STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SUNSET DRIVE HOLDINGS, LLC, AND LA SONNA HAYES-TOMANEK,	)	
Petitioners,	)	
vs.	)	Case Nos. 10-1973GM
	)	10-1980GM
CITY OF LAKE WORTH AND DEPARTMENT OF COMMUNITY AFFAIRS,	)	
Respondents.	)	

RECOMMENDED ORDER

Pursuant to notice, this matter was conducted by video teleconferencing before the Division of Administrative Hearings (DOAH) by its assigned Administrative Law Judge, D. R. Alexander, on January 12, 2011, in West Palm Beach and Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues are (1) whether the City of Lake Worth (City) followed required statutory and rule procedures in adopting the height restrictions on pages 22 and 23 of the Future Land Use Element (FLUE) of the Evaluation and Appraisal Report (EAR) amendments, and (2) whether the adoption of the EAR-based amendments by the City more than 120 days after receiving the Department of Community Affairs' (Department's) Objections, Recommendations, and Comments (ORC) report renders them not in compliance.

PRELIMINARY STATEMENT

Ordinance No. 2008-25, also known as the EAR-based amendments, was adopted by the City on October 20, 2009, pursuant to section 163.3191, Florida Statutes. Among other things, it includes new height restrictions in Table 1 of the FLUE of the Comprehensive Plan (Plan) that apply to various categories of land use designations. On December 31, 2009, the Department published notice of its intent to find the EAR amendments to be in compliance.

The first petition for formal administrative hearing was filed by Petitioner, Sunset Drive Holdings, LLC (Sunset), on

January 19, 2010, but was dismissed by the Department by Order dated March 15, 2010, with leave to file an amended petition within 21 days. A second amended petition for formal administrative hearing was filed by Sunset on April 2, 2010, alleging that (a) Table 1 had been adopted by the City without following required statutory and rule procedures, and (b) the City had incorrectly identified the land use designation on its property on the new Future Land Use Map (FLUM). The second petition was referred by the Department to DOAH on April 14, 2010, and was assigned Case No. 10-1973GM. In its transmittal letter, the Department stated that the only issue to be tried was "the EAR Amendment challenge regarding height restrictions. As to the Sunset property land use designation, this issue has already been adjudicated." This limitation on the issues was reconfirmed by Order dated May 20, 2010. Sunset's motion for reconsideration of that Order was denied by Order dated October 13, 2010. (Due to the cases being abated, a ruling on the motion was deferred until the cases were reset for hearing.) On April 5, 2010, Petitioner, La Sonna Hayes-Tomanek, filed a paper with the Department styled "Appeal and Intervention" in which she stated that she was "challenging as to the definitions of 'Building Hiegts' [sic], Table 1, policy 1" based on procedural irregularities by the City. Although not filed

within 21 days after the notice of intent was published, her petition was treated by the Department as a separate timely petition (rather than a petition to intervene) and was forwarded to DOAH on April 14, 2010. It was assigned Case No. 10-1980GM. The cases were consolidated by Order dated April 23, 2010.

By Notice of Hearing dated April 26, 2010, a final hearing was scheduled in Lake Worth, Florida, on July 13-15, 2010. At the request of the parties, on June 7, 2010, the matter was abated pending settlement negotiations. After settlement efforts failed, the cases were rescheduled to November 16-18, 2010. On November 2, 2010, Sunset was authorized to file a third amended petition for formal administrative hearing, which added a contention that the EAR amendments are not in compliance because they were adopted by the City more than 120 days after receiving the Department's ORC report. It also sought to add a contention that the City assigned an incorrect land use designation to its property, an issue already excluded by the Department in its transmittal letter and twice by the undersigned. Therefore, only the first issue was added. A joint pre-hearing stipulation (stipulation) was filed by the parties on November 15, 2010. At the request of the parties, the matter was again continued pending settlement negotiations. Thereafter, the matter was rescheduled to January 12, 2011, and

was conducted by video teleconferencing, with the parties located in West Palm Beach and Tallahassee, Florida. By Order dated December 28, 2010, the undersigned denied Sunset's motion to amend notice of hearing to again include the allegation that its property was given an incorrect land use designation on the FLUM.

