STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PIETER BAKKER AND SHIRLEY BAKKER,

Petitioners,

vs. Case No. 14-1026GM

THE TOWN OF SURFSIDE,

Respondent.
_____/

RECOMMENDED ORDER

D. R. Alexander, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing on April 17, 2014, in Surfside, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether Future Land Use Element (FLUE) Policy 10.6 and Map FLU-8 adopted by the Town of Surfside (Town) by Ordinance No. 14-1613 on February 11, 2014, are in compliance.

PRELIMINARY STATEMENT

On March 7, 2014, Petitioners filed with DOAH a Petition for Formal Administrative Hearing (Petition) to challenge a new FLUE policy and map change adopted by the Town. On March 17, 2014, the Town filed a Notice of Demand for Expedited Proceeding pursuant to section 163.3184(7), Florida Statutes (2013), and a final hearing was scheduled within 30 days. Petitioners' request to amend their Petition was granted in part at the outset of the hearing.

At the final hearing, Pieter Bakker, who owns property, operates a business, and resides in the Town, testified on his own behalf and presented the testimony of Sarah Sinatra Gould, Town Planner and a professional planner with Calvin, Giordano & Associates, Inc. Petitioners' Exhibits 1, 14, 33, 43, 55, 58, 74, 77, and 79-83 were received in evidence. Exhibit 52 was accepted on a proffer basis only. The Town presented the testimony of Sarah Sinatra Gould, who was accepted as an expert. Town Exhibits A, H, N, O, and Q-S were admitted into evidence. The parties' Joint Exhibits 1-6 and 8-13 were also received.

Joseph Graubart, a former Town Commissioner, testified as a member of the public pursuant to section 120.57(1)(b). Finally, subject to a relevancy objection by the Town, Petitioners' request for official recognition of the following documents was granted: the complaint and motion to dismiss in the case of Young Israel of Bal Harbour, Inc. v. Town of Surfside, Case No. 10-CV-24392-JEM (S.D. Fla.); and the amended petition for writ of certiorari and de novo complaint and appendix filed in the pending case of Bakker v. Town of Surfside and Young Israel of Bal Harbour, Inc., Case No. 13-366 APP (App. Div., 11th Cir. Fla.).[1]

A two-volume Transcript of the hearing has been prepared. Proposed findings of fact and conclusions of law were filed by the parties, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. The Parties

1. The Town is a small municipality located in Miami-Dade County just north of the City of Miami Beach and south of the Village of Bal Harbour. The Town's most recent comprehensive plan (Plan) was adopted in January 2010 and was found to be in compliance by the Department of Community Affairs.

2. Petitioners own at least two single-family homes and operate a business within the Town and submitted oral comments in opposition to the amendments at the transmittal and adoption hearings. Since 1988, their principal residence has been Lot 10, Block 7 of Altos Del Mar No. 6 Subdivision, otherwise identified as 9572 Abbott Avenue. The property is designated on the Future Land Use Map as Low Density Residential and zoned H30B, a single-family residential zone.

B. Background

3. A long and unusual history precedes the adoption of the challenged amendments. A short explanation is that they were adopted as a result of the Town's experience prior to 2006 as a defendant in a federal case based on the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), codified as 42 U.S.C. § 2000 et seq. RLUIPA protects individuals and religious institutions from discriminatory and unduly burdensome land use regulations. This means that the Town cannot impose or implement a land use regulation in a manner that imposes a "substantial burden" on the religious exercise of a person, religious assembly, or institution unless it can demonstrate that imposition of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.

4. Even though Mr. Bakker stated that he does not object to having a religious building on the property adjacent to his home, he has pressed forward with a compliance challenge. It is fair to say that his principal grievance is a site plan approved by the Town pursuant to a settlement agreement with a religious organization that allows the construction of a large, two-story structure with an underground parking garage just 7.5 feet from his property line. He contends that in order to settle a RLUIPA lawsuit, the Town approved a site plan that varies from numerous development standards. However, the validity of the site plan is the subject of pending litigation in circuit court and cannot be resolved in this proceeding.

