STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SECTION 7 TRACT 64 PROPERTY, INC., AND THE GRAND AT DORAL I, LTD.,	)	
Petitioners,	)	
vs.	)	Case No. 09-4297GM
CITY OF DORAL AND DEPARTMENT OF COMMUNITY AFFAIRS,	)	
Respondents.	)	

FINAL ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, D. R. Alexander, on May 18 and 19, 2010, in Miami, Florida.

APPEARANCES

For Petitioners: Beth-Ann Krimsky, Esquire
Robyn L. Libow, Esquire
Jamie B. Wasserman, Esquire
Ruden McClosky, P.A.
200 East Broward Boulevard, Suite 1500
Fort Lauderdale, Florida 33301-1963

For Respondent: (City) Michael D. Cirullo, Jr., Esquire
Jamila V. Alexander, Esquire
Goren, Cherof, Doody & Ezrol, P.A.
3099 East Commercial Boulevard, Suite 200
Fort Lauderdale, Florida 33308-4311

For Respondent: (Department)
L. Mary Thomas, Esquire
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

STATEMENT OF THE ISSUE

The issue is whether the Land Development Code (LDC) adopted by Ordinance No. 2007-12 on August 22, 2007, as amended on February 27, 2008, is inconsistent with the effective comprehensive plan for the City of Doral (City), which is the Miami-Dade Comprehensive Development Master Plan (County Plan).

PRELIMINARY STATEMENT

On August 22, 2007, the City adopted a new LDC. Because the City's Comprehensive Plan (City Plan) was not yet effective due to administrative litigation, the controlling comprehensive plan for the City was, and still is, the County Plan. On February 27, 2008, the City amended the LDC in minor respects. On August 20, 2008, or within twelve months after the adoption of the LDC, Petitioners, Section 7 Tract 64 Property, Inc. (Section 7) and The Grand at Doral I, Ltd. (The Grand), or Petitioners collectively, who own two parcels consisting of ten acres in the City, timely filed with the City a Petition pursuant to Section 163.3213(3), Florida Statutes (2009),[1] contending that the new LDC was inconsistent with the County Plan. On November 20, 2008, the City served its response to the Petition, which denied the Petition. On December 22, 2008,

Petitioners filed a Petition with Respondent, Department of Community Affairs (Department), alleging generally that the LDC is inconsistent with the County Plan and the new, but not yet effective, City Plan. In a Determination of Consistency of a Land Development Regulation (Determination) issued on July 23, 2009, the Department denied the Petition and determined that the LDC was not inconsistent with either Plan.

On August 13, 2009, Petitioners filed a Petition for Formal Proceedings with the Division of Administrative Hearings (DOAH) alleging generally that the Department's Determination was incorrect for numerous reasons and asserting again that the LDC was inconsistent with both the City and County Plans.

By Notice of Hearing dated August 26, 2009, a final hearing was scheduled on November 9 and 10, 2009, in Miami, Florida. By agreement of the parties, the matter was continued and rescheduled to May 18 and 19, 2010, at the same location.

During the course of this proceeding, various discovery disputes arose and their disposition may be found in Orders issued in this matter.

On May 14, 2010, the City filed a Motion in Limine to Limit the Scope of the Formal Proceedings seeking to limit the evidence to those issues raised in the first Petition filed with the City on August 20, 2008, rather than the issues later raised

before the Department and DOAH, and to further exclude all evidence relating to Petitioners' site plans for developing its property now pending before the City. The Motion was denied at hearing, and Petitioners were allowed to present evidence to support all claims in the Petitions filed with the Department and DOAH. However, evidence regarding Petitioners' pending site development plans with the City is not relevant to this appeal.