At the hearing, Sunset presented the testimony of C. Wesley Blackman, a certified land planner with CWB Associates, Inc., and accepted as an expert. Also, it offered Sunset Exhibits 1-15. All were received in evidence except 6 and 11, which were proffered only as they related to the excluded issue. Exhibits 13 and 14 are the depositions of Richard W. Post and Bob Dennis, both Department planners. Ms. Hayes-Tomanek testified on her own behalf and adopted the evidence presented by Sunset. Also, she offered Tomanek Exhibits 1-13. Exhibit 13 was initially received and a ruling on the remaining exhibits was reserved; however, a further review indicates that all of the exhibits relate to zoning issues on her property, which are not relevant to a compliance determination, and the City and Department's objections to their receipt in evidence are sustained. The City offered City Exhibits 1-9, which were received in evidence. Exhibits 7 and 8 are the same depositions of Richard W. Post and Bob Dennis offered by Sunset, while Exhibit 9 is the deposition

of former City Commissioner Cara Jennings. The Department did not present any witnesses, but adopted the evidence presented by the City. Finally, Joint Exhibits 1-7 were received in evidence.

The Transcript of the hearing was filed on February 3, 2011. At the request of the parties, they were given until March 15, 2011, in which to file proposed findings of fact and conclusions of law. They were timely filed by Sunset and jointly by the City and Department on March 15, 2011, and have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. The Parties

1. Sunset is a Florida limited liability company whose principal address is 5601 Corporate Way, Suite 111, West Palm Beach, Florida. It owns property located at 826 Sunset Drive South within the City. See Sunset Exhibit 3. The property is currently classified on the FLUM as County Medium Residential 5.[1] There is no factual dispute that Sunset is an affected person and has standing to participate in this proceeding.

2. Ms. Hayes-Tomanek owns property within the City. She submitted comments regarding the height restrictions during the public hearing on October 20, 2009, adopting the EAR amendments. See City Exhibit 6, Minutes, p. 7.

3. The City is a local government that administers the City's Plan. The City adopted the EAR-based amendments which are being contested here.

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

B. The Amendments

5. On October 1, 2008, the City's EAR-based amendments were passed on first reading and transmitted to the Department. See Joint Exhibit 2. These amendments did not include any height-based restrictions on the three categories of residential property in the Plan: Single-Family, Medium-Density, and High-Density. These three categories make up around 75 percent of the City's total land area. According to Sunset's expert, height restrictions for those categories (which are less stringent than those later adopted and being challenged here) were then in the City's zoning ordinances.

6. On January 14, 2009, the Department issued its ORC report regarding the EAR-based amendments. See Joint Exhibit 3. Objection 4 in the report stated in part that the "City has not adequately established its mixed use districts . . . because the mixed used categories do not establish the types of non-residential uses or the appropriate percentage distribution

among the mix of uses, or other objective measurement. In addition, the General Commercial, Industrial, Public, Public Recreation and Open Space Future Land Use categories do not include the densities and intensities of use for these categories." Id. Sunset's expert points out that the ORC report, and in particular Objection 4, did not recommend any changes to the residential categories of property.

7. Accompanying the ORC report was a document styled "Transmittal Procedures," which stated, among other things, that "[u]pon receipt of this letter, the City of Lake Worth has 120 days in which to adopt, adopt with changes, or determine that the City will not adopt the proposed EAR-based amendments." Id. The 120-day period expired on May 14, 2009. See Sunset Exhibit 15.