5. In 1999, the Town permitted churches and synagogues in only one of the Town's eight zoning districts, the RD-1 two-family residential district. Religious assembly uses were prohibited in the other seven zoning districts, even though secular places of public assembly were allowed. Young Israel of Bal Harbour, Inc. (Young Israel) and Midrash Sephardi, Inc., two small Orthodox Jewish synagogues serving the immediate area in and around the Town, were leasing space in the Town's business district despite the zoning code limiting synagogues to the RD-1 district. In addition to retail and service businesses, the business district allowed various other secular places of public

assembly above the first floor, but not churches and synagogues. The two synagogues challenged the land use restrictions, claiming that the exclusion from the business district violated both the substantial burden and equal treatment provisions of RLUIPA. Eventually, the court declined to find that the restrictions imposed a substantial burden on the synagogues' religious exercise. The court did find, however, that the zoning code violated RLUIPA's equal treatment provision because it excluded religious assemblies from the Town's business district while allowing private clubs and other secular assemblies in the district, provided they were located above the first floor. See Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1231 (11th Cir. 2004).

6. As a result of the lawsuit, the Town identified a need for an ordinance with protections for places of public assembly and religious institutions. In 2006, it began the task of amending its zoning code for that purpose. The Town considered the percentage of area within the Town which should allow places of public assembly. It also considered religious institutions within the Town that were intending to locate or expand a religious building. Because Young Israel owned several lots and was planning to develop its property for a synagogue, the property was included in the RLUIPA map ultimately adopted.

7. At the same time the map was being created, the Town was conducting a study of transportation corridors. Based upon that study, the Town concluded that religious uses should be located along the major transportation corridors.

8. With the aid of various consultants, including architects, planners, and engineers, in 2006 the Town began conducting a so-called visioning program, including multiple charrette sessions held with the public. This program produced a report in April 2007 entitled "Steps Forward Post Charrette Booklet," which contained conclusions and recommendations.

9. A primary issue addressed in the report is the treatment of single-family zoning on major corridors in the Town, and the need for transition from the higher intensity area of the downtown to the adjacent single-family areas. One solution discussed in the report was to allow mixed use, live/work structures along the Abbott Avenue corridor between 95th and 96th Streets, which includes the Young Israel and Bakkers' properties. The report also discussed the possibility of allowing more intensity in the row of single-family lots west of Harding Avenue between 93rd and 94th Streets, which area is now included on the FLU-8 and RLUIPA maps. The report identifies the Young Israel lots as appropriate to be included in the retail core of the Town's business district. These

higher intensity areas are shown in the Illustrative Master Plan of the report.

10. On April 26, 2007, the report was considered by the Town's local planning agency, the Planning and Zoning Board (PZB). The PZB recommended approval of certain amendments to the zoning code that would create locational requirements for places of public assembly. Although Petitioners contend that the PZB failed to follow all procedural requirements in adopting its recommendation, the undersigned has no authority to adjudicate that issue. Petitioners also contend that because of these procedural irregularities, the data relied upon by the PZB, and later the Town, in crafting the zoning amendments are likewise tainted and cannot be used to support the plan amendments being challenged here. That argument is rejected.

11. On June 12, 2007, the Town adopted Ordinance No. 2007-1479 (the first RLUIPA map), which accepted the Charette Booklet by Resolution and amended the zoning code by defining a place of public assembly and creating an overlay map that allowed places of public assembly to be located in certain areas of the Town. No changes to the Plan were made.

12. The area depicted on the overlay map included the vacant lots located between Abbott Avenue and Byron Avenue and south of 96th Street. Like Petitioners' property, all of the

lots have residential zoning, and they are designated Low Density Residential. When Petitioners moved into their home in 1988, the lots were vacant and used as a parking lot by a nearby bank. After a series of sales over the years, the vacant lots were eventually purchased by Young Israel. (Mr. Bakker attempted to purchase the lots but was unsuccessful.)

13. On January 13, 2009, the Town adopted a second RLUIPA ordinance to avoid other RLUIPA litigation. Ordinance 2009-1510 created section 90-99 in the zoning code, entitled Religious Land Use Relief Procedures. That section creates discretionary application and approval processes which authorize the Town to consider and act on requests for reasonable relief. It also created three standards that an applicant is required to meet in order to obtain relief.

