STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BARBARA GRAVES,

Petitioner,

vs. Case No. 11-1206GM

CITY OF POMPANO BEACH,

Respondent,

and

PPI, INC.,

Intervenor.
_____/

RECOMMENDED ORDER

After notice was given, this matter was heard before the Division of Administrative Hearings (DOAH) by its assigned Administrative Law Judge, D. R. Alexander, on January 14-17, 2013, in Pompano Beach, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether the plan amendments adopted by the City of Pompano Beach (City) by Ordinance Nos. 2011-24 and 2011-25 on February 8, 2011, are in compliance.

PRELIMINARY STATEMENT

On March 9, 2011, Petitioner, Barbara Graves, and three other individuals later dismissed as parties, filed with DOAH a Petition for Administrative Hearing challenging a Future Land Use Element (FLUE) text amendment (Ordinance No. 2011-24) and a Future Land Use Map (FLUM) amendment (Ordinance No. 2011-25) to the City's Comprehensive Plan (Plan). The map amendment changes the land use designation on 230 acres owned by Intervenor, PPI, Inc. (PPI), while the text amendment establishes new development limitations on the property. Because chapter 163, Florida Statutes, was substantially revised by the Legislature shortly after the amendments were adopted, Petitioner was authorized to file an amended petition to conform her allegations to the new law. The case was later transferred from Administrative Law Judge J. Lawrence Johnston to the undersigned.

A Joint Pre-hearing Stipulation (Stipulation) was filed by the parties. At hearing, PPI's motion to limit the introduction of evidence regarding matters not previously raised in the Amended Petition was granted. Also, Petitioner's request to file a second amended petition was denied.

Petitioner presented the testimony of Alan V. Tinter, a professional engineer with Tinter Traffic, LLC, and accepted as an expert; Leigh R. Kerr, a land use planner with Leigh Robinson Kerr & Associates, Inc., and accepted as an expert; Dr. Robert N. Pennock, a land use planner and accepted as an expert; Joseph Quinty, Transportation Planning Manager with the South Florida Regional Transportation Authority; Christopher J. Clemmons, City Planner; and Jean E. Dolan, City Principal Planner. Petitioner's Exhibits 1, 4, 7, 8, 23, 25, 32, 37, 38, 61, and 68 were received in evidence. Exhibit 68 is the deposition of Larry Schuster, former Principal Planner for the City. PPI presented the testimony of Barbara Blake Boy, Executive Director of the Broward County Planning Council (Planning Council); Richard G. Coker, Jr., an attorney and land use planner and accepted as an expert; Jeffrey N. Katims, a Senior Associate Planner with The Melgren Planning Group and accepted as an expert; Thomas A. Hall, a transportation planner with Thomas A. Hall, Inc., and accepted as an expert; and

Robin Bird, City Director of Development Services. PPI's Exhibits 6-8, 13, 26, 27, and 29 were received in evidence. The City presented no witnesses. Finally, Joint Exhibits 1-13 were received in evidence.

A Transcript of the hearing (seven volumes) has been prepared. Proposed findings of fact and conclusions of law were timely filed by Petitioner and jointly by the City and PPI, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. The Parties

1. Petitioner is a resident and owner of real property within the City. Through counsel, she submitted written and oral comments to the City during the transmittal and adoption hearings for the plan amendments. Petitioner is employed by the Seminole Tribe of Florida at its casino located in Coconut Creek, Broward County (County). PPI's claim that this challenge is rooted in gaming interests of the Seminole Tribe of Florida appears to be a valid assumption.

2. The City is a municipal corporation in the County and is responsible for adopting and maintaining its Plan. It adopted the amendments pursuant to former section 163.32465, in effect at that time, which codified an adoption process known as

the Alternative State Review Pilot Program (Pilot Program). Under the Pilot Program, the Department of Community Affairs (DCA)[1] did not issue an Objections, Recommendation, or Comments report or a notice of intent regarding compliance or non-compliance of the plan amendments. The DCA and other reviewing agencies did, however, issue letters advising that they did not object to the final version of the adopted amendments.

3. PPI owns property in the City and is the applicant for the amendments. PPI submitted comments in support of the amendments throughout the adoption process.

