

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF COMMUNITY )  
AFFAIRS, )  
 )  
    Petitioner, )  
 )  
and )  
 )  
VALERIE BRITT, KATHLEEN S. )  
BROWN, MARY F. AND SAM )  
BILLOTI, KIMBERLY A. CRAFT, )  
LORETTA PERRONE, and )  
PATRICIA T. HAIRSTON, )  
 )  
    Intervenors, )  
 )  
vs. )  
 )  
CITY OF JACKSONVILLE, )  
 )  
    Respondent, )  
 )  
and )  
 )  
WESTLAND RESIDENTIAL )  
DEVELOPMENT, LLC; MCCUMBER )  
GOLF, INC.; M.D. MOODY & )  
SONS, INC.; DUNN CREEK, LLC; )  
JOHNNY I. DUDLEY, LLC; )  
BALDWIN TRADEPLEX, INC.; L. )  
CHARLES MANN; JAMES M. AND )  
FAY S. COLEMAN; GEORGE SAYAR; )  
SKYLINE REALTY SERVICES, )  
INC.; HST VENTURES, INC.; R. )  
LOUISE KITTRELL, INC.; )  
WHITEHOUSE MANOR, INC.; D.R. )  
HORTON-JACKSONVILLE; HASSCO, )  
LLC; HIDDEN CREEK LANDING, )  
LLC; TITAN LAND, LLC; FRAZIER )  
TREMBLAY; and ADEL BARIN, )  
 )  
    Intervenors. )  
\_\_\_\_\_ )

Case Nos. 07-3539GM  
          08-4193GM

RECOMMENDED ORDER

Pursuant to notice, these matters were heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on October 27, 28, 29, and 30, 2008, in Jacksonville, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether the City of Jacksonville's (City's) amendment to the Future Land Use Map (FLUM), also known as Ordinance No. 2007-355-E, and a related text amendment to Conservation/Coastal Management Element Policy 7.3.1 adopted by Ordinance No. 2008-315-E are in compliance.

PRELIMINARY STATEMENT

This matter began on May 14, 2007, when the City adopted Ordinance No. 2007-355-E, which changed the land use designation for a 77.22-acre parcel at 13911 Atlantic Boulevard on the west side of the Intracoastal Waterway from Water Dependent/Water Related and Agriculture IV to Community/General Commercial. If found to be in compliance, the change would potentially result in a net increase in development by 1,146 dwelling units and 200,245 square feet of nonresidential land use. The property is owned by Intervenor, M.D. Moody & Sons, Inc. (Moody). On the same date, the City adopted nineteen other changes to the FLUM by separate ordinances. On August 1, 2007, the 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 were not in compliance. The Petition was assigned DOAH Case No. 07-3539GM. Of the seventeen map amendments, only the Moody amendment is in issue here; all others were abated pending efforts by the parties to settle those disputes. One map change (Ordinance No. 2007-385-E) was eventually resolved. Although the other fifteen FLUM amendments are abated, they remain a part of Case No. 07-3539GM and the applicants for those map changes and their counsel are included in the style of the case and the service list, respectively. As to Ordinance No. 2007-355-E, the Department generally alleged that the amendment conflicted with certain provisions within Chapter 163, Florida Statutes (2008)<sup>1</sup>, and Florida Administrative Code Rule Chapter 9J-5 by increasing density in the Coastal High Hazard Area (CHHA), impacting environmentally sensitive land, and impacting transportation facilities. The Department also alleged that the amendment conflicted with seven policies of the State Comprehensive Plan, and it conflicted with a goal and policy of the Northeast Florida Strategic Regional Policy Plan.

On July 31, 2007, Intervenor, Valerie Britt (Britt), filed with the Department a paper styled "Petition to Intervene and Petition for Hearing, Raising New Issues, in the Matter of Jacksonville Plan Amendment 06D-001 as Adopted by Ordinance 07-

355-E and to Intervene in Support of Department of Community Affairs' Notice of Intent to Find Amendment Adopted by Ordinance 2007-355-E Not in Compliance." On the same date, seven individual residents who reside and own property near the affected site, Kathleen S. Brown, Sarah Broadway, Sam and Mary F. Billotti, Patricia T. Hairston, Loretta Perrone, and Kimberly Craft (resident intervenors), filed with the Department a paper styled "Seven Individual Residents' Petitions for Hearing and Petitions to Intervene in the DCA Not in Compliance Proceeding to find Jacksonville Plan Amendment Ordinance 07-355-E Not in Compliance." Both filings were forwarded to DOAH. On August 8, 2007, Moody filed its Petition for Leave to Intervene in support of the challenged FLUM amendment. By Order dated August 9, 2007, intervention was authorized for all parties. The matter was originally scheduled for final hearing on December 17-21, 2007, in Jacksonville, Florida, but was later abated while the parties attempted to informally resolve the disputes.

On June 10, 2008, the City adopted Ordinance No. 2008-315-E, which modified the definition of the CHHA found in Conservation/Coastal Management Element Policy 7.3.1, by allowing site-specific data to be used to determine whether a parcel lies outside of the CHHA. On August 25, 2008, the Department filed its Petition for Formal Administrative Hearing

alleging that the plan amendment was not in compliance on the grounds the amendment was inconsistent with the definition of CHHA found in Section 163.3178(2)(h), Florida Statutes; it was inconsistent with Policy 7.3.1 and Map C-18 within the Element; it was inconsistent with four goals and three policies in the State Comprehensive Plan; and it conflicted with a regional goal of the Northeast Florida Strategic Regional Policy Plan. The text amendment was given Case No. 08-4193GM and was originally assigned to Administrative Law Judge J. Lawrence Johnston. On September 25, 2008, Case No. 08-4193GM was transferred to the undersigned.

On August 26, 2008, Valerie Britt filed her Petition for Leave to Intervene in Alignment with Petitioner Department of Community Affairs and Britt's Petition for Hearing in Case No. 08-4193GM. On the same date, Moody filed its Petition for Leave to Intervene in support of the text amendment. By Orders dated August 27 and 28, 2008, respectively, Britt and Moody were authorized to intervene. On September 3, 2008, Sarah Broadway filed a paper indicating she no longer wished to participate in either case. This filing was treated as a notice of voluntary dismissal. (The applicants for the other fifteen map changes

have not expressed an interest, or asked to participate, in the text amendment case.)

