

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FLAGLER RETAIL ASSOCIATES, )  
LTD.; FLAGLER S.C., LLC; AND )  
SC MOTO ASSOCIATES, LTD., )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 09-4713GM  
 )  
DEPARTMENT OF COMMUNITY )  
AFFAIRS AND MIAMI-DADE COUNTY, )  
 )  
Respondents, )  
 )  
and )  
 )  
BLUE LAKE DEVELOPMENT )  
CORPORATION, )  
 )  
Intervenor. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the  
Division of Administrative Hearings by its assigned  
Administrative Law Judge, D. R. Alexander, on March 1, 2, and 3,  
2010, in Miami, Florida.

APPEARANCES

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

John J. Quick, Esquire  
Weiss, Serota, Helfman, Pastoriza,  
Cole & Boniske, P.A.  
2525 Ponce de Leon Boulevard, Suite 700  
Coral Gables, Florida 33134-6045

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

For Respondent: Eduardo I. Sanchez, Esquire  
(County) Assistant County Attorney  
Miami-Dade County Attorney's Office  
111 Northwest 1st Street, Suite 2810  
Miami, Florida 33128-1930

For Intervenor: Eduardo A. Ramos, Esquire  
Richard A. Perez, Esquire  
Holland & Knight, LLP  
701 Brickell Avenue, Suite 3000  
Miami, Florida 33131-2847

STATEMENT OF THE ISSUE

The issue is whether a change on the Land Use Plan (LUP) map of Respondent, Miami-Dade County (County), adopted by Ordinance No. 09-28 on May 6, 2009, is in compliance.

PRELIMINARY STATEMENT

On April 30, 2008, an application was filed with the County seeking to change the land use designation on a 41-acre parcel of property in an unincorporated part of the County from Low-Medium Density Residential Communities to Business and Office. The property is owned by Intervenor, Blue Lake Development Corporation (Blue Lake). The application was approved by the County, with certain modifications, by Ordinance No. 09-28 on

May 6, 2009. On August 3, 2009, Respondent, Department of Community Affairs (Department), published its Notice of Intent to Find Miami-Dade County Comprehensive Plan Amendment in Compliance (Notice of Intent). A Petition challenging the map change was timely filed with the Department by Petitioners, Flagler Retail Associates, Ltd., Flagler S.C., LLC, and SC Moto Associates, Ltd. (collectively Petitioners), who each own and operate a shopping/retail center in the vicinity of the site. After the first petition was dismissed, without prejudice, an Amended Petition for Administrative Hearing (Amended Petition) was filed with the Department on August 26, 2009. In that filing, Petitioners contended generally that the map change was not supported by relevant and appropriate data and analysis demonstrating a need for commercial development and that the amendment would have an adverse impact on roadways. The matter was referred by the Department to the Division of Administrative Hearings on August 28, 2009, with a request that a formal hearing be conducted. On September 4, 2009, Blue Lake filed its Unopposed Petition for Leave to Intervene, which was granted by Order dated September 8, 2009. By Order dated November 12, 2009, Petitioners were authorized to file their Second Amended Petition for Formal Administrative Hearing, which generally added allegations to support their standing as affected persons.

During the course of this proceeding, various discovery disputes arose, and the disposition of those matters is found in Orders entered in this docket.

By Notice of Hearing dated September 3, 2009, a final hearing was scheduled on February 2-5, 2010, in Miami, Florida. The hearing was rescheduled to February 16-19, 2010, and then to March 1-3, 2010, at the same location. A Joint Pre-Hearing Stipulation (Stipulation) was filed by the parties on February 25, 2010. The Stipulation indicated that Petitioners withdrew their challenge to the plan amendment on the basis of traffic and/or roadway issues.

