STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JACQUELINE ROGERS,

Petitioner,

vs. Case Nos. 18-2103GM
18-2109GM

ESCAMBIA COUNTY AND DEPARTMENT
OF ECONOMIC OPPORTUNITY,

Respondents.
_____/

FINAL ORDER

Pursuant to notice, a final hearing was held in this matter on August 14, 2018, in Pensacola, Florida, before Francine M. Ffolkes, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jacqueline A. Rogers, pro se
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For Respondent Escambia County:

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For Respondent Department of Economic Opportunity:

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STATEMENT OF THE ISSUES

A. Whether Escambia County Ordinance No. 2017-65 (Ordinance) adopted on November 30, 2017, amending the Heavy Commercial/Light Industrial (HC/LI) zoning district in the Escambia County Land Development Code (LDC) is consistent with the 2030 Escambia County Comprehensive Plan (Comp Plan).

B. Whether Remedial Ordinance No. 2018-30 (Remedial Ordinance) adopted on August 2, 2018, alleviates any inconsistency in the Ordinance such that the HC/LI zoning district regulation is consistent with the Comp Plan.

PRELIMINARY STATEMENT

The Respondent, Escambia County (County), adopted the Ordinance on November 30, 2017, which amended the HC/LI zoning district in the County LDC. On January 16, 2018, the Petitioner, Jacqueline Rogers, petitioned the Respondent, Department of Economic Opportunity (DEO), under section 163.3213, Florida Statutes, to contest the Ordinance as inconsistent with the Comp Plan. DEO conducted an investigation as required by section 163.3213(4), which included holding an informal hearing at which the Petitioner and the County presented oral and documentary evidence. Based on its investigation, DEO made the following written determination:

> 1) To the extent Escambia County Ordinance No. 2017-65 permits "light industrial" uses within the Mixed Use-Suburban (hereinafter

> "MU-S") Future Land Use Category, the Ordinance is not consistent with the Escambia County Comprehensive Plan.
>
> 2) Escambia County Ordinance 2017-65 is otherwise consistent with the Escambia County Comprehensive Plan.

Under section 163.3213(5)(b), DEO referred this matter to the Division of Administrative Hearings (DOAH). Under section 163.3213(5)(a), the Petitioner filed a petition with DOAH contesting the Ordinance and Remedial Ordinance as inconsistent with the County's Comp Plan. The petitions were consolidated in this proceeding.

The County adopted the DEO's determination, conceding that to the extent the Ordinance permitted "light industrial" uses within the Mixed-Use Suburban (MU-S) Future Land Use (FLU) category, the Ordinance is not consistent with the Comp Plan. On August 2, 2018, the County amended the Ordinance by adopting the Remedial Ordinance, which removed industrial uses from the permitted uses of HC/LI when located in MU-S. DEO agreed that the Remedial Ordinance remedied the inconsistency determination. The Petitioner maintained that the HC/LI zoning district regulation as amended in the Remedial Ordinance remained inconsistent with the Comp Plan.

At the final hearing, the Petitioner testified and offered the direct testimony of Griffin Vickery and Horace Jones. The Petitioner's Exhibits 1 through 10 were admitted into evidence.

The County cross-examined these witnesses and offered the direct testimony of Horace Jones. The County's Exhibits 1 through 5 were admitted into evidence.

Mr. Jones is the director of the Escambia County Development Services Department and previously qualified as an expert in land use and growth management. Mr. Vickery is an Urban Planner II with the Escambia County Development Services Department.

A one-volume Transcript of the final hearing was filed on October 1, 2018. The parties were given 21 days, through and including October 22, 2018, to submit proposed final orders. The undersigned granted the parties' joint request for an extension, and the parties filed their proposed final orders on November 2, 2018. Those proposed final orders have been considered in the preparation of this Final Order.

References to the Florida Statutes are to the 2018 version, unless otherwise indicated.

FINDINGS OF FACT

1. The Petitioner lives and owns property in Cantonment, Escambia County, Florida, in proximity to parcels of land impacted by the Ordinance and Remedial Ordinance. As such, the Petitioner would be subject to an increase in noise and traffic resulting from the Ordinance and Remedial Ordinance, as well as an adverse change in the character of her rural neighborhood.

2. The County is a non-charter county and political subdivision of the State of Florida. The County is the affected local government and is subject to the requirements of chapter 163.

3. DEO is the state land planning agency and has the duty to review and investigate petitions submitted under section 163.3213, challenging land development regulations adopted by local governments.