On September 11, 2008, the City filed a Motion to Consolidate (Motion) the Moody FLUM amendment and the text amendment. The Motion was filed under Case No. 08-4193GM and was served only on the parties in that case. By Order dated September 25, 2008, the Motion was granted and the two cases were consolidated. This Order was reconsidered after three individual residents in Case No. 07-3539GM filed a paper indicating that they were not served with a copy of the Motion and objected to consolidation. The matter was reconsidered in light of their objections, and after doing so, consolidation was reaffirmed by Order dated October 8, 2008.

By Notice of Hearing issued on September 29, 2008, a final hearing in both cases was scheduled for February 23-27, 2008, in Jacksonville, Florida. On October 3, 2008, the City filed a Demand for Expeditious Resolution under Section 163.3189(3), Florida Statutes, which requires that, absent extraordinary circumstances, a hearing be held within thirty days after the filing of the demand. Thereafter, the final hearing was rescheduled to October 27-30, 2008, in Jacksonville, Florida.

On October 27, 2008, the Department filed a Motion in Limine to exclude Moody Exhibit LYC on the ground the materials

contained therein were irrelevant and hearsay in nature. That Exhibit consists of documents taken from DOAH Case No. 06-0049GM, including the Transcript of hearing, a topographic map, the Hurricane Storm Tide Atlas for Lee County prepared by the Southwest Florida Regional Planning Commission, and the Recommended and Final Orders in the case, Department of Community Affairs v. Lee County and Leeward Yacht Club, LLC, 2006 Fla. ENV LEXIS 159 (DOAH Aug. 25, 2006); 2006 Fla. ENV LEXIS 158 (Admin. Comm. Nov. 15, 2006). The Motion was denied without prejudice to the Department presenting evidence at hearing and/or argument in its proposed recommended order as to why Case No. 06-0049GM was irrelevant and should not be considered, or was distinguishable.

At the final hearing, the Department presented the testimony of Dr. Joseph Addae-Mensa, a Principal Planner and accepted as an expert; Patrick Odom, Statewide Incident Management and Road Ranger Manager for the Florida Department of Transportation (DOT) and accepted as an expert; Margo Moehring, Director of Strategic Initiatives for the Northeast Florida Regional Council (Council) and accepted as an expert; and Jeffrey A. Alexander, Director of Emergency Preparedness Program for the Council and accepted as an expert. Also, it offered Department Exhibits 1, 2, 4, 7, 9, 12-14, 16-21, 28, and 32,



which were received in evidence. Intervenor Britt and the resident intervenors participated through cross-examination but offered no witnesses or exhibits. The City presented the testimony of William B. Killingsworth, Chief of its Community Planning Division and accepted as an expert, and Michael Sands, Chief of the Development Services Division and accepted as an expert. Also, it offered City Exhibits 1, 2, and 4, which were received in evidence. Moody presented the testimony of Valerie J. Hubbard, a planner and accepted as an expert; Anthony S. Robbins, a planner and accepted as an expert; Nancy C. Zyski, Chief Executive officer of Environmental Resource Solutions, Inc., and accepted as an expert; David W. Spangler, a geotechnical project engineer and accepted as an expert; Brian R. Jarvinen, a storm consultant and accepted as an expert; Alfred F. Kyle, III, a professional engineer and accepted as an expert; Stephen A. Sabia, President of Buffy Environmental Corporation and accepted as an expert; P. Dean Privett, Jr., a land surveyor and accepted as an expert; and Paul M. Harden, an attorney. Also, it offered Moody Exhibits GLD 1 and 2, DWS-1, AFK-1 through 4, PDP-1 through 4, NCZ-1 and 2, SAS-1, BRJ-1 through 3, VJH-1 through 3, ASR-1 and 2, and LYC 1-4, which were received in evidence. Finally, the parties submitted Joint Exhibits 1 through 14, which were received in evidence.

Near the conclusion of the hearing, Moody (with the City's concurrence) acknowledged through an expert and its counsel that the map amendment adopted by Ordinance No. 2007-355-E was not in compliance and that a recommended order to that effect should be sent to the Administration Commission (Commission). (The City and Moody still contend that the text amendment adopted by Ordinance No. 2008-315-E is in compliance.) Moody suggested, however, that during the course of the hearing, it had offered proposed remedial actions that, if specified by the Commission in its final order, and adopted by the City in a new remedial amendment, would "bring the amendment into compliance." See § 163.3184(11)(a), Fla. Stat. Moody further requested that the undersigned submit proposed remedial actions with his recommended order that, if ordered to be adopted by the Commission, would bring the amendment into compliance. Although recommended orders issued by administrative law judges do not include proposed remedial action to cure deficiencies in amendments that are found to be not in compliance, the undersigned nonetheless directed Moody to file proposed remedial amendment commitments, together with their record support, for review by the other parties prior to the filing of its proposed recommended order.<sup>2</sup> On December 2, 2008, Moody and the City filed a paper styled Proposed Remedial Amendment Commitments.

The Department filed a responsive paper (joined "in principle" by Britt and the resident intervenors who are aligned with the Department) on December 9, 2008, indicating generally that while it did not object to the proposed commitments, it takes the position that even if these commitments are adopted, the City has still not demonstrated that it can meet certain rule and statutory requirements necessary to bring the amendment into compliance.

The Transcript of the hearing (seven volumes) was filed on December 1, 2008. By agreement of the parties, proposed findings of fact and conclusions of law were due no later than December 15, 2008. A Proposed Recommended Order was timely filed by the Department and jointly by Moody and the City on that date, and they have been considered in the preparation of this Recommended Order. No filings were made by Britt or the resident intervenors.

#### FINDINGS OF FACT

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

##### A. The Parties

1. The City (which also comprises Duval County) is a local government in northeast Florida whose eastern boundary adjoins the Atlantic Ocean. The City is partially bisected by the St.

Johns River (River), which begins several hundred miles to the south, flows north through the lower half of the City, and then turns east, eventually emptying into the Atlantic Ocean. The Intracoastal Waterway is connected to the River and runs parallel to the coast. The City adopted the plan amendments which are being challenged by the Department and Intervenors.

2. Intervenor Valerie Britt and the six resident intervenors own property and/or reside within the City. They each presented oral or written comments to the City regarding both amendments before transmittal but before their adoption. As such, they are affected persons and have standing to participate in this matter.

3. Moody (formerly known as the Moody Land Company, Inc.) owns property and operates a business within the City. Moody submitted oral or written comments in support of both amendments to the City after transmittal but before adoption of the amendments. As such, it has standing as an affected person to participate.