At the final hearing, Petitioners presented the testimony of Ryan Grindler, director of acquisitions for Terranova Corporation, which owns Flagler Retail Associates, Ltd.; Mark R. Woerner, Chief of the County's Metropolitan Planning Section and accepted as an expert; Manual Armada, County Chief of Planning Research; and William Pable, a Department Principal Planner. Also, they offered Petitioners' Exhibits 10, 17, 19-25, 33, 34, and 54, which were received in evidence. The County presented the testimony of Franklin Gutierrez, County Zoning Services Coordinator. Also, it offered County Exhibits 1-3, 5-14, 16, 18, 20, 27, 34, 38, 46-48, 53, 54, 57, 59, 60, 62, 64, 70, 73, 77-79, 111, 117, 119-127, 157-159, and 161A, which were received

in evidence. Blue Lake presented the testimony of Bruce E. Rapee, Esquire, a retired non-practicing attorney and president of Blue Lake; Stephen Bittel, a principal in Terranova Corporation; Susana Hernandez-Hazzi, Director of Real Estate for Cinco Realty Corporation, the managing corporation of Flagler S.C., LLC; Juan J. Mayol, Jr., Esquire, an attorney with Holland & Knight, LLP; Craig Mueller, corporate representative for S.C. Moto, LLC; Brian Kosoy, general partner for S.C. Moto, LLC; and Andrew Dolkart, an economics consultant and accepted as an expert. Also, it offered Blue Lake Exhibits 4, 9, 14, 24, 31, 35, 36, 46, 48, 57, 60, 62, 63, 66, 73, 78, 79, 82, 86, 87, 94, and 100, which were received in evidence. The Department did not present any witnesses, but adopted the evidence of the County and Blue Lake.

The Transcript of the hearing (three volumes) was filed on April 6, 2010. By agreement of the parties, Proposed Findings of Fact and Conclusions of Law were filed by Petitioners, County, and Blue Lake on June 28, 2010, and they have been considered in the preparation of this Recommended Order.

On February 19, 2010, Blue Lake filed a Motion for Attorney's Fees and Costs pursuant to Sections 57.105 and 120.595(1), Florida Statutes.<sup>1</sup> That filing is addressed in the Conclusions of Law.

## FINDINGS OF FACT

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

### A. The Parties

1. The County is a charter government that administers the Comprehensive Development Master Plan (Plan), a broad-based countywide policy-planning document to guide future growth and development. See County Exhibit 1. The LUP is a component of the Plan and contains the various land use designations. The County adopted the Ordinance which approved the change in the LUP that is being challenged here.

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

3. Blue Lake is a small, family-owned corporation that has owned the subject property since 1966. It submitted oral and written comments to the County during the adoption process.

4. Flagler Retail Associates, Ltd., owns and operates a retail shopping center, Park Hill Plaza, located at 9501 West Flagler Street, around one-half mile from Blue Lake's property. It submitted comments and objections to the plan amendment during the adoption process.

5. Flagler, S.C., LLC, owns and operates a retail shopping center, Flagler Park Plaza, at 8221 West Flagler Street, which is approximately 1.8 miles from the subject property. It also submitted comments and objections to the plan amendment during the adoption process.

6. SC Mota Associates, Ltd., owns and operates a retail shopping center, the Mall of Americas, located at 7757 West Flagler Street, which is approximately 25 blocks from Blue Lake's property. It submitted comments and objections to the plan amendment during the adoption process.

B. History of the Amendment

7. A mobile home park with around 275 units occupied the property from 1957 until June 2007, when Blue Lake closed the park. At the time of the hearing, the mobile home park was around 80 percent demolished and cleared out. The property is currently listed for sale by its owners.

8. The property is located within the County's Urban Development Boundary at the northeast corner of West Flagler Street, a six-lane divided arterial roadway running in an east-west direction and designated as a major roadway, and Northwest 102nd Avenue (also known as West Park Drive). The southwest corner of the property borders the City of Sweetwater and a small shopping center. Directly to the west of the property and

across West Park Drive is a part of the Florida International University campus. To the east are the campuses of a public middle school and elementary school, while a large, single-family residential area lies to the south. Directly north of the property (and just south of State Road 836, also known as the Dolphin Expressway) is the western portion of a large multi-family residential complex (formerly a golf course) identified in the record as the Fountainbleau Park area, which stretches across Northwest 97th Avenue to the east.

9. The County has two cycles per year for applicants to file amendments to the Plan, which may be text amendments having countywide application, or site-specific LUP map amendments having localized impact. In the April 2008 cycle, nineteen applications were filed with the County, including Blue Lake's Application No. 9. The application was filed by Gold River Corporation, which had a contract to purchase the property from Blue Lake contingent on a land use change. Gold River Corporation later assigned the contract to Blue Lake Partners, LLC, an entity unrelated to Blue Lake. The contract to purchase later "fell through" for unknown reasons. Blue Lake is now pursuing the land use change on its own behalf.

