STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE BOCA RATON GREEN SPACE LLC, and ROBERT DUKATE,	)	
Petitioners,	)	
vs.	)	Case No. 08-1212GM
CITY OF BOCA RATON and DEPARTMENT OF COMMUNITY AFFAIRS,	)	
Respondents,	)	
and	)	
MCZ/CENTRUM FLORIDA V OWNER, LLC,	)	
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 May 22 and 23, 2008, in Boca Raton, Florida.

APPEARANCES

For Petitioners: Marcy I. Lahart, Esquire
Marcy I. LaHart, P.A.
711 Talladega Street
West Palm Beach, Florida 33405-1443

For Respondent: (Department)
Samuel Dean Bunton, Esquire
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

For Respondent: (City)
Daniel L. Abbott, Esquire
Weiss Serota Helfman Pastoriza Cole & Boniske, P.L.
200 East Broward Boulevard, Suite 1900
Fort Lauderdale, Florida 33301-1949

Diane Grub Freiser, Esquire
City Attorney
201 West Palmetto Park Road
Boca Raton, Florida 33432-3730

For Intervenor:
Maureen McCarthy Daughton, Esquire
Broad & Cassel
215 South Monroe Street, Suite 400
Tallahassee, Florida 32301-1804

Patricia M. Baloyra, Esquire
Broad & Cassel
One Biscayne Tower
Two South Biscayne Boulevard
21st Floor
Miami, Florida 33131-1806

STATEMENT OF THE ISSUE

The issue is whether the City of Boca Raton's (City's) amendments to the Future Land Use Map (FLUM) and the Transportation Element of its Comprehensive Plan (Plan) adopted by Ordinance Nos. 4987 and 4991 on December 11, 2007, are in compliance.

PRELIMINARY STATEMENT

This matter began on December 11, 2007, when the City adopted two plan amendments (Ordinance Nos. 4987 and 4991) which

(a) changed the land use designation on approximately 29.58 acres from Recreation and Open Space (PR) to Residential Medium (RM) and (b) amended the Transportation Element of the Plan by amending one existing policy and creating a new goal, objective, and four policies. The effect of the latter amendment was to establish a new level of service for Northwest Second Avenue from Yamato Road to Jeffrey Street within the City. (In addition, two other Ordinances were adopted at the same time; however, they are not at issue in this case.) The land which is the subject of the FLUM change is owned by Intervenor, MCZ/Centrum Florida V Owner, LLC (MCZ), and makes up a part of the Ocean Breeze Golf and Country Club (Club) in Boca Raton, Florida.

On February 4, 2008, Respondent, Department of Community Affairs (Department), published a Notice of Intent to Find City of Boca Raton Comprehensive Plan Amendment in Compliance (Notice of Intent). On February 25, 2008, Petitioners, Save Boca Raton Green Space, LLC (Save Boca), an association of property owners, some of whom own property and live at the Club, and Robert Dukate, who also owns property and resides at the Club, filed their Petition for Formal Administrative Hearing (Petition) alleging that the two amendments were not "consistent with the requirements of Sections 163.3177, F.S., and 163.3180, F.S. the

state comprehensive plan" in several respects. At that time, Petitioners were not represented by counsel. (Counsel for Petitioners filed her Notice of Appearance on May 15, 2008.) The matter was referred by the Department to the Division of Administrative Hearings on March 11, 2008. On the same date, Intervenor filed a Petition to Intervene into Comprehensive Plan Challenge Proceeding. Subject to the filing of a timely objection, intervention was authorized by Order dated March 12, 2008.

By Order dated March 27, 2008, a final hearing was scheduled on August 19 and 20, 2008, in Boca Raton, Florida. On April 24, 2008, Intervenor filed a Notice of Demand for Expedited Hearing under Section 163.3189(3)(b), Florida Statutes.[1] The following day, Intervenor filed a Motion for Expedited Discovery. Notices of Opposition to Expedited Hearing and Discovery were filed by Robert Dukate on May 1, 2008. Over Mr. Dukate's objection, an Amended Notice of Hearing was issued rescheduling the final hearing to May 15 and 16, 2008, at the same location. Also, by Order dated May 7, 2008, the Motion for Expedited Discovery was denied. On May 2, 2008, the Department filed an Unopposed Motion to Reschedule the Hearing Date, and the matter was continued to May 22 and 23, 2008, at the same location. On May 19, 2008, the case was transferred from

Administrative Law Judge J. Lawrence Johnston to the undersigned.

Prior to the hearing, numerous procedural and discovery disputes arose. Between May 12 and 15, 2008, four Motions to Quash Subpoenas Duces Tecum and a Supplement thereto were filed by the City. Only one Motion to Quash ultimately required resolution, and that requested relief (to quash the subpoena issued to Steve Utrecht, the sole member of the City's Planning and Zoning Board who voted against the recommended approval of the plan amendments) was granted at the outset of the hearing.[2] On May 15, 2008, Petitioners filed a Motion for Protective Order, which was resolved by the parties prior to hearing. On May 19, 2008, Intervenor filed a Motion in Limine to Prohibit Testimony and Evidence Regarding Alleged "Environmental" or "Golf Course Safety" Issues. After Petitioners acknowledged that environmental matters were no longer in issue, a ruling was reserved on the golf course safety issue until testimony on the subject was presented. That issue was later determined not to be a relevant consideration in a compliance proceeding and should more appropriately be addressed during the site plan phase of the process. On May 20, 2008, Intervenor filed a Motion in Limine to Bar Testimony and Evidence Regarding the City's MMTD (Multi-Modal Transportation District).[3] Because the