A Joint Pre-Hearing Stipulation was filed by the parties on May 14, 2010. At the final hearing, Petitioners presented the testimony of Pablo Valdez, the owner and president of the corporations that own the subject property; Mark Woerner, chief of the County Metropolitan Planning Section; Nathan Kogon, City Planning and Zoning Director; Henry Iler, a land use consultant, president of Iler Planning Group, and accepted as an expert; and Dr. David W. Depew, president of Morris-Depew Associates, Inc., a land planner, and accepted as an expert. Also, they offered Petitioners' Exhibits 1A, 1B, 2-11, 13a, 13b, 15, 24-33, 36, 38, 39, 44, 45, 53-55, 59, 65, 67, 68, 70, 71, 75-78, 83, 84, 101-148, 195, 210, 263, 416, and 428 (also identified in the record as Joint Exhibit 428), which were received in evidence. Exhibit 428 is the deposition testimony of Robert Dennis, a Department Regional Planning Administrator. The City presented the testimony of Nathan Kogon, City Planning and Zoning Director;

and Guillermo Olmedillo, an urban and regional planner and accepted as an expert. Also, it offered City Exhibit 77, which was received in evidence. The Department presented no witnesses but adopted the evidence presented by the City. Finally, Petitioners' Motion for Official Recognition of Public Records was granted, and the following documents were officially recognized: City of Doral Zoning Map Version 2007; City of Doral Future Land Use Map; City of Doral Zoning Map adopted as part of Ordinance 2007-12; and the Miami-Dade County Land Use Plan (LUP) map.

The Transcript of the hearing (three volumes) was filed on June 8, 2010. Proposed Final Orders were filed by Petitioners and jointly by the City and Department on July 19, 2010, and have been considered in the preparation of this Final Order.

FINDINGS OF FACT

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

A. The Parties

1. Section 64 is a Florida corporation. The Grand is a Florida limited partnership. Both entities are owned by the same individual. On September 25, 2001, Section 7 acquired ownership of an approximate ten-acre tract of property in the County (now the City) located along the southern boundary of

Northwest 82nd Street, between 109th and 112th Avenues. See Petitioners' Exhibit 416. On December 16, 2005, title in one-half of the property was conveyed to The Grand in order to divide the property into two different ownerships. Id. It was Petitioners' intent at that time to build two hotels on separate five-acre tracts, one owned by Section 7 and the other by The Grand.

2. The City is located in the northwestern part of Dade County and was incorporated as a municipality in June 2003. At the time of incorporation, the County's Plan and Land Use Code were the legally effective comprehensive plan and land development regulations (LDRs), respectively. On April 26, 2006, the City adopted its first comprehensive plan. After the Department determined that the Plan was not in compliance, remedial amendments were adopted on January 10, 2007, pursuant to a Stipulated Settlement Agreement. Although the Department found the Plan, as remediated, to be in compliance, it was challenged by a third party, and the litigation is still pending. See DOAH Case No. 06-2417. Therefore, the County Plan is still the legally effective Plan. See § 163.3167(4), Fla. Stat.

3. The Department is the state land planning agency charged with the responsibility of reviewing LDRs whenever the

appeal process described in Section 163.3213, Florida Statutes, is invoked by a substantially affected person.

B. History of the Controversy

4. When Petitioners' property was purchased in 2001, the County zoning on the property was Light Industrial (IU-1), having been rezoned by the County to that designation on October 9, 1984. See Petitioners' Exhibit 5. One of the uses permitted under an IU-1 zoning classification is a hotel with up to 75 units per acre. See Petitioners' Exhibit 6. The land use designation on the County's LUP map for the property is Low-Density Residential (LDR), with One Density Bonus, which allows 2.5 to 6 residential units per acre with the ability for a "bump-up" in density to 5 to 13 units per acre if the development includes specific urban design characteristics according to the County urban design guide book.

5. Language found on pages I-62 and I-63 of the Future Land Use Element (FLUE) in effect at the time of the incorporation of the City (now found on pages I-73 and I-74 of the current version of the FLUE) provides in relevant part as follows:

> Uses and Zoning Not Specifically Depicted on the LUP Map. Within each map category numerous land uses, zoning classifications and housing types may occur. Many existing uses and zoning classifications are not specifically depicted on the Plan map.

