STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RONALD "CHIP" ROSS,

Petitioner,

vs. Case No. 17-3286GM

CITY OF FERNANDINA BEACH,
FLORIDA,

Respondent.
_______________________________/

RECOMMENDED ORDER

A duly-noticed final hearing was held in this matter in Fernandina Beach, Florida, on August 23, 2017, before Suzanne Van Wyk, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ronald Joseph Ross, pro se
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Fernandina Beach, Florida 32034

For Respondent: Nicole C. Nate, Esquire
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STATEMENT OF THE ISSUE

Whether small-scale amendments to the City of Fernandina Beach Comprehensive Plan, adopted by Ordinances 2017-13 and 2017-15 on June 6, 2017 (the "FLUM Amendments"), are "in compliance," as that term is defined in section 163.3184(1)(b), Florida Statutes (2016).[1/]

PRELIMINARY STATEMENT

On June 6, 2017, the City of Fernandina Beach ("the City" or "Respondent") adopted the FLUM Amendments, which changes the FLUM category of eight parcels of property from Industrial ("IND") to Central Business District ("CBD"). Together, the parcels total less than an acre.

On June 8, 2017, Petitioner filed a Petition with the Division of Administrative Hearings ("Division") challenging the FLUM Amendments as internally inconsistent with the City's adopted Comprehensive Plan, not based on relevant and appropriate data and analysis, and other grounds alleged to violate the Community Planning Act, chapter 163, Part II, Florida Statutes. Following a telephonic hearing and the undersigned's ruling on Respondent's Motion to Dismiss or Strike Portions of Petition, Petitioner filed a Second Amended Petition, which is referred to hereinafter as "the Petition."

The case was originally set for hearing on August 8 and 9, 2017, but was subsequently rescheduled to August 23 and 24,

2017, following ruling on a number of motions related to discovery disputes. The final hearing commenced and concluded on August 23, 2017.

At the final hearing, the parties' Joint Exhibits J1 through J5 were admitted in evidence. Petitioner offered the testimony of Greg Roland, former Mayor and City Council member, and introduced the deposition testimony of Marshall McCrary, the City's Community Development Director. Petitioner's Exhibits P2 through P14 were admitted in evidence.[2/]

Respondent offered the deposition testimony of Kelly Gibson, the City's Senior Planner. Respondent's Exhibits R1 through R3, R7 through R9, and R15 were admitted in evidence. Neither party offered any live expert witness testimony at the final hearing.

A one-volume Transcript of the proceedings was filed on August 25, 2017. The undersigned granted Petitioner's Motion for Extension of Time to Submit Proposed Recommended Orders until September 18, 2017. The undersigned subsequently extended the deadline again, sua sponte, in conjunction with an Order dated September 15, 2017, reversing certain evidentiary rulings.

Both parties timely filed Proposed Recommended Orders. On October 17, 2017, Respondent filed a Motion to Strike Portions of Petitioner's Proposed Recommended Order, to which Petitioner filed a timely response. The undersigned granted the Motion on

October 23, 2017, striking portions of Respondent's Proposed Recommended Order as beyond the scope of the Petition and the Prehearing Stipulation. Otherwise, the parties' Proposed Recommended Orders have been considered in preparing this Recommended Order.

Acceptance of Expert Witnesses

In the pre-hearing stipulation, the City identified both Kelly Gibson and Marshall McCrary as expert witnesses. Neither witness testified at the final hearing. Having reviewed the deposition transcripts, and exhibits thereto, of both witnesses, the undersigned accepts both Ms. Gibson and Mr. McCrary as experts in land use planning.

FINDINGS OF FACT

The Parties and Standing

1. Petitioner, Ronald Ross, resides and owns property within the City. Mr. Ross submitted written comments concerning the FLUM Amendments to the City during the period of time beginning with the transmittal hearing for the FLUM Amendments and ending with the adoption of same.

2. Respondent is a Florida municipal corporation with the duty and authority to adopt and amend a comprehensive plan, pursuant to section 163.3167, Florida Statutes (2017).

