STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CLIFTON CURTIS HORTON AND HORTON ENTERPRISES, INC.,	)	
Petitioners,	)	
vs.	)	Case No. 10-5965GM
CITY OF JACKSONVILLE,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings (DOAH) by its assigned Administrative Law Judge, D. R. Alexander, on October 20, 2010, in Jacksonville, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether a text amendment to the general description of the Commercial land use designations of the Comprehensive Plan (Plan) of Respondent, City of Jacksonville (City), adopted by Ordinance No. 2010-401-E on June 22, 2010, is in compliance.

PRELIMINARY STATEMENT

To eliminate conflicting language in its Plan, the City adopted Ordinance No. 2010-401-E, which deleted the following language from the general description of the Commercial land use designations: "Adult entertainment facilities are allowed by right in the heavy industrial land use category, but not in commercial." The amendment was adopted under the Alternative Review Process Pilot Program (Pilot Program), which is codified in Section 163.32456, Florida Statutes (2010).

On July 21, 2010, Petitioners, Clifton Curtis Horton and Horton Enterprises, Inc., who own and operate an adult entertainment facility on property with a Heavy Industrial land use designation, filed their Petition for Formal Administrative Hearing (Petition) with DOAH requesting that an administrative law judge be assigned to conduct a formal hearing. The Petition generally contended that the City failed to follow the statutory requirements for advertising the adoption of the amendment, that

the amendment is inconsistent with Goal 15 in the State Comprehensive Plan, and that it is "inconsistent with the balance of the [City's] 2030 Comprehensive Plan." By Notice of Hearing dated August 5, 2010, a final hearing was scheduled in Jacksonville, Florida, on October 20 and 21, 2010.

On October 18, 2010, the parties filed a Pre-Hearing Stipulation (Stipulation). At the final hearing, Petitioners presented the testimony of R. Bruce McLaughlin, a certified land use planner with Bruce McLaughlin Consulting Services, Inc., and accepted as an expert. Also, they offered Exhibits A-Z and AA through LL, which were received in evidence. Exhibits X, Y, and Z are the depositions of William B. Killingsworth, James F. Bailey, Jr., and Folks M. Huxford, respectively, while Exhibits KK and LL are affidavits of attorneys G. Randall Garrou, Esquire, and Lawrence G. Walters, Esquire. The City presented the testimony of James F. Bailey, Jr., president and publisher of the Financial News and Daily Record (Daily Record), a local newspaper in which notice of the adoption of the amendment was published. A special appearance was made by Wayne R. Malaney, Esquire, on behalf of witness Bailey. Also, the City offered Exhibits A-Z and AA-MM, which were received in evidence.

The Transcript of the hearing was filed on November 8, 2010. By agreement of the parties, proposed recommended orders

were filed on December 22, 2010, and they have been considered in the preparation of this Recommended Order.[1]

FINDINGS OF FACT

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

A. The Parties

1. The City is a municipal entity and is responsible for enacting and amending its Plan. Since 2007, the City has participated in the Pilot Program for adoption of comprehensive plan amendments. Except for amendments based on the Evaluation and Appraisal Report or amendments based on new statutory requirements that specifically require that they be adopted under the "traditional" procedure described in section 163.3184, and small-scale amendments, all other amendments must be adopted under that process. Under the Pilot Program, municipalities have "reduced state oversight of local comprehensive planning," and plan amendments may be enacted in "an alternative, expedited plan amendment adoption and review process." § 163.32465, Fla. Stat. Although the City must send a transmittal package to the Department of Community Affairs (Department) and other designated agencies for their preliminary review, the Department does not issue an Objections, Recommendations, and Comments Report or a notice of intent. Instead, the Department "may

provide comments regarding the amendment or amendments to the local government." Id. It may also initiate an administrative proceeding to challenge whether an amendment is in compliance. Id. In this case, the Department did not file adverse comments or initiate a challenge to the City's amendment.

2. Clifton Curtis Horton owns real property located at 7175 Blanding Boulevard, Jacksonville, Florida. Horton Enterprises, Inc., is a Florida corporation that owns and operates a "strip club" known as "New Solid Gold" located on Mr. Horton's property. The club is an "adult entertainment establishment" as defined by the Jacksonville Municipal Code (JMC). See §§ 150.103(c) and 656.1101, JMC.