> . . . All existing lawful uses and zoning are deemed to be consistent with the [Plan] unless such a use or zoning (a) is found through a subsequent planning study, as provided in Land Use Policy 4E, to be inconsistent with the criteria set forth below; and (b) the implementation of such a finding will not result in a temporary or permanent taking or in the abrogation of vested rights as determined by the Code of Metropolitan Dade County, Florida.

As noted above, if there is a concern that zoning might be inconsistent with land use, using the criteria described in the provision, the County may initiate a planning study to analyze consistency and down-zone the property to a less intense use if an inconsistency is found. Although the County initiated a number of planning studies after it adopted its Plan in 1993, and ultimately down-zoned many properties, none was ever initiated by the County for Petitioners' property.

6. Essentially, when existing uses and zoning are not depicted on the County LUP map, the language in the FLUE operates to deem lawfully existing zoning consistent with the land use designation on the property. In this case, the parties agree that the zoning of Petitioners' property is not depicted on the County LUP map. Therefore, absent a planning study indicating an inconsistency, the zoning is deemed to be consistent with the land use category.

7. On August 22, 2007, the City adopted Ordinance No. 2007-12, which enacted a new LDC, effective September 1, 2007, to replace the then-controlling County Land Use Code. Although the LDC was adopted for the purpose of implementing the new City Plan, until the new Plan becomes effective, the LDC implements the County Plan. Amendments to the LDC were adopted by Ordinance No. 2008-1 on February 27, 2008. The LDC does not change the zoning on Petitioners' property. However, it contains a provision in Chapter 1, Section 5, known as the Zoning Compatibility Table (Table), which sets forth the new land use categories in the City Plan (which are generally similar but not identical to the County land use categories) and the zoning districts for each category. Pertinent to this dispute is an asterisk note to the Table which reads in relevant part as follows:

> Under no circumstances shall the density, intensity, or uses permitted be inconsistent with that allowed on the city's future land use plan. . . . Zoning districts that are inconsistent with the land use map and categories shall rezone prior to development.

See Petitioners' Exhibit 27 at p. I-3. Under the Table, only residential zoning districts (with up to ten dwelling units per acre and no density bonus) are allowed in the City's proposed LDR land use category. Therefore, if or when the City Plan

becomes effective, before Petitioners can develop their property, they must rezone it to a district that is consistent with the land use designation shown on the Table. There is no specific requirement in the LDC that the City conduct a planning study when it has a concern that the zoning is inconsistent with the relevant land use category in the new City Plan.

8. Petitioners construed the asterisk note as being inconsistent with the text language on pages I-62 and I-63 of the County Plan. See Finding of Fact 5, supra. Accordingly, on August 21, 2008, Petitioners submitted a Petition to the City pursuant to Section 163.3213(3), Florida Statutes, alleging generally that they were substantially affected persons; that the LDC was inconsistent with the County Plan; that the LDC changes the regulations regarding character, density, and intensity of use permitted by the County Plan; and that the LDC was not compatible with the County Plan, as required by Florida Administrative Code Rule 9J-5.023.[2] See Petitioners' Exhibit 103.

9. The City issued its Response to the Petition on November 20, 2008. See Petitioners' Exhibit 104. The Response generally indicated that Petitioners did not have standing to challenge the LDC; that the Petition lacked the requisite factual specificity and reasons for the challenge; that the LDC

did not change the character, density, or intensity of the permitted uses under the County Plan; and the allegation concerning compatibility lacked factual support or allegations to support that claim.

10. On December 22, 2008, Petitioners filed a Petition with the Department pursuant to Section 163.3213(3), Florida Statutes, alleging that the LDC implements a City Plan not yet effective; that the LDC changes the uses, densities, and intensities permitted by the existing County Plan; and that the LDC changes the uses, densities, and intensities permitted by the not yet effective City Plan. See Petitioners' Exhibit 105.

