STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM J. SEMMER AND JOANNE E. SEMMER,

Petitioners,

vs. Case No. 20-3273GM

LEE COUNTY, FLORIDA,

Respondent,

and

SOUTHERN COMFORT STORAGE, LLC,

Intervenor.
_____/

RECOMMENDED ORDER

A duly-noticed final hearing was held in this matter via Zoom conference on September 29 and 30, 2020, before Suzanne Van Wyk, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether Lee County Comprehensive Plan Amendment CPA2015-00005, adopted by Ordinance No. 20-07 on June 17, 2020 (the "Plan Amendment"), is "in compliance," as that term is defined in section 163.3184(1)(b), Florida Statutes (2019).[1]

PRELIMINARY STATEMENT

On July 17, 2020, Petitioners William J. Semmer and Joanne E. Semmer ("Petitioners"), filed a Petition with the Division of Administrative Hearings ("Division") challenging the Plan Amendment as: (1) not based on relevant and appropriate data and analysis, in violation of section 163.3177(1)(f); and (2) rendering the Lee County Comprehensive Plan ("the Comprehensive Plan"), internally inconsistent, in violation of section 163.3177(2). On that same day, Southern Comfort Storage, LLC ("Intervenor"), filed an unopposed Motion to Intervene, which was granted by the undersigned on July 29, 2020.

The case was scheduled for final hearing on September 29 and 30, 2020, and commenced as scheduled.

At the final hearing, the parties' Joint Exhibits 1 through 21 were admitted into evidence.

Petitioners testified on their own behalf and offered the testimony of Joseph McHarris, who was accepted as an expert in planning, and Nicholas

[1] Except as otherwise noted, all references to the Florida Statutes are to the 2019 version, which was in effect when the Plan Amendment was adopted.

White. Petitioners' Exhibits 2, 3, 5 through 13, 16, 17, and 19 through 25 were admitted into evidence.

Respondent offered the testimony of Brandon Dunn, who was accepted as an expert in comprehensive planning. Respondent's Exhibits 1 through 6 were admitted into evidence.

Intervenor offered the testimony of Tina Ekblad, who was accepted as an expert in land use planning; Matthew Simmons, who was accepted as an expert in real estate appraisal and property valuation; Ted Treesh, who was accepted as an expert in transportation planning; and David Depew, who was accepted as an expert in land use planning. Intervenor's Exhibits 1 through 8, 14, 15, and 18 were admitted into evidence.

The proceedings were recorded and the two-volume Transcript of the final hearing was filed with the Division on October 23, 2020. The parties timely filed Proposed Recommended Orders, which have been carefully considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties and Standing

1. Petitioner, William J. Semmer, owns and operates seven businesses on San Carlos Island in Lee County, and owns 25 properties on San Carlos Island, including his personal residence, as well as several rental properties and commercial establishments.

2. Petitioner, Joanne E. Semmer, lives and owns her personal residence in San Carlos Island, and owns and operates a business—Ostego Bay Environmental—on San Carlos Island at 1130 Main Street, directly across Main Street from the property subject to the Plan Amendment ("subject property").

3. Both Petitioners submitted oral comments to the County concerning the Plan Amendment at the adoption hearing on the Plan Amendment.

4. Lee County ("the County") is a political subdivision of the State of Florida, with the duty to adopt and amend its Comprehensive Plan in compliance with the Community Planning Act ("the Act"). *See* § 163.3167(1), Fla. Stat.

5. Intervenor, Southern Comfort Storage, LLC, owns property and operates a business within the County, and owns the subject property. Intervenor applied for the Plan Amendment that is the subject of this final hearing.

San Carlos Island

6. The subject property is located on San Carlos Island, a non-barrier island in the unincorporated area of the County between the cities of Fort Myers and Fort Myers Beach. The Matanzas Pass lies to the south, between the island and Ft. Myers Beach. The pass provides access to Estero Bay through a channel with depths between 11 and 14 feet. That portion of the Bay lying north of the island is shallower, with average depths of between four and six feet.

7. The island is approximately one mile long, and is bisected by two main roadways: San Carlos Boulevard, a north/south arterial roadway on the western side of the island that connects via a bridge to Fort Myers Beach; and Main Street, a collector roadway running east/west bisecting the island north and south.

8. Under the existing Comprehensive Plan Future Land Use Map ("FLUM"), San Carlos Island is dominated by Industrial, Urban Community, and Suburban land use designations, generally located as follows: Suburban (residential) on both the eastern and western ends of the island, as well as in the island center north of Main Street; Industrial concentrated in the center of the island, both north and south of Main Street; and Urban Community concentrated in a corridor along San Carlos Boulevard connecting to Fort

Myers Beach. Other large land uses include conservation lands, both uplands and wetlands.

9. Another category—Destination Resort Mixed Use Water Dependent ("DRMUWD")—was added by a plan amendment in 2009, converting 28 acres of Industrial and Suburban to this new use for the Ebtide development, which includes a 450-unit hotel with 75,000 square feet of convention space; 271 multi-family residential units; 10,000 square feet of office; 85,000 square feet of retail, and a marina. This development is approximately one quarter mile from the subject property.