B. History Preceding the Amendment

3. In order to operate an adult entertainment facility within the City, the facility must have both a correct land use and zoning classification. The location must also satisfy certain distance limitations from schools (2,500 feet), other adult entertainment businesses (1,000 feet), churches (1,000 feet), residences (500 feet), and businesses selling alcohol (500 feet). See § 656.1103(a)(1)-(4), JMC; § 847.0134, Fla. Stat. Prior to 2005, adult entertainment facilities were an authorized use in the Heavy Industrial (HI) land use category.

4. In 2005, the City adopted Ordinance No. 2005-1240-E, which approved a text amendment to the Future Land Use Element (FLUE) of the City's 2010 Plan adding the following language to the Community/General Commercial (C/GC) land use category: "Adult entertainment facilities are allowed by right only in Zoning District CCG-2." See Respondent's Exhibit D. That classification is the primary zoning district within the C/GC land use category. The Ordinance also deleted the following language from the HI land use category: "Adult entertainment facilities are allowed by right." Id. The purpose of the amendment was to change the permissible land use designation for adult entertainment facilities from HI to C/GC with a further condition that the property must also have a CCG-2 zoning classification. At the same time, the City enacted Ordinance No. 2005-743-E, which adopted a new zoning requirement that any adult entertainment facility whose location was not in conformity with the revised land use/zoning scheme must close or relocate within five years, or no later than November 10, 2010. See § 656.725(k), JMC. Because New Solid Gold did not conform to these new requirements, it would have to close or relocate within the five-year timeframe.

5. On an undisclosed date, Horton Enterprises, Inc., and two other plaintiffs (one who operated another adult

entertainment facility in the City and one who wished to open a new facility) filed suit in federal court challenging the constitutionality of the City's adult zoning scheme and seeking to enjoin the five-year amortization requirement, as applied to them. See Jacksonville Property Rights Ass'n v. City of Jacksonville, Case No. 3:05-cv-1267-J-34JRK (U.S. Dist. Ct., M.D. Fla.).

6. On September 30, 2009, the United States District Court entered a 33-page Order generally determining that, with one exception not relevant here, the City's zoning and land use scheme was permissible. See Petitioners' Exhibit V. On November 3, 2009, that Order was appealed by Petitioners to the United States Court of Appeals for the 11th Circuit where the case remains pending at this time. The parties' Stipulation indicates that oral argument before that Court was scheduled during the week of December 13, 2010. An Order of the lower court memorialized an agreement by the parties that the five-year time period for complying with the new requirements are stayed until the federal litigation is concluded. See Petitioners' Exhibit JJ.

7. The Court's Order also noted that an "ambiguity" in the Plan arose because the City failed to "remove the language in the general description of the Commercial land use designations

acknowledging its intention to locate adult entertainment facilities in the HI category." Id. at 19. This occurred because when adopting the new amendments, the City overlooked conflicting language in the general description of the Commercial land use designations in the FLUE. However, the Court resolved the ambiguity in favor of the City on the theory that the conflicting language was contrary to the City's overall legislative intent in adopting the new land use/zoning scheme and could be disregarded. Id. Thereafter, a new amendment process was begun by the City to delete the conflicting language. This culminated in the present dispute.

C. The Transmittal Amendment - 2010-35-E

8. To eliminate the ambiguity, the City proposed to amend the FLUE by deleting the following language from the general description of the Commercial land use designations: "Adult entertainment facilities are allowed by right in the heavy industrial land use category, but not in commercial." This amendment was numbered as Ordinance No. 2010-35-E. A public workshop was conducted by the City's Planning and Development Department on December 14, 2009. Thereafter, public hearings were conducted by the City Planning Commission on February 11, 2010; by the City Council Land Use and Zoning Committee on February 17, 2010; and by the full City Council on February 9

and 23, 2010. It became effective upon the Mayor signing the Ordinance on February 26, 2010. Although the Ordinance inadvertently referenced section 163.3184 as the statutory authority for its adoption, it also stated that the amendment was being transmitted for review "through the State's Pilot Program." See Petitioners' Exhibit E.

9. As required by the Pilot Program, copies of the amendment were then transmitted to the Department and seven other agencies. No adverse comments were received from any agency.

10. It is undisputed that Petitioners did not attend the the workshop or any hearing, and they did not submit written or oral comments concerning the proposed amendment.

11. When the process for adopting Ordinance No. 2010-35-E began, the City's 2030 Plan was still being reviewed by the Department and had not yet become effective. Consequently, at the Department's direction, the Ordinance referenced the City's then-effective 2010 Plan as the Plan being amended. On February 3, 2010, the City's 2030 Comprehensive Plan became effective, replacing the 2010 Plan. However, the 2030 Plan contained the same conflicting language.