14. In 2010, the Town amended its Plan as part of the Evaluation and Appraisal Report update. Places of public assembly were shown as permitted uses in only three of the five residential land use districts: Moderate Low Density Residential, Moderate High Density Residential, and High Density Residential/Tourist. They were not allowed in the Low Density Residential category.

15. The 2010 FLUE contained the following Goals, Objectives, and Policies, which Petitioners describe as

protecting the sanctity of single-family homes and which they assert conflict in part with the new amendments:

> Goal 1: Ensure that the character and location of future land uses provides high economic and quality of life benefits to the Town's residents and business people while preserving the Town's natural resources, residential character and appropriate levels of public services.
>
> Objective 1 - Coordination of land uses with topography and soils: Maintain existing development and achieve new development and redevelopment which is consistent with the goal above and which otherwise coordinates future land uses with the appropriate topography and soil conditions and the availability of facilities and services. This objective shall be measured by implementation of its supporting policies.
>
> Policy 1.1 - The Town shall maintain, improve and strictly enforce provisions which are consistent with the Future Land Use Map, including the land uses and densities and intensities specified thereon and including the following:
>
> Low Density Residential: up to 8 dwelling units per acre and not more than 30 feet in height. Permitted uses are single family residential use and parks and open space.
>
> * * *
>
> Policy 1.11 - The Town shall maintain zoning code standards for new development and/or redevelopment that meet high standards for open space, landscaping, on-site circulation, parking and other performance standards.
>
> * * *

Objective 2 - Protection of single family residential areas: Direct future growth and development so as to minimize the intrusion of incompatible land uses into single family residential areas. Achievement of this objective shall be quantified by the implementation of the following policies:

Policy 2.1 - The Town shall maintain a future land use map pattern and zoning pattern which keeps two-family and other incompatible uses out of single family residential areas.

Policy 2.2 - The Town shall maintain a future land use map pattern and other development regulations which provide effective buffers between single family residential areas and adjacent uses.

* * *

Policy 2.4 - The Town shall maintain and enhance zoning code standards that regulate massing and scale in order to maintain the historic character and protect the single family residential district.

* * *

Objective 4 - Elimination or reduction of uses which are inconsistent with community character: In general, encourage the elimination or reduction of uses which are inconsistent with the community's character and future land uses. In particular, achieve the elimination of all inconsistent land uses. This objective shall be measured by implementation of its supporting policies.

Policy 4.1 - Inconsistent uses as referred to in Policy 1.3 are hereby defined as any uses which are located on a site where they would not be permitted by this comprehensive plan.

C. The Plan Amendments

16. On February 11, 2014, the Town adopted Ordinance No. 2014-1613, which contains new FLUE Policy 10.6. That policy reads as follows:

> The Town shall maintain land development regulations that allow reasonable relief from the Town land development regulations or the use of restrictions of this Comprehensive Plan in order to address possible unintended violations of the Religious Land Use and Institutionalized Persons Act of 2000 or the Florida Religious Freedom Restoration Act of 1998. For the purpose of allowing such relief, the land development regulations shall provide that religious land uses may be permitted in the areas of the Town as depicted on Map FLU-8 of this Comprehensive Plan.

The policy directs the Town to maintain land development regulations (LDRs) to address possible unintended violations of RLUIPA and incorporates an accompanying map, FLU-8, which depicts the areas of the Town where religious land uses are permitted.

17. Map FLU-8 is an overlay map that specifically identifies areas in the Town where places of public assembly, including religious uses, are permitted. The Map allows religious uses to locate in certain land use categories that do not currently list religious uses or places of public assembly as permitted uses in the category, including the Low Density Residential category. It allows religious uses to locate in

only two areas in the Low Density Residential category where they were not already authorized by the Plan. Those areas include the Young Israel lots, just north of, and adjacent to, Petitioners' property, and a row of lots west of Harding Avenue between 93rd Street and 94th Street. The Map includes all lots in the area bounded by Collins Avenue, 96th Street, Harding Avenue, and 88th Street, plus other lots west of Harding Avenue and north of 93rd Street.