B. The Amendment Process in Broward County

4. Under the County Charter, land use changes to the City's Plan that are not more restrictive than the County Land Use Plan must be reviewed by the Planning Council to ensure that they are in "substantial conformity" with the County Land Use Plan. However, the Planning Council does not review the City's plan amendments for consistency with the City's Plan or chapter 163. After the County's review was completed, the DCA recommended that certain changes be made. The amendments were transmitted back to the City and were amended to conform to the DCA's recommendations. The amendments were then required to undergo the same review process a second time. Although a determination was made by the Planning Council that the initial

amendments were in substantial conformity with the County Land Use Plan, the revised amendments cannot be recertified for consistency until this challenge has been concluded.

5. If plan amendments are in substantial conformity with its Land Use Plan, the County must amend its Plan to incorporate the City's changes. Based upon a favorable recommendation by the Planning Council, on September 28, 2010, the County adopted companion amendments, although not identical to the City's revised amendments. Those amendments are the subject of a pending challenge by the same petitioner in Case No. 10-9939GM and have not yet become effective. A hearing in that case is now scheduled in September 2013. Until that challenge is resolved, the City amendments cannot become effective.

C. The Property

6. PPI owns approximately 230 acres of property within the City. The property is bounded on the north by Racetrack Road, by North Cypress Bend Drive to the south, by Powerline Road to the west, and the CSX railroad tracks to the east. The current land use designation on 160 acres is Commercial Recreation (CR), while the remaining 70 acres has a Regional Activity Center (RAC) designation. The 70 acres makes up the southern part of a pre-existing RAC known as the Arvida Pompano Park Regional Activity Center (Arvida RAC), whose boundaries are coextensive

with a Development of Regional Impact approved in the 1980s, but which expired in 2004. Except for the 70 acres owned by PPI, the Arvida RAC is fully developed. The CR property lies just to the south of the Arvida RAC and forms the southern boundary of that development.

7. The 160 acres is now occupied by the Pompano Park Harness Track, Isle of Capri Casino, surface parking lots, various commercial uses, horse stables, a training area, and other uses associated with the harness track and casino.

8. The 160 acres is the only property in the City designated as CR. That designation allows an extremely wide range of permitted uses: outdoor and indoor recreation facilities such as active recreation complexes, marinas, stadiums, jai-alai frontons, bowling alleys, golf courses, and dog and horse racing facilities; accessory facilities, including outdoor and indoor recreation facilities that support the primary recreation facility; hotels, motels, time shares, and similar lodging ancillary to the primary commercial recreation uses; and other active and passive recreation uses. The site was once considered for a new baseball stadium for the Florida Marlins and a hockey arena for the Florida Panthers.

9. The CR property can have more than one primary use. For example, besides the harness track, the casino is an "indoor

recreation facility" and qualifies as a second primary use. If a hotel has resort and destination features that are open to the public, the amenities can become a primary use. Under the City's interpretation of CR land, a hotel containing a destination function with resort and recreation features is also a primary use. Ancillary facilities for each of these uses is also allowed.

10. The City is already 95 percent built-out, and it considers PPI's property to be regionally significant, under developed, and ripe for redevelopment as a major attraction. For these reasons, it supports the designation of the property as a new RAC.

11. PPI filed the application because it desires greater flexibility in planning for the future development of the property. If the amendments become effective, PPI intends to expand the existing casino and build a large resort hotel, various commercial and residential uses, and other amenities associated with those activities.

D. The Amendments

12. In December 2009, PPI submitted an application to the City to reduce the existing Arvida RAC by removing PPI's 70 acres south of Racetrack Road; eliminate the development intensity assigned to those 70 acres; and combine the 70 acres

removed from the Arvida RAC with its 160 acres of CR property to create a new South RAC. PPI also proposed to transfer credit for the remaining undeveloped portion of the Arvida RAC to the new South RAC.

13. After the local review process was completed, the plan amendments were transmitted to the DCA, which issued a letter of comment recommending that the amendments be revised to identify the maximum amount of development (i.e., square footage) that would be allowed in each non-residential use, including CR, commercial, and office. Based on the DCA's comments, the application was modified by PPI to include floor area ratios (FARs) for each non-residential use, and in October 2010 the revised amendments were approved by the City on first reading. The DCA reviewed the revised amendments and had no objections. In February 2011, the revised amendments were adopted on second reading. Petitioner then timely filed her challenge.