12. Notice of the public hearings for Ordinance No. 2010-35-E (and other plan amendments adopted at the same time) was

published in the Daily Record on January 29, 2010, a local newspaper that the City has used for advertising plan amendments since at least 2003. The parties agree that the legal advertisements complied with the size, font, and appearance requirements of section 166.041(3)(c)2.b.

13. Besides the above notice, an additional notice regarding Ordinance No. 2010-35-E was published in the Florida Times Union on January 31, 2010. The parties agree that this advertisement did not meet the size, font, and appearance requirements of section 166.041(3)(c)2.b. but was published by the City for the purpose of providing additional public notice and to broaden the coverage of the plan amendment.

D. The Adoption Amendment - 2010-401-E

14. Because the 2030 Plan contained the same conflicting language in the Commercial land use descriptions, on May 25, 2010, a draft of Ordinance No. 2010-401-E was introduced at City Council for the purpose of deleting this language. Except for referencing the latest Plan, the language in Ordinance Nos. 2010-35-E and 2010-401-E was identical. While somewhat unusual, this procedure was authorized by the Department because the 2030 Plan became effective during the middle of the amendment process. A copy of the draft Ordinance and schedule for the upcoming hearings on that Ordinance was emailed by the City's

counsel to Petitioners' counsel on June 4, 2010. See Petitioners' Exhibit FF.

15. Public hearings on Ordinance No. 2010-401-E were conducted by the Planning Commission on June 10, 2010; by the City Council Land Use and Zoning Committee on June 15, 2010; and by the full City Council on June 8 and 22, 2010. All of the meetings occurred after Petitioners' counsel was given a schedule of the hearings. The amendment became effective upon the Mayor signing the Ordinance on June 24, 2010.

16. Notice of the public hearings for Ordinance No. 2010-401-E was published in the Daily Record on May 28, 2010. The parties agree that the size, font, and appearance requirements of section 166.041(3)(c)2.b. were met. An additional notice of the public hearings was published in the Florida Times Union on May 30, 2010. The parties agree that this legal advertisement did not meet the size, font, and appearance requirements of section 166.041(3)(c)2.b., but was published by the City for the purpose of providing additional public notice and to broaden the coverage of the plan amendment.

17. Ordinance No. 2010-401-E, as originally proposed, incorrectly referenced section 163.3184, rather than the Pilot Program, as the statutory authority for adopting the amendment. During the hearing conducted by the City Council Land Use and

Zoning Committee on June 15, 2010, an amendment to Ordinance No. 2010-401-E was proposed changing the statutory authority to section 163.32465. The City proposed the same amendment for 19 other plan amendments being considered at the same hearing. The amendment was minor in nature and had no effect on the substance of the Ordinance.

18. It is undisputed that Petitioners did not appear or submit written or oral comments at any public hearing regarding Ordinance No. 2010-401-E.

19. On July 21, 2010, Petitioners timely filed their Petition with DOAH challenging Ordinance No. 2010-401-E. Their objections, as later refined in the Stipulation, are both procedural and substantive in nature and are discussed separately below.

E. Petitioners' Objections

a. Substantive Objections

20. As stated in the Stipulation, Petitioners contend that the amendment is not in compliance because it "is inconsistent with the balance of the 2030 Comprehensive Plan, and underlying municipal policies, since it forces adult uses into zones which permit residential and educational uses."

21. To support this claim, Petitioners point out that the C/GC land use category permits a wide range of uses, including

commercial uses in close proximity to sensitive uses, such as schools, churches, and residential areas. Petitioners characterize the current range of uses in C/GC as "an excellent planning approach to downtown Jacksonville" and one that promotes a well-reasoned, mixed-use development in the urban area. Because Ordinance No. 2010-401-E "forces" adult uses into the C/GC category where, despite the distance limitations, they will have to co-exist with sensitive uses, Petitioners contend the amendment is inconsistent with Policy (15)(b)3. and Goal (16) of the State Comprehensive Plan, which generally encourage orderly, efficient, and functional development in the urban areas of the City. Further, they assert it would contradict the City's "policy" of separating adult uses from residences, businesses, and schools. Petitioners' primary fear is that if they are required to relocate from HI to C/GC where sensitive uses are allowed, this will generate more complaints from schools, churches, and residents, and result in further zoning changes by the City and more forced relocations.