8. The City initially scheduled an adoption hearing on May 5, 2009. See Sunset Exhibit 8. For reasons not of record, the EAR amendments were not considered that day. On June 25, 2009, then City Commissioner Jennings wrote Bob Dennis, Department Regional Planning Administrator, and asked whether the City could incorporate certain substantive changes into its EAR amendments between the first (transmittal) and second (adoption) readings. Among others, she asked if the following change to the EAR amendments could be made:

> Establish or change the maximum building heights in various land use classifications. During the master plan process, the city received public input regarding maximum building heights . . . . The height changes vary from a 10' reduction to a 25' reduction in different land use categories.

The letter included an outline of the proposed changes in seven land use categories, including the three residential categories. See City Exhibit 2. In her deposition, Commissioner Jennings stated that around the time of the transmittal hearing in January 2008 she had requested that new height restrictions be incorporated into the EAR amendments, but based on conversations with City staff, she was under the impression that these changes could not be made at that time. See City Exhibit 9.

9. By letter dated July 29, 2009, the Department, through its Chief of Office of Comprehensive Planning, responded to Commissioner Jennings' inquiry as follows:

> The proposed maximum building height changes identified in your letter are for the Single Family Residential, Medium Density Multi-family Residential, High Density Multi-family Residential, Mixed Use, Downtown Mixed Use, Transit Oriented Development, and the General Commercial land use categories. Contrary to the [FLUM] revisions discussed above, the City did transmit proposed amendments to Future Land [Use] Policy 1.1.3, including new and revised Sub-policies 1.1.3.1 through 1.1.3.11 concerning these land use classifications. Height limitations were proposed for the Mixed Use and Downtown Mixed Use land use categories. In addition, the Department's ORC Report includes an objection that the Mixed Use, Downtown Mixed Use, Transit Oriented Development, General Commercial, Industrial, Public, Recreation and Open Space land use classifications do not establish

> adequate densities and intensities of use for these categories. In preparing this letter, the Department notes that an intensity standard of 0.1 F.A.R. (floor area ratio) was proposed for the Recreation and Open Space category.
>
> To address the Department's objection, the Department recommended the City include densities and intensities for the listed land use categories and specify the percentage distribution among the mix of uses in the mixed use categories. Appropriate intensity standards for non-residential uses include a height limit and maximum square footage or a floor area ratio.
>
> Because the City transmitted amendments that included revisions to the residential and several non-residential land use categories and because the Department's ORC Report identified the need to include density and intensity standards for the mixed use categories and several non-residential land use categories, it would be acceptable for the City to revise the proposed height limitations previously submitted or to include height limitations for the other land use categories. As noted above, height alone is not a density or intensity standard. (Emphasis added)

City Exhibit 3. This determination by the Department was just as reasonable, or even more so, than the contrary view expressed by Sunset's expert.

10. After receiving this advice, the City conducted a number of meetings regarding the adoption of the EAR-based amendments, including a change in the height restrictions. On September 2, 2009, a Board meeting was conducted regarding the proposed new height restrictions. The Board voted unanimously to adopt the changes. The Minutes of that meeting reflect that a "special workshop" would be conducted by the Commission at

6:00 p.m., September 14, 2009, "to address height and intensity" changes to the EAR amendments. See City Exhibit 4, Minutes, p. 11. On October 11, 2009, a "special meeting" of the Commission was conducted. Finally, on October 20, 2009, the City conducted the adoption hearing. There is no dispute that Petitioners appeared and presented comments in opposition to the proposed changes. By a 3-2 vote, Ordinance No. 2008-25 was adopted with the new height restrictions described on Table 1, pages 22 and 23 of the FLUE.[2] See Joint Exhibit 4; Sunset Exhibit 6. This was 279 days after the City received the ORC report. The adopted amendments were then submitted to the Department for its review.

11. Notices for each hearing (but not the special workshop) were published in a local newspaper. See City Exhibits 4, 5, and 6. Each advertisement indicated that one of the purposes of the meetings was to consider the "City's EAR-Based Amendments." No further detail regarding the EAR amendments was given. Sunset's expert acknowledged that local governments do not always provide more specificity than this in their plan amendment notices but stated he considers it to be a good planning practice to provide more information.