14. The map amendment (Ordinance No. 2011-25) changes the land use designation on the CR property to RAC. It consolidates the 70-acre parcel with the 160-acre parcel to create a unified RAC designation. The amendment does not change the boundary or designation of uses within the existing Arvida RAC. The amended FLUM now shows only a single RAC, with different intensity and

density standards assigned to the North and South RACs in the text amendment.[2]

15. The text amendment to the FLUE (Ordinance No. 2011-24) affects a total of 399 acres of land, which covers both the existing Arvida RAC and the 160 acres of CR property south of Racetrack Road. It amends the listed uses for the Arvida RAC and names the uses for the new South RAC.

16. The amendments permit a mixed use complex on PPI's property with a combination of 135 acres of CR (rather than 160 acres), 27 acres of commercial uses, 26 acres of office uses, and 43 acres of residential usage, consisting of 1,050 mid-rise apartments and 250 garden apartments, or a total of 1,300 residential units. The only new use introduced by either amendment is the 1,300 residential units.

17. The maximum intensity on the CR property is not defined in the text of the Plan. However, FLUE policy 01.07.20 allows development on the 160 acres to a maximum intensity of 105 feet in height with 50 percent floor area coverage. This equates to an effective FAR of 5.0. All parties agree that a 5.0 FAR is unrealistic, and PPI never considered using that level of development. For this reason, the text amendment reduces the CR intensity to 0.31, which represents a far more reasonable and realistic development limitation. The amendment

limits the maximum development within the South RAC to the following maximum FARs: 0.31 for commercial recreation use; 0.84 for office use; and 0.65 for commercial use. To the extent any portion of the 160 acres is re-designated as commercial or office, the amendment limits the maximum potential development on that acreage.

E. Petitioner's Objections

18. Petitioner's objections, broadly defined, are that the amendments are not in compliance because (a) they are not based on relevant and appropriate data and analysis regarding transportation impacts; (b) they are internally inconsistent with four policies in the FLUE, one objective and two policies in the Transportation Element (TE), one policy in the Capital Improvement Element (CIE), and three policies in the Housing Element (HE); and (c) they are not supported by appropriate data and analysis regarding affordable housing.

a. Data and Analysis -- Transportation

19. Section 163.3177(1)(f) requires that plan amendments be based on "relevant and appropriate data and analysis by the local government that may include, but not be limited to, surveys, studies, community goals and vision, and other data available at the time of adoption of the comprehensive plan or plan amendment." In addition, "the future land use plan and

plan amendments shall be based upon surveys, studies, and data regarding the area, as applicable, including: . . . [t]he availability of water supplies, public facilities and services." § 163.3177(6)(a)2.d., Fla. Stat. FLUM amendments must be based on an "analysis of the availability of facilities and services." § 163.3177(6)(a)8.a., Fla. Stat. Finally, "[w]here data is relevant to several elements, consistent data shall be used." § 163.3177(2), Fla. Stat.

20. Relying on the foregoing statutory requirements, Petitioner contends that the data and analysis regarding transportation impacts are inconsistent with the data and analysis supporting the TE and CIE; the various data and analysis supporting the amendments are not accurate and professionally acceptable because they underestimate impacts to transportation facilities by overstating the maximum development intensity of the property under the existing CR land use designation and do not identify the true impact of the amendments; and the City did not react appropriately to the data and analysis demonstrating serious impacts to already failing roadways in the area.

21. In broad terms, a traffic impact analysis identifies the potential traffic impacts of the plan amendments on the transportation system. In their analyses, the parties used very

different assumptions as to the maximum development intensity under the existing land use designations on the PPI property. Each analysis compares the traffic generated at the maximum intensity permitted under the existing land uses to the traffic generated by the maximum density/intensity under the plan amendments.

22. The City does not require that a particular methodology or set of assumptions be used in performing an analysis. This is because the methodologies and assumptions used in a traffic impact study may differ, and they are grounded in part on the expert's sound judgment, experience, and discretion.

23. PPI submitted two traffic impact analyses, one in March 2010 and the second in October 2010. Because the City disagreed with PPI's pre-amendment assumptions in the first analysis and assumed a smaller development under the existing land uses, it recommended that an independent traffic engineer be hired to conduct a second analysis and verify the transportation impacts. Due to a lack of resources, the City does not conduct its own traffic analysis; instead, it typically defers to the traffic analysis conducted by the Planning Council or, in some cases, it may hire its own consultant.