22. As explained by Mr. Killingsworth, Director of the City's Planning and Development Department, Ordinance No. 2010-401-E does not change the permitted uses in the Commercial or HI land use categories. Those changes in permitted uses were made by Ordinance No. 2005-1240-E in 2005 and are now being litigated

in federal court. The purpose of the new amendment is simply "to clear up an inconsistency [noted by the federal court but told that it could be disregarded] that existed in the comprehensive plan." Mr. Killingsworth added that even if the language remained in the Plan, it would have no regulatory weight since the actual language in the C/GC and HI categories, and not the "header" or general description that precedes the category, governs the uses allowed in those designations.

23. Assuming arguendo that the new amendment constitutes a change in permitted uses, the City established that from a use standpoint, adult entertainment facilities (like businesses selling alcohol) are more consistent with the C/GC land use category with the appropriate distance limitations from schools, churches, and residential areas. Further, the placement of adult entertainment facilities on property with a C/GC designation will not necessarily result in their being closer to residential property, as the City currently has a "great deal" of HI land directly adjacent to residential properties, as well as grandfathered enclaves of residential areas within the HI category. The City also established that the HI category is set aside for uses that generate physical or environmental impacts, which are significantly different from the "impacts" of a strip club. Finally, while a plan amendment compliance determination

does not turn on zoning issues, it is noteworthy that the CCG-2 zoning district is the City's most intensive commercial district, and that very few schools (all grandfathered) remain within that zoning classification. The preponderance of the evidence supports a finding that the amendment is consistent with the State Comprehensive Plan and internally consistent with the "balance of the 2030 Comprehensive Plan."

b. Procedural Objections

24. Petitioners' principal argument is that the City did not publish a notice for either Ordinance in a newspaper of general circulation, as described in section 166.041(3)(c)2.b., or in the proper location of the newspaper; that these deficiencies violate both state law and a Department rule regarding notice for the adoption of this type of plan amendment; and that these procedural errors require a determination that the amendment is not in compliance. They also contend that because the legal notice did not strictly comply with sections 163.3184(15)(e) and 166.041(3)(c)2.b., both Ordinances are void ab initio.[2]

25. As noted above, the City has published legal notices for plan amendments in the Daily Record since at least 2003. The newspaper is published daily Monday through Friday; it has been published continuously for 98 years; it is published wholly

in English; it is mailed to 37 zip codes throughout the City and around 20 zip codes outside the City; most of its revenue is derived from classified and legal advertisements; it is considered by the United States Postal Service to be a general circulation newspaper; it is available in newsstands throughout the City; and although much of the newspaper is directed to the business, legal, and financial communities, the newspaper also routinely contains articles and editorial content regarding special events, sporting news, political news, educational programs, and other matters of general interest pertaining to the City that would be of interest to the general public and not just one professional or occupational group. Its publisher acknowledges that the newspaper is a "Chapter 50 periodical," referring to chapter 50 and specifically section 50.031, which describes the minimum standards for newspapers that can be utilized for publishing certain legal notices. Also, its website states that it covers political, business, and legal news and developments in the greater Jacksonville area with an emphasis on downtown.

26. Although Petitioners contend that the legal notice was published in a portion of the Daily Record where other legal notices and classified advertisements appear, as proscribed by section 166.041(3)(c)2.b., and is thus defective, this

allegation was not raised in the Petition or specifically in the parties' Stipulation. Therefore, the issue has been waived.

27. Both proposed recommended orders are largely devoted to the issue of whether the Daily Record is a newspaper of general paid circulation as defined in section 166.041(3)(c)2.b. For the reasons expressed in the Conclusions of Law, it is unnecessary to decide that question in order to resolve the notice issue.

28. Petitioners received written notice that the City intended to adopt Ordinance No. 2010-401-E prior to the public hearings, along with a copy of the draft Ordinance and "everything" in the City's file. They also received a copy of all scheduled hearings during the adoption process. See Petitioners' Exhibits EE and FF. Therefore, notwithstanding any alleged deficiency in the published legal notice, they were on notice that the City intended to adopt the plan amendment; they were aware of the dates on which public hearings would be conducted; and they had an opportunity to submit oral or written comments in opposition to the amendment and to otherwise participate in the adoption process. Given these facts, even assuming arguendo that the publication of the legal notice in the Daily Record constitutes a procedural error, there is no

evidence that Petitioners were substantially prejudiced in any way.

