

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

222 LAKEVIEW LLC,

Petitioner,

vs.

Case No. 18-4743GM

CITY OF WEST PALM BEACH,

Respondent.

_____/
PALM BEACH COUNTY AND THE TOWN
OF PALM BEACH,

Petitioners,

vs.

Case No. 18-4773GM

CITY OF WEST PALM BEACH,

Respondent.

_____/

RECOMMENDED ORDER

A duly-noticed final hearing was held in these cases on October 16 and 22 through 24, 2018, in West Palm Beach, Florida, before Francine M. Ffolkes, a duly designated Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner 222 Lakeview LLC:

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STATEMENT OF THE ISSUES

The issues to be determined in this consolidated proceeding are (1) whether the Petitioners have demonstrated standing under section 163.3184, Florida Statutes (2018), and (2) whether the Okeechobee Business District Comprehensive Plan Amendment (OBD Amendment) adopted on August 13, 2018, by the Respondent by Ordinance No. 4783-18 (Ordinance) is "in compliance" under section 163.3184(1) (b).

PRELIMINARY STATEMENT

On September 12, 2018, the Petitioner 222 Lakeview LLC (Lakeview) timely filed a Petition for Formal Administrative Hearing challenging the Respondent City of West Palm Beach's (City) adoption of the OBD Amendment. On September 12, 2018, the

Petitioners Town of Palm Beach (Town) and Palm Beach County (County) timely filed a Petition for Formal Administrative Hearing also challenging the adoption of the OBD Amendment. On September 17, 2018, the City filed a Notice of Request for Expeditious Resolution under section 163.3184(7). The cases were consolidated for hearing on September 18, 2018.

At the hearing, the parties filed unilateral pre-hearing statements, and the Town and County's request for official recognition of the comprehensive plans of the Town, the County, and the City was granted. Lakeview's Motion to Enforce Order of Pre-hearing Instructions was granted, precluding Ms. Uyen Dang, Ms. Hazel Carson, and Mr. Jeff Greene as witnesses for the City. The City's Motion to Strike Witnesses was granted, in part, and denied, in part, precluding Ms. Terry England and Mr. Rene Tercilla as witnesses for Lakeview. The City's Motion in Limine was granted, in part, and denied, in part, excluding the City's mayor and commissioners from being called as witnesses.

The County and Town presented the testimony of Ross Hering; H. Paul Brazil, P.E.; Eric McClellan, accepted as an expert in land use planning and comprehensive planning, including transportation planning; Motasem Al-Turk, Ph.D., P.E., accepted as an expert in traffic engineering and traffic planning; and Richard A. Ryabik, P.E., accepted as an expert in traffic engineering and traffic planning. The County and Town's

Exhibits 1, 2, 6 through 8, 10, 15, 21, and 23 were received in evidence.

Lakeview presented the testimony of Shari Neissani, senior vice president of Asset Management, RedSky Capital, LLC, which is the owner of Lakeview; Jo Ann Holl, property manager for Esperanté Corporate Center (Esperanté); Richard Greene, AICP, the City's director of Development Services; Scott Kelly, assistant city administrator; Michael Eschmann, presented as an expert in the area of property appraisal and market valuation; Cecelia Ward, AICP, accepted as an expert in comprehensive planning and zoning. Lakeview's Exhibits 1, 12, 18, 20, 21, 24 through 26, 29, 39(A through E), 41, 48, 50, and 52 were received in evidence.

The City presented the testimony of Richard Greene, AICP; Ana Maria Aponte, AICP, the City's urban designer; Eric McClellan from the County; Alex Hansen; Larry Hymowitz from the Florida Department of Transportation (FDOT); David W. Depew, Ph.D., accepted as an expert in comprehensive planning; and Douglas Whitney, certified real estate appraiser. The City's Exhibits 3 through 8, 11, 13, 14, 16, 22 through 25, 27 through 30, 32 through 34, and 37 were received in evidence. Also, Joint Exhibits 1 through 30 were received in evidence.

Post-hearing motions designating and cross designating portions of depositions were authorized and were ruled on by

separate Order. Lakeview filed a motion to reopen the evidence that was denied by separate Order.

