8. The study also identifies proposed roadway improvements in the vicinity of the project site that are intended to help cure or mitigate the failing standards. See Petitioner's Exhibit 8, p. 12. These improvements are listed in the CIE and will cost around $85 million. A "fair share" agreement has also been executed by the City and Dunn, which requires Dunn to pay more than $4.3 million to offset impacts of the RPI development. Those monies would be applied to improvements in Sector 6.1 (the North Planning District), which includes Starratt Road and the East-West Connector. The agreement notes that this contribution would offset the proportionate share of traffic impacts of the proposed RPI development. Notably, the City has already funded both the

widening of Starratt Road and the improvements to the East-West Connector, U.S. Highway 17 to Berlin Road, through the Better Jacksonville Plan. Therefore, even if the Dunn fair share agreement is not implemented, the two improvements will still be made.

23. According to Dunn's engineer, the completion of the four projects listed on page 12 of his traffic study, which are labeled as "mitigation," will not restore or cure any of the LOS failures that now exist on the six impacted segments in Table 4 of the study. However, two of the failing segments (373 and 543) may be "helped" by the projects listed on that page.

24. Dunn's engineer also analyzed City Exhibit 3 and concluded that if the Dunn property is developed as LDR, rather than RPI, there would be potentially one less roadway segment (374) impacted by development, while five other segments would continue to fail. When the proposed mitigation in the King study is factored in, he opined that the East-West Connector may help two other failing segments. He further opined that if LDR development on the property occurs, probably three of the six impacted segments will continue to fail adopted LOS standards. Even so, the improvements identified in the CIE, including those already funded by the Better Jacksonville Plan, should offset

the proportionate share of traffic impacts associated with any future LDR development.[7]

25. The foregoing data and analysis establish that the LDR land use category generates less traffic impacts than the originally-proposed RPI use; that a change from LDR to LDR should have zero effect in terms of traffic impacts; that even if there are impacts caused by a change back to LDR, the proposed mitigation in the CIE will offset the proportionate share of the impacts associated with any LDR use; that while it differed from other studies, a professionally acceptable traffic impact analysis was used by the City to support the remedial amendment; and that the proposed road improvements are fully funded without having to implement the fair share agreement. Finally, in adopting the amendment, the City has reacted to the data and analysis in an appropriate manner.

b. Does the Remedial Amendment Resolve All Issues?

26. Dunn also asserts that the amendment does not resolve the issues raised by the Department in its Notice and Statement of Intent dated July 9, 2007. Under Section 163.3184(16)(f)2., Florida Statutes, an affected party may assert that a compliance agreement does not resolve all issues raised by the Department in its original notice of intent. The statute allows an affected party to then address those unresolved issues in the

realigned proceeding. In this case, Petitioner asserts that the Department's original objection that the change in land use would result in a lowering of the LOS in the study area was not addressed by the remedial amendment.

27. In its Notice and Statement of Intent to find the amendment not in compliance, the Department cited the following rules and statutes as being contravened: Sections 163.3164(32) and 163.3177(3)(b),(6)(a), (8), and (10), Florida Statutes, and Rules 9J-5.005(2)(a) and (c), 9J-5.006(2)(a), (3)(b)1. and 3., 9J-5.016(4)(a)1. and 2., and 9J-5.019(3)(a) through (h) and (4)(b)2. Although these sources of authority were cited in a single generic notice of intent as a basis for objecting to all seventeen map changes, it is assumed that they have equal application to this proceeding. The cited statutes relate to funding of transportation projects and concurrency issues, while the rules relate to data and analysis requirements, concurrency issues, the capital improvement element, and required transportation analyses, all subjects addressed by Dunn at the final hearing. Assuming arguendo that the remedial amendment does not address all of the issues raised in the original notice of intent, Dunn was given the opportunity to fully litigate those matters in the realigned proceeding.