29. Petitioners also contend that reference by the City to section 163.3184, rather than the Pilot Program, in the draft ordinance during the preliminary stages of the amendment process is a procedural error that rises to the level of requiring a determination that the amendment is not in compliance. This argument is rejected as the error was minor in nature, it was corrected shortly after Ordinance No. 2010-401-E was introduced, it did not affect the substance of the amendment, and it would not confuse a member of the public who was tracking the amendment as to the timing and forum in which to file a challenge. In Petitioners' case, they cannot claim to be confused since they timely filed a Petition with DOAH, as required by section 163.32465(6)(a).

30. Finally, intertwined with the procedural arguments is the issue of whether Petitioners are affected persons and thus have standing to challenge the plan amendment. The parties have stipulated that Petitioners (or their representative) did not attend any meeting regarding the adoption of either Ordinance. Petitioners argue, however, that emails between the parties in May and June 2010, and a telephone conference call on June 3, 2010, involving Petitioners' counsel and the City's then Deputy

General Counsel, equate to the submission of written and oral comments regarding the amendment.

31. The parties have stipulated that the following written communications between Petitioners and the City occurred in May and June 2010:

> (a) Petitioners made a public records request regarding the amendment on May 21, 2010, to Cheryl Brown, Council Secretary/Director, seeking various public documents relating to Ordinance No. 2010-35-E, transmitted by electronic mail and facsimile.
>
> (b) On May 27, 2010, counsel for Petitioners exchanged emails with Assistant General Counsel Dylan Reingold regarding pending document requests relating to Ordinance No. 2010-35-E, and Mr. Reingold provided a number of responsive documents.
>
> (c) On June 3, 2010, Cindy A. Laquidara, then Deputy General Counsel (but now General Counsel), sent an email to Petitioners' counsel stating: "Below please find the schedule for the passage of the comp plan changes. Call me with questions or to discuss. Take care."
>
> (d) On June 4, 2010, counsel for Petitioners exchanged a series of emails with Assistant General Counsel Reingold regarding the status of Ordinance Nos. 2010-35-E and 2010-401-E, as well as the review of the proposed plan amendment by the Department of Community Affairs.
>
> (e) On June 4, 2010, Jessica Aponte, a legal assistant with counsel for Petitioners' office, exchanged emails with Jessica Stephens, legislative assistant, regarding the proofs of publication for the legal advertisements relating to Ordinance No. 2010-35-E.

32. The affidavits of Petitioners' counsel (Petitioners' Exhibits KK and LL) regarding a conversation with the City's

then Deputy General Counsel would normally be treated as hearsay and could not, by themselves, be used as a basis for a finding of fact. See § 120.57(1)(c), Fla. Stat. However, the parties have stipulated that they may be used in lieu of live testimony by Petitioners' counsel. See Stipulation, p. 17.

33. The affidavits indicate that the reason for the conference call was "that [Petitioners] were trying to reach a mutually acceptable approach with the City by which enforcement of the City of Jacksonville's amortization ordinance against [them] . . . would be deferred pending the outcome of the appeal to the Eleventh Circuit." Petitioners' Exhibits KK and LL. During that call, counsel also advised the City's counsel that "there were [procedural] problems with the enactment of the subject Comprehensive Plan Amendment and that they would likely be filing challenges to its enactment." Id.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to sections 120.569, 120.57(1), and 163.32465(6).

35. The City contends that Petitioners lack standing to initiate this action. Only affected persons, as defined by section 163.3184(1)(a), have standing to challenge a Pilot Program amendment. See § 163.32456(6)(a), Fla. Stat. Affected

persons must own property or own and operate a business within the City, and they must have "submitted oral or written comments, objections, or recommendations to the local government during the period of time beginning with the transmittal hearing for the plan or plan amendment and ending with the adoption of the plan or plan amendment." § 163.3184(1)(a), Fla. Stat.

36. Petitioners own property and operate a business within the City. In addition, the record shows that during the period of time between the transmittal hearing and the adoption hearing they submitted public record requests for documents relating to the transmittal amendment; they requested information regarding the status of both the transmittal and adoption ordinances; they were given a schedule of public hearings for Ordinance No. 2010-401-E; they requested copies of proofs of publication for the transmittal amendment; and through counsel they orally advised the City's counsel that they would "likely be filing challenges to [the] enactment [of the new amendment]" based upon procedural errors. Collectively, these "comments," especially the oral ones, arguably constitute the type of comments necessary to support a conclusion that Petitioners are affected persons. Compare Pyle v. City of St. Pete Beach, Case No. 08-4772GM, 2009 Fla. ENV LEXIS 136 (Fla. DOAH May 4, 2009), modified in part, Case No. DCA09-GM-255, 2009 Fla. ENV LEXIS 136 (Fla. DCA Aug.