The four-volume hearing Transcript was filed with DOAH on November 26, 2018. The parties' proposed recommended orders were timely filed and have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties and Standing

1. Lakeview is a Delaware limited liability company, registered with the State of Florida. Lakeview owns Esperanté, a 20-story office tower at 222 Lakeview Avenue within the boundaries of the OBD. Lakeview submitted oral and written objections to the City during the process leading to adoption of the OBD Amendment. Lakeview's concerns included impact to views of the Intracoastal Waterway by potential development of a 25-story office tower to the east of Esperanté at the location referred to as the "church site," as well as increased traffic congestion on Lakeview Avenue. Lakeview is an affected person under section 163.3184(1) (a).

2. The Town is a Florida municipal corporation and a home rule charter municipality. The Town owns property within the City, including its public works facility in close proximity to the OBD. The Town submitted oral and written comments, recommendations, and objections to the City during the adoption

process for the OBD Amendment. The Town is an adjoining local government to the City. The Town was concerned that the OBD Amendment would produce substantial impacts on the increased need for publicly funded infrastructure by increasing the cost of traffic signalization on Okeechobee Boulevard and Lakeview Avenue in the OBD. The Town is an affected person under section 163.3184(1)(a).

3. The County is a political subdivision of the State of Florida and a home rule charter county. The County owns property within the jurisdiction of the City, including its convention center and parking garage, which are located on Okeechobee Boulevard in close proximity to the OBD. The County was concerned that the OBD Amendment would produce substantial impacts on the increased need for publicly funded infrastructure in the form of increased cost for traffic signalization and other active traffic management measures on Okeechobee Boulevard and on increased cost of providing bus services. The County submitted oral and written comments, recommendations, and objections to the City during the adoption process for the OBD Amendment. The County is an affected person under section 163.3184(1)(a).

4. The City is a Florida municipal corporation located in the County and is responsible for adopting a comprehensive plan and plan amendments. The City adopted the OBD Amendment under the state expedited review process in section 163.3184(3). The

City also owns a parcel within the OBD referred to throughout this proceeding as the "tent site."

Background

5. The OBD includes all the properties located between Okeechobee Boulevard, Lakeview Avenue, Rosemary Avenue, and Flagler Drive in the City's downtown. It is a five-block area with the church site as its easternmost parcel.

6. The OBD is a new district within the area defined in the Downtown Master Plan (DMP) Element of the City's Comprehensive Plan (City Comp Plan). The DMP Element is an optional element of the City Comp Plan that was adopted in 1995. The DMP's vision includes promoting a place of sustainable and efficient transportation systems that promote greater connectivity for pedestrians, cyclist, and transit riders. The OBD Amendment is a small component of the City's large and comprehensive strategy to encourage mode shift within the DMP area.

7. The DMP currently sets forth 13 districts that are described in Policy 1.1.1 and whose boundaries are depicted on the Downtown District Map in the City Comp Plan. DMP Policy 3.1.1 directs the City to maintain the DMP Zoning Atlas showing the districts from DMP Policy 1.1.1, the planning areas and the subdistricts.

8. The OBD is also located within the Downtown Transportation Concurrency Exception Area (TCEA) established in

Objective 2.3.5 of the Transportation Element in the City Comp Plan. The Downtown TCEA is also adopted in the County's Comprehensive Plan (County Comp Plan), and the TCEA boundaries are coterminous with the DMP area. The City entered into an agreement with the County and FDOT in 1998 regarding the TCEA. Adoption of the TCEA meant that the City, the County, and FDOT acknowledged that in order for desired development and redevelopment to occur in the City's downtown area, it would be difficult for certain roadways to continue to meet the adopted level of service standards. Thus, the City was exempted from meeting transportation concurrency requirements and traffic performance standards in the TCEA.

9. A Florida Standard Urban Transportation Modeling System (FSUTMS) traffic analysis of the area that was done prior to adoption of the TCEA ultimately established the required residential and nonresidential development ratios described in Transportation Element Policy 2.3.5(h). The development ratios required the City to have both residential and nonresidential space in the downtown area. The City achieved the projection for residential units set forth in Transportation Element Policy 2.3.5(g), but has approximately five million square feet more of nonresidential space available to reach the stated projection for nonresidential space.

The OBD Amendment

10. On April 30, 2018, Gabe Klein, a consultant for the City, presented the Downtown Mobility Plan to the mayor and city commission. The workshop was open to the public and televised on the City's website. At this workshop, the Mayor initiated the process for pursuing the OBD Amendment.