12. On December 30, 2009, the Department issued its Notice of Intent to find the amendments in compliance. See City

Exhibit 5. The following day, a copy of the Notice of Intent was published in The Lake Worth Herald. On January 19, 2010, Sunset timely filed a petition contending that certain procedural errors were committed by the City during the adoption process. This petition was twice amended prior to hearing. A petition was filed by Ms. Hayes-Tomanek on April 5, 2010.

C. Petitioners' Objections

13. Petitioners first point out that the City did not follow the requirement in section 163.3184(7)(a) that it "shall" adopt the amendments no more than 120 days after receipt of the ORC report. They contend that because the City failed to do so, this requires a determination that the EAR-based amendments are not in compliance. At hearing, Sunset also relied upon (for the first time) Florida Administrative Code Rule 9J-11.009(8)(e), which provides that "[p]ursuant to Section 163.3191(10), no amendment may be adopted if the local government has failed to timely adopt and transmit the evaluation and appraisal report-based amendments."

14. The parties agree that the City did not adopt the EAR-based amendments until 279 days after receipt of the ORC report. According to the Department's Regional Planning Administrator, Bob Dennis, the Department took no action after the 120 days had run because the statute "gives no guidance as to what happens

when a local government does take more than the prescribed time in the statute." See City Exhibit 8. He also indicated that the Department has no policy relative to this situation. Sunset's expert agreed that there is no penalty in the statute in the event a local government takes more than the prescribed time.

15. Richard Post, a Department Planning Analyst, noted that local governments sometimes take longer than the statutory time periods to "send in adopted amendments, and the Department has taken no particular posture regarding their tardiness." See City Exhibit 7. He further noted that if a filing is late, as it was here, it does not affect the Department's review. As a safeguard, if an adopted amendment is transmitted to the Department after the statutory time period, it is reviewed by a planner to determine whether the information is still relevant and appropriate or has become "stale" and out-of-date. In this case, the Department reviewed the adopted amendments and, notwithstanding the passage of 279 days since the ORC report was received by the City, the amendments were found to be in compliance.

16. For the reasons expressed in Endnote 3, infra, rule 9J-11.009(8)(e) does not prohibit the City from adopting the challenged amendments.[3]

17. While Petitioners stated that they have suffered prejudice because the new height restrictions will adversely impact the use of their property, there was no evidence that the delay in adopting the amendments affected their ability to participate in the planning process.

18. Petitioners also contend that the City failed to follow statutory and rule procedures when it added the height restrictions between the first and second readings of the amendments. By the City doing so, Petitioners argue that rule 9J-5.004 was violated, which requires that the City "adopt procedures to provide for and encourage public participation in the planning process, including consideration of amendments to the . . . evaluation and appraisal reports[,]" and procedures to assure that the public is noticed regarding such changes and has the opportunity to submit written comments. Petitioners further argue that subsections 163.3191(4) and (10) were violated by this action. The first subsection requires the local planning agency (the Planning & Zoning Board) to prepare the EAR report (as opposed to the amendments) in conformity with "its public participation procedures adopted as required by s. 163.3181[,]" while the second subsection requires that the City adopt the EAR-based amendments in conformity with sections 163.3184, 163.3187, and 163.3189. They also argue that the notice of the

adoption hearing violated section 163.3184(15) because it failed to describe the changes being made to the original EAR-based amendments. Finally, they contend the new height restrictions were not responsive to the ORC report.[4]

19. Petitioners do not contend that the City has failed to adopt adequate public participation procedures, as required by rule 9J-5.004. Rather, they contend that the participation procedures were violated, and that members of the public and other reviewing agencies, such as the Treasure Coast Regional Planning Council, were not given an opportunity to provide input on the new height restrictions.