11. After conducting an informal hearing on April 7, 2009, as authorized by Section 163.3213(4), Florida Statutes, on July 23, 2009, the Department issued a Determination of Consistency of a Land Development Regulation (Determination). See Petitioners' Exhibit 102. See also Section 7 Tract 64 Property, Inc., et al. v. The City of Doral, Fla., Case No. DCA09-LDR-270, 2009 Fla. ENV LEXIS 119 (DCA July 23, 2009). In the Determination, the Department concluded that Petitioners were substantially affected persons and had standing to file their challenge; that the provision on pages I-62 and I-63 of the County FLUE did not apply to Petitioners' property because the uses and zoning of the property are specifically designated

on the LUP map; that the law does not prohibit the Department from reviewing the LDC for consistency with the not yet effective City Plan; and that because the LDC will require Petitioners to rezone their property to be consistent with the City Plan, the challenge is actually a challenge to a rezoning action and not subject to review under this administrative process. See § 163.3213(2)(b), Fla. Stat.

12. On August 13, 2009, Petitioners filed their Petition for Formal Proceedings with DOAH raising three broad grounds: that the LDC unlawfully implements a comprehensive plan not yet effective; that it changes the uses, densities, and intensities permitted by the County Plan and is therefore inconsistent with the County Plan; and that it changes the uses, densities, and intensities permitted by the not yet effective City Plan and is inconsistent with that Plan. See Petitioners' Exhibit 39. These issues are repeated in the parties' Stipulation. As to other issues raised by Petitioners, and evidence submitted on those matters over the objection of opposing counsel, they were tried without consent of the parties, and they are deemed to be beyond the scope of this appeal.

C. The Objections

13. Petitioners first contend that the LDC unlawfully implements a comprehensive plan not yet in effect, in that it

was specifically intended to be compatible with, further the goals or policies of, and implement the policies and objectives of, the City Plan. See Fla. Admin. Code R. 9J-5.023. But Petitioners cited no statute or rule that prohibits a local government from adopting LDRs before a local plan is effective, or that implement another local government's plan (in this case the County Plan). While the LDC was adopted for the purpose of implementing a City Plan that the City believed would be in effect when the LDC was adopted, the City agrees that until the new City Plan becomes effective, the LDC implements the County Plan. Even though the two Plans are not identical, and may even be inconsistent with each other in certain respects, this does automatically create an inconsistency between the LDC and County Plan. Rather, it is necessary to determine consistency between those two documents, and not the City Plan. Except for testimony regarding one provision in the LDC and its alleged inconsistency with language in the County FLUE, no evidence was presented, nor was a ground raised, alleging that other inconsistencies exist. The Table note and the County Plan do not conflict. The LDC is not "inconsistent" merely because it was initially intended to implement a local plan that has not yet become effective.

14. Petitioners next contend that the LDC changes the uses, densities, and intensities permitted by the County Plan and is therefore inconsistent with that Plan. Specifically, they contend that the note following the Zoning Compatibility Table in Chapter 1, Section 5 of the LDC is inconsistent with the language on pages I-62 and 63 (now renumbered as pages I-73 and I-74) of the County Plan. In other words, they assert that an inconsistency arises because the note requires them to down-zone their property before development, while the County Plan deems their zoning to be consistent with the County LUP map unless a special planning study is undertaken.

15. The evidence establishes that if there is a conflict between zoning and land use on property within the City, it is necessary to defer to the language on pages I-62 and I-63 of the County FLUE for direction. This is because the County Plan is the effective plan for the City. Under that language, if no planning study has been conducted, the zoning would be deemed to be consistent with the land use. On the other hand, if a planning study is undertaken, and an inconsistency is found, the property can be rezoned in a manner that would make it consistent with the land use. Therefore, the LDC does not change the use, density, or intensity on Petitioners' property that is permitted under the County Plan. It is at least fairly

debatable that there is no conflict between the Table note and the County Plan.