11. The City then timely sent its executive summary of the proposed OBD Amendment to the Interlocal Plan Amendment Review Committee (IPARC) Clearinghouse on May 3, 2018. On May 7, 2018, the Clearinghouse provided notice (IPARC Notice) of the OBD Amendment to the Town and the County under the terms of the Interlocal Agreement that established the IPARC.

12. On May 21, 2018, by Resolution No. 134-18, the City Commission adopted the Downtown Mobility Plan, along with the Okeechobee Corridor Study, Downtown Parking and Transportation Demand Management Study, and the Citywide Bicycle Master Plan.

13. In addition to the IPARC Notice, the City provided notice to both the County and Lakeview by mail and published required notices in the newspaper.

14. Counsel for Lakeview presented oral comments regarding the OBD Amendment at the City's Planning Board meeting on May 15, 2018; at the Downtown Action Committee (DAC) meeting on June 13, 2018; at the transmittal hearing on June 18, 2018; and at the adoption hearing on August 13, 2018.

15. County representatives made oral comments at the transmittal hearing on June 18, 2018, and the adoption hearing on August 13, 2018. A Town representative made oral comments at the adoption hearing on August 13, 2018.

16. The Ordinance reflected the City's continuing policy of seeking to attract high-intensity office uses to consolidate the area as an economic center of downtown, with innovative high-rise buildings and an active pedestrian environment. The Ordinance further allowed for the creation of incentives to permit building heights to increase from five stories to 25 stories in the OBD 5 subdistrict without increasing the permitted floor area ratio (FAR) of 2.75.

17. The Ordinance amended the City Comp Plan's DMP Element to identify the location, development capacity, and height allowed within the OBD. DMP Policy 1.1.1 was amended to create the OBD. DMP Policy 3.1.3 was amended to show maximum development capacity, subdistrict boundaries and incentive areas for the OBD.

18. The text added to DMP Policy 1.1.1 stated:

N. **Okeechobee Business District:** The Okeechobee corridor is the traditional business district of downtown, around which office buildings have historically located. The focus of the Okeechobee business district should be towards attracting high intensity office uses to consolidate the area as an economic center of downtown, with innovative high-rise buildings and an active pedestrian

environment. The district shall function as a connection between the north and south portions of the City, with enhanced pedestrian crossings and a large percentage of public open spaces.

Intensity and Density

19. The OBD Amendment did not increase development intensity or density. In fact, the OBD Amendment reduced the allowable development within the Okeechobee Corridor. The evidence established that the FAR of 2.75 on the church site remained the same with the OBD Amendment.

20. Ms. Aponte is in charge of overseeing the development and implementation of the DMP. She testified that prior to adoption of the OBD Amendment, the FAR on the church site was 2.75 and that the church site property could have been developed to accommodate approximately 300,000 square feet of usable office space and provide parking on site. With the same FAR of 2.75 after adoption of the OBD Amendment, the church site's development capacity remained the same.

21. Ms. Aponte also concluded that from a planning perspective, since the development capacity at the church site remained the same before and after the OBD Amendment, and the use did not change, there would not be additional traffic impacts.

22. Mr. Greene explained that the OBD Amendment would actually reduce the development capacity on the tent site and that all other blocks in the OBD would retain the same

development capacity as before the OBD Amendment. Since there was a reduction in the actual development capacity within the OBD, there was not an increase in intensity. Mr. Greene and/or his staff explained the reduction in development capacity in the OBD at all four public hearings and in many telephone conversations with staff from the County and the Town.

23. The tent site is located within the City Place Development of Regional Impact (DRI) that holds certain development rights. Sites located within the DRI may use the DRI's development rights on a "first come, first serve" basis until they are exhausted. Reducing capacity on the tent site would allow another site within the DRI to use those development rights. This would shift development away from the Okeechobee Corridor in the OBD to another site within the DRI.

24. The City proved that the OBD Amendment did not increase development intensity or density. The City credibly established that the OBD Amendment reduced the allowable development within the OBD.

Petitioners' Objections

25. The Petitioners jointly presented their cases during the hearing. They argued that the OBD Amendment was not "in compliance" because it created internal inconsistencies within the City Comp Plan, it was not supported by relevant and appropriate data and analysis, it was not properly coordinated

with the neighboring local governments, it was not coordinated with the comprehensive plans of the Town and the County, and it was a de facto future land use plan amendment.