City and Department had not considered the MMTD during the adoption and review process, limited evidence on this issue was allowed for the purpose of determining whether the MMTD was a relevant consideration for the City when it adopted the plan amendments and by the Department when it performed its compliance review. In a later portion of this Recommended Order, the undersigned has determined that it is not a relevant consideration. On May 20, 2008, Petitioners filed a Motion to Place Case in Abeyance on the ground there was a substantial likelihood that the issues in this case would become moot as a result of a pending case in Circuit Court. That Motion was opposed by all other parties and was denied at the hearing. On May 21, 2008, Intervenor filed a Motion to Strike "Expert" Report and Proposed Testimony of Gary Nash. The Motion was rendered moot after Petitioners announced at hearing that Mr. Nash would not testify. On May 21, 2008, Intervenor filed a Motion in Limine to Exclude the Introduction of the Archive Items from the City of Boca Raton by the Petitioners. The requested relief was granted during the course of the hearing on the ground the documents sought to be introduced, which were prepared between 1973 and 1980, were too remote and dated to be relevant to the challenged plan amendments. On May 21, 2008, Petitioners filed a Request for Leave to Amend, together with an

Amended Petition for Administrative Hearing, which was opposed by all other parties. Because the Request for Leave to Amend the pleadings was not filed until the afternoon before the hearing, and if granted would cause prejudice and/or delay to the other parties, the Request for Leave to Amend was denied. Intervenor filed Requests for Official Recognition on May 7, 13, and 14, 2008, respectively. The first Request was granted by Order dated May 20, 2008; the other two were granted by oral ruling at the hearing. By those rulings, official recognition has been taken of City Ordinance Nos. 4487, 4488, 4489, and 4491 adopted by the City on December 11, 2007; the City's Comprehensive Plan (Plan) dated February 25, 2005; and the City's 2005 Evaluation and Appraisal Report (EAR). Finally, because a pre-hearing stipulation was not filed, various disputes by the parties over the timely disclosure of witnesses, exhibits, and expert opinions were resolved as they arose during the course of the hearing.

At the final hearing, Petitioner Robert Dukate testified on his own behalf and both Petitioners presented the testimony of Larry Hymowitz, a Transportation Planner with the Florida Department of Transportation (DOT); Douglas Hess, City Traffic Engineer; Robert Wyman, a traffic consultant and accepted as an expert; Jennifer Simon Hofmeister, a Principal Planner for the

City and accepted as an expert; Joy Puerta, a Transportation Analyst for the City; and Deborah Golden-Gestner, a certified grant professional and accepted as an expert. Also, they offered Petitioners' Exhibits 2, 5, 7, 10, and 12, 13, 14a, 14b, and 15, which were received in evidence.[4] The Department presented the testimony of Robert Dennis, a Department Regional Planning Administrator and accepted as an expert. Also, it offered Department's Exhibits 10, 17, and 18, which were received in evidence. Intervenor presented the testimony of Dennis Taback, a partner in the joint venture which owns the Club; Karl B. Peterson, a professional engineer and accepted as an expert; and Timothy R. Stillings, a planner and accepted as an expert. Also, it offered Intervenor's Exhibits 1-9, 11-15, 18, and 20-29, which were received in evidence. Exhibit 29 is the deposition of Lillian Dukate, the wife of Robert Dukate, who signed the Petition on behalf of Save Boca. The City, which is aligned with the Department and Intervenor, presented no evidence except through examination of the other parties' witnesses.

The Transcript of the hearing (four volumes) was filed on June 24, 2008. (A second copy of the Transcript was filed on July 10, 2008.) By agreement of the parties, the time for filing proposed findings of fact and conclusions of law was

extended to July 14, 2008, or twenty days after the filing of the Transcript. A Joint Proposed Recommended Order was timely filed by the Department, Intervenor, and City and has been considered in the preparation of this Recommended Order. Also, on July 14, 2008, Intervenor filed Motions for Sanctions, Fees, and Costs under Section 163.3184(12), Florida Statutes, directed to each Petitioner. On July 22, 2008, Petitioners filed a Response to Intervenor's Motions for Sanctions and Fees [and Costs]. As noted in the Conclusions of Law, these Motions must be dealt with by separate final order. Finally, on July 17, 2008, Petitioners filed a Motion for Enlargement of Time to File Proposed Recommended Order and asked for an additional twenty-one days in which make their filing. The Motion was opposed by all other parties and was denied by Order dated July 18, 2008.[5]

FINDINGS OF FACT

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

A. The Parties

1. The City is a municipality in eastern Palm Beach County located approximately half way between West Palm Beach and Fort Lauderdale. It adopted the Ordinances which approve the land use amendments being challenged.

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

3. MCZ is a joint venture real estate company (and an Illinois limited liability company) that acquired ownership of the Club in December 2004. MCZ applied to the City for the plan amendments being challenged and plans to redevelop the property which is the subject of the land use change. Through its agent and consultants, MCZ timely submitted comments to the City during the adoption of the plan amendments.

4. Robert Dukate owns and resides on property facing one of the Club's golf courses, on which are the 29.58 acres that MCZ wishes to develop. He acknowledged that he drafted the Petition (without the assistance of counsel) which was filed in this case. Mr. Dukate timely submitted comments to the City during the adoption of the amendment. The parties agree that he is an affected person. See § 163.3184(1)(a), Fla. Stat.