The Subject Properties

3. Together the FLUM Amendments affect eight contiguous parcels located at the corner of North 2nd Street and Broome Street, which runs perpendicular to, and dead ends at, North Front Street, the City's historic waterfront. The subject properties are located two blocks east of North Front Street.

4. The structure at 211 Broome Street is an existing single-family home built circa 1900.

5. The structure at 205 Broome Street is a vacant single-family home built circa 1900.

6. The parcel at 224 North 2nd Street contains a multi-family structure.

7. The remaining parcels are vacant and undeveloped.

8. The Amendments are owner-initiated.

Existing Conditions

9. Residential uses are not allowed in the IND land use category. As such, the residential uses on the subject parcels are non-conforming to the regulations for that category.

10. The residential uses at 211 Broome Street and 224 North 2nd Street are "grandfathered" from the prohibition on residential uses, and are allowed to continue as non-conforming uses until such time as any one of a number of criteria are met. Significant redevelopment of the structure would trigger the requirement to conform to allowable uses.

11. The residential structure at 205 Broome Street is vacant, in disrepair, and cannot be redeveloped for a residential use in the IND category.

<u>The FLUM Amendments</u>

12. The FLUM Amendments change the FLUM category for each of the eight parcels from IND to CBD.

13. The purpose of the IND land use category is to "recognize the existing industrial development, appropriate open air recreation activities, and the animal shelter, and to ensure the availability of land for industrial and airport purposes."

14. Industrial uses include "airport dependent uses, manufacturing, assembling and distribution activities; warehousing and storage activities; green technologies, general commercial activities; integral airport related support services such as rental car facilities, parking facilities; and other similar land uses."

15. The CBD category is designed to "accommodate single-family or duplex residential uses, either 'stand alone' or in a mixed residential and business structures; offices; commercial retail; personal service establishments; restaurants; transient accommodations; commercial parking facilities; civic uses; and cultural uses." The CBD allows other uses, such as indoor recreation, multi-family, marinas, daycare centers, and educational facilities, subject to certain conditions.

16. The maximum density of residential uses in CBD is 34 units per acre (34/acre).

17. The maximum intensity of non-residential uses in both IND and CBD is a floor area ratio ("FAR") of 2.0.

The Community Redevelopment Area

18. All of the subject properties are located within the City's Waterfront Area Community Redevelopment Area ("Waterfront Area CRA").

19. Section 163.360, Florida Statutes, authorizes local governments to undertake community redevelopment projects in areas designated as slum or blighted, or areas with a shortage of affordable housing. The local government must first adopt, by resolution, findings that slum, blight, or inadequate housing exists. See § 163.355, Fla. Stat. Following adoption of this "Finding of Necessity," the local government, or community redevelopment agency, may adopt a community redevelopment plan for the area, following review and comment by the local planning agency, and an advertised public hearing.

20. Once a community redevelopment area ("CRA") is designated, the local government may issue redevelopment revenue bonds; approve investments, acquisitions, demolition, removal, or disposal of property in the area; approve community policing innovations; and exercise the power of eminent domain.

21. The statute provides a financial benefit for CRAs known as tax increment financing, or "TIF." The incremental increase in ad valorem value of properties within the CRA, derived from investment in the CRA, must be deposited in a trust fund established by the local government. TIF revenues may only be utilized for redevelopment projects within the CRA boundary.

22. The City adopted a "Finding of Necessity" to establish a CRA in 2004. The City found the following statutorily-enumerated blighted conditions in its waterfront district: inadequate street layout and parking facilities; unsanitary or unsafe conditions; deterioration of site and other improvements; and inadequate and outdated building density patterns.

23. In June 2004, the City established the Waterfront Area CRA including the marina, shrimping and seafood processing area, and adjacent residential areas, including the subject properties. The total acreage of the Waterfront Area CRA is 37.364 acres.