24. PPI's second analysis assumed a different mix of pre-amendment CR uses. Also, it used the County Metropolitan Planning Organization's (MPO's) latest model (the Florida Standard Urban Transportation Model Structure, a/k/a FSUTMS) for traffic distribution, which was not available until after the first analysis had been completed.

25. The second analysis assumed that under existing land uses the 160 acres could be developed with a 15,000 seat racetrack (instead of a 5,625 seat facility); a 125,000 square-foot casino; a 400,000 square-foot amusement center; a 2,333 room hotel; 350,000 square feet of accessory retail; and a new 100,000 square-foot theme park. The analysis sought to represent the existing condition of the property as reflecting a reasonable amount of development which could actually be built on the property. While these assumed uses dramatically expand the existing development on the parcel, each is permitted under the CR category, and the intensities are substantially lower than those allowed under the FLUE limitations.

26. The assumed pre-amendment development was compared with an assumed post-development condition of a 11,591 seat racetrack; a 96,561 square-foot casino; a 309,091 square-foot amusement center; a 1,750 room hotel; 270,455 square feet of accessory retail; and a 77,273 square-foot theme park. Thus,

PPI's post-amendment assumptions represented a reduction in the pre-development conditions.

27. The October study concluded that the plan amendments would generate 6,578 net new daily trips and 568 net new total afternoon peak-hour trips (i.e., trips during rush hour). It further concluded that a number of roadway segments would continue to operate at unacceptable Level of Service (LOS) F in the future no matter whether the amendments were approved or not. Notably, only State and County roadways were impacted, and those impacts have been further evaluated by the Planning Council through its own traffic impact study.

28. To mitigate these impacts, the revised study identified various improvements or modifications to the three affected segments, Racetrack Road east of Powerline Road, Racetrack Road east of Southwest 23rd Avenue, and Powerline Road north of McNab Road. These modifications were accepted as adequate mitigation by the City. Although Petitioner questioned whether the proposed mitigation could be enforced without being incorporated into the Plan, the City takes the position that PPI's representations are enforceable. If additional mitigation is required, PPI has agreed that this can be provided during the permit stage.

29. After receiving PPI's second impact analysis, the City noted that it was "more detailed" than the City's abbreviated analysis performed after PPI's first study; it agreed with PPI's use of FARs for each land use category (as recommended by the DCA) to determine the maximum development that could occur; it agreed that the accepted analysis "shows a lower net increase in the demand for public facilities and services than the City's analysis"; and it concluded that "the project can meet all applicable concurrency requirements."

30. By then, the City was also aware that the County had adopted PPI's companion amendments, and the Planning Council, with the MPO's technical assistance, had made its own evaluation of traffic impacts before amending its own Plan.

31. The Planning Council used a different methodology to analyze traffic impacts for CR land use amendments. Unlike PPI, the Planning Council's analysis did not assume the maximum development potential in either the before or after condition. Rather, it converted the acreage of uses in the before and after conditions by assuming a development potential of 10,000 square feet per acre for all non-residential uses, which equals a 0.23 FAR. It also assumed that the only new use would be the addition of 1,300 new residential units.

32. The Planning Council analysis concluded that the amendments would add 305 afternoon peak-hour trips to the regional roadway network, or fewer than that found in PPI's study. The County further concluded that the net increase in trips would not significantly impact the two major roadways in the area, Powerline Road and Atlantic Boulevard, and that they would continue to operate at LOS F even if the amendments were not approved. Under current Planning Council review standards, any impact that is less than three percent of the capacity of a roadway is considered insignificant. There were no impacts that exceeded this threshold. The Planning Council's traffic impact analysis and supporting data are a part of the data and analysis supporting the City's amendments.

33. Petitioner contends that PPI's second traffic study is flawed in several respects. One concern is that the assumptions made by PPI in determining the pre- and post-amendment conditions on its property "significantly overestimate the development in the pre-approval condition," and therefore "grossly underestimate the net increase in traffic." Using different assumptions, Petitioner's expert prepared his own traffic impact analysis which substantially reduces the pre-amendment maximum development on the property. In all, Petitioner's expert prepared 11 different scenarios, some

showing no impacts at all, but he eventually decided to use the tenth version, which is probably the most favorable to his position.