5. Save Boca is a Florida-for-profit limited liability corporation formed on June 14, 2007, or approximately two months after MCZ filed its application for approval of the plan amendments. According to Petitioners' Exhibit 5, it has around eighty members, although Mr. Dukate stated at hearing that it has "[a]pproximately 70," of which around thirty-five own

property at the Club, and twenty-eight live directly adjacent to the proposed development. The corporation's Operating Agreement approved on June 24, 2007, indicates that Save Boca is a "member managed organization." Petitioners' Exhibit 12. However, it has only one manager, Lillian Dukate (Mr. Dukate's wife), who also serves as its Treasurer. Even though Ms. Dukate is the sole manager of the corporation and signed the Petition, she had no role in the drafting of the document. She added that she only reviewed "a little" of the Petition before it was filed in February 2008 and "just kind of skimmed through it just to see what it was." There is one other officer, Ann Pinkocze, who serves as Secretary but has no involvement with the corporation except for signing checks.

6. The Petition alleges that the organization "submitted oral and/or written comments and objections to the amendment during the adoption process." This was confirmed at hearing by Mr. Dukate who indicated that the organization hired an attorney (Jane West, Esquire) to submit oral or written comments to the City Commission during the adoption process.

7. There is some confusion regarding the nature and purpose of the organization. Neither the Articles of Incorporation nor the Operating Agreement (the only two documents pertaining to the operation of the corporation)

provides that information. At hearing, Mr. Dukate, who was responsible for its formation, stated that the corporation was formed "for the purposes of saving green space within the City of Boca Raton at the request of many residents in this particular community." He added that it is not necessarily limited to activities within the City and denied that it was formed specifically to oppose these plan amendments or "reap the benefits of any negotiations [it] might have with the developer."

8. Although Section III.6 of the Operating Agreement requires that the organization conduct "an annual membership meeting," and it provides that "any member may call a special membership meeting at any time by communicating to all other members the plan to schedule a special meeting," there is no evidence that the organization has ever held a meeting or passed a resolution. This fact was partially acknowledged by Mr. Dukate when he confirmed that no meetings have been held since the City adopted the amendments in December 2007. Minimal activities conducted by the organization include the filing of a Petition and participating in this matter, sending emails and correspondence to members of the Boca Teeca community, and the hiring of one expert and counsel shortly before the hearing.

9. According to a letter he wrote to his neighbors on June 22, 2007, or around a week after Save Boca was formed, Mr. Dukate urged them to join Save Boca "to coordinate the process" of negotiating with MCZ on behalf of the community in order to reduce the impact of the project as much as possible. Intervenor's Exhibit 21. In an earlier email authored by Mr. Dukate on June 10, 2007, concerning the possibility of hiring an attorney to oppose the project, he stated that "[c]onsidering the amount of money that the city was extracting from this developer -- $3myn [$3 million] + $185K for the median beautification + more money for work-force housing -- we should have no trouble getting in excess of $300k for our community, or almost $10k/house." Intervenor's Exhibit 22.

10. Through cross-examination at hearing, Intervenor sought to establish that there was no action ever taken by the corporation to approve the filing of a petition in this case. However, that issue was not pursued in the Joint Proposed Recommended Order and it is assumed that claim has been abandoned. The Operating Agreement indicates that all management decisions will require "the approval of a majority of managers" and that "[a]ction by written consent may be taken without a meeting, without prior notice, and without a vote." Petitioners' Exhibit 12, page 1. Ms. Dukate is the only manager

and she alone could presumably make a decision to initiate a legal proceeding on behalf of Save Boca. Except for the Petition itself, there is no evidence of any other "written consent."

B. Background

11. As noted above, MCZ purchased the Club in December 2004. The Club consists of approximately 212 acres on which are located a residential community known as Boca Teeca, three nine-hole golf courses (known as the north, west, and south courses), a clubhouse, an inn, and maintenance facilities. The Club is bounded on the west by Interstate 95 (I-95), on its southern border by Yamato Road, by a railroad track which lies just west of North Dixie Highway (State Road 811) on its eastern side, and by a canal on its northern boundary. Northwest Second Avenue (a part of which is also known as Boca Raton Boulevard), a City-maintained road, runs in a north-south direction through the eastern half of the property, while Jeffrey Street intersects with Northwest Second Avenue and runs from there through the center of the property in a northwest direction and eventually crosses over I-95 where it becomes Clint Moore Road.

12. MCZ plans to redesign the Club by significantly upgrading the eighteen-hole championship golf course, creating a new nine-hole executive golf course from an existing nine-hole

championship course, creating new enhanced social facilities, and constructing 211 new townhome units. The townhomes will be constructed on approximately 29.58 acres in the southwest portion of the property just east of I-95 and south of Jeffrey Street. Nine holes of the existing golf course are currently located on that site and will be eliminated, to be replaced by a nine-hole executive course in another area of the Club. It is fair to infer that one of the driving forces behind this challenge is Petitioners' opposition to the construction of 211 townhomes on what is now open space (currently a nine-hole golf course) lying to the west-southwest of the homes of Mr. Dukate and presumably some other Save Boca members.