16. Finally, Petitioners contend that the LDC changes the uses, densities, and intensities permitted by the not yet effective City Plan because the current industrial zoning designation will be inconsistent with the LDR land use designation. Petitioners argue that once the new City Plan becomes effective, the LDC requires them to down-zone their property before development. However, this concern will materialize only if or when the new City Plan, as now written, becomes effective; therefore, it is premature.

17. Further, the definition of "land development regulation" specifically excludes "an action which results in zoning or rezoning of land." See § 163.3213(2)(b), Fla. Stat. Because the challenged regulation (the note to the Table) is "an action which results in zoning or rezoning of land," the issue cannot be raised in an administrative review of land development regulations. Id.

18. The other contentions raised by Petitioner are either new issues that go beyond the scope of the Petition filed in this case or are without merit.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569, 120.57(1), and 163.3213(5)(a), Florida Statutes.

20. Unlike a challenge to a comprehensive plan amendment, in order to have standing to challenge an LDR, a challenger must be an affected person as defined in Chapter 120, Florida Statutes. See § 163.3213(2)(a), Fla. Stat. The facts establish that Petitioners' substantial interests are affected, and they have standing to file this challenge.

21. Section 163.3194(1)(b), Florida Statutes, requires that "[a]ll land development regulations enacted or amended shall be consistent with the adopted comprehensive plan, or element or portion thereof . . . ." Because the City Plan is still not effective, consistency must be measured against the County Plan. Section 163.3194(3)(a), Florida Statutes, provides that a "land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development permitted by such . . . regulation are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated

by the local government." Rule 9J-5.023 in turn sets forth further criteria for determining the consistency of an LDR. That rule provides that

> A determination of consistency of a land development regulation with the comprehensive plan will be based upon the following:
>
> (1) Characteristics of land use and development allowed by the regulation in comparison to the land use and development proposed in the comprehensive plan. Factors which will be considered include:
> (a) type of land use;
> (b) intensity and density of land use;
> (c) location of land use;
> (d) extent of land use; and
> (e) other aspects of development, including impact on natural resources.
>
> (2) Whether the land development regulations are compatible with the comprehensive plan, further the comprehensive, and implement the comprehensive plan. The term "compatible" means that the land development regulations are not in conflict with the comprehensive plan. The term "further" means that the land development regulations take action in the direction of realizing goals or policies of the comprehensive plan.
>
> (3) Whether the land development regulations include provisions that implement objectives and policies of the comprehensive plan that require implementing regulations in order to be realized, including provisions implementing the requirement that public facilities and services needed to support development shall be available concurrent with the impacts of such development.

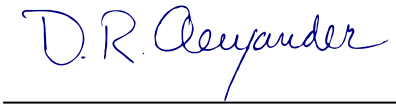
22. Section 163.3215(5), Florida Statutes, provides that the adoption of an LDR "is legislative in nature and shall not be found to be inconsistent with the local plan if it is fairly debatable that it is inconsistent with the plan." For the reasons given in the Findings of Fact, Petitioners have failed to establish beyond fair debate that the challenged LDC is inconsistent with the County Plan.

DISPOSTION

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

ORDERED that the Petition is denied, and that Ordinance No. 2007-12, as later amended by Ordinance No. 2008-1, is not inconsistent with the County Plan.

DONE AND ORDERED this 11th day of August, 2010, in Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of August, 2010.

ENDNOTES

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

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

COPIES FURNISHED:

Beth-Ann Krimsky, Esquire
Ruden McClosky, P.A.
200 East Broward Boulevard, Suite 1500
Fort Lauderdale, Florida 33301-1963

L. Mary Thomas, Esquire
Department of Community Affairs
2555 Shumard Oak Boulevard, Suite 325
Tallahassee, Florida 32399-2100

Michael D. Cirullo, Jr., Esquire
Goren, Cherof, Doody & Ezrol, P.A.
3099 East Commercial Boulevard, Suite 200
Fort Lauderdale, Florida 33308-4311

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.