26. Each argument is generally addressed below. However, the major underlying premise of the Petitioners' challenge was that the OBD Amendment would allow more intense development and that the City had not evaluated potential impacts to traffic and parking. As found above, the City proved that the OBD Amendment did not increase development intensity or density. Thus, the City did not need to evaluate the traffic impacts of the OBD. In addition, the City was exempted from meeting transportation concurrency requirements and traffic performance standards in the TCEA.

Internal Consistency

27. The Town and County identified elements in the City Comp Plan in order to argue internal inconsistency. Those were the Coastal Management Element, Intergovernmental Coordination Element, and Transportation Element. The Town and County also claimed the OBD Amendment was inconsistent with the Strategic Regional Policy Plan.

28. Lakeview claimed the OBD Amendment was inconsistent with the entire City Comp Plan generally, and specifically inconsistent with the vision of the DMP Element, DMP Policies 3.1.3, 1.1.1.H, and 1.1.1.M; Future Land Use Policy 1.1.7;

Transportation Element Policy 2.3.1(a), Objective 2.3.4, Policies 2.3.5(a) and 2.3.5(h); and Intergovernmental Coordination Element Objectives 1.1, 1.2, 1.3, and 1.4, Policies 1.3.1, 1.3.3, 1.3.4, and 1.5.3.

29. The Petitioners argued that "high-rise Class A" buildings must be built in the Quadrille Business District (QBD) described in DMP Policy 1.1.1.H. However, the DMP Element does not limit tall buildings to the QBD. For example, a maximum height of 30 stories is allowed in the Quadrille Garden District, 25 stories in the QBD, and 15 stories in the Transit Oriented District and Flagler Waterfront District.

30. During the hearing, Mr. Greene narrated drone footage that showed high-rise buildings are located throughout the downtown area, including in and near the OBD in the Okeechobee Corridor. Two residential towers that are 32 stories in height are also located along the waterfront in the Flagler Waterfront District. The evidence supported the description in the OBD that "[t]he Okeechobee corridor is the traditional business district of downtown, around which office buildings have historically located."

31. The evidence also established that the tallest buildings in the downtown are not located in the QBD. The City Comp Plan does not prohibit high-rise buildings in districts other than the QBD.

32. Lakeview's witness, Ms. Ward, opined that creation of the OBD conflicted with the intention of the Flagler Waterfront District to preserve waterfront views and its function as a transition from more intense development in the urban core of downtown. The evidence showed that these intentions can be realized with creation of the OBD. The OBD's implementing regulations adopted at the same time as the OBD Amendment as changes to the DMP Urban Regulations required that any development be set back 400 feet from the Intracoastal Waterway and that open space be increased. This would maintain an open space promenade along Flagler Drive.

33. The County argued that the OBD Amendment conflicted with Policy 1.2-m of its Transportation Element, which provides in part: "Based on the results of the traffic monitoring report, the City will pursue strategies including, but not limited to . . . develop a centrally-managed system of strategically located parking facilities." The same language is found in the Transportation Element of the City Comp Plan in Policy 2.3.5(a).

34. Contrary to the County's argument, the OBD Amendment in no way prohibited or directed the location of centrally-managed parking garages. The OBD Amendment complemented the many strategies referenced in Policy 1.2-m and Policy 2.3.5(a) by promoting public transit services, encouraging transportation

mode options, and implementing employer-based Transportation Demand Management (TDM) activities.

35. The evidence established that parking requirements for any developments within the DMP, including the new OBD, complied with the provisions of DMP Element Objective 4.3 and the implementing DMP Urban Regulations. DMP Objective 4.3 states that "[t]he City shall develop strategies to manage the downtown parking supply and demand."

36. Lakeview argued that Exhibit 3 to the Ordinance showed two Okeechobee Business subdistricts but did not list the other subdistricts that were created under the OBD, specifically OBD-12CP. Mr. Hansen explained that OBD-12CP is contained within the City Place DRI, which was amended by the adoption of a separate Ordinance No. 4782-18 and is not subject to review in a comprehensive plan challenge.

37. At the hearing, the County and Town withdrew their claim relating to conflict with the Coastal Management Element. In an abundance of caution, the City presented evidence and established that the OBD is not in a coastal high hazard area.