10. San Carlos Island is designated within the Iona-McGregor Planning Community ("the planning community") pursuant to the Comprehensive Plan. According to the Comprehensive Plan, "[t]his community primarily has lands designated as Central Urban, Urban Community, Suburban, and Outlying Suburban …. This community, due to its proximity to the area beaches, will continue to be a popular area for seasonal residents."

11. The island is one of three discernable sub-areas of the planning community. According to the Comprehensive Plan:

> The San Carlos Island area, which is nearly built out today, will continue to develop its infill areas while maintaining its marine oriented nature. Residents of the community will address current planning concerns in a comprehensive review of this area and future amendments to this plan will be made to address these concerns. This area is anticipated to grow substantially from today to 2030.

12. Historically, the economy of the island was driven by the commercial shrimping and fishing industries. Many of the industrial uses on the island were associated with processing seafood, especially packing and freezing seafood for transport beyond the island; warehousing and storage of equipment; and boat repair yards.

13. Advances in technology, including shipboard freezing, have reduced the need for dockside packing houses. In 1950, there were seven packing houses on the island. There are only two packing houses currently in operation on the island, both of which are located south of Main Street, where the boats have access to deep water ports.

14. Increased imports of shrimp from other countries has also contributed to the decline of the shrimping industry on the island.[2] The amount of shrimp harvested from waters near the island peaked in the mid-1990s at over 6,000,000 pounds, but had fallen to slightly more than 2,000,000 pounds by 2015.

15. Petitioner, Joanne Semmer, attempted to contradict the evidence that the local shrimp harvest is in decline because the data introduced does not include anything subsequent to 2015. She maintains that the industry has stabilized since 2015. Ms. Semmer testified that "they're having a bang-up year this year." Ms. Semmer's testimony was based on her discussions with commercial shrimp fleet owners and is entirely hearsay evidence upon which the undersigned cannot rely for finding that the shrimp industry has stabilized.[3]

16. One of the more recent changes in the shrimping industry is the move from 50-foot to 100-foot shrimp boats, which can carry larger amounts of shrimp, thereby reducing the number of trips needed to harvest the catch. Due to the deeper channel, the properties south of Main Street can better accommodate the larger deep-draft shrimp boats used in the modern shrimping industry.

17. In the last 20 years, the significant development and redevelopment on the island has been commercial and recreational in character.

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[2] The ratio of local to foreign-sourced shrimp in the United States had decreased from roughly 1:1 in the late 1970s, to roughly 1:5.8 in 2002.

[3] Furthermore, Ms. Semmer's testimony that the shrimpers are having a "bang-up year" and "one of their best years ever," does not provide numbers of pounds of shrimp to compare with the data introduced by Intervenor.

Redevelopment south of Main Street has been characterized by commercial and mixed-use development, rather than industrial development on the waterfront.

18. Two large recreational marinas have been developed which provide commercial fishing berths and boat rentals. They have supporting restaurants, wet slips, dry storage, and some commercial retail. Generally, the area south of Main Street is in transition from traditional industrial to more commercial and recreational uses.

19. The industrial uses north of Main Street are less intense and conducted on mostly unimproved properties. The uses include open yards for storing equipment, repairing and maintaining equipment and boats, parking and turnaround of large trucks used to transport seafood beyond the island, and areas to offload seafood products and equipment from boats.

Waterfronts Florida Partnership

20. In 1997, the island was designated by the state as one of the first communities in its Waterfronts Florida Partnership ("Waterfronts Florida" or "the partnership") program. A self-created committee, of which Ms. Semmer was a vital member, applied for the Waterfronts Florida designation "to help the community deal with the capacity of shrimping and fishing boats that docked there seasonally, as well as educate residents and visitors about the island's working waterfront."

21. The portion of the island encompassing the Waterfronts Florida Designated Area includes only property south of Main Street, and stretches from its intersection with the San Carlos Boulevard bridge one half-mile along the Matanzas Pass.

22. Through the partnership, the community developed a self-guided working waterfront tour called "A Healthy Bay = Healthy Seafood," which takes participants along a short trail with kiosks that provide information about the bay, the habitat, and the fish that live in it. Although it is self-guided, a volunteer is available on certain days to provide a narrated tour.

Ms. Semmer is the volunteer program manager and frequently guides the tour herself.

23. Ms. Semmer is also the executive director of the Ostego Bay Foundation Marine Science Center, which is integral to the partnership. The center provides a marine science experience through interactive exhibits, aquariums, hands-on tanks, collections and displays, and holds educational camps.

24. One of the projects of the Waterfronts Florida committee was development of a special area management plan (the "special area plan") for the island, which was adopted in 1999.

25. The special area plan included the following vision statement for the community:

> San Carlos Island is a people-oriented community with an important working waterfront that includes vibrant commercial seafood and other marine-based industries and recreational opportunities. These assets contribute to making San Carlos Island an attractive community for its permanent and seasonal residents as well as an interesting area for visiting tourists.

26. The first goal of the special area plan is to "[c]ontinue to support and develop" the island's commercial fishing and passenger vessel industry "while diversifying the economic base" of the island "to enhance recreational and tourism-related opportunities" and support businesses along San Carlos Boulevard and Main Street.

27. Objectives to accomplish that goal include "[d]iversify[ing] the island's economic base by enhancing tourism, retail, and recreation opportunities." The special area plan also refers to the need to possibly revise the water-dependent land use policies "which have been identified as limiting

development options along the west side of Main Street."[4] The special area plan calls for developing language that will "increase flexibility and mix of land use types" allowable on land currently zoned for water-dependent uses, which may include traditional commercial fishing village industry "such as restaurants and mixed use commercial/residential."