c. Procedural Irregularities

28. Rule 9J-5.004 requires that the City "adopt procedures to provide for and encourage public participation in the planning process." See also § 163.3181(1), Fla. Stat. ("it is the intent of the Legislature that the public participate in the comprehensive planning process to the fullest extent possible"). Dunn does not contend that the City failed to adopt the required procedures. Rather, it contends that the City did not follow those procedures during the adoption of the remedial amendment. More specifically, prior to the Committee meeting, Dunn says it spent "hundreds of thousands of dollars on top of the millions that [it] had spent previously, working for fourteen months in conjunction with the City and [Department]" so that the parties could resolve the Department's objections. Dunn argues that it was unduly prejudiced by the last-minute revisions made by the Committee and City Council, and that it did not have an adequate opportunity to respond.

29. Dunn points out that a City Planning Commission meeting was conducted before the Committee meeting, and that body unanimously recommended that Ordinance Nos. 2008-627 and 628 be approved. It further points out that when the Committee met on September 3, 2008, the proposed revisions to the settlement agreement, the accompanying remedial amendment, and

the new traffic data were not discussed until after the public comment portion of the meeting was closed. (The transcript of that meeting reflects, however, that after the new revisions and traffic study were raised, Dunn's counsel was briefly questioned about Dunn's traffic study and the density/intensity of the project. Also, according to Mr. Coe, a copy of the City's newly-prepared traffic study was given to a Dunn representative just before the Committee meeting.) For both public meetings, the City's published notices indicated that the purpose of the meetings was to consider the proposed revised settlement agreement and remedial amendment allowing a cap on the development of the RPI property through the use of an asterisk, as reflected in Ordinance Nos. 2008-627 and 2008-628. See Petitioner's Exhibits 16 and 17.

30. Dunn contends that it had insufficient time between the Committee meeting on September 3, 2008, and the final City Council meeting on September 9, 2008, in which to review and evaluate the new traffic information and respond to the comments of the Committee member who supported the revisions. It also points out that, like other members of the public, Dunn's attorney was only given three minutes to present comments in opposition to the revised agreement at the City Council meeting on September 9, 2009.

31. Notwithstanding any procedural errors that may have occurred during the City's adoption process, Dunn received notice and attended both the Committee and City Council meetings, it presented written and oral objections to the revised plan amendment prior to and at the City Council meeting on September 9, 2008, and it was given the opportunity to file a petition to challenge the City's decision and present evidence on the revisions at the hearing in this case.

D. Savings Clause in Senate Bill 360

32. In support of its position that the matter is now moot, and that the savings clause in Senate Bill 360 does not "save" the revised settlement agreement executed by the City, Department, and Britt, on November 10, 2008, Dunn submitted extrinsic evidence to show the Legislature's intent in crafting a savings clause, which include four separate analyses by the Legislative staff (Appendices A-D); an article authored by the Bill's Senate sponsor (Senator Bennett) and published in the St. Petersburg Times on May 23, 2009 (Appendix E); a similar article authored by the same Senator and published in the Sarasota Harold-Tribune on June 11, 2009 (Appendix F); a seven-page letter from Secretary Pelham to Senator Bennett and Representative Murzin dated July 23, 2009, concerning the new law and a two and one-half page summary of the bill prepared by

the Department (Appendix G); a power point presentation for the Senate Community Affairs Committee on October 6, 2009 (Appendix H); and an article published in the October 2009 edition of The Florida Bar Journal (Appendix I).

33. The Florida Senate Bill Analysis and Fiscal Impact contained in Appendix A was prepared on February 17, 2009, and does not reference the relevant savings clause. A second Senate Bill Analysis and Fiscal Impact contained in Appendix B and prepared on March 19, 2009, merely acknowledges that the legislation includes a savings clause but provides no further explication. See App. B, p. 9.

34. Appendix C is the Florida House of Representatives 2009 Session Summary prepared in May 2009, while Appendix D is a Summary of Passed Legislation prepared by the House of Representatives Economic Development and Community Affairs Policy Council on an undisclosed date. Neither document addresses the issue of what types of agreements were intended to be saved.