18. Like the Bakkers' property, the Young Israel property is zoned single-family residential and has a land use designation of Low Density Residential. The two-story Young Israel synagogue currently under construction is more than 23,000 square feet in size and has an underground parking garage. As noted above, Petitioners have pending a lawsuit in Dade County Circuit Court challenging the site plan. According to Mr. Bakker, despite a 30-foot high wall built by Young Israel along the entire property line, he and his wife have been forced to move to another location in the Town due to the round-the-clock construction activities, which are only a few feet from their home.

D. Petitioners' Objections

19. Petitioners contend that the amendments are not consistent with section 163.3177(1)(f), which requires plan

amendments to be based upon appropriate data and analysis. They also contend that the amendments are not consistent with section 163.3177(1) because the amendments fail to "guide future decisions in a consistent manner," "establish meaningful and predictable standards for the use and development of land," or "provide meaningful guidelines for the content of more detailed land development and use regulations." Petitioners further contend that the amendments are not consistent with section 163.3177(6)(a)1., which requires that each future land use category include uses and standards for control of density and intensity. Finally, they contend that the amendments conflict with portions of the FLUE, and therefore are not consistent with section 163.3177(2), which requires that the various elements in the Plan be consistent with one another. These contentions are addressed separately below.

a. Data and Analysis

20. Section 163.3177(1)(f) requires that plan amendments be based on relevant and appropriate data, taken from professionally accepted sources, and that an analysis of that data be made by the local government. 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 adoption. Copies of data and supporting documents

for proposed plan amendments must be made available for "public inspection." § 163.3177(1)(f)1., Fla. Stat.

21. Ms. Gould, who is the designated Town Planner, was the only expert who testified at the hearing. She testified that the amendments were based on the data and analysis that were used to create an identical zoning map (first RLUIPA map) adopted by Ordinance No. 07-1479 on June 12, 2007. The first RLUIPA map is an overlay map to the Town zoning map that specifically identifies areas in the Town where places of public assembly, including religious uses, are permitted. She further indicated that the same reasons for inclusion of property in the first RLUIPA map to allow places of public assembly were the reasons for the inclusion of property in the FLU-8 Map to allow religious uses.

22. In addition, the Town used the data resulting from the charrette process, including the transportation study, in its analysis of the locations that were included in the RLUIPA map and the FLU-8 Map. The charrette process revealed that some single-family areas were located on major corridors, which is not a good planning practice.

23. During her analysis, Ms. Gould recognized that it would not be a good planning practice to create nonconformities in adopting a RLUIPA map or the FLU-8 Map. Therefore, she

considered the existing and proposed public assembly uses in the Town. Based upon a settlement agreement between the Town and Young Israel, and the subsequent approval of a site plan for Young Israel's property, she knew that Young Israel planned to build a synagogue. She also considered the desirability of allowing major corridors to transition from solely single-family uses to uses that act as more of a buffer to the single-family uses. The north side of the Young Israel property fronts on a major, four-lane, east-west corridor (96th Street) that is one of the primary access ways from the Town to the mainland. The synagogue use on this major corridor is an appropriate buffer to the single-family uses south and to the west. The Young Israel property is across the street from the Town's commercial district and a parking lot located to the east. Also, an existing church, the Little Church by the Sea, is across the street, and the Bal Harbour Shops, a major regional shopping mall with storefronts reaching up to 50 feet in height, is located directly to the north across 96th Street. Ms. Gould further established that it is an accepted planning practice to include religious uses within single-family residential districts. Finally, she recognized that the Young Israel property is close to residential areas enabling congregants to walk to the synagogue.

24. Besides the Young Israel property, Ms. Gould also took into account other proposed synagogues such as The Shul, whose site plan was then being reviewed. Consideration of existing and planned religious uses was appropriate data to consider in the creation of the FLU-8 Map. While Petitioners have challenged the Young Israel site plan in circuit court, its legality is not relevant to a contention that the amendment is not based on sufficient data and analysis.