The Subject Property

28. The subject property is 7.47 acres located north of, and abutting, Main Street. The property is a combination of eight adjoining lots, most of which are narrow and elongated, with a variety of existing zoning designations—marine industrial, light industrial, commercial, and mobile home.

29. The property was most recently the site of the Compass Rose marina, which, in 2006, was approved, through special exception and a variance, for a 286-dry slip boat storage facility at a maximum of 65 feet in height, 29 wet slips, and an associated boat launch; commercial spaces for member gatherings, a restaurant, ship store, and mini-storage. The marina and attendant uses were subsequently destroyed, except for the storage facility, which is located on the westernmost portion of the subject property.

30. The subject property has access to Estero Bay via a 75-foot man-made canal along its eastern boundary. However, from the canal, vessels must access the Bay via a shallow channel with average depths of four to six feet. Commercial fishing and shrimping vessels require over six feet of depth at mean low tide.

31. Most of the subject property is designated Industrial on the FLUM, with a very small portion in Suburban. According to the Comprehensive Plan, the Industrial designation is "reserved mainly for industrial activities and selective land use mixtures … includ[ing] industrial, manufacturing, research, educational uses, and office complex (if specifically related to

[4] This document refers to Main Street as a roadway running north/south, rather than east/west. West of Main Street coincides with south of Main Street in the parlance of other documents describing Main Street as an east/west corridor.

adjoining industrial uses)[.]" Retail, recreational, and service uses are allowed if they are limited to the sale of products "manufactured or directly related to that manufactured on the premises," and are subject to acreage limitations.

32. Residential uses are not allowed in the Industrial category.

33. The subject property is also located within the San Carlos Island Water-Dependent overlay zone, the objective of which is to "protect marine-oriented land uses [on the island] from incompatible or pre-emptive land uses." New development, and substantial redevelopment, within this overlay north of Main Street, is limited to marine industrial uses and recreational marinas.

Surrounding Land Uses

34. The subject property is surrounded by property in the Industrial category, with the exception of the property to its east. Lying across the 75-foot canal are three "fingers" of densely-developed residential property extending into Estero Bay which are designated Suburban. The developments are mostly mobile homes and manufactured housing, which, in large part, serve the workforce living on the island.

35. The standard density in the Suburban land use category is six dwelling units per acre ("6 du/acre"). The Oak Street residential development lying directly across the canal is developed at a density of 7 du/acre, and is non-conforming. The Canal Point Mobile Home Park just east of Oak Street, encompasses two "fingers," Nancy Lane and Emily Lane. Both "fingers" were developed at non-conforming densities of 9.6 du/acre and 11.6 du/acre, respectively. Continuing east along Main Street, Helen Lane and Oyster Bay are mobile home and manufactured housing communities developed at over 13 du/acre.

36. Another residential development, Sportman's Cove, lies north of the Industrial properties, directly on the Bay, and is developed at 13.1 du/acre.

37. Industrial uses to the west include open storage, closed storage, warehousing, and distribution facilities.

38. South of Main Street is a mix of more intense industrial uses with direct access to the Bay via Matanzas Pass' deep water channels.

39. A portion of the Industrial property directly north of the subject property is owned by Mr. Semmer. He conducts, or leases the property for, a variety of industrial uses. Mr. Semmer's property is adjacent to the canal, and he contracts with some smaller shrimp boats and blue crab fishermen to dock and unload there. The property is often used for storage of equipment used by those industries, as well as an open yard for equipment repair. Mr. Semmer's property was also used as a staging area during reconstruction of the Sanibel Causeway, providing a landing site for marine barges to load and unload large equipment needed for the reconstruction. The property was used to pour and set concrete forms used in the reconstruction process.

40. Access to Mr. Semmer's property from Main Street is via Ostego Drive, a platted street that runs through the eastern portion of the subject property, separating the upland property from that adjacent to the canal. During reconstruction of the Sanibel Causeway, large equipment trucks, and cement trucks accessed his property via this street.

2015 Plan Amendment Application and Concurrent Rezoning

41. In 2015, Intervenor filed separate applications for the Plan Amendment and a concurrent rezoning of the subject property. The Plan Amendment sought to change the land use classification from Industrial and Suburban to Central Urban. In addition to residential uses, the Central Urban classification allows light industrial and commercial uses.

42. The 2015 concurrent rezoning application sought planned development ("PD") rezoning for a project consisting of 113 residential dwelling units (of which 38 would be affordable housing); a marina with 29 wet and 286 dry slips; and 30,000 square feet of commercial space, including a restaurant, 200 public parking spaces, and a civic/recreational

space that would be available to the general public. The PD establishes a maximum structural height of 175 feet.

43. In 2016, an adoption hearing for the Plan Amendment was scheduled before the County Commission, but action on it was deferred at the request of the Intervenor, who then submitted a new plan amendment application seeking to change the FLUM designation of the subject property to DRMUWD, along with text amendments to the DRMUWD classification. That plan amendment, as well as the concurrent rezoning, were denied by the County in 2019. The original Plan Amendment to Central Urban remained pending.