20. The record shows that, notwithstanding the content of the notice in the newspaper, both Petitioners were aware of new height restrictions being considered by the City prior to their adoption, and both were given the opportunity to participate at the adoption hearing. There is no dispute that Sunset submitted written or oral comments to the Commission prior to the adoption of the new height restrictions. Likewise, Ms. Hayes-Tomanek has closely followed the planning process for years (mainly because she wants the density/intensity standards on her property increased) and became aware of the new height restrictions well before they were adopted. The record further shows that the new height limitations were discussed by City officials before

June 2009, when Commissioner Jennings authored her letter to the Department, and that written input on that issue was received from 239 residents. See Sunset Exhibit 9; City Exhibit 9. It is fair to construe these comments from numerous citizens as "public input." Even if there was an error in procedure, there is no evidence that either Petitioner was substantially prejudiced in the planning process.

21. Finally, Petitioners' assertion that the new height restrictions are not responsive to the ORC report has been considered and rejected. See Finding of Fact 9, supra; City Exhibits 7 and 8.[5]

CONCLUSIONS OF LAW

22. 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)(a).

23. 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). There is no factual dispute that Petitioners are affected persons within the meaning of the law.

24. 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. In this case, Petitioners do not contend that the amendments are not in compliance as that term is defined in section 163.3184(1)(b); rather, they contend that the amendments should be found not in compliance or set aside on the ground the City failed to comply with required procedural requirements for adopting the amendments.

25. Section 163.3181 and rule 9J-5.004 direct local governments to adopt procedures to ensure that public participation is consistent with the plain language in the statute and rule. They are not, however, part of the Department's statutory review to determine whether an amendment is in compliance. See, e.g., Emerald Lakes Residents' Ass'n, Inc. v. Collier Cnty., Case No. 02-3090GM, 2003 Fla. ENV LEXIS 58 at *32-33 (Fla. DOAH Feb. 10, 2003), modified in part, Case No. DCA03-GM-103, 2003 Fla. ENV LEXIS 57 (Fla. DCA May 8, 2003). Therefore, when a party asserts that a statutory notice or other procedural requirement has not been satisfied, it bears the burden of showing prejudice occasioned by the procedural error. In a compliance case, this burden is not satisfied by showing that the adoption of the challenged amendment will have an impact on the use of the owner's property. Rather, affected persons must demonstrate that a procedural error affected their ability to participate in the planning process.

26. Petitioners first contend that the City erred by not adopting the amendments within 120 days after receipt of the Department's ORC report. Section 163.3184(7)(a) provides in part that upon receipt of the ORC report, the local government "shall have 120 days to adopt or adopt with changes the proposed comprehensive plan or s. 163.3191 plan amendments." The parties agree that in this case, the City did not adopt the amendments until 279 days after receipt of the ORC. However, this is a procedural requirement, and not a compliance criterion under section 163.3184(1)(b). As noted above, absent a showing of prejudice, a plan amendment will not be set aside for failing to timely adopt EAR-based amendments. See, e.g., Brevard Cnty. v. Dep't of Community Affairs, Case Nos. 00-1956GM and 02-0391GM, 2002 Fla. ENV LEXIS 288 at *35-36 (Fla. DOAH Dec. 16, 2002), modified in part, Case No. DCA03-GM-013A (Fla. DCA Feb. 25, 2003); Dep't of Community Affairs v. Hamilton Cnty., Case No. 91-6038GM, 1995 Fla. ENV LEXIS 87 at *30-32 and *39-42 (Fla. DOAH April 21, 1995), modified in part, (Fla. Admin. Comm. Aug. 9, 1995); McSherry v. Alachua Cnty., Case No. 02-2676GM, 2004 Fla. ENV LEXIS 252 at *152 (Fla. DOAH Oct. 18, 2004), modified in part, Case No. DCA04-GM-224 (Fla. DCA May 2, 2005). Here, Petitioners had actual notice of the adoption hearing and the proposed changes being considered, which enabled them to submit

oral or written comments in opposition to those amendments. Therefore, it is concluded that even if the City erred by adopting the EAR-based amendments 279 days after receipt of the Department's ORC report, Petitioners would not be prejudiced by the error.