38. The Treasure Coast Regional Planning Council (Treasure Coast) is the regional planning council that reviewed the City's OBD Amendment. Treasure Coast's review and comments were limited to any adverse effects on regional resources or facilities identified in the Strategic Regional Policy Plan, and any extra-

jurisdictional impacts that would be inconsistent with the comprehensive plan of any affected local government within the region.

39. Based on the City's staff report for the OBD Amendment, Treasure Coast found that the maximum development potential of property, as expressed by FAR, did not increase as a result of the creation of the OBD. Treasure Coast found no adverse effects on regional resources or facilities and no extra-jurisdictional impacts resulting from creation of the OBD.

40. The Petitioners did not present any evidence that would establish the OBD Amendment was not consistent with the requirements of the Strategic Regional Policy Plan.

41. The Petitioners did not prove beyond fair debate that the OBD Amendment conflicted with the policies, goals, and objectives of the City Comp Plan or the County Comp Plan.

Data and Analysis

42. The City Commission adopted the Downtown Mobility Plan (Mobility Plan), along with the Okeechobee Corridor Study, Downtown Parking and Transportation Demand Management Study and the Citywide Bicycle Master Plan. The various studies that make up the Mobility Plan included data relating to mode shift, walkability, mobility, circulation on Okeechobee Boulevard, economic growth in the downtown, and TDM initiatives.

43. The Mobility Plan created a vision of desired outcomes, goals, a mode hierarchy, a mode-shift goal, and a series of proposed projects and strategies to improve mobility, not only along the Okeechobee Corridor, but also the entire downtown. The plan estimated needs in 2040 based on jobs and population rates and provided specific proposed projects that could be implemented to manage future growth in the entire downtown. The study specifically included streets within the OBD and was, therefore, relevant data and analysis that supported the OBD Amendment.

44. The Okeechobee Corridor Study looked at the needs, capacity, and characteristics along Okeechobee Boulevard, all of which are related to the OBD.

45. The Downtown Parking and Transportation Demand Management Study provided an audit of the parking in the downtown area. The study supported adoption of the OBD Amendment since the OBD is an area included within the overall parking demand study.

46. The Citywide Bicycle Master Plan included an analysis of bike facilities and bike lanes along and accessing the OBD. It discussed the existing transit network in the Okeechobee corridor, obstacles, and the need for modification to some of the street systems to achieve the Bicycle Master Plan's long-term goals of producing a connected series of trails.

47. The City also relied upon traffic count data for Okeechobee Boulevard produced by the County. In addition to the County's traffic count data, the City relied on an FDOT analysis dated June 7, 2018, which showed existing conditions before and after the Brightline train service began and which revealed that there were no intersections on the relevant portions of Okeechobee Boulevard that were failing. The City Commission also reviewed data concerning trolley ridership and skybike ridership.

48. There were numerous other data and analyses that existed at the time of adoption of the OBD Amendment that supported the City's action in adopting the amendment including:

a. The Economic Impact Analysis of the OBD by Fishkind & Associates, which found that the City's Class-A office market is underserved, that the City's market has a vacancy rate far below average for business districts in Florida or the United States, that a new Class-A office building in the OBD is likely to have a beneficial impact on the City's office market, that the OBD could create 1,000 new high-wage jobs and create additional demand for residential housing, that a new Class-A office building would likely generate \$1 million in tax revenue for the City, and that approval of the OBD would not have a detrimental impact on surrounding Class-A offices.

b. The West Palm Beach Downtown Walkability Analysis specifically stated that certain streets, most notably the state-

owned Okeechobee Boulevard and Quadrille Avenue, are considered "downright hazardous" to pedestrians. Dr. Depew explained that the study was relevant to the OBD Amendment because it explained how the City could get people out of their personal automobiles and move them into an urban environment in different modes of transportation, which is consistent with the TCEA's aim to have more people living and working downtown. The City has adopted the walkability study in the Transportation Element Policy 2.4.4(a) of the City Comp Plan.

c. The FDOT District 4 Road Safety Audit Report was intended to look at the performance of existing or future road intersections, including the intersection of Okeechobee Boulevard and Florida Avenue and Rosemary Avenue, to determine how the area itself could be made safer for pedestrians, provide alternative means of transportation, and reduce conflicts between pedestrians, bicycles, and vehicles in the area.