13. By application filed with the City on April 10, 2007, MCZ sought approval of the two plan amendments in question, including a change in the 29.58 acres from Recreation and Open Space to Residential Medium (Ordinance No. 4987) and a text amendment (consisting of a new goal, policy, and four objectives and an amendment to an existing policy) to the City's Transportation Element (Ordinance No. 4991). The FLUM amendment allows a density on the property not to exceed 9.5 units per acre, although MCZ has agreed to not exceed 7.1 units per acre. See Policy LU.1.1.2. The text amendments specifically provide for the adoption of an Alternate Traffic Concurrency Standard

(ATCS). The effect of the text amendments is to allow a new interim level of service (LOS) standard (1,960 two-way peak hour trips) for that portion of Northwest Second Avenue extending from Yamato Road to Jeffrey Street to account for the anticipated impacts of the proposed development. This was necessary since the traffic volume on the roadway has been, and is currently, exceeding the upper limit of its established LOS E (1,550 vehicles at peak hour). Any development approved pursuant to the ATCS must also employ certain mitigation measures, such as improved turn lanes.

14. The amendments were considered at a meeting of the City's Planning and Zoning Board on June 7, 2007. With one dissenting vote, the Board recommended approval to the City. The amendments were then considered and approved by the City Council at a public hearing conducted on September 11, 2007. On September 25, 2007, the amendment package was transmitted to the Department for its review. (The amendment package included four Ordinances; however, only two are in issue.) On November 30, 2007, the Department issued its Objections, Recommendations and Comment Report (ORC), which cited objections relating to ensuring adequate potable water and transportation capacity to support the proposed map amendments and establishing a level of service (LOS) standard "consistent with Rule 9J-5, F.A.C." More

specifically, in terms of traffic impacts, the Department was concerned that the City had only evaluated the impacts of the proposed development rather than the maximum development potential that would be allowed under the new land use category.

15. On December 11, 2007, the City Council voted to adopt Ordinance Nos. 4987 and 4991, which approved the change in the FLUM and amended the Transportation Element. The amendment package was transmitted to the Department for its final review on December 17, 2007. That package included revised data and analysis in response to the ORC. See Finding of Fact 44, infra.

16. On January 25, 2008, a Department staff report was issued recommending that the two Ordinances be found in compliance. This was approved by the Office of Comprehensive Planning on January 28, 2008.

17. On February 4, 2008, the Department published its Notice of Intent in the Boca Raton News.

18. On February 25, 2008, Petitioners filed their Petition contending that Ordinance Nos. 4987 and 4991 were not in compliance. As grounds, they asserted that Ordinance No. 4987 (the FLUM amendment) is inconsistent with Objective REC. 3.1.0 of the Plan, while they generally contended that Ordinance No. 4991 (the text amendment) is inconsistent with the EAR and various provisions within the Transportation Element of the

Plan, is not supported by adequate data and analysis, and violates the concurrency statute.

C. Petitioners' Objections

19. Petitioners first contend that the FLUM amendment is inconsistent with Objective REC 3.1.0, which requires the City to "[d]esignate, acquire, or otherwise preserve a system of open space" that, among other things, "provides visual relief from urban development." The Petition alleges that the amendment "reduces the availability of open space, as well as, the availability of land designated for recreational use within the city and does not provide visual relief from urban development." Petition, paragraph 15.

20. Mr. Dukate's residence is approximately 150 feet from the location of the proposed townhome development and overlooks a golf course, some trees, and I-95 in the distance.

21. The proposed townhomes are designed to resemble villas in a Key West architectural style and are clustered in groups of six connected by pedestrian walkways. The height restriction for all units is thirty-five feet. However, the townhomes closest to the single-family homes have been designed as two-story units. There will be significant landscaping and a buffer between the townhomes and I-95 and the existing single-family

homes to the east. The evidence shows that if the property is developed, it will provide visual relief from urban development.

22. In addition, the proposed development provides substantial open space on site, over sixty percent more than is required by the City's Land Development Code.

23. The FLUM amendment also furthers the cited Objective by providing pedestrian and bicycle linkages between parks, schools, residential, and commercial areas.

24. Although the issue of compatibility was not raised in the Petition except in the context of proving standing, the City's Principal Planner, Jennifer Hofmeister, established that her review of the FLUM amendment was a "lot more detailed and specific than a lot of other local governments would do [for] their compatibility analysis." Ms. Hofmeister concluded that the two uses are compatible under the current Plan. In making her analysis, she reviewed the adjacent land uses on the FLUM, the proposed site plan submitted by MCZ, including the maximum height of the townhomes, and the densities allowed by single-family neighborhoods and the new land use. Ms. Hofmeister further noted that higher density housing has existed adjacent to single-family homes in the area just north of Yamato Road since the Club was developed in 1973 or 1974. She also pointed out that in the field of planning, medium density (such as

townhomes) is considered a transitional land use in the residential land use category and is compatible with a single-family neighborhood.

25. Petitioners' planning expert, Deborah Golden-Gestner, acknowledged that while she had reviewed parts of the application file, such as the Department of Transportation's (DOT) traffic comments, she had never seen or reviewed the challenged plan amendments before she presented testimony at the final hearing.

26. Ms. Golden-Gestner contended that the City's review process was flawed because it failed to consider the 1973 master plan for the Boca Teeca community, which limited development to 1,774 units, of which 1,682 have been built to date. Therefore, she concluded that the FLUM amendment violates the terms of that plan since it allows 211 more units to be built. However, consistency with a master plan is not a compliance consideration. Further, the 1973 master plan was not raised as an issue in the Petition. Assuming arguendo that the master plan is data that could have been considered by the City (although this argument was not made by Petitioners), Ms. Hofmeister established that the property subject to the FLUM amendment (a golf course) has been purchased by a separate entity (MCZ) and is subject to a different master plan.

27. Petitioners have not shown beyond fair debate that the FLUM amendment is inconsistent with the cited Objective or is otherwise not in compliance.