44. On November 5, 2019, Intervenor filed a request for relief with the County pursuant to the Florida Land Use and Environmental Dispute Resolution Act ("FLUEDRA"), section 70.51, Florida Statutes; as well as a request for informal mediation pursuant to section 163.3181(4). These processes culminated in a mediated settlement agreement between the County and Intervenor whereby the County agreed to adopt the instant Plan Amendment, as well as the concurrent rezoning, for a project consisting of 75 residential dwelling units (reduced from the 113); a marina with 286 dry and 29 wet slips; and 30,000 square feet of commercial space, including a restaurant and waterfront civic/recreational space of 20,000 square feet (land area) that would be open to the general public. The maximum height for structures was reduced from 175 feet to 100 feet under the mediated settlement. The mediated settlement agreement also provided for conditions of development approval and property development regulations.

<u>The Plan Amendment</u>

45. The Plan Amendment changes the FLUM designation of the subject property from Industrial and Suburban to Central Urban, a classification which allows residential uses at a standard density range of 4-10 du/acre and

up to 15 du/acre through the County's "bonus density" program for affordable housing. [5]

46. The Central Urban category allows development of residential, commercial, public and quasi-public, and limited light industrial land uses (e.g., wet slips, dry storage, marinas). The Comprehensive Plan encourages mixed-use future development in the Central Urban category.

47. The maximum number of residential units that could be constructed on the subject property at the density of 15 du/acre is 113.

48. The Comprehensive Plan does not govern intensity of non-residential uses. The evidence is insufficient to determine the maximum allowable buildout of the non-residential uses on the subject property.

Challenges to the Plan Amendment

49. Petitioners allege that the Plan Amendment: (1) creates internal inconsistencies with the existing Comprehensive Plan, in contravention of section 163.3177(2); (2) is not "based upon relevant and appropriate data and analysis," as required by section 163.3177(1)(f); and (3) increases density in the Coastal High Hazard Area ("CHHA"), in violation of section 163.3178(8).

Internal Inconsistencies

50. Petitioners allege the Plan Amendment is internally inconsistent with a number of Goals, Objectives, and Policies ("GOPs") of the Comprehensive Plan. The specific allegations can be grouped, generally, as arguments that (1) the Plan Amendment is incompatible with, or will have negative impacts on, surrounding uses; and (2) the Plan Amendment will negatively impact hurricane evacuation by increasing density in the CHHA.

Compatibility

51. Petitioners allege the maximum density and intensity of development allowed under the Plan Amendment is incompatible with surrounding industrial uses, specifically Mr. Semmer's industrial property directly

[5] Density may be increased to 20 du/acre utilizing an existing transfer of development rights ordinance which does not apply to San Carlos Island.

adjacent to the north, and the residential uses to the west; and will be destructive to the character of the island.

52. With regard to compatibility, Petitioners allege the Plan Amendment is inconsistent with the following specific GOPs:

> FLUE Objective 2.2: Development Timing. Direct growth to those portions of the future urban areas where adequate public facilities exist or are assured and where compact and contiguous development patterns can be created.
> FLUE Policy 2.2.1.: Rezonings and Development of Regional Impact proposals will be evaluated as to the availability and proximity of the road network; central sewer and water lines; community facilities and services such as schools, EMS, fire and police protection, and other public facilities; *compatibility with surrounding land uses*; and any other relevant facts affecting the public health, safety, and welfare.
>
> FLUE Objective 2.6: Redevelopment. Future redevelopment activities will be directed in appropriate areas, consistent with sound planning principles, the goals, objectives, and policies contained within this plan, and the desired community character.
>
> FLUE Policy 5.1.5: Protect existing and future residential areas from any encroachment of uses that are potentially destructive to the character and integrity of the residential environment. Requests for conventional rezonings will be denied in the event that the buffers provided in Chapter 10 of the Land Development Code are not adequate to address potentially incompatible uses in a satisfactory manner. If such uses are proposed in the form of a planned development or special exception and generally applicable development regulations are deemed to be inadequate, conditions will be attached to minimize or eliminate the potential impacts or, where no adequate conditions can be devised, the application will be denied altogether.

FLUE Policy 6.1.1: All applications for commercial development will be reviewed and evaluated as to:

a. Traffic and access impacts (rezonings and development orders);
b. Landscaping and detailed site planning (development orders);

c. Screening and buffering (planned development rezoning and development orders;
d. Availability and adequacy of services and facilities (rezoning and development orders);

e. Impact on adjacent land uses and surrounding neighborhoods (rezoning);

f. Proximity to other similar centers (rezoning);

g. Environmental considerations (rezoning and development orders).

FLUE Policy 6.1.3: Commercial developments requiring rezoning and meeting Development of County Impact (DCI) thresholds must be developed as commercial planned developments designed to arrange land uses in an integrated and cohesive unit in order to:

a. Provide visual harmony and screening;

b. Reduce dependence on the automobile;

c. Promote pedestrian movement within the development;

d. Utilize joint parking, access and loading facilities;

e. Avoid negative impacts on surrounding land uses and traffic circulation;

f. Protect natural resources; and,

g. Provide necessary services and facilities where they are inadequate to serve the proposed use.

FLUE Policy 6.1.4: Commercial development will be approved only when compatible with adjacent existing and proposed land uses and with existing and programmed public services and facilities.