10. Application No. 9 requested that the County amend the LUP map by changing the land use designation on a 41-acre parcel



from Low-Medium Density Residential Communities to Business and Office. The former land use allows between six and thirteen dwelling units per gross acre and could be fully developed with as few as 244 residential units or as many as 533. The new land use allows both residential and commercial development, including a wide range of commercial uses such as retail, professional services, and offices. If developed to its maximum residential potential, the new category could accommodate more than 2,200 units. If developed to its maximum commercial potential, the new use would allow more than 679,000 square feet of commercial floor space.

11. A Declaration of Restrictions is a tool permitted by the Plan to craft "a more refined amendment" that can take into consideration more than just a change in the land use of a parcel of property. See County Exhibit 1 at I-74.1. Restrictions are considered an adopted part of the Plan. Id. They can provide greater restrictions on a parcel, delineate the property's uses, and make the amendment more consistent with the Plan than it might otherwise be. In July 2008, Blue Lake offered a first Declaration of Restrictions that would prohibit residential development on the property on the premise that the change would satisfy a deficiency in land designated for commercial development. See County Exhibit 60.

12. Land Use Element Policy LU-8E provides that applications requesting amendments to the LUP map shall be evaluated to consider consistency with the Goals, Objectives, and Policies of all Plan Elements, other timely issues, and in particular the extent to which the proposal, if approved, would:

- i) Satisfy a deficiency in the Plan map to accommodate projected population or economic growth of the County; [and]
- ii) Enhance or impede provision of services at or above adopted LOS Standards; [and]
- iii) Be compatible with abutting and nearby land uses and protect the character of established neighborhoods; and
- iv) Enhance or degrade environmental or historical resources, features or systems of County significance; and
- v) If located in a planned Urban Center, or within 1/4 mile of an existing or planned transit station, exclusive busway stop, transit center, or standard or express bus stop served by peak period headways of 20 or fewer minutes, would be a use that promotes transit ridership and pedestrianism as indicated in the policies under Objective LU-7, herein.

County Exhibit 1 at I-17-18. The various factors in the Policy are weighed and balanced when considering a map change.

However, paragraph (i) is considered by the County to be the "primary," or at the very least an "important," factor when reviewing map changes since the County must ensure that there is enough land for different types of uses to accommodate the

projected growth within the County. In fact, a County witness could recall no more than one or two instances over the last thirty years where the County had approved a LUP map change when the staff had determined that there was a lack of need under this provision.

13. Under the County's plan amendment review process, an application for a change in the LUP map is first reviewed by the Department of Planning and Zoning staff, then the applicable community council, next by the Planning Advisory Board, and finally by the Board of County Commissioners. Community councils are elected bodies from thirteen different geographic areas of the County that act as a planning board for making recommendations on amendments that affect their jurisdiction.

14. A needs analysis determines the availability of commercial land in a given area relative to the availability of residential land. Consistent with its past practice of performing a supply and demand analysis under paragraph (i) of Policy LU-8E, the Department of Planning and Zoning staff looked at need within two minor statistical areas (MSAs). An MSA is one of 32 geographical subareas into which the County has been subdivided for the purpose of collecting and inventorying data on the supply and demand for different land uses and for disaggregating the County's population into subareas. On very

infrequent occasions, the staff has used a "tier," which is an aggregation or collection of several MSAs, rather than a single MSA. Another geographic area known as a census tract, which is much smaller than an MSA, is also allowed by the Plan. See Land Use Element Policy LU-8F ("the adequacy of land supplies . . . for business and office uses shall be determined on the basis of localized subarea geography such as Census Tracts, [MSAs] and combinations thereof"). As noted below, however, the County has never used a census tract and considers them to be "inappropriate" for a needs analysis in a case such as this. Because the Blue Lake property is located within MSA 3.2 and borders on MSA 5.4, the staff conducted a supply and demand analysis in those two MSAs.