25. Ms. Gould testified that another purpose in adopting the amendments was to depict in the Plan where places of public assembly can be located. The RLUIPA zoning ordinance already describes the areas where religious organizations may be built. The amendment includes an overlay that provides the same information in the Plan.

26. All of the data supporting the amendments, including the documentation for the Charrette Booklet, the Resolutions, the RLUIPA maps, the minutes and reports for the adoption of the Young Israel site plan, the settlement agreement, and the staff reports, were available for public inspection before and at the time of the adoption of the challenged amendments.

27. The amendments do not implicate the provision of services or capital improvements, nor do they require the Town to take any immediate action. In this respect, the amendments

are akin to an aspirational amendment and can be based on less data and analysis than might otherwise be required. See, e.g., Indian Trail Improve. Dist. v. Dep't of Cmty. Affairs, 946 So. 2d 640, 641 (Fla. 4th DCA 2007).

28. Petitioners provided no expert testimony or evidence that contradicted the testimony of Ms. Gould regarding the appropriateness of the data or her analysis of that data.

29. Whether considered an aspirational amendment or not, it is at least fairly debatable that the Town satisfied the data and analysis requirements of sections 163.3177(1)(f), 163.3177(l)(f)1., and 163.3177(l)(f)2.

b. Predictable Standards and Meaningful Guidelines

30. Petitioners contend that the amendments are not consistent with section 163.3177(1) because they fail to "guide future decisions in a consistent manner," "establish meaningful and predictable standards for the use and development of land," or "provide meaningful guidelines for the content of more detailed land development and use regulations." However, the Plan itself must provide this type of general guidance, and the challenged plan amendments should be viewed in the context of the guidance that is provided by the entire Plan.

31. The entire Plan was determined to be in compliance in 2010, and the amendments do not significantly change or impact

the Plan's consistency with section 163.3177(1). The amendments simply add a religious use to limited properties within the Low Density Residential land use category; they do not bring the entire Plan out of compliance.

32. Even if section 163.3177(1) applies to each plan amendment, Petitioners have failed to carry their burden of proof on this issue. Petitioners rely on the testimony of the Town Planner, but her testimony, not contradicted, is that the amendments are consistent with section 163.3177(1). The text amendment and Map describe where religious uses may be located. Thus, they guide future decisions in a consistent, predictable, and meaningful manner about where religious uses may be located.

33. The FLU-8 Map overlays the existing FLUE categories, and the underlying categories provide standards and guidance for the use and development of land. The FLUE categories include standards for intensity that apply to religious uses. In the case of residential categories, the intensity standard is the height restriction in each category. For example, in the Low Density Residential category, height is restricted to 30 feet. In the case of non-residential categories, the intensity standard is Floor Area Ratio. The intensity standards of each of the FLUE categories, including those that list places of public assembly (and thus religious uses) as allowable uses,

were adopted in the 2010 Plan and were found to be in compliance by the Department of Community Affairs. Although Petitioners argued that a religious use is a commercial use that must have another intensity standard in a residential category, the evidence establishes that religious uses are not commercial uses. Petitioners provided no persuasive evidence that these intensity standards are not meaningful or predictable or that they do not meet the requirements of section 163.3177(1) in any way.

34. Ms. Gould further testified that the amendment provides meaningful guidelines for the content of more detailed LDRs by referring to LDRs that will address possible unintended violations of RLUIPA and the Florida Religious Freedom Restoration Act. Policy 10.6 directs the Town to "maintain land development regulations that allow reasonable relief . . . in order to address possible unintended violations of the [law]." The RLUIPA relief procedures were adopted by Ordinance 2009-1510 on January 13, 2009, and are incorporated in the Town zoning code as section 90-99. Ms. Gould described how those procedures operate, consistent with the restrictions of the Plan and the Town Charter.