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

B. Coastal High-Hazard Area

5. Because the CHHA is relevant to both the FLUM amendment and the text amendment challenges, a brief overview of its history and development is appropriate. For local governments abutting the Atlantic Ocean or Gulf of Mexico, or that include or are contiguous to waters of the state, Section 163.3178, Florida Statutes, enumerates certain requirements that must be included within the coastal management element of their comprehensive plans. See § 163.3178(2)(a)-(k), Fla. Stat. The purpose of this directive is that comprehensive plans should "protect human life and limit public expenditures in areas that are subject to destruction by natural disaster." § 163.3178(1), Fla. Stat. Because it lies adjacent to the Atlantic Ocean, the City is subject to these requirements. One of the requirements is the designation of a CHHA in the element. § 163.3178(2)(h), Fla. Stat.

6. "[F]or uniformity and planning purposes," prior to 2006, the CHHA was simply defined as "category 1 evacuation zones." § 163.3178(2)(h), Fla. Stat. (2005). Presumably to eliminate inconsistencies in the application of this broad definition, in 2006 the Legislature redefined the term as "the area below the elevation of the category 1 storm surge line as established by a Sea, Lake, and Overland Surges from Hurricanes

(SLOSH) model." § 163.3178(2)(h), Fla. Stat. (2006). The new law required that no later than July 1, 2008, local governments situated on or near Florida's coastline amend their "future land use map and coastal management element to include the new definition of [CHHA] and to depict the [CHHA] on the [FLUM]." § 163.3178(9)(c), Fla. Stat. Because Policy 7.3.1 of the Conservation/Coastal Management Element of the City's current Plan still utilizes the old definition of CHHA, Ordinance No. 2008-315-E was adopted for the purpose of complying with this requirement.

7. The SLOSH model is a computerized model developed by the National Oceanic and Atmospheric Administration's National Weather Service to calculate hurricane storm surge heights. Storm surge is the abnormal rise of water caused by wind and the pressure forces of hurricanes. Based upon various inputs, such as the direction and speed of a hurricane, initial water elevation, topography, and bathymetry, the model produces a display with storm tide elevations per grid cell. The use of a grid cell enables the model to predict storm surge in a smaller land area. The outputs of the model are storm surge elevations averaged over grid cells, which are accurate to within twenty percent based upon post-storm observations from tide gauges behind coastal barrier islands.

8. In July 1998, the Northeast Florida Regional Planning Council, now known as the Northeast Florida Regional Council, published a four-volume Storm Surge Atlas (Atlas) as a public safety planning tool to assist with hurricane evacuation planning within northeast Florida. (Each regional planning council in the State is tasked with this responsibility.) Volume 2 applies to Duval County. The Atlas reflects SLOSH model storm surge data on a map with land elevations and water features, thus providing emergency planners information they can use to evacuate coastal areas at appropriate times. Areas depicted in the Atlas below the elevation of the category 1 storm surge line are subject to evacuation and are considered to be in the CHHA.

9. In preparing the Atlas, the Council used not only SLOSH model data, but other "suggested changes" (not otherwise disclosed) by emergency manager directors. Because of the time and effort involved in preparing the original Atlas, it has not been revised since its original publication in 1998.

10. The topographical data input for the SLOSH model and the base map for Volume 2 of the Atlas was the 7.5-Minute Series Jacksonville Beach Quadrangle Map produced by the United States Geological Survey. These maps are used to establish the ground elevations for the grids but are limited in their ability to do

fine resolution, that is, provide detailed information regarding the elevation for small areas of land within the grid. Although the Atlas indicates that it used the most current quadrangle map available, which was the 1994 version, the Council actually used the 1981 version. Except for some minor items, however, the record does not disclose any material differences between the two maps. Therefore, the use of the older version does not affect the validity of the information in the Atlas. The Atlas further indicates that the base contours taken from the Quadrangle Map were five-foot contours. However, both the 1981 and the 1994 versions of the Quadrangle Map only show a ten-foot contour line just to the south and southwest of the Moody property, and no five-foot contour lines. See Moody Exhibit BRJ-3. Thus, the map was "just saying that this property [the Moody property] is 10 feet or less."

11. Time/History points are specific points within SLOSH grid cells that are selected by the Council for the purpose of giving detailed information at the point selected. Many of the points are on or near critical roadways. The Moody property is directly underneath Time/History Point 73. In terms of size, the Moody property is a very small percentage of the total grid cell in which that point is located. According to the Atlas, Point 73 is where Atlantic Boulevard crosses the Intracoastal



Waterway. The Department, City, and Moody agree, and the Atlas indicates, that the maximum category 1 storm surge elevation at that point is five feet. Therefore, any land that is in the vicinity of Time/History Point 73 and is less than or equal to five feet in elevation will be inundated by the maximum category 1 hurricane storm surge.

12. According to the legend on the Atlas, areas depicted in dark blue can anticipate inundation in a category 1 storm. The geographic area within Time/History Point 73 is shown on Plate 6 of Volume 2 of the Atlas and depicts the entire Moody property, as well the land in the vicinity of that point, in dark blue, thus implying that all or most of Moody's property is within the storm surge for a category 1 storm. However, it is noted that a significant portion of the Moody property is obscured by the Point 73 label on the Atlas' Plate 6. Even so, given the broad brush scope of that document and the solid dark blue color extending along the Intracoastal Waterway in that area, it is fair to infer that the land area under the label is also dark blue and subject to category 1 evacuation requirements.

13. For land use planning throughout the State, the Department uses the CHHA that is established in the Atlas published by the local regional planning council. (In both the

existing and amended versions of Policy 7.3.1, the City also uses the Atlas for purposes of delineating the CHHA.)

Therefore, if the Atlas depicts a geographic area as being in the CHHA, the Department relies upon that information when it reviews plan amendments proposing to increase density within that area. In doing so, the Department acknowledges that the Atlas necessarily reflects the areas subject to storm surge on a "broad-brush regional approach," but points out that it would be impractical to attempt to carve out extremely small areas along the coast or waterways, parcel by parcel or acre by acre, which might have elevations above the storm surge line and not be subject to the development requirements within a CHHA. It also points out that if exceptions to the storm surge line in the Atlas are allowed, the CHHA requirements could be circumvented by a landowner simply placing fill on the property to raise the elevation. Finally, the SLOSH model is based on average elevations for an entire grid cell, and the model cannot produce a map with land elevations for specific parcels. The Department suggests, however, that generalized data is the best data available for conducting an analysis of storm surge.