15. After completing its review, on August 25, 2008, the staff recommended that the application be denied, mainly on the ground the amendment was inconsistent with Policy LU-8E(i). See County Exhibit 60 and Blue Lake Exhibit 24. Specifically, based on its review of MSAs 3.2 and 5.4, the staff found that there was already an ample supply of vacant and available commercial land within the study area. In fact, out of 32 MSAs within the County, MSA 3.2 had the second highest ratio of commercial activity to population. Characterizing this supply of commercial land as "significant," the staff noted that there

were more than 2,500 acres of commercial land in MSAs 3.2 and 5.4 either in use or vacant, and this category would not be depleted until after the year 2025. As to residential land, the supply of that category within the MSAs would be depleted by the year 2015, and staff noted that the property was currently designated residential and could serve to satisfy the future demand for residentially designated land within the MSAs. Despite a lack of need, the staff recommended that the amendment be transmitted for further local and state review on the belief that during the subsequent review process the application could possibly be modified into a more mixed-use project and thus be compatible with the Plan. In making this recommendation, the staff did not examine other needs or deficiencies, such as the need for elderly housing or for mixed-use properties.

16. On September 23, 2008, the amendment was reviewed by the Westchester Community Council, which recommended that the amendment be approved but only with a change to allow residential development on the property to encourage a mixed-use project.

17. Just before the amendment was considered by the Planning Advisory Board, Blue Lake offered a second Declaration of Restrictions, which reduced the amount of proposed commercial development from 620,000 to 400,000 square feet. See Blue Lake

Exhibit 35. On October 6, 2008, the Planning Advisory Board recommended approval and transmittal of the amendment with a change to allow a potential mixed-use project.

18. Although the County staff continued to recommend that the application be denied, on November 6, 2008, the Board of County Commissioners considered the matter and voted to transmit the amendment and second Declaration of Restrictions to the Department for its review.

19. On March 13, 2009, the Department issued its Objections, Recommendations, and Comments (ORC) Report to the County. See Petitioners' Exhibit 10. In its ORC, the Department noted, among other things, that the County had not demonstrated a need for additional commercial uses on the property since the County's need analysis demonstrated that the commercial land in the area would not be depleted until after the year 2025. The ORC went on to recommend that the County either retain the current land use or provide data and analysis to support the need for the proposed amendment and its consistency with Policy LU-8E. On March 27, 2009, the County staff issued its response to the ORC in which it agreed that there was a lack of need for the amendment and that no new data and analysis had been submitted by the applicant. On April 6, 2009, the Planning Advisory Board again considered the

application and recommended approval with the acceptance of the proposed Declaration of Restrictions.

20. On April 13, 2009, Blue Lake's consultant submitted a revised commercial needs analysis to the County which concluded that there was in fact a need for more Business and Office designated land within his defined study area. See Blue Lake Exhibit 66. As a study area, the consultant used four census tracts (rather than MSAs) comprising around two square miles. The study area, in which Blue Lake's property was located, was bounded by major roadways on three sides and a man-made canal on the fourth. The consultant noted that the three roads and canal created an insular area that discouraged residents from leaving the area and thus justified in part further commercial development in the study area.

21. Within his study area, the consultant found the ratio of commercial to population to be 3.3 acres per 1,000 people, which is significantly below the county-wide average of 6.0 acres per 1,000 people. He also found that the study area contained 1.4 vacant acres split up in five different locations, which because of the size and distribution made the study area essentially depleted. Although the County generally uses the same type of analysis as the consultant, it disagreed with the consultant's use of a smaller selected study area as well as

many of his assumptions. Further, the County has never used a census tract in performing a needs analysis. It rejected Blue Lake's alternative needs analysis on the grounds it was not peer-reviewed and it appeared to be using an inappropriate primary trade area. The Department agreed with the County's assessment of the study. Given the deficiencies cited by the County, the report submitted by Blue Lake's consultant has not been credited.

22. On May 1, 2009, Blue Lake offered a third Declaration of Restrictions which continued to include a restriction on commercial development of 400,000 square feet, but added certain requirements addressing compatibility of the proposed development of the property with existing residential development to the north and west by prohibiting construction of buildings on the northerly two acres of the property, requiring a landscape buffer, prohibiting certain types of commercial uses on the property, and including various other requirements not relevant here. See Blue Lake Exhibit 78.