35. Petitioners contend that the policy's use of the word "reasonable" is not a sufficiently meaningful guideline for the

RLUIPA LDRs. This argument, however, is based upon the Town's approval of the Young Israel site plan, which occurred years before the new policy was adopted. Petitioners argue that the Young Israel site plan approval proves that Policy 10.6 does not provide meaningful guidelines for the RLUIPA LDRs. This argument misses the mark for at least three reasons. First, Petitioners presented no evidence that the LDRs themselves lack meaningful standards, or that any court has found the regulations to be invalid or otherwise inappropriate in any way. Even if such evidence had been presented, the validity of the regulations cannot be decided here. Second, Petitioners' complaint that the application of the LDRs to the Young Israel site plan approval was "contract zoning" is not a matter that can be decided in this proceeding. Any evidence that the regulations were improperly applied to Young Israel is not relevant to the question of whether Policy 10.6 provides meaningful guidance to the content of the LDRs. Finally, Petitioners' complaint centers on the content of the settlement stipulation that formed the basis for the site plan approval, but nothing in Policy 10.6 requires or even refers to the settlement stipulation. The Young Israel settlement stipulation is irrelevant to the amendment and its use by the Town is not

evidence that the amendment lacks sufficient guidelines and standards.

36. Ms. Gould testified that the circumstances under which there may be the need for relief from LDRs because of RLUIPA necessarily will vary on a case by case basis, according to the facts of the specific case. In this context, the policy's reference to "reasonable relief" is sufficient to guide the development of more detailed LDRs. The use of the term "reasonable relief" is no different than the directive in section 163.3177(l) that plans shall establish "meaningful" standards. What standards are "meaningful," or data "relevant and appropriate," necessarily will vary according to the facts and circumstances of the case. The LDRs should contain the detail for that purpose, and it is not necessary to add these details to the Plan.

37. Finally, because the meaning of "reasonable relief" may change over time as RLUIPA is further interpreted by the courts, the details of the LDRs will need to be flexible to accommodate those changes. This does not make the Policy's reference to LDRs that provide "reasonable relief" meaningless.

38. It is at least fairly debatable that the plan amendments satisfy the requirements of section 163.3177(l) for guidance to future decisions, meaningful and predictable

standards for the use and development of land, and meaningful guidelines for more detailed LDRs.

c. Internal Consistency

39. Petitioners contend that the amendments are internally inconsistent with a number of FLUE goals, objectives, and policies and therefore contravene section 163.3177(2). That statute requires that "[t]he several elements of the comprehensive plan shall be consistent." The FLUE provisions relate generally to the protection of the character of the single-family neighborhood. Petitioners also contend that Ordinance Nos. 2007-1479 and 2009-1510 conflict with the same FLUE provisions. However, the Department of Community Affairs has already found the 2010 Plan to be in compliance. Accordingly, that issue cannot be adjudicated here.

40. Ms. Gould testified that from a planning perspective religious uses are consistent with single-family uses, and they are an integral part of neighborhoods. The Town has a large Jewish Orthodox community, and a synagogue that is within walking distance is essential to the community. The amendments allow religious uses along the major transportation corridors in the Town at the edges of the Low Density Residential area. These religious uses act as buffers and transition uses between

the adjacent commercial areas and the rest of the single-family residences in the Low Density Residential areas.

41. The amendments do not eliminate the existing zoning code standards that regulate open space, massing, and scale. They simply direct the Town to maintain LDRs to address possible unintended violations of RLUIPA. The amendments do not create an internal inconsistency with the policies and objectives of the FLUE.

42. It is at least fairly debatable that the amendments satisfy the requirements of section 163.3177(2) for internal consistency between the several elements of the Plan.

d. Standards for Intensity and Density

43. Petitioners contend that the amendments are not consistent with section 163.3177(6)(a)1., which requires, in part, that each land use category "must be defined in terms of uses included, and must include standards to be followed in the control and distribution of population densities and building and structure intensities."

44. It is at least fairly debatable that the amendments are consistent with this statutory requirement.

e. Other Contentions

45. All other contentions not specifically addressed above have been considered and found to be without merit.

CONCLUSIONS OF LAW

46. To have standing to challenge or support a plan amendment, a person must be an affected person as defined in section 163.3184(1)(a). Petitioners are affected persons within the meaning of the statute.