14. Because of the "broad-brush" and "averaging" constraints inherent in the Atlas and SLOSH, and the fact that the Atlas' delineation of the CHHA is used primarily for

evacuation planning purposes rather than land use planning, the City and Moody contend that site-specific data is more desirable when determining land use entitlements. They suggest that professionally prepared surveys are far more accurate and precise in determining the elevation on a parcel than the Quadrangle Map, which in this case only depicted ten-foot contours. In this vein, the amended version of Policy 7.3.1 (which is the subject of Case No. 08-4193GM) allows a property owner to submit site-specific data (such as a survey) to demonstrate that the property, or part of it, is not below the category 1 storm surge elevation and is not within the CHHA.

15. An increase of density (or development) within a CHHA is not barred by the statute. In fact, Section 163.3178(9)(a), Florida Statutes, provides that plan amendments proposing an increase in density within a CHHA may be found in compliance if (a) the adopted level of service (LOS) for out-of-county hurricane evacuation is maintained for a category 5 storm event; or (b) a 12-hour evacuation time to shelter is maintained for a category 5 storm event and shelter reasonably expected to accommodate the residents of the contemplated development is available; or (c) appropriate mitigation is provided that will satisfy the provisions of items (a) and (b), including payment of money, contribution of land, and construction of hurricane

shelters and transportation facilities. Therefore, even if the Moody parcel is found to be within a CHHA, it may still increase density within that parcel so long as the above criteria are met. By way of example, payments into a shelter mitigation fund would be one way to mitigate the effects of increasing residential density within the CHHA.

C. FLUM Amendment

a. The property

16. In early 1995, Moody acquired the 77.22-acre tract of property which is the subject of the FLUM amendment, although it has been used as an industrial shipyard since 1951. The property lies on the north side of Atlantic Boulevard, a principal arterial roadway which generally extends from the coast (beginning just north of Neptune Beach) westward to the "downtown" area. The eastern boundary of the property adjoins the Intracoastal Waterway.

17. Approximately 37 acres of the property, or a little less than one-half of the total acreage, consists of environmentally sensitive saltwater marshes. These are located on the west, north, and northeast sides of the property. Near the southwest corner of the property there is also a small wetland scrub vegetative community. The commercial activities on the current site consist of approximately 116,500 square feet

of heavy industrial uses involved in the construction and repair of large ships. They are located on that part of the southern half of the property which sits closest to Atlantic Boulevard and the Intracoastal Waterway. The site also includes a small harbor for docking of ships. The area immediately surrounding the existing boat basin in the south-central part of the property has been environmentally disturbed as part of the ongoing shipyard operations.

18. The development surrounding the Moody site is a mix of residential, commercial, and industrial uses. Single-family residences are the dominant use, occupying seventy-four percent of parcels within a one-half mile radius of the property.

19. Britt and the resident intervenors all reside or own property in a residential development known as Pablo Point, which begins a hundred feet or so to the west of the Moody property, separated only by a marshland.

20. Directly south of the Moody property, and on the south side of Atlantic Boulevard, is a new development known as HarborTown, which in 2002 was the subject of two land use changes, one from Agriculture IV to Conservation and one from Water-Dependent and Water Related (WD-WR) to Community/General Commercial (C/GC). A companion Planned Unit Development (PUD) provides for a mixed residential development with a maximum of

690 dwelling units, 28,000 square feet of office and commercial space, 150 wet slips, and conservation of approximately 29 acres of marshlands. According to the Atlas, it appears that at least part, if not all, of that development may be within the CHHA.

21. The property is accessed by a service road at the Intracoastal Waterway, off Atlantic Boulevard. The eastbound exit ramp, which would be used by emergency rescue teams to access the site, exits to the right and goes under Atlantic Boulevard adjacent to the Intracoastal Waterway in order to reach the Moody site. Egress from the site westbound is by way of a service road on the north side of Atlantic Boulevard.

22. The Moody property is in two flood zones: X5 and AE. Flood zone X5 generally corresponds with the upland areas at the center of the property that have been historically disturbed by shipyard operations and are not likely to flood. Floodzone AE generally corresponds with the environmentally sensitive wetland areas of the property and will likely flood in a 100-year storm.

b. The Application and Review Process

23. Sometime in 2006, Moody filed an application with the City to change the land use designation on its property from WD-WR and Agriculture IV to C/GC. The WD-WR classification allows for water dependent industrial uses such as shipyards, industrial docks, and port facilities. The Agriculture IV land

use allows various agriculture uses and single-family residential development at the maximum density of 2.5 units per acre. The C/GC designation permits a wide range of uses, including multi-family residential and boat storage and sales, and is the same land use classification as the HarborTown project across Atlantic Boulevard and to the south. In contrast to the Agriculture IV land use, however, the C/GC land use allows residential development up to twenty units per gross acre. Thus, the map amendment will result in a potential net increase in development by 1,146 dwelling units and 200,245 square feet of nonresidential land use.

24. After reviewing the application, the City approved the map change in December 2006 as a part of its semi-annual land use changes to its Plan. The amendment was then transmitted to the Department for its review. On March 5, 2007, the Department issued its Objections, Recommendations and Comments (ORC) Report, which noted six objections and one comment.

25. Despite the objections contained in the ORC, on May 14, 2008, the City approved the map change by enacting Ordinance No. 2007-355-E. In conjunction with the land use change, the City also approved a PUD for the property (Ordinance No. 2007-356-E enacted the same date), which authorizes a maximum residential development of four residential buildings

and 590 dwelling units on the property. This density would be achieved by the construction of four twelve-story buildings, each standing around 144 feet high. In addition, Moody intends to develop marina-related specialty retail (including a club, retail, and restaurant activities) not exceeding 6,500 square feet; a marina consisting of 650 slips, a minimum of which will be available to the public on a first come, first served basis; and a public boat ramp. However, the PUD conditions the residential approval through the restriction that no residential development shall be permitted on any portion of the property in the CHHA unless residential units are made available as a result of a program of mitigation for development in the CHHA, approved by the City and the Department under Section 163.3178(9)(a), Florida Statutes. This meant that the mitigation plan would take those impacts created by residential density in vulnerable areas and negate those impacts by minimizing the time it would take to evacuate and by providing adequate sheltering for those individuals if there was not adequate sheltering already available.