FLUE Policy 6.1.6: The land development regulations will require that commercial development provide adequate and appropriate landscaping, open space, and buffering. Such development is encouraged to be architecturally designed so as to enhance the appearance of structures and parking areas and blend with the character of existing or planned surrounding land uses.

FLUE Goal 32: San Carlos Island [Water-Dependent Overlay]. All development approvals on San Carlos Island must be consistent with the following objective and policy in addition to other provisions of this plan.

Objective 32.2: To manage growth, development, and redevelopment on San Carlos Island. To maintain and enhance the area's quality of life and public and private infrastructure.

Housing Element ("HE") Policy 135.9.5: New development adjacent to areas of established residential neighborhoods must be compatible with or improve the area's existing character.

HE Policy 135.9.6: Lee County will administer the planning, zoning, and development review process in such a manner that proposed land uses acceptably minimize adverse drainage, environmental, spatial, traffic, noise, and glare impacts, as specified in county development regulations, upon adjacent residential properties, while maximizing aesthetic qualities.

53. The Plan Amendment is not a rezoning or a development order. It does not, in and of itself, approve any specific development on the subject property. It approves the property for a mix of residential, commercial, and light industrial uses, and provides a maximum density for the residential use.

54. FLUE Policies 2.2.1, 6.1.1, 6.1.3, and 6.1.4, do not apply to the Plan Amendment because it is not an application for specific commercial development, a rezoning, or a development order.[6]

55. The Plan Amendment cannot be inconsistent with Policy 6.1.6 because the policy merely provides the requirements for the land development regulations. It does not impose any requirement on plan amendments.

56. The bases for Petitioners' argument that the Plan Amendment creates internal inconsistencies regarding compatibility is limited to FLUE Goal 32; FLUE Objectives 2.2, 2.6, 32.1,[7] and 32.2; FLUE Policies 5.1.5 and 32.1.1;[8] and HE Policies 135.9.5 and 135.9.6.

57. The Comprehensive Plan does not define "compatibility." The Act defines "compatibility" as "a condition in which land uses or conditions can coexist in relative proximity to each other in a stable fashion over time such that no use or condition is unduly negatively impacted directly or indirectly by another use or condition." § 163.3164(9), Fla. Stat.

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[6] The Plan Amendment was considered concurrently with a PD rezoning which includes a more detailed development plan. To the extent that Petitioners allege the rezoning does not meet the requirements of policies 2.2.1, 6.1.1, 6.1.3, and 6.1.4, Petitioners' remedy is a challenge to those development orders, pursuant to section 163.3215. ("Subsections (3) and (4) provide the exclusive methods for an aggrieved or adversely affected party to appeal and challenge the consistency of a development order with a comprehensive plan.").

[7] Objective 32.1 was not cited in Petitioners' Amended Petition for Formal Administrative Hearing as a provision with which the Plan Amendment is alleged to be internally inconsistent. However, the issue was tried by consent as neither Respondent nor Intervenor objected to Petitioners' evidence on this issue, and all parties introduced evidence related to this allegation.

[8] Policy 32.1.1 was not cited in Petitioners' Amended Petition for Formal Administrative Hearing as a provision with which the Plan Amendment is alleged to be internally inconsistent. However, the issue was tried by consent as neither Respondent nor Intervenor objected to Petitioners' evidence on this issue, and all parties introduced evidence related to this allegation.

58. Petitioners contend that the Plan Amendment is incompatible with the surrounding uses because it introduces high density residential, which could be built to a maximum height of 100 feet; and commercial and recreational uses, into an area of industrial uses, including open storage, boat and equipment repairs, and unloading and packing seafood.

59. Petitioners' expert planning witness, Joseph McHarris, opined that the anticipated residential development is exactly the type of pre-emptive development anticipated and discouraged by the San Carlos Island Water-Dependent Overlay Zone. Mr. McHarris testified that "dropping in central urban," the highest density and intensity use category, "right on top of industrial and right next to a suburban neighborhood is not good planning." Mr. McHarris opined that residents of the "high-end condominiums" proposed for the property will not enjoy the view overlooking industrial outdoor storage yards, unloading cargo vessels, or the sounds and smells that are attendant thereto. The residential use will pre-empt any expansion or redevelopment of the existing industrial for more intense industrial uses. In fact, Mr. McHarris testified that the uses are so incompatible, that he would expect the new residents to push for ceasing the existing operations on those properties. Mr. McHarris did not rely upon any empirical evidence for his conclusion that the introduction of residential uses would be detrimental to the existing low-intensity industrial uses to the north and west of the subject property. His testimony was grounded in what "he would expect" to happen.

60. Intervenor's planning expert, Dr. David Depew, opined that in both his professional and personal experience, he has observed new waterfront residential and mixed use to coexist nicely with waterfront industrial and commercial. He cited Florida communities such as Apalachicola, Destin, and Cedar Key, generally, as examples of areas where newer residences and condominiums have developed in proximity to historic waterfront industrial uses without unduly negative effects on the historic uses. Dr. Depew made general references to "professional and personal" experiences, but gave no

more detailed evidence regarding the coexistence of residential and industrial in traditional industrial waterfronts.

61. The County's expert planning witness, Brandon Dunn, is the principal planner for the County. He has worked in the County Department of Community Development for at least 13 years, 11 of those in the planning section. Mr. Dunn is extremely familiar with, and has extensive experience applying and interpreting, the Comprehensive Plan.