47. Plan amendments adopted under the expedited state review process do not receive an ORC report or a notice of intent from the state land planning agency. See § 163.3184(3), Fla. Stat. Instead, proposed plan amendments are sent directly to reviewing agencies that have 30 days to send comments within their respective areas of expertise back to the local government. In this case, no adverse comments were made by the reviewing agencies, including the Department of Economic Opportunity. Within 30 days after the adoption process is concluded, an affected person may challenge the plan amendment by filing a petition directly with DOAH. See § 163.3184(5)(a), Fla. Stat. A hearing is then conducted to determine "whether the plan or plan amendments are in compliance as defined in paragraph [163.3184](1)(b)." Id.

48. "In compliance" means "consistent with the requirements of ss. 163.3177, 163.3178, 163.3180, 163.3191, 163.3245, and 163.3248, with the appropriate strategic regional policy plan, and with the principles for guiding development in

designated areas of critical state concern and with part III of chapter 369, where applicable." § 163.3184(1)(b), Fla. Stat.

49. The "fairly debatable" standard, which provides deference to the local government's disputed decision, applies to any challenge filed by an affected person. Therefore, Petitioners bear the burden of proving beyond fair debate that the challenged plan amendments are not in compliance. This means 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, where there is "evidence in support of both sides of a comprehensive plan amendment, it is difficult to determine that the [Town's] decision was anything but 'fairly debatable.'" Martin Cnty. v. Section 28 P'ship, Ltd., 772 So. 2d 616, 621 (Fla. 4th DCA 2000).

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

51. Section 163.3177(1)(f) requires that all plan amendments be based on relevant and appropriate data and an analysis by the local government. For the reasons previously found, it is concluded that the plan amendments are supported by relevant and appropriate data and an analysis by the City.

52. Petitioners also contend that the data and supporting documents for the amendments were not "made available for public inspection," as required by section 163.3177(1)(f)1. They point out that a complete list of the data was not disclosed until a discovery response was filed by the Town several weeks before the hearing, and the list included documents not referred to by the Town during the meetings at which the plan amendment was being considered. Petitioners contend that under the rationale in U.S. Funding Group, LLC v. Manatee County, Case No. 09-6014GM, 2010 Fla. Div. Adm. Hear. LEXIS 555 (Fla. DOAH July 28, 2010), Final Order Dismissing Case (Fla. DCA Dec. 8, 2010), the data were not available for public inspection. However, the U.S. Funding case is clearly distinguishable. In that case, existing documents in the private files of an expert that were never provided to the local government prior to the adoption of the amendment were determined to be unavailable for public inspection and therefore were inadmissible. Id. at *34. In this case, the supporting documents, all generated by the Town over a number of years, were available for public inspection throughout the amendment process. Even though each and every piece of datum relied upon to support the amendments was not identified by the Town during the six meetings at which the amendments were considered, the statute should not be so

narrowly construed as to find the amendments out of compliance solely on this basis. Assuming arguendo that the statute contemplates that this disclosure be made, and a procedural error occurred, Petitioners did not demonstrate how they were prejudiced by this omission.

53. The elements of a comprehensive plan must be internally consistent. See § 163.3177(2), Fla. Stat. For the reasons previously found, Petitioners have not shown beyond fair debate that the amendments are internally inconsistent with the FLUE.

54. For the reasons previously found, Petitioners have failed to show beyond fair debate that the amendments do not satisfy the requirements of section 163.3177(1) for guidance to future decisions, meaningful and predictable standards for the use and development of land, and meaningful guidelines for more detailed LDRs.

55. Finally, Petitioners have failed to show beyond fair debate that the amendments are inconsistent with section 163.3177(6)(a)1. for lack of standards.

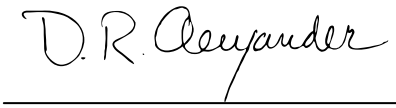
56. In summary, Petitioners have failed to demonstrate beyond fair debate that the plan amendments are not in compliance.

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 No. 2014-1613 are in compliance.

DONE AND ENTERED this 17th day of June, 2014, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of June, 2014.

ENDNOTE

[1] Because relevant excerpts of the Town's comprehensive plan and land development regulations have been accepted as Town Exhibits N and O, Petitioners' request to take official recognition of those documents is rendered moot.

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.