4. The Ordinance was enacted to amend Part III of the County's LDC to address consistency of parcels zoned HC/LI with the MU-S FLU Category. The preamble to the Ordinance indicates a previous consolidation of zoning districts implemented on April 16, 2015, "did not eliminate all occurrences of zoning districts that appear to allow uses, density, or other intensities of use not authorized by the prevailing purposes and associated provisions of applicable future land use categories." The County's Board of County Commissioners (Board) found that "there are occurrences of HC/LI zoning within the MU-S future land use category," and "it is in the best interests of the health, safety, and welfare of the public to address any inconsistency created by HC/LI zoning within the MU-S future land use category."

5. After the DEO's determination of partial inconsistency, the County adopted the Remedial Ordinance, which makes no

reference to the April 15, 2015, consolidation of zoning districts in the preamble. In addition, the Remedial Ordinance amends the Ordinance to delete certain confusing references to parcels and their previous zoning as of April 15, 2015. Thus, the Remedial Ordinance is much clearer than the Ordinance in addressing the prior inconsistency created by HC/LI zoning within the MU-S FLU category.

Mixed-Use Suburban Future Land Use Category

6. The MU-S FLU is described in FLU Policy 1.3.1 of the Comp Plan as "[i]ntended for a mix of residential and non-residential uses while promoting compatible infill development and the separation of urban and suburban land uses." The MU-S FLU lists the range of allowable uses as "[r]esidential, retail sales & services, professional office, recreational facilities, public and civic, limited agriculture." The MU-S FLU prescribes standards, such as a residential maximum density of 25 dwelling units per acre (du/acre) and a non-residential maximum intensity floor area ration (FAR) of one.

7. The MU-S FLU also describes the mix of land uses that the County intends to achieve for new development in relation to location, i.e., the distance from arterial roadways or transit corridors. Within one-quarter mile of arterial roadways or transit corridors: residential percentages of 8 to 25 percent; public, recreational and institutional percentages of 5 to

20 percent; non-residential uses such as retail service at 30 to 50 percent; and office at 25 to 50 percent. Beyond one-quarter mile of arterial roadways or transit corridors: residential percentages of 70 to 85 percent; public, recreational and institutional percentages of 10 to 25 percent; and non-residential percentages of 5 to 10 percent.

8. The mix of land uses described by the Comp Plan MU-S FLU category can be implemented by multiple zoning districts in the LDC. Certain zoning districts within MU-S further the residential intentions of the FLU category and other zoning districts further the non-residential intentions of the MU-S FLU category. However, all zoning districts within MU-S contain some element of residential use.

The Ordinance and Remedial Ordinance

9. The Remedial Ordinance amended the purpose subsection (a) of section 3-2.11 of the County LDC by adding language that directly limited the "variety and intensity of non-residential uses within the HC/LI [zoning] district" by "the applicable FLU." This means that although various non-residential uses are permitted in the HC/LI zoning district, the FLU category in the Comp Plan determines the "variety and intensity" of those non-residential uses.

10. The Ordinance had amended subsection (h) of section 3-1.3 of the County LDC to clarify that "[o]ne or more districts may implement the range of allowed uses of each FLU, but only at densities and intensities of use consistent with the established purposes and standards of the category." This clarification is consistent with FLU Policy 1.1.4 in the Comp Plan, which states that "[w]ithin a given future land use category, there will be one or more implementing zoning districts."

11. The Remedial Ordinance amended the permitted uses in subsection (b) of section 3-2.11 of the County LDC by deleting the confusing reference to parcel sizes and their previous zoning as of April 15, 2015. In paragraph (6) of subsection 3-2.11(b), the Remedial Ordinance made clear that the listed "industrial and related uses" are not permitted "within MU-S." In general, the other permitted uses mirror the range of allowable uses in the MU-S FLU category.

12. The Remedial Ordinance amended the conditional uses in subsection (c) of section 3-2.11 to make clear that the listed industrial and related conditional uses are not permitted within MU-S. The Ordinance added MU-S to the site and building requirements in subsection (d) of section 3-2.11 to require a maximum FAR of 1.0. The Remedial Ordinance also imposed a maximum structure height for "any parcel previously zoned GBD

[Gateway Business District] and within the MU-S" of 50 feet, which is lower than the maximum of 150 feet for HC/LI zoning not within MU-S.