26. On July 9, 2008, the Department issued its Statement of Intent to Find Comprehensive Plan Amendments Not in Compliance (Statement of Intent). (This action was directed not only to Ordinance No. 2007-355-E, but also to the other sixteen



FLUM amendments, as well as certain other amendments not relevant here.) On August 1, 2008, the Department filed its Petition alleging that Ordinance No. 2007-355-E is not in compliance.

c. The Department and Intervenors' Objections

27. Moody (with the City's concurrence) has acknowledged on the record that the FLUM amendment is not in compliance. Although the Department has stated a number of reasons why the amendment is not in compliance, unfortunately, there is no record stipulation by the parties as to which specific deficiencies in the Statement of Intent, if any, the City and Moody still dispute. Further, in their Joint Proposed Recommended Order, the City and Moody contend that the Department and supporting Intervenors failed to sustain their objections in several respects. Because of this, a discussion of the Department and Intervenors' objections is appropriate. This Recommended Order will focus only on the objections to the amendment as adopted by the City, and not whether proposed mitigation measures will bring the amendment into compliance.

28. The Department asserts that the FLUM amendment is not in compliance for four reasons. First, it alleges that the City has failed to direct population concentrations away from a known or predicted CHHA, maintain or reduce hurricane evacuation

times, or present sufficient mitigation to offset these impacts. Fla. Admin. Code R. 9J-5.012(3)(b)6. and 7.; § 163.3178(9)(a), Fla. Stat. Second, it alleges that the amendment does not comply with the wetlands protection and conservation requirements of Florida Administrative Code Rule 9J-5.013(3), and it is internally inconsistent with Conservation/Coastal Management Element Goal 4 and Objective 4.1 of the Plan. Third, the Department alleges that the amendment will cause LOS standards on two segments of Atlantic Boulevard to fail, that the traffic analysis performed by Moody was flawed, and that the amendment did not include a financially feasible transportation improvement plan to mitigate traffic impacts. Fla. Admin. Code R. 9J-5.019(3)(a), (c), and (h). Finally, it contends that because of these deficiencies, the amendment is inconsistent with certain goals and policies of the State Comprehensive Plan (State Plan) and Northeast Florida Strategic Regional Policy Plan (Regional Plan). In resolving these contentions, it is noted that the Department's Petition adopts the allegations in the Statement of Intent, which alleges that the amendment is inconsistent with numerous provisions within Chapter 163, Florida Statutes, Florida Administrative Code Rule Chapter 9J-5, and the City, State, and Regional Plans. However, in its Proposed Recommended Order, the Department relies on only some,

but not all, of these grounds for urging that the amendment be found not in compliance.<sup>3</sup> The undersigned assumes that the Department has simply conformed its allegations to the proof adduced at hearing. (In any event, because the parties agree the amendment is not in compliance, this assumption does not affect the outcome of the case.)

29. Britt and the resident intervenors are aligned with the Department and also contend that the amendment is inconsistent with Future Land Use Element Objective 1.1 and Policies 1.1.7, 1.1.10, and 1.1.14; Conservation/Coastal Management Element Goals 2, 3, 4, and 7, Objectives 4.1 and 7.4, and Policies 2.8.3, 7.1.6, 7.1.9, 7.3.12, 7.4.8, 7.4.12, and 11.1.1; and Transportation Element Objectives 1.1 and 1.2 and Policy 1.1.4. They further assert that archeological resources will be impacted.

i. Development Within the CHHA

30. The Department has alleged that the FLUM amendment constitutes a failure by the City to direct population concentrations away from a known or predicted CHHA, maintain or reduce hurricane evacuation times, or present sufficient mitigation to offset these impacts. These requirements are applicable when an increase in density is proposed for property within a CHHA. See Fla. Admin. Code R. 9J-5.012(3)(b)6. and 7.;

§ 163.3178(9)(a), Fla. Stat. As noted above, the parties sharply disagree on whether, for land use entitlement purposes, the entire site is within a CHHA. Although existing and amended Policy 7.3.1 rely upon the Atlas for delineating the areas of the City within the CHHA, the proposed amendment to Policy 7.3.1 also allows property owners to provide site-specific data indicating that the property is above the category 1 storm surge elevation and therefore is not subject to the development constraints associated with the CHHA.

31. A professionally prepared survey confirms that about 23.88 acres of the Moody property, mostly located at the south-center of the site where existing commercial activities take place, are above five feet in elevation. (The elevation on the entire parcel ranges from two or three feet along the marsh of the lower lands to nearly twelve feet in the southwest corner of the property, or an average elevation of about seven feet.) Therefore, only the approximately 53.34 acres of the property below five feet in elevation can be expected to be inundated by the maximum category 1 storm surge; the other 23.88 acres will not be affected.

32. The areas on the property which are above the five-foot contour line are connected to Atlantic Boulevard by a service road with an elevation of eleven or twelve feet down to

eight feet at its lowest point. Thus, this part of the property is unlikely to ever become completely surrounded by water or inaccessible by emergency personnel or others by car in a category 1 storm event. Even those areas that are below five feet and subject to the storm surge will only reach and maintain an elevation of five feet of water for five or ten minutes before the water begins receding.

33. The evidence shows that slightly less than twenty-four acres of the property are above the category 1 storm surge elevation of five feet, as established by the SLOSH. The evidence further shows that the Atlas is not the most accurate or precise in terms of land elevations because it only depicts ten-foot contours taken from the Quadrangle Map. Thus, it does not identify the elevation on any property less than ten feet. Because of this, on a site-specific scale, based on the Atlas, it cannot be said with certainty that a site or portions of a site are inside or outside of the CHHA. The more persuasive evidence supports a finding that, for land use entitlement purposes within the City, a professionally prepared survey constitutes the best available data regarding land elevations. Therefore, as long as Moody restricts its development to the twenty-four acres that have an elevation of five feet or higher,

the mitigation requirements cited by the Department for development within a CHHA do not apply.

ii. Environmental Issues

34. The Department asserts that the amendment fails to comply with the wetlands protection and conservation requirements of Florida Administrative Code Rule 9J-5.013(3)(a) and (b) and is internally inconsistent with Goal 4 and Objective 4.1 of the Conservation/Coastal Management Element of the Plan. The Department also cites to Section 163.3177(6)(d), Florida Statutes,<sup>4</sup> which requires that the Plan protect wetlands and other natural resources. These requirements are relevant here since the site to be developed is bordered on the north and west by wetland areas and other environmentally sensitive lands that are characterized as primarily saltwater marshes.

35. Florida Administrative Code Rule 9J-5.013(3)(a) and (b) addresses policies regarding the protection and conservation of wetlands. It reads as follows:

(a) Wetlands and the natural functions of wetlands shall be protected and conserved. The adequate and appropriate protection and conservation of wetlands shall be accomplished through a comprehensive planning process which includes consideration of the types, values, functions, sizes, conditions and locations of wetlands, and which is based on supporting data and analysis.