28. Ordinance No. 4991 amends the Transportation Element of the Plan in several respects. First, it revises Policy TRAN. 1.3.1., which prescribes the LOS standards to be maintained on roadways during peak hour and daily conditions, by providing that an exception to those LOS standards is permitted if it is "approved pursuant to Goal 5 of the Transportation Element." At the same time, the Ordinance creates a new Goal 5 which reads as follows:

> GOAL TRAN. 5.0.0: IT IS THE GOAL OF THE CITY OF BOCA RATON TO IMPLEMENT INTERIM CONCURRENCY MEASURES FOR CONSTRAINED ROADWAYS IDENTIFIED IN THE COMPREHENSIVE PLAN, PENDING THE ADOPTION BY THE CITY COUNCIL OF A MULTI-MODAL TRANSPORTATION DISTRICT ("MMTD") FOR THE CITY.

29. The City also created the following rather lengthy objective and policies to implement the above goal:

> OBJECTIVE TRAN. 5.1.0: The City Council shall adopt interim traffic concurrency measures that are compatible with, and supportive of, MMTD concepts and principles, including the provision of alternative modes of transportation, funding mechanisms to support transit, applicable roadway improvements and transportation mode connectivity.
>
> POLICY TRAN. 5.1.1: The Boca Raton City Council established as its "Major Issue"

pursuant to the 2005 Evaluation and Appraisal Report, the adoption of an MMTD for the City. As an interim measure, pending adoption of MMTD Goal, Objective and Policy amendments to the Comprehensive Plan, the City Council desires to implement a procedure for the approval of an alternative traffic concurrency standard ("ATCS") over roadways that are constrained and exceed the adopted level-of-service as provided in Policy TRAN 1.3.1. Any development approved pursuant to the ATCS shall employ mitigation measures as provided below and must be consistent with all other provisions of the Comprehensive Plan.

Any development approved pursuant to the ATCS shall implement mitigation measures including, but not limited to, the following:

a. All development shall include on-site and off-site non-vehicular transportation improvements including sidewalks, shared use pathways, transit facilities and/or bike lanes. These improvements shall be constructed to either tie into or expand existing public facilities as a means to provide connectivity to existing regional transit facilities.

b. All development shall continue to test for concurrency pursuant to the Palm Beach County Traffic Performance Standards Ordinance.

c. Any required roadway network improvements otherwise consistent with the Comprehensive Plan, such as turn lanes and signalization improvements shall be constructed by, and at the expense of, the petitioner [developer].

d. All development shall include a Transportation Demand Management program, traffic calming techniques, a complementary

mix of land uses, appropriate densities and intensities of land, access to transit facilities, access management plans and pedestrian friendly site design.

e. Any development approved pursuant to this Comprehensive Plan goal shall enter into an agreement documenting any and all mitigation measures, including any funding necessary to implement MMTD improvements (i.e. mitigation measures) proposed to mitigate roadway level-of-service impacts.

POLICY TRAN. 5.1.2: The City shall adopt appropriate Land Development Regulations prior to the approval of any development pursuant to the Code.

POLICY TRAN. 5.1.3: Any request for development approval pursuant to the ATCS shall be authorized by the City Council through an amendment to the Comprehensive Plan, and shall be processed in accordance with the Conditional Land Use Amendments and Rezoning provisions found at Chapter 23, Article VI, of the Land Development Code.

POLICY TRAN. 5.1.10: Policy TRAN. 1.4.8. establishes NW 2nd Avenue from Yamato Road to the northern City Limit as a 2-lane, undivided, constrained roadway, in order to, among other reasons, maintain the residential character of the adjacent neighborhoods. The following establishes the ATCS for the proposed Ocean Breeze development ("Development") (Universal Conditional Approval Request (UC-06-04)) to satisfy traffic concurrency under Goal 5 of the Transportation Element, pursuant to the purposes stated in this Goal and Objective, subject to the following mitigation measures and conditions:

a. The level-of-service for NW 2nd Avenue between Yamato Road and Jeffrey Street is

> hereby established as 1,960 two-way peak hour trips.
>
> b. The Ocean Breeze developer shall enter into a written mitigation agreement to implement the below described mitigation measures, including but not limited to those measures provided in POLICY TRAN. 5.1.1., as more specifically defined below.
>
> 1. The developer shall contribute $6,000,000 to the City to offset roadway capacity constraints. These dollars shall be used by the City to improve NW 2nd Avenue as a 4-lane divided highway or to fund MMTD improvements that will impact the Development. The Mitigation Agreement shall specify the disposition of funds in the event the Development Order expires.
>
> 2. The developer shall construct the following off-site MMTD improvements: sidewalks along NW 2nd Avenue and Jeffrey Street to tie the proposed development into the City's pedestrian and bikeway system.
>
> 3. The Mitigation Agreement shall not be transferred or assignable without the written consent of the City and it shall be entered into prior to the issuance of a Development Order.
>
> * * *

(Although the terms of a mitigation agreement between a local government and a developer are not normally included in the comprehensive plan, the testimony was that local governments are now incorporating this type of language in their plans.)

30. Petitioners have alleged that the amendments adopted by Ordinance No. 4991 are not in compliance for a number of

reasons, some of which are quite general in nature and do not identify the specific parts of the lengthy text amendments that are actually being challenged. First, they argue that the amendments are inconsistent with a statement found at page 37 of the City's 2005 EAR, which reads as follows:

> For any significant future development to occur in this area, Boca Raton Blvd. would need to be widened to a four (4)-lane divided roadway. Developers would be required to fund this improvement. The estimated cost to widen Boca Raton Blvd. to a four (4)-lane divided road is approximately 14.3 million dollars based upon the FDOT Transportation Cost Manual.