23. On May 5, 2009, the day before the Board of County Commissioners' adoption hearing, Blue Lake submitted a fourth Declaration of Restrictions which provided that commercial development would not exceed 375,000 square feet; "up to 150 dwelling units [would be] designated for elderly housing";



"ancillary and accessory uses" for the elderly could be constructed but would not exceed 15 percent of the floor area of the elderly housing facility (or just over 25,000 square feet); the northerly two acres would be reserved without buildings or used for elderly housing; a buffer would be installed; and certain commercial uses would be prohibited. See Blue Lake Exhibit 79. Notwithstanding these restrictions, the staff was still not satisfied that a need existed for further commercial development or that the owner had a commitment to build a specific minimum number of elderly housing units.

24. On the evening of May 5, 2009, in response to a continued concern by the County staff, Blue Lake submitted a fifth (and final) Declaration of Restrictions, which provided in relevant part as follows:

Notwithstanding the re-designation of the Property to "Business and Office" on the County's LUP map, the maximum development of the Property shall not exceed the following:

- (a) 375,000 square feet of retail, commercial, personal services and offices;
- and (b) no less than 150 dwelling units designated for elderly housing, as such term is defined under Section 202 of the Fair Housing Act of 1959 (12 USC 1701) and Chapter 11A of the Miami-Dade County Code (the "Code"), along with such ancillary and accessory uses as may be desirable, necessary or complementary to satisfy the service needs of the residents, such as, but not limited to, counseling, medical, nutritional, and physical therapy, provided that such ancillary and accessory uses shall

not exceed fifteen percent (15%) of the floor area of the elderly housing facility.

County Exhibit 18. The final version of the restrictions differed from the fourth version by changing the words "up to 150 dwelling units designated for elderly housing" to "no less than 150 dwelling units designated for elderly housing," a change suggested by the County staff.

25. As finally revised, the last set of restrictions allows a mixed-use development and limits the owner to less than sixty percent of the non-residential uses that could have been available under the Business and Office land use designation. It also requires the allocation of two acres of land for the development of the elderly housing units as a precondition to any commercial development of the property. This means that the only permissible use on those two acres is the construction of no less than 150 dwelling units for "elderly housing," or more than sixty percent of the minimum residential units (233) that could have been previously constructed at full development under its current land use. If an elderly component is constructed, depending on the size of the structure, it allows the owner to provide "ancillary and accessory uses" for that component that could increase the total amount of commercial use to more than 400,000 square feet. As a prerequisite to approval of its

application, Blue Lake executed and recorded the fifth Declaration of Restrictions.

26. Although the staff still "[had] concerns regarding the demand for additional commercial land in this area," and agreed that the needs test in Policy LU-8E(i) had not been met, given the foregoing restrictions, the inclusion of a mixed-use component, and the need for elderly housing in the County, it recommended adoption of the amendment.

27. Just prior to the vote by the Board of County Commissioners on May 6, 2009, a Blue Lake attorney sent the following email to a County staffer for the purpose of clarifying the commitment that Blue Lake was making in the Declaration of Restrictions:

Yesterday's revision to the Declaration [which requires no less than 150 dwelling units for elderly housing] simply expands the universe of uses that would be permitted on the property. By reducing the overall square footage of commercial development, the owner would set up the conditions to allow the future development of 150 senior housing units. However, because the development of this type of project depends on so many factors, including zoning approvals, government incentives, etc., the owner's ability to build 375,000 square feet of commercial space is not in any way dependent on whether any senior housing units are actually built on the Property or the timing of such construction. (Emphasis added)

Blue Lake Exhibit 86. There is no record of any response by the staff to the email or any indication that this "clarification" was conveyed to the Board of County Commissioners prior to its vote. A copy of the email was not provided to the Department. After learning of its contents at the final hearing, a Department planner stated that he considers the Declarations of Restrictions to be controlling, and not the email.

28. On May 19, 2009, the County staff prepared a final response to the ORC stating that while it rejected the alternate needs analysis submitted by Blue Lake's consultant, and it "partially concur[red] with the Department's view that there was a lack of need, the applicant had adequately responded to its needs objection by "commit[ting] to building a mixed-use project and to reducing the commercial floor area." County Exhibit 10 at p. 2.