34. The permitted uses under the City's CR category are extremely broad and mimic the permitted uses under the "very, very broad" CR category in the County's Plan. Petitioner's expert opined that because the CR land use is so "ill-defined," the "best indicator" of what could be built in the before condition "appeared to be the plat." A plat is a development permit approved by, and recorded with, the County. It normally reflects what a property owner intends to build on his property at the time the plat is approved or in the very near future. The County then uses the plat to determine the amount of impact fees to be paid by the owner. Because it can be amended at any time, usually when a land use amendment is being processed or when more development is contemplated, a plat is not used to determine the maximum potential development capacity on a parcel. Notably, PPI could easily file an application for approval of a new plat on the CR land showing exactly what it assumed in pre-amendment conditions. The existing plats themselves were not made a part of the record.

35. By using recorded plats for his entire analysis, including the CR land, which he admitted was "a little unusual,"

Petitioner's expert significantly reduced the amount of development in a pre-amendment condition, increased the difference between pre- and post-amendment traffic, and created more post-amendment traffic impacts on the road network. However, this assumption is contrary to the plats' intended use, it does not represent a parcel's true development potential, and at best it produces results that are no more reasonable than the results presented by PPI.

36. The City's Future Conditions Analysis (FCA) makes up a part of the narrative portion of the TE and forecasts future travel demands, land use growth, and traffic operations within the City. The FCA was "developed to be consistent with the MPO travel demand process and incorporates the [MPO's] analysis, findings and recommendations as appropriate for the City." Jt. Ex. 1, TE, p. 60. Petitioner contends that PPI failed to coordinate with the MPO data and analysis (specifically the LOS standards and traffic volumes), incorporated by reference into the TE, when it prepared its pre-amendment conditions. Thus, she argues that the amendments are inconsistent with the data and analysis supporting the TE (and by implication the CIE), and it results in far more traffic in the existing condition than the MPO model assumes. See § 163.3177(2), Fla. Stat.

37. The Planning Council traffic impact study is a part of the data and analysis supporting the City amendments. In performing their pre-amendment analyses, both the Planning Council and MPO reviewed the same MPO "analysis, findings, and recommendations" that are incorporated by reference into the City's Plan. Notably, the Planning Council's analysis concluded that the additional traffic generated by the difference between the assumed pre- and post-amendment conditions would not cause significant impacts on the regional transportation network.

38. Testimony presented by the City and PPI established that all relevant portions of the City Plan were reviewed for consistency, and unless a provision was found to have some significance, no reference to that provision was made in the traffic impact analysis, application, or staff report. Even if PPI's traffic impact study does not overtly state that PPI coordinated with the MPO data and analysis before making its pre-amendment assumptions, the Planning Council data and analysis are sufficient to show that the required review and coordination were made. The City reacted appropriately to the data.

39. Petitioner's expert also leveled criticisms regarding the following aspects of PPI's traffic impact study: the level of internal trip capture; by-pass capture; and pedestrian access

internal to the site, i.e., walking to a site. Petitioner did not prove that the assumptions supporting those aspects of the study were unreasonable.

40. Petitioner has failed to establish beyond fair debate that the plan amendments are not supported by relevant and appropriate data and analysis regarding transportation impacts, or that they are inconsistent with other data and analysis supporting the Plan.

b. Affordable Housing

41. Petitioner contends that affordable housing was not addressed by PPI or the City, and PPI failed to provide any data and analysis with regard to various affordable housing requirements in the City's Plan. Given these omissions, she contends that the City did not react appropriately by approving the amendments.

42. The application contains a section relating to affordable housing. While PPI referred to HE policies 05.03.02, 05.08.02, and 05.08.05 and County Land Use Plan policy 1.07.07, no explanation was given as to how the amendments conform to these provisions.

43. Policy 1.07.07 provides a number of ways to meet the affordable housing policies, methods, or programs to achieve and/or maintain a sufficient supply of affordable housing. One

option is that when a plan amendment adds more than 100 residential dwelling units, an applicant must agree to either provide 15 percent of the proposed residential units in the project for affordable housing or make a contribution of $750.00 per residential unit, to be paid to the local government when building permits are issued. To comply with this requirement, an applicant must provide the County a declaration of restrictive covenants.