d. The Transit Choices Report + Sketch Alternatives contained data related to population and employment trends in the downtown area and alternatives for transit in the downtown area. It provided options, alternatives, and recommendations that included a portion of the OBD area. The report contained a map related to the mobility plan and shifting transit services to a new downtown site as a potential for future consideration within

the OBD. It also referenced the Okeechobee Boulevard Corridor Study.

e. The West Palm Beach Economic Development Study by Avalanche evaluated economic and demographic data, assessed the City's business climate, analyzed visitor trends, analyzed real estate trends, and reviewed economic development assets and programs in the City. With regard to infrastructure and real estate, the study found that Class A office space was in high demand, that office vacancy rates have been falling since 2011, and that the potential OBD would allow the City to increase in-demand Class A office product in a prime downtown location.

f. The appraiser report by Aucamp, Dellenback and Whitney concluded that the proposed OBD would not have an adverse effect on property values for the downtown-at-large, no adverse effect on property values for nearby residential buildings, and no adverse effect on property values for nearby office buildings.

g. The Palm Beach Metropolitan Planning Organization (MPO) 2040 Long Range Transportation Plan included growth forecasts regarding population and employment (population growth at 35 percent and employment growth at 56 percent by 2040), which Dr. Depew looked at to confirm that the materials in other reports he reviewed were accurate.

49. The City did not perform a site-specific traffic impact study because it was exempt under the TCEA, and there was a

reduction of development intensity within the Okeechobee Corridor. Dr. Depew opined that the proposed OBD Amendment did not require a traffic impact study.

50. The Petitioners argued that the various surveys, studies, and reports did not expressly refer to the OBD and the OBD Amendment. However, section 163.3177(1)(f) does not require creation of a plan amendment prior to conducting studies and gathering data to support it. In fact, a plan amendment is usually the reaction to surveys, studies, community goals and vision, and other data.

51. The data and analyses relied on by the City were prepared by recognized professionals using professionally accepted methodologies and sources. The City's reaction to the data and analyses was appropriate.

52. The Petitioners did not prove beyond fair debate that the OBD Amendment was not supported by relevant data and analysis or that the City did not react appropriately to the data and analysis.

Intergovernmental Coordination

53. The County, Town, and City entered into the Comprehensive Plan Amendment Coordinated Review Interlocal Agreement, dated October 1, 1993 (Interlocal Agreement), to comply with the intergovernmental coordination requirements of chapter 163.

54. The Interlocal Agreement established a countywide coordinated review process designed to provide cooperation between affected local governments and opportunities to resolve potential disputes within the plan amendment process with the least amount of infringement upon existing processes.

55. The Interlocal Agreement established the IPARC Clearinghouse. Local governments are obligated to provide the Clearinghouse with an executive summary and hearing information.

56. The City timely sent its executive summary to the Clearinghouse, and the Clearinghouse provided notice of the OBD Amendment to the Town and the County.

57. The Interlocal Agreement provided that a written notice of intent to object may be filed by a participating local government and must be filed no later than 15 days before the transmittal hearing. Once filed, a meeting is required between the jurisdictions, a fact-finding panel is established, an opinion letter is issued, and conflict resolution is available as provided under Article X.

58. The Town signed the Interlocal Agreement. It also adopted Policy 1.1.3 in the Intergovernmental Coordination Element (ICE) of its Comprehensive Plan requiring it to cooperate with all other local governments in a voluntary dispute resolution process for the purpose of facilitating intergovernmental coordination.

59. The County also signed the Interlocal Agreement. In the County's ICE, it too recognized the intergovernmental review process established under the Interlocal Agreement.

60. The County and Town did not present any evidence that they filed notices of intent to object to the OBD Amendment 15 days prior to the transmittal hearing as required by the Interlocal Agreement.

61. In addition to the IPARC Notice, the City provided notice to both the County and Lakeview by mail and published required notices in the newspaper.

62. Mr. Greene and Ms. Aponte spoke with John Lingren from the Town about the OBD Amendment. During that conversation, the purpose of the amendment was clarified, development capacity was discussed, and it was explained that the amendment did not increase development capacity on the corridors and did not change the uses. Ms. Aponte and Mr. Hansen also spoke with Mr. Mohyuddin, a principal planner from the County, and clarified that the City was not modifying development capacity and that there was no effect on traffic in the corridor. Mr. Hansen also spoke to Jorge Perez, a senior urban designer with the County, regarding the plan amendments.