Petitioners generally assert that because the Mitigation Agreement entered into by the developer and the City only provides for $6 million for the widening of Northwest 2nd Avenue (Boca Raton Boulevard) and not the $14.3 million referred to in the EAR, the amendment and the EAR are inconsistent.

31. An EAR is the first step in updating a local government's comprehensive plan and is prepared every seven years to determine if the plan's goals, objectives, and policies are being met, or if new goals, objectives, and policies need to be implemented. See § 163.3191, Fla. Stat.; Fla. Admin. Code R. 9J-5.003(44). Once an EAR is found to be sufficient by the Department, the next step is for the local government to adopt EAR-based amendments which incorporate the recommended revisions

in the EAR. However, there is no requirement in Chapter 163, Florida Statutes, or Florida Administrative Code Rule Chapter 9J-5 that plan amendments be consistent with EAR provisions. See § 163.3184(1)(b), Fla. Stat. In fact, the City may deviate from changes recommended in the EAR, so long as the action taken is supported by adequate data and analysis. In this case, the proposed amendments are not EAR-based amendments, and the Department did not review, and was not required to review, the City's EAR to determine whether the proposed amendments were consistent with that document.[6]

32. Petitioners further allege that the City is basing the amendments on the adoption and implementation of the MMTD, which "may, or may not be adopted." Petition, paragraph 18. They go on to allege that this in turn violates GOAL TRAN. 1.0.0, which provides that a goal of the City shall be to provide a safe transportation system.

33. The purpose of a MMTD is to promote alternative forms of transportation, such as pedestrian, bicycle, and transit modes, in order to reduce automobile trips. The 2005 EAR identified the adoption of a MMTD as a major issue for the City. Intervenor's Exhibit 7, Chapter 3. While the City is currently in the planning stages for the establishment of a MMTD, it must first have money in the budget to implement the changes and then

prepare amendments to the Plan and Code of Ordinances. The precise date when this will occur, if at all, is unknown.

34. The evidence established that the plan amendments are neither contingent nor dependent on the implementation of the MMTD. Indeed, the traffic analysis supporting the amendments has not assumed that any trips would be removed from the roadway by the implementation of the MMTD. Further, the Department did not consider the implementation of the MMTD in its review of the amendments nor deem it necessary. If the City does in fact implement the MMTD at some future date, it will need to amend its Plan by a separate amendment. Therefore, the MMTD is not relevant to determining whether the amendments are in compliance.[7]

35. Petitioners further allege that the plan amendment, which specifically modifies the LOS to allow for 1,960 two-way trips on a segment of Northwest Second Avenue, violates Policy TRAN. 1.4.8 by allowing "congestion which will jeopardize the safety of not only the motorists but especially the pedestrians and the reduction of the quality of life and lead to degradation of the residential character of the community." Petition, paragraph 19. The policy allegedly contravened provides that "NW 2nd Avenue from Yamato Road to the northern city limits shall remain a 2-lane undivided constrained facility in order to

maintain the residential character and provide a pedestrian and bicycle friendly culture to adjacent neighborhoods."

36. The segment of roadway at issue is Northwest Second Avenue between Jeffrey Street and Yamato Road, which cuts through the eastern half of the Club and is a local road. Although classified as a "2-lane undivided constrained facility" in the Plan, this roadway is actually considered an undivided three-lane roadway because it has a number of dedicated left turn lanes. Like all City (or local) roads, this segment is designated LOS E, which allows for 1,550 two-way peak trips. This LOS has been consistently exceeded since 1994. (Local governments have the discretion to establish LOS standards on local roads that are not consistent with any LOS standards established by the DOT. See § 163.3180(10), Fla. Stat.)

37. The LOS as defined in the Highway Capacity Manual and accepted by the City and Palm Beach County (County) is ultimately defined in terms of driver delay.

38. The City Traffic Engineer, Douglass Hess, established that various improvements which are required by the City as conditions of approval for these amendments will help improve the LOS along this segment. Specifically, the developer will be required to install sidewalks along Northwest Second Avenue and turn lane improvements at the intersection of Northwest Second

Avenue and Jeffrey Street. The turn lane improvements include a redesign of the north-bound turn lane (by expanding the lane from 120 feet to 300 feet long), which will allow for more storage of cars, and the addition of a new south-bound turn lane which will direct traffic to West Jeffrey Street.

39. Mr. Hess also analyzed the intersection of Northwest Second Avenue and Jeffrey Street on a chart demonstrating the average motorist's delay during the morning and afternoon peak hours under three different scenarios. See Intervenor's Exhibit 18. The first scenario was as the intersection currently exists in 2007 peak season; the second is 2010 conditions without the development; and the third demonstrated 2010 conditions with the development, including the lane improvements. The Exhibit reflects that the average delay in seconds during morning and afternoon peak hours under existing traffic conditions in 2007 is now 74.8 and 73.1 seconds, respectively, or LOS E. Under 2010 traffic conditions with development, including the required improvements, the average delay in seconds will be reduced to 30.5 and 47.3 seconds during morning and afternoon peak hours, respectively, or within the standards for LOS C and D. Therefore, any congestion will greatly improve with this development and the improvements required by the City.

40. Petitioners further allege that Policy TRAN. 1.3.7 is violated "due to a lack of accurate [traffic] data being provided to the city" (Petition, paragraph 17), and "[i]ncreasing the peak-hour traffic level of service standards for a development results in having no standards at all and should not be allowed under the policies of responsible growth planning and therefore violates the concurrency requirements required by the State of Florida" Petition, paragraph 20.