24. In its 2005 resolution approving the Waterfront Area CRA Redevelopment Plan (Redevelopment Plan), the City found, "The Plan will afford maximum opportunity, consistent with the sound needs of the municipality as a whole, for the rehabilitation or redevelopment of the Area by private enterprise."

Challenges to the Plan Amendments

Internal Inconsistency

25. Petitioner first challenges the FLUM Amendments as inconsistent with Housing Element Policy 3.01.01, which reads as follows:

> The City shall perform a housing needs assessment by December 2013. Information contained in the assessment should include, but not be limited to, information regarding housing trends; the number, type and condition of existing housing units; identification of substandard housing units; the number and types of housing units needed in the future for all income ranges based on growth projections; and shortages and/or deficiencies in the existing housing stock. The housing needs assessment should be updated a minimum of every five (5) years.

26. It is an undisputed fact that the City has not conducted the housing needs assessment mandated by the subject policy.

27. Petitioner maintains that the FLUM Amendments, which allow the subject properties to be developed (or, redeveloped, as the case may be) for residential densities as high as 34/acre, conflict with the policy.

28. Petitioner's argument on this point is essentially that the FLUM Amendments are not supported by relevant data and analysis in the form of the assessment called for in the policy. That argument is separate and apart from the issue of whether

the FLUM Amendments create an internal inconsistency with the policy.

29. The cited policy does not prohibit the City from adopting any plan amendment until the assessment is completed.

30. Petitioner presented no expert witness testimony regarding internal inconsistency between the FLUM Amendments and the cited policy.

31. The record does not support a finding that the FLUM Amendments are inconsistent with Housing Element Policy 3.01.01.

32. Petitioner next contends the FLUM Amendments are inconsistent with Housing Element Policy 3.02.08, which reads as follows:

> The City shall establish a City-wide neighborhood planning program to encourage the stabilization and preservation of residential areas throughout the City and strengthen linkages between neighborhoods and City government.

33. The parties stipulated that the City has not implemented the neighborhood planning program called for in the policy.

34. Petitioner's argument on this point is that without the neighborhood planning program, the City cannot assess the impact of the FLUM Amendments on the medium density residential neighborhood to the east of the subject properties.[3/]

35. The policy in question does not prohibit the City from adopting plan amendments until the neighborhood planning program is implemented.

36. Petitioner introduced no expert witness testimony regarding internal inconsistency between the FLUM Amendments and the cited policy.

37. The evidence does not support a finding that the FLUM Amendments are inconsistent with Housing Element Policy 3.02.08.

Data and Analysis

38. Petitioner's last argument is the FLUM Amendments are inconsistent with section 163.3177(1)(f), which requires as follows:

> All . . . plan amendments shall be based upon relevant and appropriate data and an 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 . . . plan amendment.

39. The City's Senior Planner, Kelly Gibson, testified in deposition that the FLUM Amendments are supported by the Findings of Necessity supporting creation of the Waterfront Area CRA, the Redevelopment Plan, and the historic development patterns of the Waterfront Area CRA.

40. One of the City's stated purposes of creating the Waterfront Area CRA is to "afford maximum opportunity, consistent with the sound needs of the municipality as a whole,

for the rehabilitation or redevelopment of the Area by private enterprise."

41. Applicants for the change in land use designation of 205 and 211 Broome Street seek to redevelop the deteriorated residential structure at 211 Broome Street. The applicants will not invest in redevelopment of the property under the IND designation because that designation prohibits residential uses. The FLUM Amendments will encourage redevelopment by allowing the applicants to invest in the dilapidated structure. Further, the FLUM Amendments afford the applicants more flexibility in development of the vacant lots because, while the IND land use category is limited to the uses described in paragraph 14, above, the CBD category allows single-family and duplex residential uses, offices, commercial retail, personal service establishments, restaurants, transient accommodations, commercial parking facilities, civic uses, and cultural uses.

42. The applicants for change in the land use designation of properties located at 224 North 2nd Street, and the adjoining vacant lots, seek to reinvest in the existing non-conforming multi-family residential structure. The FLUM Amendments encouragement redevelopment by allowing the reinvestment sought by the applicants. Likewise, the FLUM Amendments provide flexibility for infill development of the adjoining vacant lots.