29. On June 11, 2009, the County transmitted the amendment to the Department for its compliance review. On July 29, 2009, the Department found the amendment to be in compliance and noted in a staff report that "[t]he adopted amendment provides additional information for application #9 related to need (objection #1) and road capacity (objection #2)." Petitioners' Exhibit 54. It went on to say that "the County adequately responded to the Objection [regarding need] by reducing the

commercial uses and introducing a mixed use component by adding residential units." Id. The Department's report added that Blue Lake had "committed to building a mixed use project which reduces commercial area from 679,535 square feet . . . to 375,000 square feet . . . [,] the mixed use development is supported by FLUE Policy LU-10A and Land Use Concept #8, [and] the mixed use development reduces the potential loss of housing units on the site, which is supported by Goal 1 of the Housing Element." Id.

30. On August 3, 2009, the Department published in the Miami Herald its Notice of Intent to find the map change in compliance.

31. On August 26, 2009, Petitioners filed their Amended Petition with the Department generally contending that the map change was not supported by adequate data and analysis for new commercial development in the area and that the change in land use would have an adverse impact on traffic. The latter objection was later withdrawn. As clarified in Petitioners' Proposed Recommended Order and the Stipulation, they contend that the plan amendment is inconsistent with Land Use Element Policies LU-8E(i), LU-8F, and LU-10A, Land Use Concept No. 8, and Housing Element Goal 1, as well as the requirements of

Florida Administrative Code Rules 9J-5.005(2) and 9J-5.006(2)(c).<sup>2</sup>

C. Petitioners' Objections

32. Petitioners first object to the amendment on the ground that the amendment is not consistent with Policy LU-8E(i) because there is no demonstrated need for more commercial land in the study area. That Plan provision requires that map amendments "shall" be evaluated against all goals, objectives, and policies of the Plan, "and in particular" whether the amendment satisfies "a deficiency in the Plan map to accommodate projected population or economic growth of the County."

Similarly, while Petitioners agree that the data and analysis used to support the amendment are relevant and appropriate, and were applied in a professional manner, they contend the data support a continuation of the current residential land use.

33. Despite efforts by the County at hearing to downplay the importance of Policy LU-8E(i) in its review process, it can be inferred that a needs analysis under that provision is one of the most important, if not primary, consideration when reviewing LUP map changes. This is borne out by the fact that except for one or two occasions, the County has never approved a map change over the last thirty years without a needs analysis supporting that change. The evidence supports a finding that the amendment

is inconsistent with Policy LU-8E(i) because there is no need for 375,000 square feet of new commercial development within the study area (MSAs 3.2 and 5.4). More specifically, the relevant data and analysis used by the County reveal that the MSA in which the property is located (MSA 3.2) has the second highest ratio of commercial activity to population of the 32 MSAs in the County; that the supply of existing or available commercial land use will not be depleted for at least another fifteen years; and that there is no "deficiency" of commercial land in the study area to accommodate projected population or growth, as required by the Policy. Although the amendment will authorize at least 375,000 square feet of new commercial development, both the County and Department concede that a need for more commercial land does not exist. It is beyond fair debate that the amendment is inconsistent with Land Use Element Policy LU-8E(i). Likewise, because the data and analysis do not support the amendment, but rather support a contrary result, the County reacted to the data in an inappropriate manner. See Fla. Admin. Code R. 9J-5.005(2).

34. The County and Blue Lake argue, however, that even though no need for commercial land exists, the final version of the Declaration of Restrictions incorporates a provision requiring an elderly housing component, which when combined with

the commercial component, changes the character of the land to a mixed use. By Blue Lake offering this restriction, they argue that the application, as amended, furthers other Plan provisions that encourage affordable housing for the elderly (e.g., Housing Element Goal 1, Objective HO-9, and Policy HO-9A) and furthers provisions that encourage the rejuvenation of decayed areas (in this case a 50-year-old mobile home park) with a mixture of land uses (e.g., Land Use Element Policy LU-10A and Land Use Concept 8). Thus, they contend that the "need" requirement in Policy LU-8E(i) is now met because Blue Lake is satisfying a deficiency in both the supply of elderly housing as well as mixed uses.