35. Appendices E through I are guest newspaper columns, correspondence, a power point presentation, and an article in a professional journal. None are authoritative sources of legislative intent.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569, 120.57(1), and 163.3184(16), Florida Statutes.

37. The parties agree that there are sufficient facts to establish that Britt and Dunn are affected persons and have standing to participate in this matter. See § 163.3184(1)(a), Fla. Stat.

38. Section 163.3184(16)(f)1., Florida Statutes, provides in part as follows:

> If the local government adopts a comprehensive plan pursuant to a compliance agreement and a notice of intent to find the plan amendment in compliance is issued, the [Department] shall forward the notice of intent to the [DOAH] and the administrative law judge shall realign the parties in the pending proceeding under ss. 120.569 and 120.57, which shall be governed by the process contained in paragraphs (9)(a) and (9)(b), including provisions relating to challenges by an affected person, burden of proof, and issues of a recommended order and a final order.

39. Because the Department issued a cumulative notice of intent to find Ordinance No. 2007-383-E, as remediated by Ordinance No. 2008-628-E, to be in compliance, the "plan amendment shall be determined to be in compliance if the local government's determination of compliance is fairly debatable."

See § 163.3184(9)(a), Fla. Stat. This standard requires "approval of a planning action if reasonable persons could differ as to its propriety." Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997).

40. Like any other FLUM amendment, a remedial FLUM amendment requires relevant and appropriate data and analysis to support the amendment. See § 163.3177(8), Fla. Stat.; Fla. Admin. Code R. 9J-5.005(2). By its express terms, Ordinance No. 2008-628-E is a FLUM amendment and is not a repeal or rescission of Ordinance No. 2007-383-E. (Had the City simply repealed the original ordinance, rather than adopting a remedial amendment, the administrative process would have ended.) Therefore, in order to be in compliance, Ordinance No. 2008-628-E must be supported by relevant and appropriate data and analysis. In this case, however, because the map amendment simply changes the land use back to its original classification (which land use was in compliance at that time), it follows that the amendment here can be based on less data and analysis than may be otherwise required for other types of amendments. Compare Indian Trail Improvement District v. Department of Community Affairs, et al., 946 So. 2d 640, 641 (Fla. 4th DCA 2007)(approving Department's policy that aspirational amendments do not require the same amount or type of data as other plan amendments); Zemel, et al.

v. Lee County, et al., DOAH Case No. 90-7793GM, 1992 Fla. Div. Adm. Hear. LEXIS 5927 at *49-50 (DOAH Dec. 12, 1992, DCA June 22, 1993)(the complexity and detail of data and analysis should be commensurate with the type of amendment being adopted). Under the unique circumstances here, it is concluded that the amount and type of data presented are relevant and appropriate.

41. For the reasons previously found, Dunn has failed to prove beyond fair debate that Ordinance No. 2007-383-E, as remediated by Ordinance No. 2008-628-E, are not supported by relevant and appropriate data and analysis. This being so, the Department's determination of compliance is fairly debatable and should be sustained. Martin County, supra.

42. Dunn further contends that the remedial amendment fails to resolve all issues raised in the Department's original Notice of Intent and is therefore not in compliance. See § 163.3184(16)(f)2., Fla. Stat. The cited statute provides that an affected person may require unresolved "issues to be addressed in the pending consolidated realigned proceeding under ss. 120.569 and 120.57." Whether the remedial amendment resolves all issues is in dispute. When confronted with a similar issue in a much earlier case, the Department contended during that proceeding that "resolved" means "eliminated from contention between the Department and the other party or parties