43. The Redevelopment Plan includes initiatives and programs for the Waterfront and "Transitional Areas." The subject properties are located within a Transitional Area of the Waterfront Area CRA.

44. One of the purposes of the Redevelopment Plan is to "encourage opportunities for new development by allowing a broader mix of uses in the . . . transitional areas[.]" Further, the Plan states, "It is critical that the strategies are prioritized to initiate growth of tax increment revenues to the Agency – a primary or seed funding source for many of the redevelopment efforts identified in this Plan."

45. Objective 2 of the Redevelopment Plan is to promote a mix of uses within the CRA. This section states, "The existing Future Land Use and Zoning designations along the waterfront and adjacent areas limit the type of allowable uses to industrial uses. Such limitations may be a primary impediment to redevelopment of the CRA." The Redevelopment Plan further states, "[T]he City should take a proactive position in accommodating a broader mix of uses with design controls."

46. The CBD category allows a broader mix of uses than the IND category. See paragraphs 14 and 15, above.

47. Further, the FLUM Amendments remove the impediment to redevelopment of the subject properties created by the prohibition on residential uses in the IND category.

48. Petitioner elicited testimony from the City's experts that there are minimal differences between the uses allowed within the existing zoning category of the subject properties and the zoning category sought under the applicant's concurrent rezoning request.

49. Petitioner proved that the uses allowed within the CBD zoning category, which are not allowed in the existing I-1 (Light Industrial), are residential, daycare centers, group homes, and bed and breakfast inns.

50. The issue in this case is not the breadth of the zoning category, but that of the FLUM category.[4/]

51. The FLUM Amendments are supported by both the Findings of Necessity establishing, and the Redevelopment Plan for, the Waterfront Area CRA.[5/]

52. Finally, Petitioner points to Future Land Use (FLU) Policy 1.07.10 to support his argument that the FLUM Amendments are not supported by data and analysis.

53. FLU Policy 1.07.10 reads, in pertinent part, as follows:

> f. A proposed amendment to the FLUM to increase the land area within the Central Business District land use category shall demonstrate the suitability of the proposed site based on:
>
> 1. The need for additional land area within the Central Business District land use category;

2. Consistency of the land area with the characteristics of the Central Business District; and

3. Consistency of the land area with the characteristics of the downtown.

54. Petitioner presented the lay testimony of former City Mayor and Councilman Greg Roland, distinguishing the location and characteristics of the downtown and the CBD from those of the subject properties. In the same vein, Petitioner grilled both Ms. Gibson and Mr. McCrary in deposition regarding what data and analysis support a need for additional land in the CBD.

55. The testimony and other evidence regarding this policy was largely irrelevant because Petitioner did not allege, in either his Petition or the pre-hearing stipulation, that the FLUM Amendments were internally inconsistent with FLU Policy 1.07.10.

56. The testimony regarding compliance with FLU Policy 1.07.10 was relevant to Petitioner's contention that the FLUM Amendments are not based on relevant and appropriate data. However, as explained below, the issue is whether the FLUM Amendments are supported by data available at the time the amendments were adopted, not whether non-existent data may be contrary to the amendments.

57. Petitioner did not prove beyond fair debate that the FLUM Amendments are not based upon relevant and appropriate data and analysis in violation of section 163.3177(1)(f).

CONCLUSIONS OF LAW

58. The Division of Administrative Hearings has jurisdiction over the subject matter and parties hereto pursuant to sections 120.569, 120.57(1), and 163.3187, Florida Statutes.

59. 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).

60. Petitioner is an affected person within the meaning of the statute.

61. "In compliance" means "consistent with the requirements of §§ 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.

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

63. The FLUM Amendments shall be determined to be in compliance if the local government's determination that the

small scale amendment is in compliance is "fairly debatable." See § 163.3187(5)(a), Fla. Stat.