41. Policy TRAN. 1.3.7 provides that "[p]roposed land use changes shall only be approved when traffic impact studies or mitigation measures ensure that adopted roadway level-of-service standards will be upheld." The new LOS for the segment in question is 1,960 two-way peak trip hours, of which only seventy-eight are attributable to the proposed development at the Club during the peak hour.

42. In determining the impact of the development, the City Traffic Engineer considered a number of factors. First, he noted that the traffic volumes on this segment of roadway had actually been declining over the past several years. Even so, he elected to increase the existing traffic by a compounded growth rate of 1.15 percent per year. Second, based upon data provided by the County and City, he also included committed traffic that has not yet materialized on the roadway network.

This is traffic that is associated with the approved projects within the area that have not yet reached full build-out of the development. Finally, he added to the roadway network the traffic associated with the Club development.

43. The foregoing analysis resulted in the volume on the relevant segment of roadway to be 1,908 in the peak hour. Because of concerns noted by the Department in its ORC, which asked that the City assume a total build-out of the proposed new zoning category rather than the reduced number of units proposed by MCZ, the City made a second analysis of the traffic impacts.

44. In its second analysis, the City evaluated the impacts using a horizon year of 2012, rather than 2010. Even though the developer proposed to construct only 211 townhomes, the City assumed that there would be 281 dwelling units on the property. With these new assumptions, the traffic volume increased to 1,958, which was still within the proposed LOS standard of 1,960 vehicles during the peak hour. The City reacted appropriately to this data and analysis when it adopted the challenged amendments.

45. In challenging Ordinance No. 4991, Petitioners relied primarily upon the testimony of Larry Hymowitz, a Transportation Planner with the DOT who submitted comments to the Department on November 21, 2007, as part of the Department's review process.

See Petitioners' Exhibit 10. The DOT is one of the agencies that is required by law to be provided with copies of proposed amendments for review and to then forward its comments to the Department. In criticizing the same amendment, Ms. Golden-Gestner also relied heavily upon the DOT's comments.

46. Although Mr. Hymowitz concluded that there was a lack of information submitted by the City to demonstrate that adequate mitigation had been proposed to offset the increased traffic from the project, he did not review the adoption package or any other documentation dated after September 2007. Therefore, he was unaware of the additional data and analysis submitted by the City. In this respect, his analysis was flawed. Mr. Hymowitz also incorrectly assumed that the LOS for the Boca Raton Boulevard segment was LOS D, or 1,250 trips per peak hour. In doing so, he overlooked a footnote in the City's transmittal package to the Department which explained that links within the jurisdiction of the City are assigned LOS E.

47. Moreover, the only objection noted by the DOT in its written comments was related to potential traffic impacts on I-95 and U.S. Highway 1. The evidence establishes, however, that the impact of the proposed development on I-95 between Glades Road and Yamato Road (which are the roadways having the two closest ramps onto I-95) was only six trips during peak

hour, which is considered to be insignificant and requires no mitigation. Similarly, the impacts on U.S. Highway 1 were small, and the impacted sections would continue to operate at an acceptable LOS D throughout the building of the project and into the horizon year of 2012.

48. Petitioners' traffic consultant, Mr. Wyman, concluded that because Northwest Second Avenue is already a constrained roadway, and the project will generate new traffic, the City should require "proper" mitigation, such as four-laning the roadway or scaling back the development. In reaching this conclusion, Mr. Wyman questioned the accuracy of the City consultant's traffic report. He stated that if he had prepared the traffic report, he would have used more conservative estimates for pass-by trips and different directional components in the traffic count calculation. He agreed, however, that the traffic counts were done "professionally and correctly," he stated that he "respected" the methodology used by the City's consultant, and he agreed that a traffic study includes some subjective analysis by the person performing the study.

49. Finally, in a similar vein, Petitioners have raised a broad contention that "concurrency" requirements under Section 163.3180, Florida Statutes, have been violated. Petition, paragraph 20. (Although the statute runs for eight

pages, a more specific citation to a particular part of the statute was not given.) In responding to this broad contention, the Department's Regional Planning Administrator pointed out that the Department is not required to make a concurrency determination in its review of a plan amendment. Rather, its review is limited to determining whether the local government is properly planning for its public facilities. In doing so, the Department determines whether the City (a) has the facilities available at the present time to meet the needs of the proposed development, or (b) the City has plans for facilities to be in place when the impacts of the development occur. Thus, the actual concurrency determination is made by the local government at the time a development order or permit is issued. In this case, the Department determined that the new LOS standard of 1,960 trips on the impacted roadway segment was sufficient to accommodate the development of the project at the maximum development potential. Finally, contrary to Petitioners' assertion, in establishing the new LOS, the City was not required to include any capital improvements in its schedule of capital improvements since none are necessary to maintain that standard.

50. Petitioners have failed to show beyond fair debate that the plan amendments adopted by Ordinance No. 4991 are not

supported by adequate data and analysis, are inconsistent with other Plan provisions, violate the concurrency statute, or are otherwise not in compliance.

CONCLUSIONS OF LAW

51. 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(9), Florida Statutes.

52. In order to have standing to challenge a plan amendment, a challenger must be an affected person as defined in Section 163.3184(1)(a), Florida Statutes. The parties agree that Mr. Dukate owns property and resides within the City and he submitted oral or written comments to the City during the adoption process. Even though Save Boca has engaged in minimal activities as an organization, given the Department's liberal interpretation of the above statute, the facts arguably show that it is operating a "business" within the City. It also submitted comments to the City during the adoption of the amendments. Therefore, it is an affected person and has standing to participate in this matter.