62. Mr. Dunn testified that the Plan Amendment represents a transitional use between the existing traditional industrial uses north and west of the subject property and the suburban use east of the subject property. Developing the subject property for a mix of uses, including residential, commercial, and water-dependent light industrial (i.e., marina, wet-slips, dry storage), provides a "step-down" from the single use industrial properties to the north and west, to the traditional suburban residential development to the east. Mr. Dunn's testimony is accepted as reliable and persuasive.

63. There is insufficient evidence to support a finding that the Plan Amendment introduces uses which are incompatible with the surrounding uses, as that term is defined in section 163.3164(9).

64. The Plan Amendment is not inconsistent with Policy 5.1.5 because it does not allow the encroachment of uses into residential areas which are destructive to the integrity and character of those areas. The entire island is only one mile in length, and residential and industrial, as well as commercial marine uses, exist throughout the island in relative proximity to each other. Petitioners introduced no evidence from which the undersigned can conclude that juxtaposition has been adverse to the residential development. New residential development at Ebtide is located in proximity to low-intensity industrial uses north of Main Street and no evidence was introduced to suggest that the new residential development has pre-empted the continuation or expansion of those established industrial uses.

65. FLUE Objective 2.2 requires new growth to be directed to urban areas "where adequate public facilities exist or are assured and where compact and contiguous development patterns can be created."

66. Adequate public facilities (i.e., sewer, water, fire protection, emergency services, law enforcement, and schools) are sufficient to address the impacts of the Plan Amendment at maximum allowable density of use. One roadway segment impacted by the Plan Amendment is currently operating at Level of Service F, but is designated as "constrained," and the Plan Amendment will not cause the "volume to capacity ratio" established in the Comprehensive Plan to be exceeded.

67. In Mr. McHarris's opinion, the Plan Amendment is inconsistent with Objective 2.2 because the uses allowed in Central Urban are not contiguous with the uses of any surrounding property. However, the properties east of the subject property, in the Suburban land use category, are developed for residential, a use which is allowed in Central Urban. Residential uses on the subject property will be contiguous with the adjacent Suburban development. Further, the Industrial category allows limited retail, recreational, and service uses; therefore, the change to the Central Urban designation, which allows commercial and light industrial development, does not introduce any radically-different uses than that allowed on the subject property, except for residential, under its current designation.

68. HE Policy 135.9.5 requires that new development "adjacent to established residential neighborhoods" must be "compatible with or improve the area's character." The Plan Amendment is not inconsistent with this policy based on the findings above regarding compatibility of the Plan Amendment with surrounding residential uses.

69. HE Policy 135.9.6 requires the County to "administer the planning, zoning and development review process" to ensure that proposed land uses "acceptably minimize adverse … traffic, noise, and glare impacts, *as specified in county development regulations*, upon adjacent residential properties[.]"

Petitioners argue that this policy applies to the Plan Amendment, and that placement of residential uses adjacent to existing industrial uses will expose the residential uses to traffic, noise, and other adverse impacts, which cannot be "acceptably minimized." Mr. McHarris testified that the unloading and transportation of seafood, as well as repair of boat and other equipment, with their attendant noises and smells, will be a nuisance to the residential uses allowed by the Plan Amendment, thus violating the requirement to minimize those effects on the residential properties.

70. Petitioners did not establish that this policy applies during the plan amendment phase. While the policy includes the "planning process," in addition to the zoning and development review process, the policy specifically refers to minimizing adverse impacts "as specified in the county land development regulations." The land development regulations, rather than the Comprehensive Plan, contain the standards for setbacks, screening, buffers, and noise levels, in order to "acceptably minimize" those impacts to adjoining residential properties. The rezoning and site plan review of the development proposed to implement the Plan Amendment, rather than the Plan Amendment review process, are the appropriate processes in which to apply land development regulations for minimization of adverse impacts.

71. Mr. McHarris opined that the Plan Amendment is contrary to Objective 2.6 because it is contrary to the desired "community character," which he described as a "working waterfront."

72. Working waterfront is not a term that is used or defined in the Comprehensive Plan. To the extent that the reference is to the Waterfronts Florida designation in partnership with the state, the designation is strictly confined to that area south of Main Street.

73. The desired community character is best reflected in the vision statement in the Comprehensive Plan for the Iona-McGregor Planning Community, of which the island is a designated sub-area. The Comprehensive Plan states, "The San Carlos Island area, which is nearly

built out today, will continue to develop its infill areas while maintaining its marine-oriented nature." The Comprehensive Plan provides that the overall planning community, given its proximity to the area beaches, "will continue to be a popular area for seasonal residents," and that the entire planning community, is "anticipated to grow substantially from today through 2030." Some of that growth was anticipated to be residential, as the planning community projected 17 acres of Central Urban for residential development through the year 2030. Plenty of acreage remains for residential development in the Central Urban category.

74. The Plan defines infill as "the use of vacant land within a predominately developed area for further construction or development. These lands already have public services available but may require improvements to meet the current development standards." The Plan Amendment is infill redevelopment of a former marina site, now utilized only for storage, where all public services are available.

75. The community character is one of transition from historic industrial marine uses to waterfront commercial and mixed-use developments. The Plan Amendment allowing residential development is not inconsistent with that transitioning character.

76. The Plan Amendment is not contrary to Objective 2.6 because it is infill development that is not inconsistent with the community character.