64. The "fairly debatable" standard, which provides deference to the local government's disputed decision, applies to any challenge filed by an affected person. Therefore, Petitioner bears the burden of proving beyond fair debate that the challenged FLUM 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).

Internal Inconsistency

65. Based on the foregoing Findings of Fact, Petitioner did not prove beyond fair debate that the FLUM Amendments are inconsistent with Housing Element Policies 3.01.01 and 3.02.08. While the cited policies require the City to conduct a housing needs assessment and establish a neighborhood planning program, respectively, neither policy prohibits the City from adopting FLUM amendments until the assessment is complete or the program is initiated.

66. Petitioner argued, based on the deposition testimony of Mr. McCrary, that a housing needs assessment would provide data relevant to the availability of affordable housing and shortages and deficiencies in the existing housing stock. Petitioner apparently believes the City must undertake the

assessment in order to have appropriate data to support this, or any future, plan amendment authorizing additional residential development. To this extent, Petitioner's arguments on internal inconsistency and adequate data and analysis overlap.

67. Petitioner's contention is inaccurate. The local government is not required to undertake original data collection. See § 163.3177(1)(f)2., Fla. Stat. Local government plan amendments must be supported data "available on that particular subject at the time of adoption of the . . . plan amendment at issue." The fact that better data may be available to the City after it conducts a housing assessment is irrelevant to whether the subject FLUM Amendments are supported by relevant and appropriate data, pursuant to 163.3177(1)(f).

Data and Analysis

68. Section 163.3177(1)(f) requires plan amendments to be "based upon relevant and appropriate data and analysis" by the local government, and includes "surveys, studies, community goals and vision, and other data available at the time of adoption."

69. The FLUM Amendments are supported by the data collected and analysis provided in the Findings of Necessity to establish the Waterfront Area CRA, as well as the Redevelopment Plan.

70. Petitioner did not challenge as professionally unacceptable either the sources of data or analytical methodologies underpinning the CRA. Petitioner presented no relevant acceptable data or analysis which contradicted the City's adoption of the FLUM Amendments.

71. Based upon the foregoing Findings of Fact, Petitioner did not prove beyond fair debate that the FLUM Amendments are not based on relevant and appropriate data and analysis as required by 163.3177(1)(f).

72. For the reasons stated above, Petitioner has not proven beyond fair debate that the FLUM Amendments are not "in compliance" with the specified provisions of chapter 163, Florida Statutes.

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 City of Fernandina Beach Comprehensive Plan Amendments adopted by Ordinances 2017-13 and 2017-15 on June 6, 2017, are "in compliance," as that term is defined in section 163.3184(1)(b), Florida Statutes (2017).

DONE AND ENTERED this 9th day of November, 2017, in Tallahassee, Leon County, Florida.

SUZANNE VAN WYK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of November, 2017.

ENDNOTES

[1/] Except as otherwise provided herein, all references to the Florida Statutes are to the 2016 version, which was in effect when the FLUM Amendments were adopted.

[2/] At the final hearing, the undersigned excluded Petitioner's Exhibits P3, P4, P5, P10, and P12. Those rulings were reversed by Order dated September 15, 2017.

[3/] To the extent Petitioner's Proposed Recommended Order suggests that the FLUM Amendments may destabilize or otherwise negatively impact the adjoining neighborhood, that argument is not within the scope of this proceeding. Petitioner did not allege in the Petition that the FLUM Amendments are incompatible with the existing adjoining development.

[4/] Assuming, arguendo, the specific zoning category sought were at issue, the City proved the CBD zoning category is, indeed, broader than the existing I-1 category.

[5/] Ms. Gibson's deposition testimony that the FLUM Amendments were supported by the historical development pattern of the area as evidenced by the Sanborn maps, consisted of a single statement to that affect. Because Ms. Gibson's testimony was

not offered at hearing, her opinion on this issue was not further developed. There is insufficient record evidence to find that the FLUM Amendments are supported by the historic pattern of development as reflected in the Sanborn maps.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.