(b) Future land uses which are incompatible with the protection and conservation of wetlands and wetland functions shall be directed away from the wetlands. The type, intensity or density, extent, distribution and location of allowable land uses and the types, values, functions, sizes, conditions and location of wetlands are land use factors which shall be considered when directing incompatible land uses away from wetlands. Land uses shall be distributed in a manner that minimizes the effect and impact on wetlands. The protection and conservation of wetlands by the direction of incompatible land uses away from wetlands shall occur in combination with other goals, objectives and policies in the comprehensive plan. Where incompatible land uses are allowed to occur, mitigation shall be considered as one means to compensate for loss of wetlands functions.

36. Goal 4 of the Conservation/Coastal Management Element provides that a City goal shall be "[t]o achieve no further net loss of the natural functions of the City's remaining wetlands, improve the quality of the City's wetlands resources over the long-term and improve the water quality and fish and wildlife values of wetlands."

37. Objective 4.1 of the same Element implements Goal 4 and reads as follows:

The City shall protect and conserve the natural functions of its existing wetlands, including estuarine marshes. In order to achieve this objective and its associated policies, the City shall continue to work with the applicable regional, state and federal agencies charged with these regulatory responsibilities.

38. As the FLUM amendment now reads, development is limited only by the PUD. Although the PUD contains specific criteria that can be used to prevent adverse impacts to the wetland system, unless appropriate restrictions are incorporated into the Plan itself, the PUD can be amended at any time in the future to allow the property to be developed to its maximum potential. Because the data and analysis for impacts to wetlands are based on the PUD, and not the maximum development potential, the amendment is not supported by adequate data and analysis to ensure that there will be no net loss in existing wetlands, or that existing wetlands will be preserved and protected, as required by Goal 4 and Objective 4.1. Further, the amendment is not supported by adequate data and analysis to show that the City is protecting and preserving natural resources by directing incompatible uses away from the wetlands, as required by Florida Administrative Code Rule 9J-5.013(a) and (b). Therefore, the amendment is internally inconsistent with a goal and objective and is inconsistent with a Department rule. It is also inconsistent with Florida Administrative Code Rule 9J-5.005(5), which requires that there be internal consistency within a Plan. Finally, the amendment is inconsistent with Section 163.3177(6)(d), Florida Statutes, which requires that the Plan protect all natural resources, including wetlands.



iii. Transportation Impacts

39. The Department contends that the amendment will cause the LOS on two roadway links to fail, that the traffic analysis submitted inappropriately assumed densities and intensities that were less than allowed by the amendment, and that the amendment did not include a financially feasible transportation improvement plan to mitigate traffic. Fla. Admin. Code R. 9J-5.019(3)(a), (c), and (h).

40. To address potential traffic impacts from the project, Moody's engineering consultant prepared a transportation analysis and hurricane evacuation study dated April 2007. This analysis was based on the amount of development approved under the PUD rezoning, and not the maximum development allowed under the Plan. The study showed that the amendment will cause the adopted LOS standards for two links on Atlantic Boulevard to fail. Those links include the segment from the Intracoastal Waterway to San Pablo Road and the segment from San Pablo Road to Girvin Road. The study does not show how the City will maintain its LOS standards on those links, assuming that the maximum development is allowed. In this respect, the amendment is inconsistent with Florida Administrative Code Rule 9J-5.019(3)(c) and (h).

41. Also, the package did not include a financially feasible transportation improvement plan to mitigate the traffic impacts. Although one roadway improvement project is under construction and a second is included in the Capital Improvements Element, both of which should assist in alleviating the traffic impacts caused by the development, these mitigation measures assume that the project will be based upon the development restrictions contained in the PUD and not on the densities and intensities that are potentially allowed under the FLUM amendment. Therefore, in this respect, the amendment is inconsistent with Florida Administrative Code Rule 9J-5.019(3)(c) and (h).

42. After this proceeding began, the City engaged the services of Prosser Hallock Planners and Engineers to perform a Transportation Analysis Update (Update). The results of that study are dated September 2008. See Moody Exhibit AFK-4.

43. Like the original study, the Update was "based on the site plan [described in the PUD] and not on the maximum densities allowed in the land uses requested." Therefore, because the current FLUM amendment does not restrict development to the maximum densities allowed under the land uses requested, the study fails to properly assess the traffic impacts of the

changes, as required by Florida Administrative Code Rule 9J-5.019(3)(c) and (h).

44. To test transportation impacts from the project, both the original traffic analysis and the Update used a methodology taken from a September 2006 memorandum prepared by the DOT's District II office. See Moody Exhibit AFK-3. However, this methodology uses a "significant and adverse" test to determine road impacts for Development of Regional Impacts (DRIs) under Florida Administrative Code Rule Chapter 9J-2. In using the so-called DRI methodology, the City and Moody assumed that the Department had approved this methodology when it entered into settlement agreements with the applicants for the other sixteen FLUM amendments in Case No. 07-3539GM. However, this assumption was incorrect. While the DRI methodology is not specifically prohibited for use in a plan amendment review, a better methodology to assess traffic impacts for plan amendments is the LOS standard referred to in Florida Administrative Code Rule 9J-5.019(3)(a) and (h). Therefore, the amendment is not consistent with this rule.

iv. Archaeological Resources

45. The Division of Historical Resources of the Department of State has reviewed the amendment and expressed no concerns regarding potential impacts on historical or archaeological

resources. The contention by Britt and the resident intervenors that such resources will be impacted has been rejected.

v. Consistency with the State and Regional Plans

46. The Department argues that when the State Plan is construed as a whole, the amendment is inconsistent with that Plan, in contravention of Section 187.101(3), Florida Statutes. It also contends that the amendment is inconsistent with certain policies within State Plan Goals (9)(a), (15)(a), (17)(a), and (19)(a),<sup>5</sup> which are codified in Section 187.201, Florida Statutes. Those goals relate generally to natural systems and recreational lands, land use, public facilities, and transportation, respectively. Specifically, the Department contends the amendment is inconsistent with Policies (9)(b)1., 5., and 7., (15)(b)5. and 6., (17)(b)6., and (19)(b)15., which implement the Goals. The Department further contends that the FLUM amendment is inconsistent with Regional Goal 3.2 and Regional Policy 3.2.2. The Regional Goal requires that future development be directed away from areas most vulnerable to storm surge and flooding, while Regional Policy 3.2.2 provides that "[d]evelopment within hurricane evacuation areas should be responsible and permitted only when evacuation route capacity and shelter space capacity is available. Responsible development includes but is not limited to:

structures elevated in storm surge and flooding areas, adequate drainage in flooding areas, and sufficient access for emergency response vehicles to all development."