11, 2009), aff'd, 31 So. 3d 180 (Fla. 1st DCA 2010)(organization established standing by (a) owning property in the City, (b) sending an email (which was interpreted as being in support of the amendment) to the City Clerk between the transmittal and adoption hearings, and (c) submitting into evidence an email authored by the City Manager confirming that representatives of the organization met with him during the same time period to discuss the merits of the challenged plan amendment).

37. In reaching the above conclusion, the undersigned has considered the City's argument that section 163.3184(1)(a) contemplates that written or oral comments must be submitted at the public hearings, and only to an appropriate City official. Obviously, submitting such comments (oral or written) at that time allows the City Planning Commission, City Council Land Use and Zoning Committee, or full City Council to contemporaneously consider and address, if appropriate, the objections being raised by an affected person. However, the statute should not be so narrowly construed, and when interpreted in a broad and literal manner, it authorizes an affected person to submit oral or written comments to the local government at any time between the transmittal and adoption hearings. While the comments cannot be submitted to any City employee, written and oral comments submitted to the City's legal counsel are sufficient to

satisfy the requirement. These conclusions are supported in part by language in section 163.3184(15)(c), which provides that "[t]he local government shall add to the sign-in form [at the transmittal and adoption hearings] the name and address of any person who submits written comments concerning the proposed plan or plan amendment during the time period between the commencement of the transmittal hearing and the end of the adoption hearing."

38. 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.[3] 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' Assn., Inc. v. Collier Cty., 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 requirement has not been satisfied, it bears the burden of showing prejudice occasioned by the procedural error. Because Petitioners had actual notice of the adoption hearings, which allowed them to fully participate in the amendment process, it is concluded that even if a procedural error occurred, they were

not prejudiced. In view of this, it is unnecessary to decide whether the Daily Record is a newspaper of general paid circulation, as defined by section 166.041(3)(c)2.b.[4]

39. Finally, section 163.32465(6)(d) provides that "[t]he local government's determination that the amendment is 'in compliance' is presumed to be correct and shall be sustained unless it is shown by a preponderance of the evidence that the amendment is not 'in compliance'." This language is identical to the language used in small-scale amendment cases. See § 163.3187(3)(a), Fla. Stat. Therefore, challenges to compliance are evaluated under the preponderance of the evidence standard rather than the fairly-debatable standard. For the reasons given the in Findings of Fact, the preponderance of the evidence supports a conclusion that the plan amendment is 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 plan amendment adopted by Ordinance No. 2010-401-E is in compliance.

DONE AND ENTERED this 11th day of January, 2011, in Tallahassee, Leon County, Florida.

D. R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of January, 2011.

ENDNOTES

1/ Although the City's 50-page post-hearing submission exceeds the 40-page limitation allowed under Florida Administrative Code Rule 28-106.215, it has been considered.

2/ The only issue in this case is whether the plan amendment is in compliance, as defined in section 163.3184(1)(b). Even if the doctrine of void ab initio applied in this case, this tribunal lacks authority to declare the Ordinances void. This determination would have to be made by a court of competent jurisdiction. Moreover, all of the cases cited by Petitioners in support of this proposition involve zoning or impact fee ordinances, and not plan amendments, and were litigated in circuit court.

3/ Pursuant to that statute and rule, the City has enacted the required public participation procedures. See § 650.205, JMC.

4/ Section 166.041(3)(a) requires that legal advertisements for so-called routine ordinances be published "in a newspaper of general circulation in a municipality." For ordinances that change "the actual list of permitted, conditional, or prohibited

uses within a zoning category," legal advertisements must be "placed in a newspaper of general paid circulation in the municipality, and not one of limited subject matter, pursuant to chapter 50." § 166.041(3)(c), Fla. Stat. Although this case does not involve a challenge to a zoning ordinance, section 163.3184(15)(e) provides that the required advertisements for a plan amendment that "changes the actual list of permitted uses within the future land use category . . . shall be in the format prescribed by . . . s. 166.041(3)(c)2.b. for a municipality." Because the plan amendment being challenged does not fall within this category, the so-called "heightened" notice requirements in section 163.3184(15)(e) do not apply. See Finding of Fact 22, supra.

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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.