to an agreement, even if an objective observer might quarrel with whether or not the agreeing parties (1) had provided sufficient evidence that an objection should no longer be maintained or (2) had changed plan or plan amendment language enough to address the issue concretely." See Board of County Commissioners of Palm Beach County, et al. v. Department of Community Affairs, et al., DOAH Case Nos. 95-5930GM and 96-2563GM, 1997 Fla. ENV LEXIS 159 at *53-54 (DOAH Jan. 24, 1997), dismissed by Admin. Comm. Oct. 21, 1997. In accepting this interpretation of the statute, the administrative law judge concluded that an issue is resolved "if the issue was initially raised by the Department in its statement of intent as a basis for its determination that a plan amendment is not in compliance, the Department and local government subsequently enter into a compliance agreement, the local government adopts the remedial amendment consistent with the compliance agreement, and the Department subsequently issues a notice of intent finding the remedial amendment in compliance." Id. at *54. There are no reported cases overturning or modifying this holding. Under this rationale, Ordinance No. 2008-628-E resolves all issues since it is consistent with the revised compliance agreement, and the Department issued a notice of intent finding the remedial amendment in compliance. Even if

some of the issues were not "resolved," as Dunn alleges, it was given the opportunity to fully address those issues in the realigned proceeding. The contention is therefore rejected.

43. The evidence supports a conclusion that no violation of Rule 9J-5.004 has occurred. Dunn does not contend that the City failed to adopt the procedures described in the rule. Rather, it contends that the City failed to conduct the plan amendment process in accordance with those procedures. Whether a local government followed its procedures is not within the scope of compliance review. See, e.g., Current v. Town of Jupiter, et al., DOAH Case No. 03-0718GM, 2003 Fla. ENV LEXIS 250 (DOAH Oct. 24, 2003), adopted, 2004 Fla. ENV LEXIS 209 (DCA April 8, 2004). Even if a procedure was not followed, the record shows that Petitioner attended all meetings during the adoption process, and it was allowed to make written and oral objections to the revisions prior to and at the meeting conducted by the full City Council. Finally, Dunn has been afforded an opportunity to challenge the remedial amendment and fully participate in the instant proceeding. The contention that it was unduly prejudiced is rejected.

44. Dunn's Suggestion of Mootness and Motion to Dismiss Petition as to Ordinance 2007-383-E is denied. The language

giving rise to this dispute is found in Section 163.3180(5)(f), Florida Statutes. That provision reads as follows:

> (5)(f) The designation of a [TCEA] does not limit a local government's home rule power to adopt ordinances or impose fees. This subsection does not affect any contract or agreement entered into or development order rendered before the creation of the [TCEA] except as provided in s. 380.06(29)(e).

45. The language in the second sentence provides that all "agreements" entered into prior to the effective date of the new law are not affected. Under Chapter 163, Florida Statutes, the Sixteenth Partial Stipulated Settlement Agreement is an "agreement." See § 163.3184(16)(a), Fla. Stat. (parties to a plan amendment challenge may "voluntarily enter into a compliance agreement to resolve one or more of the issues raised in the proceedings").

46. Dunn contends the documents submitted in its Notice of Supplemental Evidence of Legislative Intent reflect an intent by the Legislature to remove the Department's jurisdiction to review this FLUM amendment. However, none of the documents provide evidence that the Legislature intended to exclude compliance agreements from the purview of the statute. The various summaries by Legislative staff found in Appendices A through D make no mention of the subject or simply acknowledge that the Bill contains a savings clause.[8] Likewise, the other

materials submitted by Dunn concerning legislative intent have little, if any, value. For example, comments by a bill's sponsor concerning his intent in adopting legislation "is of doubtful worth." State v. Patterson, 694 So. 2d 55, 58 n. 3 (Fla. 5th DCA 1997). See also McLellan v. State Farm Mutual Automobile Insurance Co., 366 So. 2d 811, 813 (Fla. 4th DCA 1979)(affidavit of legislator stating his view of legislative intent is inadmissible). Finally, correspondence between the Department and a senator, a power point presentation given to a legislative committee by agency representatives after the law was enacted, and an article in a professional journal are not admissible evidence of legislative intent.