44. As explained at hearing, rather than undertaking a detailed analysis of its HE policies when reviewing land use amendments, the City routinely follows the dictates of policy 1.07.07 and allows an applicant to "buy out" its affordable housing obligation. It then uses the money for one of the City's housing programs, either to subsidize the demand side, or the existing supply of affordable housing. The City already has an ample supply of affordable housing, and it prefers that developers buy out their obligations since the cash can be used more effectively to achieve HE goals, objectives, and policies. This process was followed here, and the City allowed PPI to "buy-out [its obligation] at $750.00 x 100 percent of the units." In doing so, it relied on PPI's declaration of restricted covenants provided to the County, the fact that an in-lieu fee would best meet its affordable housing needs, and

its expectation that the money would then be used to support one of its housing programs.

45. This information (data) was available to the City and was in existence at the time the amendments were adopted, it was presented at final hearing, and it is sufficient to support the amendments. See § 163.3177(1)(f), Fla. Stat.

46. Petitioner failed to establish beyond fair debate that the plan amendments are not supported by adequate data and analysis regarding affordable housing or that the City did not react appropriately to that data.

c. Internal Inconsistency

47. Section 163.3177(2) requires that the "elements of the comprehensive plan shall be consistent." Petitioner contends that the amendments are inconsistent with four FLUE policies; one TE objective and two TE policies; one CIE policy; and three HE policies. Petitioner also argues that the amendments are inconsistent with FLUE section 3.02K, which establishes criteria that must be met in order for a property to qualify for a RAC designation.

48. Among other criteria, FLUE subsection 3.02K.4 requires that a RAC "provide direct access to existing or proposed airports, ports, and rail mass transportation facilities."

49. It is undisputed that the property is bounded on its east side by the CSX railroad tracks. The South Florida Regional Transportation Authority (RTA) uses those tracks to operate a rail mass transportation facility known as Tri-Rail between Palm Beach and Dade Counties. Through its Board of Directors, the RTA has established station stops at various points on its route; there is, however, no station stop adjacent to PPI's property.

50. Because the property sits adjacent to the railroad tracks, it is eligible to be considered for a station stop. At any time, but logically after this challenge is concluded and development begins, PPI and the City can submit a formal joint proposal for a station stop. Also, PPI can offer inducements to the RTA, such as dedicating land for a station stop and assisting in its funding. In addition, the RTA currently provides a shuttle service, which can easily transport PPI patrons to the station stop.

51. These considerations support a finding that the property has "direct access" to the Tri-Rail, as contemplated by the FLUE. Petitioner contends, however, that in order to have direct access, PPI must have a binding commitment from the RTA to build a station stop before the amendment is approved. This

narrow interpretation has been rejected as not being as or more reasonable than the City's interpretation of its Plan.

52. Petitioner next contends that the amendments are internally inconsistent with HE policies 05.01.05, 05.03.02, and 05.08.01. In general terms, the first policy requires that the City promote affordable housing; the second requires that the City support public and private sector efforts to create and preserve affordable housing for very-low, low, and moderate-income groups in areas designated for residential land use for future and current residents; and the third policy requires the City to "consider the ability of the proposal to provide affordable housing" and allows restrictive covenants to be used as a tool to meet those needs.

53. PPI's execution of a restrictive covenant to buy out its obligation for affordable housing, and the City's use of those funds to provide affordable housing in the manner as it sees fit, are sufficient to achieve consistency with the requirements that the City promote and support affordable housing, and that it allow restrictive covenants to be used as a tool to meet those needs.

54. Petitioner also contends that the amendments are internally inconsistent with CIE policy 13.03.02, which requires

that the City provide infrastructure necessary to maintain the LOS standards concurrent with the impact of development.

55. The traffic impact analyses performed by PPI and the Planning Council demonstrate that the amendments will not significantly impact the regional transportation network. To the extent any adverse impacts may occur, PPI has agreed to mitigate those impacts.