35. To support the contention that a need for elderly housing exists, the County posited that there is a need, "in general," for elderly housing in the County. It also pointed out that between the years 2000 and 2008 there was a small percentage increase in the number of persons over 65 years of age residing in the County. See County Exhibit 64. But the County agrees that the needs test in Policy LU-8E(i) does not distinguish between different types of residential use, such as whether properties are available for elderly residents. Neither does the test assess the need for mixed uses. Therefore, regardless of whether or not there is a need for elderly housing or mixed-use projects, any such need does not address the needs



test in Policy LU-8E(i). Even assuming arguendo that it does, the County made no study of the need for "elderly housing" or "mixed use projects" within MSAs 3.2 and 5.4.

36. The County and Blue Lake also contend that the proposed mixed use furthers other laudable provisions within the Plan, which more than offset any lack of commercial need. While development of the property under the current or not yet effective new land use would certainly "rejuvenate" an area now occupied by a closed, 50-year-old mobile home park, and result in the redevelopment of what is now probably a substandard urban area, see Land Use Concept 8 and Land Use Policy LU-10A, furtherance of those provisions by creating a new commercial land use category does not trump the lack of need for more commercial land.

37. Similarly, the Department found the amendment, as adopted, was in compliance because the final version of the Declarations of Restrictions introduced an elderly housing mixed-use component, which essentially negated the lack of need for commercial development. It is fair to infer from the evidence that, like the County, the Department made this determination in the belief that the elderly housing component was intended to address a need for affordable or subsidized housing for senior citizens. Petitioners contend, however, that

the final version of the Declarations of Restrictions does not truly provide for an elderly housing/mixed use in this context.

38. The fifth version of the Declaration of Restrictions references the term "elderly housing" as that term is defined in "Section 202 of the Fair Housing Act of 1959 (12 USC 1701)" and "Chapter 11A of the County Code." Because the federal law, related regulations, and the entire Chapter 11A were not made a part of the record by any party, it is appropriate to take official recognition of those matters. The federal regulation (section 1701) referred to in the amendment relates to "supportive housing for the elderly" and the federal assistance programs administered by the United States Secretary of Housing and Urban Development. Its provisions are lengthy, cumbersome, and complicated, and they have been amended numerous times since their adoption. While the terms "elderly person" and "frail elderly" are defined in sections 1701q(k)(1) and (2) of the regulations, the undersigned was unable to find a specific definition of "elderly housing," and counsel have provided no citation. Chapter 11A of the County Code is a civil and human rights ordinance that is enforced by a County Commission on Human Rights. In its Proposed Recommended Order, the County has cited Section 11A-13(5) as the provision that defines the term. See County Exhibit 157. That provision enumerates "[e]xceptions

to unlawful practices" and defines "housing for older persons" in the context of unlawful housing practices, but not in the context of a land use change. Therefore, it has little, if any, value in deciphering the meaning of the term "elderly housing" in the Declaration of Restrictions.

39. When asked to define the term "elderly housing" as used in the Declaration of Restrictions, no witness could give a precise answer or refer to any provision in the federal law or County Code where a definition of that term is found. Therefore, if an elderly component is ever built on the property, it is fair to infer that the developer has wide discretion in choosing the type of units built and their price, and there is no guarantee or requirement that they be targeted for anyone except "elderly" persons, whatever age and associated income status that may encompass. Because of these ambiguities and uncertainties, the inclusion of an elderly housing component does not further the goals, objectives, and policies of the Plan encouraging affordable housing for all citizens, including the elderly, that the County relies upon to support the amendment.

40. Finally, the fifth Declaration of Restrictions permits a developer to either construct elderly housing or merely reserve for an indefinite period of time the northerly two acres of the 41-acre tract free from construction of buildings. If

construction ever occurs on those two acres, the only permissible use is "no less than 150 dwelling units for elderly housing." Petitioners contend that the commitment is illusory since there is no requirement that a residential component ever be built. The County and Blue Lake point out, however, that when a map amendment is approved, there are no timetables for when development must actually occur. Similarly, the Department does not look at the timing of development when an amendment is reviewed, and the fact that there is no time limitation in the amendment does not render it out of compliance. While it is reasonable in this case to question whether an elderly housing component will ever be built, the plan amendment simply approves a map change, and Petitioners have not cited any Plan requirement, Department rule, or statute that mandates development within a certain period of time in order for a map change to be in compliance. Petitioners' argument is rejected.