47. Dunn also contends that the savings clause is expressly limited to the effects of "this subsection" -- Section 163.3180(5)(f) -- on agreements. It points out that the provision which removes the Department's authority to review FLUM amendments for maintenance of LOS of affected roadways is in a different statutory section -- Section 163.3177(3)(f) -- and therefore the savings clause provides no protection for agreements pertaining to the latter provision. It goes on to argue that the savings clause is intended to protect a local government's home rule powers to enact and enforce local concurrency systems and impact fee systems, and not settlement

agreements entered into by the Department. Dunn suggests that the fair share agreement entered into with the City, which provides for the payment of an assessment as required under the City's local traffic concurrency system, is the type of agreement that the new law is intended to "save."

48. Section 163.3180, Florida Statutes, governs all types of concurrency issues in the planning process. Subsection (5) of the statute, and the new amendments thereto, relate exclusively to transportation concurrency issues. Similarly, Section 163.3177(3)(f), as amended, relates to transportation concurrency issues and removes the Department's jurisdiction over FLUM changes in a City designated as a TCEA by providing that "land uses within all [TCEAs] that are designated and maintained in accordance with s. 163.3180(5) shall be deemed to meet the requirement to achieve and maintain [LOS] standards for transportation." While Dunn's argument is plausible, it is just as reasonable to conclude that when new Sections 163.3177(3)(f) and 163.3180(5) are read in pari materia, absent any specific expression of intent to the contrary, the savings clause protects settlement agreements entered into by the Department prior to June 1, 2009, for the purpose of resolving a challenge to a local government's FLUM amendments. Therefore, the

Sixteenth Partial Stipulated Settlement Agreement is not affected by Senate Bill 360.

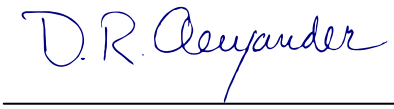
49. The City and Department's Motion to Relinquish Jurisdiction is denied.

RECOMMENDATION

Based on 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 plan amendment adopted by Ordinance No. 2008-628-E, which remediates Ordinance No. 2007-383-E, is in compliance.

DONE AND ENTERED this 28th day of December, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of December, 2009.

ENDNOTES

1/ All statutory references are to the 2009 version of the Florida Statutes.

2/ Matters officially recognized pursuant to Dunn's request are Chapter 2009-96, Laws of Florida; Ordinance No. 2007-383-E; Ordinance No. 2008-628-E; the Department's Cumulative Notice of Intent issued on December 18, 2008; a document entitled "Department of Community Affairs, Division of Community Planning Public Notices: 2009 Growth Management Legislation"; the Department's List of Local Governments Qualifying as Dense Urban Land Areas; and the Department's Summary for Presentation by Secretary Tom Pelham, dated June 11, 2009, Implementing SB 360. Matters officially recognized pursuant to the City's request are Ordinance No. 2008-621-E; Ordinance No. 2008-622-E; and the transcript of the City Council Land Use and Zoning Committee meeting on September 3, 2008.

3/ Under the City's amendment process, proposed land use changes are first presented to the City Planning Commission, then to the Committee, and finally to the full City Council. According to Mr. Coe, the City Council rarely overrules a recommendation by the Committee.

4/ The TCEAs are intended to promote urban infill and economic activity within these urban service areas.

5/ All references are to the current version of the Florida Administrative Code.

6/ The record does not show when the Department and FDOT agreed that the City could use this methodology. The record does show that the Department accepted traffic studies using the methodology suggested by Ms. Hall when it approved other FLUM changes prior to the Dunn remedial amendment being adopted.

7/ The City also contended that even if all of the six impacted segments are not cured, the mitigation will still improve the capacity of the system as a whole, thereby satisfying the requirements of the law. This position, however, is contrary to Rule 9J-5.005(3)(LOS standards "shall be set for each individual facility or facility type and not on a systemwide basis").

8/ While not determinative of legislative intent, legislative analyses are "one touchstone of the collective legislative will."

Stivers v. Ford Motor Credit Co., 777 So. 2d 1023, 1025 (Fla. 4th DCA 2000). But here the staff analyses offer no insight into the "collective legislative will" concerning the type of agreements the savings clause was intended to save.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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