77. Next, Petitioners allege the Plan Amendment is inconsistent with Goal 32, Objectives 32.1 and 32.2, and Policy 32.1.1, which relate to the San Carlos Island Water-Dependent Overlay Zone.

78. Goal 32 provides that "[a]ll development approvals on San Carlos Island must be consistent with the following objective and policy[.]"

79. Objective 32.1 provides that all development must be consistent with a series of policies "[t]o protect marine-oriented land uses" on the island "from incompatible or pre-emptive land uses."

80. Policy 32.1.1 provides:

> New development and substantial redevelopment within the Industrial … land use categor[y] … will only be permitted in accordance with the listed criteria.
>
> * * *
>
> 2. North of Main Street – Within the water-dependent overlay zone which is defined as land within 150 feet of the shoreline: water-dependent marine industrial uses and recreational marinas.
>
> - Landward of the overlay zone (150-foot line): marine-industrial uses, in addition to commercial or marine industrial uses which support the major industrial activities and recreational marinas.

81. That portion of the subject property lying 150 feet landward of the canal is in the overlay zone.

82. First, it must be noted that Goal 32 and its implementing objectives and policies apply to permitting of new development and redevelopment. Goal 32 sets requirements for "development approvals"; Objective 32.1 applies to "development"; and Policy 32.1.1 speaks to "permit[ing] new development and redevelopment." Further, Policy 32.1.1 provides that the water dependent overlay zones "will be included in the Lee County zoning regulations[.]"

83. The Plan Amendment is not an application for development permit. Enforcement of the water-dependent overlay zone restrictions will occur at the development order stage.[9]

[9] Again, to the extent Petitioners contend the approved PD rezoning of subject property is inconsistent with these plan provisions, those issues are not properly before the undersigned in this proceeding. *See* § 163.3215, Fla. Stat. ("Subsections (3) and (4) provide the exclusive methods for an aggrieved or adversely affected party to appeal and challenge the consistency of a development order with a comprehensive plan.").

84. Furthermore, Policy 32.1.1. applies to development and redevelopment "within the Industrial land use category." The Plan Amendment changes the designation of the subject property from Industrial and Suburban to Central Urban. Thus, it is at least arguable that the policy does not apply to the Plan Amendment.

85. Even if these Comprehensive Plan provisions apply to the Plan Amendment, the evidence does not demonstrate that the Plan Amendment is inconsistent with them. The amendment to the Central Urban land use category will not exclude either "light industrial," such as water-dependent marine industrial uses, or a recreational marina on the subject property.

86. At first blush, it appears that Policy 32.1.1 would prohibit residential development landward of the overlay zone on the subject property. However, the Comprehensive Plan provides that these regulations will be incorporated into the zoning regulations and "may be the subject of deviation requests during the planned development process."

Hurricane Shelter and Evacuation

87. Petitioners allege the Plan Amendment is internally inconsistent with the hurricane evacuation and shelter provisions of Community Facilities and Services Element ("CFSE") Goal 73, Objective 73.1, and Policies 73.1.1 and 73.1.2.

88. CFSE Goal 73 is a general goal for the County to provide adequate evacuation and sheltering safeguards for major storm events. Objective 73.1 directs the County to "[w]ork towards attaining" out-of-county evacuation times consistent with the Statewide Regional Evacuation Study. Notably, the objective specifies the ways in which the County will "work toward attaining" those evacuation time—by increasing shelter availability, improving evacuation routes, and increasing public awareness. The objective does not require the County to either prohibit or limit residential density to achieve that end.

89. CFSE Policy 73.1.1 requires the County to do periodic updates of its emergency management plan and the long-range transportation plan, in cooperation with the Metropolitan Planning Organization, and to identify critical evacuation routes. Policy 73.1.2 addresses replacement bridges on evacuation routes.

90. None of these provisions are implicated by or address the Plan Amendment at issue.

91. Petitioners did not prove by a preponderance of the evidence that the Plan Amendment is internally inconsistent with FLUE Goal 32; FLUE Objectives 2.2, 2.6, 32.1, and 32.2; FLUE Policies 5.1.5 and 32.1.1; HE Policies 135.9.5 and 135.9.6; and CFSE Goal 73, Objective 73.1, and Policies 73.1.1 and 73.1.2.

Data and Analysis

92. Petitioners allege the Plan Amendment does not appropriately react to data available to the County at the time the Plan Amendment was adopted, namely historical data constituting the community vision for the island.

93. Ms. Semmer testified that the Plan Amendment is not an appropriate reaction to the San Carlos Island Community Redevelopment Area ("CRA") Plan, which she testified was "the outcome of a long history of community working together to plan for its future." When asked to identify specific provisions of the CRA plan to which the Plan Amendment is not an appropriate reaction, Ms. Semmer identified the fact that the plan recognized the existence of 917 residential units. She testified that "we felt that we were built out at the time, and we were happy with that … And this project, adding another 75 units, it's going to be difficult to accommodate the additional traffic and the people."

94. The CRA plan was adopted in May 1991 and provided the background, findings, and data to support the designation of the entire island as a CRA, pursuant to section 163.358. The CRA Plan makes findings that blighted conditions exist on the island which justify designation as a CRA. The CRA

Plan defines the characteristics of the redevelopment area, provides an infrastructure needs assessment, and establishes goals for the redevelopment area, as well as specific subareas.