47. Because the FLUM amendment is now limited only by the PUD, and not by other development restrictions in the Plan, the amendment is inconsistent with the cited policies within the State Plan until appropriate remedial measures are adopted. For the same reason, the FLUM amendment is inconsistent with the Regional Goal and Policy.

vi. Other Objections

48. Because the City and Moody concede that the amendment is not in compliance, it is unnecessary to address the remaining objections lodged by Britt and the resident intervenors.

D. Ordinance No. 2008-315-E

49. Prior to the adoption of Ordinance No. 2008-315-E, Policy 7.3.1 of the Conservation/Coastal Management Element read as follows:

The City shall designate the Coastal High Hazard Areas (CHHA) as those areas designated as the evacuation zone for a category 1 hurricane as established by the 1998 Northeast Florida Hurricane Evacuation Study or the most current study.

50. In order to comply with the mandate that before July 1, 2008, it amend the definition of a CHHA to be consistent

with state law, the City originally proposed to amend its current policy by redefining the CHHA as follows:

The Coastal High Hazard Area (CHHA) is the area below the elevation of the Category 1 storm surge line as defined by the Sea, Lake, and Overland Surges from Hurricanes (SLOSH) computerized storm surge model as established by the most current Northeast Florida Hurricane Evacuation Study. It is shown on Map C-18.

51. In February 2008, the foregoing amendment, along with an amendment to another policy not relevant here, was transmitted to the Department for its preliminary review. On March 21, 2008, the Department issued an ORC in which it lodged only one technical objection to new Policy 7.3.1. -- that the amendment was inconsistent with Florida Administrative Code Rule 9J-5.005(2), which requires that when a local government adopts by reference a document that may be revised subsequent to plan adoption, the local government "will need to have [its] reference updated within the plan through the amendment process." For reasons not of record, this specific objection was not included in the Statement of Intent or in the parties' Joint Prehearing Stipulation. Even though the Department's Proposed Recommended Order now relies upon that objection, the issue has been waived. Heartland Environmental Council, Inc. v. Department of Community Affairs, et al., DOAH Case No. 94-2095GM, 1996 Fla. ENV LEXIS 163 at \*63 (DOAH Oct. 15, 1996; DCA

Nov. 25, 1996)("[challenger] is bound by the allegations in its Petition for Hearing as to the alleged deficiencies in the Plan, as further limited by the Prehearing Stipulation filed in [the] case").

52. Notwithstanding the technical objection, an adoption hearing was scheduled on June 10, 2008, at which time the City proposed to amend Policy 7.3.1 by adopting the provision as submitted to the Department. During the meeting, but prior to a vote on the matter being taken, a Moody representative submitted for consideration revised language, which added the following sentence at the end of the Policy: "A property shall be deemed to be within the CHHA unless site specific, reliable data and analysis demonstrates otherwise." See City Exhibit 1. The City then adopted the proposed amendment, including the language suggested by Moody.

53. On August 7, 2008, the Department issued a Statement of Intent to Find Comprehensive Plan Amendments Not in Compliance (Statement of Intent). A Notice was also published on August 8, 2008. The Statement of Intent indicated that the text amendment is not in compliance because it is inconsistent with the statutory definition found in Section 163.3178(2)(h), Florida Statutes, and it creates an internal inconsistency with Conservation/Coastal Element Map C-18 attached to the text

amendment. That Map defines and depicts the CHHA as the Category 1 surge zone based on the SLOSH model in the Atlas. The Statement of Intent further asserts that the foregoing deficiencies render the amendment inconsistent with State Plan Goals (7)(a), (8)(a), (15)(a), and (25)(a) and Policies (7)(b)23., (15)(b)6., and (25)(b)7. and Regional Goal 3.2. All of these objections are based upon the City's inclusion at the end of the amendment the words "unless site specific, reliable data and analysis demonstrates otherwise." Intervenor Britt has adopted the objections lodged by the Department.

54. The statutory definition of CHHA does not reference an Atlas or a Hurricane Evacuation Study, but instead only references the SLOSH storm surge elevation for a category 1 storm event. Florida Administrative Code Rule 9J-5.005(2)(c) requires that "[d]ata are to be taken from professionally accepted existing sources, such as . . . regional planning councils . . . or existing technical studies." No matter which the City uses, "[t]he data used shall be the best available data, unless the local government desires original data or special studies." Id. In this case, the City has chosen to utilize the Atlas as the best available data regarding delineation of the CHHA unless rebutted by better data and analysis in the form of "site specific, reliable data and



analysis." So long as the SLOSH storm surge elevation for a category 1 storm event is used, the greater weight of evidence supports a finding that use of either the Atlas or a land survey identifying the category 1 storm surge contour line on a given property is consistent with the statutory definition.

Therefore, the Department's contention that the text amendment conflicts with the statutory definition has not been accepted.

55. The Department also contends that the text amendment creates an internal inconsistency with Map C-18 of the Plan. However, the evidence shows that Map C-18 is used for illustrative purposes only and is intended to be a depiction of the information contained in the Atlas. For the reasons cited in the previous Finding of Fact, the Department and Intervenors have failed to show beyond fair debate that the use of site specific data is inconsistent with other provisions in the Plan.

56. The Department further contends that if the amendment is approved, the requirements of the CHHA can be circumvented by a property owner simply filling his property above the elevation of a category 1 storm surge line. Provided all applicable permitting requirements have been met, however, there is nothing of record to indicate that this would be inappropriate or unlawful.

57. There is insufficient evidence to support a finding that the text amendment is inconsistent with the State or Regional plans.