56. Petitioner contends that the amendments conflict with TE objective 02.02.00 and policies 02.02.05 and 02.07.02. The objective requires that the City coordinate the transportation system with the uses shown on the FLUM to ensure that adequate transportation services are provided. The first policy requires that the City continue supporting a system that allows development to occur in concurrence with the FLUM and consistent with the established LOS standards. The second policy requires that the City review future land use amendments in concert with maintenance of the adopted LOS standards.

57. For the reasons previously found, the plan amendments are not internally inconsistent with the objective or policies.

58. Finally, Petitioner contends that the amendments are internally inconsistent with FLUE policies 01.01.01, 01.01.02, 01.01.03, and 01.01.05. These policies require that the City adopt and maintain services based on LOS standards; review all

proposals for development using the adopted LOS standards; phase development concurrent with the availability of infrastructure; and review proposals for new development to identify the cumulative impacts of the development on public services and facilities.

59. For the reasons previously stated, the plan amendments do not conflict with these policies.

60. Petitioner failed to prove beyond fair debate that the plan amendments are internally inconsistent with objectives or policies in the FLUE, HE, CIE, and TE.

CONCLUSIONS OF LAW

61. To have standing to challenge or support a comprehensive plan amendment, a person must be an "affected person," which is defined as a person owning property, residing, or owning or operating a business within the boundaries of the local government, and who made timely comments to the local government regarding the amendment. See § 163.3184(1)(a), Fla. Stat. Petitioner and PPI have standing as affected persons.

62. A person challenging a plan amendment must show that it is not "in compliance" as that term is defined in section 163.3184(1)(b).

63. A compliance determination is not a determination of whether a plan amendment is the best approach available to the local government for achieving its purposes.

64. As the challenger, Petitioner has the burden of proof. The plan amendments being challenged "shall be determined to be in compliance if the local government's determination of compliance is fairly debatable." § 163.3184(5)(c)1., Fla. Stat.

65. The term "fairly debatable" is not defined in chapter 163. However, the Supreme Court has held that "if reasonable persons could differ as to its propriety," a plan amendment must be upheld. Martin Cnty. v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997). Or, as another appellate court stated, where there is "evidence in support of both sides of a comprehensive plan amendment, it is difficult to determine that the [local government's] decision was anything but 'fairly debatable.'" Martin Cnty. v. Section 28 P'ship, Ltd., 772 So. 2d 616, 621 (Fla. 4th DCA 2000).

66. The standard of proof to establish a finding of fact is preponderance of the evidence. See § 120.57(1)(j), Fla. Stat.

67. Section 163.3177(1)(f) requires that all plan amendments be based on relevant and appropriate data and an analysis by the local government. The statute explains that to

be based on data "means to react to it in an appropriate way and to the extent necessary indicated by the data available on that particular subject at the time of the adoption of the . . . plan amendments at issue." The question of whether one methodology used in data collection is better than another cannot be evaluated. Id.

68. Petitioner failed to prove beyond fair debate that the plan amendments are not based on relevant and appropriate data and an analysis by the City.

69. Section 163.3177(2) requires that "[w]here data is relevant to several elements, consistent data shall be used."

70. Petitioner failed to prove beyond fair debate that the data used by the City to support the plan amendments are inconsistent with data supporting other elements of the Plan.

71. Section 163.3177(2) requires the elements of a comprehensive plan to be internally consistent. A plan amendment creates an internal inconsistency when it conflicts with an existing provision of the plan.

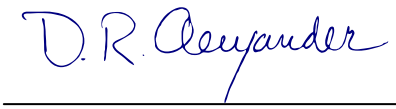
72. Petitioner failed to prove beyond fair debate that the plan amendments are inconsistent with any goal, objective, or policy of the City Plan.

RECOMMENDATION

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

RECOMMENDED that the Department of Economic Opportunity enter a Final Order determining that the Plan Amendments adopted by Ordinance Nos. 2011-24 and 2011-25 are in compliance.

DONE AND ENTERED this 19th day of June, 2013, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of June, 2013.

ENDNOTES

[1] Most of the powers, duties, and functions of the DCA, including the state land planning agency powers and duties at issue in this case, were transferred to the Department of Economic Opportunity on October 1, 2011.

[2] Petitioner contends that the two amendments are internally inconsistent with one another because the map amendment depicts a single RAC, while the text amendment creates two separate RACs, with distinct land uses and boundaries. The inconsistency, if any, is considered de minimis.

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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.