63. The FDOT sent a findings letter to the City after reviewing the OBD Amendment. Following receipt of the letter, Mr. Greene communicated with Larry Hymowitz, the FDOT

transportation planner who prepared the letter. After reviewing information provided by Mr. Greene, Mr. Hymowitz testified that he no longer believed that there were adverse impacts to transportation facilities and no longer had concerns about the data and analysis used to support the OBD Amendment.

Mr. Hymowitz stated that he considered this type of communication to be intergovernmental coordination.

64. The City also received letters from the Petitioners and heard public comment made by the Petitioners' representatives at the public hearings before making its final decision to adopt the OBD Amendment.

65. The Petitioners did not prove beyond fair debate that the City did not comply with the intergovernmental coordination requirements of the Comp Plans of the County, Town, or City, or of chapter 163.

De Facto Future Land Use Plan Amendment

66. The Petitioners argued that the OBD Amendment conflicts with the Future Land Use (FLU) Element and is a de facto future land use plan amendment. On its face, the Ordinance amended the City's DMP Element, not the City's Future Land Use Map (FLUM).

67. The only FLU designation for the entire DMP area is the Urban Central Business District. The OBD Amendment did not change the FLUM since the designation remains Urban Central Business District.

68. DMP Element Policy 3.1.3 stated that the City would establish zoning designations, and specifically indicated that Table DMP-1 identified the maximum FAR and maximum height allowed within each zoning subdistrict by right and with incentives.

69. The City's illustrative zoning maps included in the DMP Element were reviewed in the past by the state land planning agency and were accepted as part of the DMP Element, not as a part of the FLU Element or FLUM.

70. The Petitioners' argument is an attempt to challenge the status quo by claiming that the OBD Amendment is part of a change to or in conflict with the FLU Element when no change to the FLUM has occurred. The City's interpretation of its Comp Plan is reasonable.

Ultimate Findings

71. The Petitioners did not prove beyond fair debate that the Ordinance is not in compliance. All other contentions not specifically discussed have been considered and rejected.

72. The City's determination that the Ordinance is in compliance is fairly debatable.

CONCLUSIONS OF LAW

Standing

73. To have standing to challenge or support a comprehensive plan amendment under section 163.3184(1)(a), 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.

74. The Petitioners are affected persons under section 163.3184(1)(a).

Burden and Standard of Proof

75. As the challengers, the Petitioners have the burden of proof.

76. The plan amendment being challenged "shall be determined to be in compliance if the local government's determination of compliance is fairly debatable." See § 163.3184(5)(c)1., Fla. Stat. (2018).

77. The term "fairly debatable" is not defined in chapter 163. However, the Supreme Court of Florida has held that "if reasonable persons could differ as to its propriety," a planning action must be upheld. See Martin Cnty. v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997). 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).

78. The standard of proof to establish a finding of fact is preponderance of the evidence. See § 120.57(1)(j), Fla. Stat. (2018).

79. An affected person challenging a plan amendment must show that the amendment is not "in compliance" as defined in section 163.3184(1)(b). "In compliance" means consistent with the requirements of sections 163.3177, 163.3178, 163.3180, 163.3191, 163.3245, and 163.3248.

80. A compliance determination is not a determination of whether a comprehensive plan amendment is the best approach available to the local government for achieving its purposes. Martin Cnty. Land Co. v. Martin Cnty., Case No. 15-0300GM at ¶ 149 (Fla. DOAH Sept. 1, 2015; Fla. DEO Dec. 30, 2015).

81. "In a compliance determination, the motives of the local government are not relevant." Pacetta, LLC v. Town of Ponce Inlet, Case No. 09-1231GM (Fla. DOAH Mar. 20, 2012; Fla. DEO June 19, 2012).

Internal Consistency

82. 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.

83. The Petitioners did not prove beyond fair debate that the OBD Amendment was inconsistent with any goal, objective, or policy of the City Comp Plan.

Data and Analysis

84. 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 adoption of the . . . plan amendment at issue." The question of whether one methodology used in data collection is better than another cannot be evaluated. See § 163.3177(1)(f)2., Fla. Stat. (2018).

85. The data which may be relied upon in this proceeding is not limited to the data identified or used by the local government. All data available to the local government and in existence at the time of adoption of the plan amendments may be presented. See Zemel v. Lee Cnty., 15 F.A.L.R. 2735 (Dep't of Cmty. Aff. 1993), aff'd, 642 So. 2d 1367 (Fla. 1st DCA 1994).