27. Petitioners also contend that the inclusion of new height restrictions after the ORC report was received was a material and substantive change to the EAR amendments, and it was done without following the required statutory and rule procedures. Again, if procedural errors occurred, Petitioners have not demonstrated they were prejudiced in the planning process. Finally, assuming that the argument regarding the height changes being non-responsive to the ORC report is a substantive rather than a procedural claim, the Department's determination that the change was responsive to the ORC is just as reasonable as the contrary interpretation reached by Sunset's expert.

28. For the reasons given in the Findings of Fact and Conclusions of Law, Petitioners have failed to establish a basis upon which to find the amendments not in compliance or to have them set aside. Therefore, the EAR-based amendments adopted by Ordinance No. 2008-25 are in compliance.

RECOMMENDATION

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

RECOMMENDED that the Department of Community Affairs enter a final order determining that the EAR-based amendments adopted by Ordinance No. 2008-25 are in compliance.

DONE AND ENTERED this 24th day of March, 2011, in Tallahassee, Leon County, Florida.

D. R. Alexander

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of March, 2011.

ENDNOTES

1/ Sunset's property was annexed into the City on an undisclosed date prior to June 2006. Until the City assigns it a City land use designation, it continues to carry a county land use designation. See § 171.062(2), Fla. Stat. By proffer, Sunset's counsel presented argument that its property was annexed by the City from Palm Beach County (County) in late 2005. It then carried the County's land use designation of Medium Residential 5, which allows up to five dwelling units per acre. On June 6, 2006, the City adopted Ordinance No. 2006-04, which changed the land use designation from Medium Residential 5 to a City land use designation allowing up to 20 dwelling units per acre. That

ordinance was later rescinded on August 25, 2009, prior to the adoption of the EAR amendments. Therefore, when Ordinance No. 2008-25 was adopted, the appropriate designation was County Medium Residential 5. This issue was fully addressed in preliminary orders issued on May 20, October 13, and December 28, 2010.

2/ The changes include a reduction in the maximum height of buildings in the residential land use categories, a reduction in the number of stories for structures in certain categories, and a modification in the manner in which the City measures the height of a building.

3/ Sunset misconstrues the purpose and intent of rule 9J-11.009(8)(e). That rule provides in relevant part that "no amendment may be adopted if the local government failed to timely adopt and transmit the [EAR-based] amendments." But language in section 163.3191(10) makes it clear that this prohibition refers to amendments other than the EAR-based amendments. The statute provides that "beginning July 1, 2006, failure to timely adopt and transmit update amendments to the comprehensive plan based on the [EAR] shall result in a local government being prohibited from adopting amendments to the comprehensive plan until the [EAR] update amendments have been adopted and transmitted to the [Department]."

4/ In its Proposed Recommended Order, Sunset alleges for the first time that by making these changes, the City also violated rules 9J-11.006 and 9J-11.011(5)(a)5.a. However, this procedural claim was not raised in Sunset's third amended petition for administrative hearing or by stipulation of the parties and is therefore untimely.

5/ Objection 4 in the ORC report was a concern by the Department that mixed use categories (the downtown and transit-oriented development districts) did not establish the types of non-residential uses or establish the percentage distribution among the mix of uses that would be guiding development in these districts. There was deposition testimony that the Department was also concerned that the general commercial, industrial, public, and public recreation and open space categories did not include densities and intensities of use for those categories. Because (a) height is a component of intensity and density, (b) the original amendments include revisions to the residential and several non-residential categories of land, and (c) the ORC report identifies a need to include density and intensity

standards for the mixed use categories and several non-residential land use categories, the Department concluded that the inclusion of the height restrictions was permissible. This deposition testimony by Department planners Post and Dennis has been accepted as being the most persuasive on this issue and has been accepted.

COPIES FURNISHED:

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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.