13. The Remedial Ordinance amended the location criteria in subsection (e) of section 3-2.11 to limit "[a]ll new non-residential uses proposed within the HC/LI district" to parcels previously zoned GBD and within the MU-S FLU category that are located along and directly in front of "U.S. Highway 29 or State Road 95A." In addition, another location criterion limits new non-residential uses along arterial streets to within one-quarter mile of their intersection with an arterial street.

14. The provisions of the Ordinance and Remedial Ordinance are consistent with the County Comp Plan.

Petitioner's Objections

15. The Petitioner contended that the HC/LI zoning regulation allows intensities and scales of commercial uses that are inconsistent with the character of a predominantly residential FLU like MU-S. The Petitioner based her contention on the Comp Plan definition of "suburban area" and argued that the Ordinance and Remedial Ordinance permitted uses, densities, and intensities that were not "suburban in nature."

16. "Suburban area" is defined in the Comp Plan as "[a] predominantly low-density residential area located immediately outside of an urban area or a city and associated with it

physically and socioeconomically." By contrast, "mixed-use" is defined in the Comp Plan as "any use that includes both residential and non-residential uses." See ch. 3, § 3.04, Escambia Cnty. Comp Plan.

17. Contrary to the Petitioner's contention, the MU-S FLU category's primary focus is on a mix of uses in a suburban area. See Findings of Fact Nos. 6-8, above. Indeed, the FLU element of the Comp Plan expresses a purpose and intent to encourage mixed-use development.

18. Also, the Petitioner's focus on the differences between the MU-S and Mixed-Use Urban (MU-U) FLU categories in the Comp Plan was misplaced. The premise that the HC/LI zoning district implements the MU-U FLU category better than it implements the MU-S FLU category was not the issue to be determined in this proceeding. Rather, it was whether the Ordinance, as amended by the Remedial Ordinance, amending the HC/LI zoning district in the LDC is consistent with the Comp Plan.

19. All other contentions not specifically discussed have been considered and rejected.

CONCLUSIONS OF LAW

20. DOAH has jurisdiction over the subject matter of this proceeding under sections 120.569, 120.57(1), and 163.3213, Florida Statutes.

21. The Petitioner is a "substantially affected person" and has standing to maintain this proceeding under section 163.3213(2).

22. Section 163.3201 regulates the relationship of a local government's comprehensive plan to its exercise of land development regulatory authority and requires that a land development regulation "be based on, be related to, and be a means of implementation for an adopted comprehensive plan."

23. Section 163.3194(1)(b) requires that all land development regulations "shall be consistent with the adopted comprehensive plan." Section 163.3194(3)(a) provides that a "land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development permitted by such . . . regulation are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government."

24. The adoption of a land development regulation by a local government is legislative in nature and shall not be found to be inconsistent with the local plan if it is fairly debatable that it is consistent with the plan. See § 163.3213(5)(a), Fla. Stat.

25. The term "fairly debatable" is not defined in chapter 163, but in Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997), the Florida Supreme Court explained:

> [t]he fairly debatable standard is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety. In other words, an ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity. (Internal citations omitted.)

26. "The 'fairly debatable' rule is a rule of reasonableness; it answers the question of whether, upon the evidence presented to the [government] body, the [government's] action was reasonably based." Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship, 619 So. 2d 996, 1002 (Fla. 2d DCA 1993)(citing Town of Indialantic v. Nance, 400 So. 2d 37, 39 (Fla. 5th DCA 1981)).

27. The "fairly debatable" standard, which provides deference to the local government's disputed decision, applies to any challenge filed by an affected person. Therefore, the Petitioner bears the burden of proving beyond fair debate that the challenged land development regulation is not consistent with the adopted comprehensive plan. This means that "if reasonable persons could differ as to its propriety," a land development regulation must be found consistent. Yusem, 690 So. 2d at 1295.

28. It is fairly debatable that, except for permitting light industrial uses, the Ordinance is consistent with the County Comp Plan. The Remedial Ordinance remedied the identified inconsistency by removing all light industrial uses within the HC/LI zoning district when located within the MU-S FLU category.

29. The Petitioner did not prove beyond fair debate that section 3-2.11 of the County LDC, as amended by the Ordinance and Remedial Ordinance is inconsistent with the County Comp Plan.

ORDER

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

ORDERED that the Ordinance, as amended by the Remedial Ordinance, amending the HC/LI zoning district in the County LDC, is consistent with the 2030 County Comp Plan.

DONE AND ORDERED this 20th day of November, 2018, in Tallahassee, Leon County, Florida.

FRANCINE M. FFOLKES
Administrative Law Judge
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Filed with the Clerk of the
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this 20th day of November, 2018.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.