41. In summary, it is beyond fair debate that (a) the plan amendment is internally inconsistent with Land Use Policy LU-8E(i); (b) the change in land use is not supported by the most relevant and appropriate data and analysis; (c) by adopting the amendment, the County reacted to the data and analysis in an inappropriate manner; (d) the reference to "elderly housing" is ambiguous, vague, and uncertain and does not further Plan

provisions that encourage affordable housing within the County; and (e) even if the plan amendment furthers other Plan provisions that encourage the rejuvenation of decayed urban areas with mixed uses, on balance this consideration does not outweigh the foregoing deficiencies. All other contentions by Petitioners not specifically discussed herein have been considered and rejected.

#### CONCLUSIONS OF LAW

42. 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.

43. 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 facts establish that Petitioners and Blue Lake own property and/or operate a business within the County and made oral or written comments to the County during the adoption process. Thus, they have standing to participate.

44. 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, Petitioners bear 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).

45. For the reasons given in the Findings of Fact, Petitioners have established beyond fair debate that the plan amendment is internally inconsistent with a Plan policy requiring a need for the new land use, it is not supported by the most relevant and appropriate data and analysis, as required by Rule 9J-5.005(2), and the County reacted to the data in an inappropriate manner. Also, because the term "elderly housing" is vague and uncertain, the amendment does not further other Plan provisions encouraging affordable housing for the elderly. Finally, while it may further Plan provisions encouraging the rejuvenation of decayed urban areas by introducing mixed uses, on balance these considerations do not outweigh the lack of need.

46. On February 19, 2010, Blue Lake filed a Motion for Attorney's Fees and Costs under Sections 57.105 and 120.595(1), Florida Statutes, alleging that Petitioners' challenge, and continuation of this proceeding, is both improper and frivolous

and has no basis in law or fact, but was made for the purpose of "illegally quash[ing] competition." Also, in the parties' Stipulation, Blue Lake added as a statement of disputed issues "[w]hether Blue Lake is entitled to fees against Petitioners under Section[s] 163.3184(12) and 120.569, Florida Statutes." Stipulation at p. 5. Resolution of the request under Section 120.595(1), Florida Statutes, must be made in this Recommended Order, while a separate final order is required to adjudicate the claims arising under the other three statutes.

47. Petitioners are the prevailing party in this action, their participation has substantially changed the outcome of this proceeding, and they did not participate in this matter for an improper purpose, as defined in the statute. Therefore, Blue Lake is not entitled to fees and costs under Section 120.595(1), Florida Statutes. In the event a final order or appellate decision is rendered determining that the amendment is in compliance, jurisdiction is retained for the limited purpose of resolving the claims under the other three statutes so long as the requests are renewed within 30 days after the matter becomes final.

#### 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 (Application No. 9) adopted by Ordinance No. 09-28 on May 6, 2009, be found not in compliance.

DONE AND ENTERED this 14th day of July, 2010, in Tallahassee, Leon County, Florida.



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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 14th day of July, 2010.

ENDNOTES

1/ All statutory 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:

Barbara Leighty, Clerk  
Transportation and Economic  
Development Policy Unit  
The Capitol, Room 1801  
Tallahassee, Florida 32399-0001



Rick Figlio, General Counsel  
Office of the Governor  
The Capitol, Room 209  
Tallahassee, Florida 32399-0001

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

John J. Quick, Esquire  
Weiss, Serota, Helfman, Pastoriza,  
Cole & Boniske, P.L.  
2525 Ponce de Leon Boulevard, Suite 700  
Coral Gables, Florida 33134-6045

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

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

Eduardo I. Sanchez, Esquire  
Assistant County Attorney  
County Attorney's Office  
111 Northwest First Street, Suite 2810  
Miami, Florida 33128-1930

Eduardo A. Ramos, Esquire  
Holland & Knight, LLP  
701 Brickell Avenue, Suite 3000  
Miami, Florida 33131-2847

Lawrence E. Sellers, Jr., Esquire  
Holland & Knight, LLP  
Post Office Box 810  
Tallahassee, Florida 32302-0810

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.