58. The evidence shows that the City's determination that Policy 7.3.1 is in compliance is fairly debatable.

E. Proposed Remedial Measures for Ordinance 2007-355-E

59. The City and Moody have proposed the following remedial measures to bring the FLUM amendment into compliance, which would be incorporated into a new text amendment or by using an asterisk on the FLUM:

- a. Limit residential development to 590 dwellings;
- b. Limit marina-related specialty retail (including club, retail, and restaurant activities) to 6,500 square feet;
- c. Make available to the general public a minimum of 100 wet and dry slips;
- d. Make available to the 590 dwelling units a maximum of 550 wet and dry slips;
- e. Comply with the current Florida Clean Marina Program as designated by state law;
- f. Confine all residential and non-residential uses (other than boat channels, basins, docks, slips, and ramps) to the mean high water line;
- g. Confine all residential uses to areas above the elevation of the Category One storm surge line as established by the Sea, Lake, and Overland Surges from Hurricanes (SLOSH) computerized storm surge model,

which on the Moody property is 5.0 feet (NGVD-29);

h. Obtain, prior to final site plan approval, a final wetlands jurisdictional line from the appropriate regulatory agencies; and

i. Provide a conservation easement (except for boat channels, basins, docks, slips, and ramps), which will provide the highest level of protection, to the appropriate state agency or agencies for all wetlands that it or they require to be preserved.

60. The City and Moody have also agreed to "correct certain inaccurate traffic-roadway improvement descriptions contained in its Traffic Circulation and Mass Transit 5-Year Plan" by:

(a) Revising the Hodges Boulevard roadway project to describe the construction of a 4-lane urban section from Atlantic Boulevard to Beach Boulevard; and

(b) Revising the Atlantic Intracoastal West Area Intersection Improvements roadway project (Atlantic Boulevard at Girvin Road, Hodges Boulevard, and San Pablo Road) to describe additional through lanes (from 6 to 8 lanes) to Atlantic Boulevard between each of the three intersections.

61. No findings are made as to whether the above-proposed remedial measures will bring the FLUM amendment into compliance. See endnote 2, infra.

CONCLUSIONS OF LAW

62. 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(10), Florida Statutes.

63. 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 there are sufficient facts to establish that Britt, the resident intervenors, and Moody are affected persons and have standing to participate in this matter.

64. Because the Department issued Notices of Intent to find the two amendments not in compliance, those amendments shall be determined to be not in compliance if the Department demonstrates such non-compliance by a preponderance of the evidence. § 163.3184(10)(a), Fla. Stat. As to allegations of internal consistency, however, the local government's determination of compliance will be upheld if it is fairly debatable. Id. In Martin County v. Yusem, 690 So. 2d 1288 (Fla. 1997), the Court stated that the fairly debatable standard is deferential and requires "approval of a planning action if reasonable persons could differ as to its propriety." Id. at 1295. Therefore, the Department must prove by a preponderance

of the evidence that the amendments are inconsistent with the statutes, rules, and State and Regional Plan provisions cited in its Proposed Recommended Order. As to the allegations that the amendments are internally inconsistent with other City Plan provisions, they will not be sustained if the City's determination of compliance is fairly debatable.

65. For the reasons given in Findings of Fact 16-48, and a concession by Moody and the City at the hearing, the FLUM amendment adopted by Ordinance No. 2007-355-E is not in compliance. Whether the remedial amendments proposed by the City and Moody will bring the amendment into compliance need not be addressed in this Recommended Order. See endnote 2, infra.

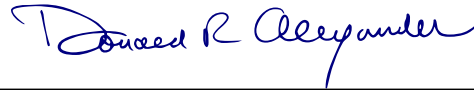
66. The Department and Intervenors have failed to demonstrate by a preponderance of the evidence that new Policy 7.3.1 is inconsistent with any statutes, rules, or provisions within the State or Regional Plans. The evidence further shows that the Department and Intervenors have failed to establish beyond fair debate that the amendments are internally inconsistent with other Plan provisions. This being so, the City's determination that the plan amendment adopted by Ordinance No. 2008-315-E is in compliance should be sustained.

RECOMMENDATION

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

RECOMMENDED that the Administration Commission enter a final order determining that the plan amendment adopted by Ordinance No. 2007-355-E is not in compliance. It is further recommended that the final order make a determination that the plan amendment adopted by Ordinance No. 2008-315-E is in compliance.

DONE AND ENTERED this 12th day of January, 2009, in Tallahassee, Leon County, Florida.



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DONALD R. ALEXANDER  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 12th day of January, 2009.

ENDNOTES

1/ Unless otherwise indicated, all statutory references are to the 2008 version of the Florida Statutes.

2/ After researching the issue, the Department cited only one occasion when proposed remedial action was included in a recommended order. In Department of Community Affairs, et al. v. Lee County, et al., DOAH Case No. 95-0098GM, 1996 Fla. ENV LEXIS 101 (DOAH Jan. 31, 1996; Admin. Comm. July 25, 1996), the hearing officer included specific recommendations for remedial plan amendments to cure the deficiencies in the plan amendment. In rejecting a contention by Lee County that this action constituted a usurpation of the Commission's role, the Commission noted that "since the recommendations for remedial actions are no more than recommendations which can be accepted or rejected as the Administration Commission deems appropriate, we do not conclude that the Hearing Officer usurped the role of the Commission." Id. at \*22. Except for this single occasion, no other precedent for doing so has been disclosed. This is probably because the Department of Community Affairs, which must review all remedial amendments, is the appropriate party to suggest remedial actions that are necessary to bring an amendment into compliance. Further, it would be inappropriate to make that determination here since any remedial amendment adopted by the City will be subject to challenge and a formal hearing conducted at a later time by DOAH under Section 163.3184(9) or (10), Florida Statutes, if requested by the Department or an affected person.

3/ For example, the Statement of Intent indicates that, besides certain statutory provisions, the City's failure to consider the maximum traffic impacts of the land use change requires a finding of inconsistency with Florida Administrative Code Rules 9J-5.005(2)(a) and (c); 9J-5.006(2)(a); 9J-5.006(3)(b)1.; 9J-5.006(3)(c)3.; 9J-5.016(4)(a)1. and 2.; 9J-5.019(3)(a)-(h); and 9J-5.019(4)(b)2. In contrast, the Proposed Recommended Order alleges only that the amendment is not consistent with Rule 9J-5.019(3)(a), (c), and (h). See Proposed Recommended Order, page 36, paragraph 8.

4/ Although the Statement of Intent and the Proposed Recommended Order cite Section 163.3177(6)(a), Florida Statutes, as the statute which underpins these objections, the undersigned assumes that paragraph (6)(d) is the correct citation, since it requires that the Plan include provisions that ensure the "protection of natural resources," including wetlands.

5/ In its Proposed Recommended Order and the Statement of Intent, the Department cites Goal 18 of Section 187.201, Florida Statutes, as being inconsistent with the FLUM amendment. That provision relates to Cultural and Historical Resources. The

undersigned assumes that the Department intended to cite Policy (b)13. of Goal 19, which requires that "transportation improvements" be coordinated with state, local, and regional plans.

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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.