53. Once the Department renders a notice of intent to find a plan amendment in compliance, as it did here, that plan provision "shall be determined to be in compliance if the local

government's determination of compliance is fairly debatable." § 163.3184(9)(a), Fla. Stat. Therefore, Petitioner bears the burden of proving beyond fair debate that the challenged plan amendment is not in compliance. This means that "if reasonable persons could differ as to its propriety," a plan amendment must be upheld. Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997). Put another way, where 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.'" Martin County v. Section 28 Partnership, Ltd., 772 So. 2d 616, 621 (Fla. 4th DCA 2000).

54. For the reasons given in the Findings of Fact, Petitioner has failed to establish beyond fair debate that the amendments are not in compliance. Therefore, the plan amendments adopted by Ordinance Nos. 4887 and 4991 are in compliance.

55. Finally, Intervenor's Motions for Sanctions, Fees, and Costs under Section 163.3184(12), Florida Statutes, filed on July 14, 2008, must be adjudicated by a separate final order. See, e.g., Highlands Homeowners' Association, Inc. v. Department of Community Affairs, et al., DOAH Case No. 06-3946GM, 2007 Fla. ENV LEXIS 94 at *22 (DOAH Aug. 15, 2007). Therefore, jurisdiction is retained in this matter for that purpose if the

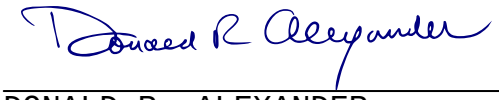
Motions are renewed by Intervenor within thirty days after a final order is entered in this matter.

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 City's plan amendments adopted by Ordinance Nos. 4987 and 4991 are in compliance. Jurisdiction is retained for the purpose of considering Intervenor's Motions for Sanctions, Fees, and Costs, if renewed within thirty days after a final order is entered in this matter.

DONE AND ENTERED this 4th day of August, 2008, in Tallahassee, Leon County, Florida.



DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of August, 2008.

ENDNOTES

1/ All statutory references are to the 2007 version of the Florida Statutes.

2/ The ruling quashed a subpoena issued to a member of the City's Planning and Zoning Board on the basis of the rationale in Department of Agriculture and Consumer Services v. Broward County et al., 810 So. 2d 1056, 1058 (Fla. 1st DCA 2002), and cases cited therein. See also Rainbow Lighting, Inc., et al. v. Chiles, et al., 707 So. 2d 939, 940 (Fla. 3d DCA 1998)(a city commissioner's motive in adopting ordinances is not subject to judicial scrutiny).

3/ A MMTD gives consideration to transportation modes other than by automobile, such as pedestrian, bicycle, and transit modes, and is designed to reduce the number of automobile trips or vehicle miles of travel. See § 163.3180(15), Fla. Stat.

4/ Although Petitioners' traffic consultant, Mr. Wyman, referred to a document styled "Summary of Findings: False Assumptions, Conflicting Data and Incomplete Data Within the Proposed Ocean Breeze Land Use Amendment Application," the document was never marked for identification purposes as an exhibit or moved into evidence. However, the witness summarized portions of his findings during his testimony.

5/ The ruling noted, among other things, that even though counsel acknowledged that she had checked the DOAH website sometime during the week of July 7, 2008, and was aware that a transcript had been filed, thereby triggering the running of the twenty-day time period in which to file a proposed recommended order, she did not file the request for an extension of time until three days after the due date. By then, the other parties had timely filed their Joint Proposed Recommended Order and served a copy on counsel.

6/ As explained by the City Traffic Engineer, the $14.3 million estimate in the EAR was for the cost of four-laning Northwest 2nd Avenue from Yamato Road to the northern City limits, which is considerably longer in length than the portion of Northwest 2nd Avenue between Yamato Road and Jeffrey Street, which is at issue here. This is confirmed by Policy TRAN. 1.4.8 and the EAR itself.

7/ A related contention, that the amendment is not in compliance because it violates Goal TRAN. 1.0.0, is also rejected. According to the Department's Regional Planning Administrator, there has never been "any instance where we have found a not in compliance determination strictly on a comprehensive plan goal." Rather, it is objectives and policies "that really are the action items and the measures of achievability that really come into play in terms of evaluating a comprehensive plan amendment."

COPIES FURNISHED:

Thomas G. Pelham, Secretary
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

Shaw P. Stiller, General Counsel
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

Marcy I. LaHart, Esquire
Marcy I. LaHart, P.A.
711 Talladega Street
West Palm Beach, Florida 33405-1443

Samuel Dean Bunton, Esquire
Department of Community Affairs
2555 Shumard Oak Boulevard, Suite 325
Tallahassee, Florida 32399-2100

Maureen McCarthy Daughton, Esquire
Broad and Cassel
215 South Monroe Street, Suite 400
Tallahassee, Florida 32301-1804

Patricia M. Baloyra, Esquire
Broad and Cassel
One Biscayne Tower
Two Biscayne Boulevard
21st Floor
Miami, Florida 33131-1806

Daniel L. Abbott, Esquire
Weiss Serota Helfman Pastoriza
Cole & Boniske, P.L.
200 East Broward Boulevard, Suite 1900
Fort Lauderdale, Florida 33301-1949

Diane Grub Freiser, Esquire
City Attorney
201 West Palmetto Park Road
Boca Raton, Florida 33432-3730

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.