86. Relevant analyses of data need not have been in existence at the time of adoption of a plan amendment. Data

existing at the time of adoption may be analyzed through the time of the administrative hearing. Id.

87. There is no statutory requirement that a local government delay adoption of amendments to its comprehensive plan based upon pending studies by other agencies or jurisdictions.

88. Data supporting an amendment must be taken from professionally accepted sources. See § 163.3177(1)(f)2., Fla. Stat. (2018). However, local governments are not required to collect original data. Id.

89. The Petitioners did not prove beyond fair debate that the OBD Amendment was not based on relevant and appropriate data and an analysis by the City.

Intergovernmental Coordination

90. Section 163.3184(3)(b)1. through 3. requires intergovernmental coordination among the state, county, and municipal governments. Such coordination includes notice of transmittal of the amendment and the ability of the intergovernmental agencies to make comments. Under the statute, a county's comments are limited to the context of the relationship and the effect of the proposed amendment on the county plan. Similarly, a municipality's comments are limited to the context of the relationship and the effects of the proposed amendment on the municipality plan.

91. Section 163.3177(4) (a) requires coordination of the local comprehensive plan with the plans of adjacent municipalities and the County.

92. The Petitioners did not prove beyond fair debate that the OBD Amendment was adopted by the City without the required intergovernmental coordination.

De Facto Future Land Use Plan Amendment

93. The Petitioners argued that the OBD Amendment conflicts with the FLU Element and is a de facto future land use plan amendment. The only FLU designation for the entire DMP area is the Urban Central Business District. The OBD Amendment did not change the FLUM since the designation remains Urban Central Business District.

94. DMP Element Policy 3.1.3 stated that the City would establish zoning designations. As such, the City's illustrative zoning maps included in the DMP Element were reviewed in the past by the state land planning agency and were accepted as part of the DMP Element, not as a part of the FLU Element or FLUM. See Dibbs v. Hillsborough Cnty., Case No. 12-1850GM (Fla. DOAH Apr. 22, 2013; Fla. DEO Dec. 10, 2013) ("The ALJ correctly noted that the state land planning agency has consistently followed the principle that existing plan provisions that were previously determined to be in compliance and that are not amended are not

subject to review or challenge in a subsequent plan amendment proceeding.").

95. The Petitioners' argument is an attempt to challenge the status quo by claiming that the OBD Amendment is part of a change to or in conflict with the FLU Element when no change to the FLUM has occurred. See Id.

Review of the Land Development Regulations

96. Amendments to a comprehensive plan, even though combined with a rezoning application, must be considered separate and apart from the rezoning request. Martin Cnty. v. Yusem, 690 So. 2d at 1288, 1293-94. The Petitioners' reliance on Payne v. City of Miami, 52 So. 3d 707 (Fla. 3d DCA 2010) is misplaced. Payne indisputably involved a site-specific, private application for a small-scale amendment to the FLUM of Miami's Comprehensive Neighborhood Plan to change the land use of a commercial boatyard and marina from industrial and general commercial to restricted commercial. Id. at 710. Significantly, the majority acknowledged that land use planning and zoning are separate issues, which "generally must be considered separately, even when amendments to both are presented together." Id. at 721-722. The exception was made in Payne because the court concluded that "because both requests were tied together, and the zoning amendment was the driving force and was essential to obtaining

the land use amendment, the zoning amendment cannot be ignored in this case." Id. That is not the case here.

97. The Petitioners' arguments regarding the DMP Urban Regulations that were changed by separate ordinance seemed more directed toward claiming that the regulations were inconsistent with the City Comp Plan, which was not an issue for this "in compliance" proceeding. See § 163.3213, Fla. Stat. (2018).

Summary

98. The City's determination that the Ordinance is in compliance is fairly debatable.

99. The Petitioners did not prove beyond fair debate that the Ordinance is not in compliance.

RECOMMENDATION

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

RECOMMENDED that the Department of Economic Opportunity enter a final order finding the OBD Amendment adopted by the City by Ordinance No. 4783-18 "in compliance," as defined by section 163.3184(1)(b), Florida Statutes (2018).

DONE AND ENTERED this 26th day of December, 2019, in
Tallahassee, Leon County, Florida.



FRANCINE M. FOLKES
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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.