95. The CRA Plan actually notes the existence of 995 dwelling units on the island, not 917, according to the 1980 census. The CRA Plan does not contain any prohibition on increasing the number of dwelling units on the island, or reflect an intent to prohibit new residential development.[10]

96. On the contrary, the CRA Plan contains data which is supportive of the Plan Amendment. For example, one of the findings of blight conditions is "faulty lot layout in relation to size, adequacy, accessibility, or usefulness." The CRA Plan finds that many lots "do not comply with minimum lot size requirements" and "would have significant difficulty being developed under current regulations." The Plan Amendment combines eight lots, redevelopment of which is constrained by their size and configuration (narrow, elongated lots) with zoning designations of marine industrial, light industrial, commercial, and mobile home. Under the Plan Amendment, the lots are aggregated for a single development.

97. The CRA Plan identifies the area north of Main Street and east of San Carlos Boulevard (where the subject property is located) as "a mixture of single-family, mobile home parks, marinas, commercial retail and service clubs." *San Carlos Island CRA Plan*, p. 23. The CRA Plan does not identify this mix of uses as incompatible or undesirable, nor does it express an intent to discontinue mixed uses in that area. The Plan Amendment proposes a land

[10] In contrast, the plan reflects the community's staunch opposition to development of a parking garage on the island: "It is basic that [the island] neither become a parking lot for Fort Myers Beach (Estero Island) nor for Lee County. This would preclude construction of a parking garage on [the island] or additional surface parking for benefit of other areas of Lee County … or which would be utilized as temporary parking with the people parking their vehicles then being transported to another area by any means." San Carlos Island CRA Plan, p. 11. "The residents and property owners of San Carlos Island are united in their opposition to construction of a parking garage, unless it can be shown that such garage is of benefit to those residents and owners and is not just part of a plan to permit development in some other area of Lee County." *Id*. at p. 26.

use category that allows a mix of residential, commercial, marina, and light industrial, underscoring the consistency of the Plan Amendment with the historic development pattern.

98. The CRA Plan further describes more particularly the uses in the area of the subject property as "an area of light industrial development consisting of rental storage area, a service club, a fish house, and a large marina." *Id.* at 24. The Plan Amendment retains this essential mix of uses and allows these uses, along with residential, to be developed on the subject property.

99. Petitioners identified a report from the San Carlos Island Community Design Workshop, held February 21 and 22, 1992, as an example of data to which the Plan Amendment does not appropriately react. The workshop was conducted solely to determine "the best uses for a piece of County-owned property," 5.6-acres in size, fronting on the Matanzas Pass. The report, which is entirely hearsay, notes that the community participants "[d]efinitely [did] not want[] high rises or major public attractions, Disney-style." The report has no relevance to the Plan Amendment, which is not part of the property being considered for redevelopment during the workshop.

100. Next, Petitioners allege the Plan Amendment is not an appropriate reaction to the data and analysis reflected in the documents designating San Carlos Island within the Waterfronts Florida partnership. Ms. Semmer testified that the Plan Amendment is inconsistent with the Community Vision contained in that document, to wit:

> San Carlos Island is a people-oriented community with an important working waterfront that includes vibrant commercial seafood and other marine-based industries and recreational opportunities. These assets contribute in making San Carlos Island an attractive community for its permanent and seasonal residents as well as an interesting area for visiting tourists.

101. The designated "working waterfront" under the Waterfronts Florida partnership is located entirely south of Main Street. Thus, the Plan

Amendment, affecting property north of Main Street—outside of the designated area—cannot be inconsistent with the vision expressed therein. Ms. Semmer's contention that the Plan Amendment will convert property from industrial "working waterfront" use, contrary to the Waterfronts Florida document, is not credible.

102. Likewise, the San Carlos Island Special Area Management Plan, adopted in 1999 to implement the Waterfronts Florida designation, applies mainly to the one-half mile long area designated under the program.

103. Finally, Ms. Semmer introduced a 1978 resolution of the Board of County Commissioners stating, "The Board hereby establishes a policy of granting no additional multi-family zoning on Estero Island or San Carlos Island." Ms. Semmer testified that this resolution recognizes that the island was "built out, that we could not handle any additional density[.]" Thus, Ms. Semmer argues that the Plan Amendment is not an appropriate reaction to that data because it allows new residential uses on the subject property.

104. The resolution addresses rezonings, and the Plan Amendment is not a rezoning. Rezoning of the property has been undertaken and is not an issue cognizable in this challenge to the Plan Amendment.[11]

105. Petitioners did not prove that the Plan Amendment fails to react appropriately to data available to the County at the time it was adopted. The Plan Amendment is based on, and appropriately reacts to, the development trends on the island from intense industrial fishing-related uses to more recreational and commercial uses, including more mixed use uses both north and south of Main Street. The Plan Amendment is supported by data on the availability of public utilities to service the property—a condition necessary for infill development. The Plan Amendment will allow for a transition

[11] Moreover, Petitioners did not prove that this resolution is still valid.

between the industrial uses to the north and west of the subject property and the suburban uses to the east.

State Requirements for Development in the CHHA

106. Finally, Petitioners allege that the Plan Amendment increases residential density in the CHHA and does not meet the state requirements for such development set forth in section 163.3178(8).

107. Section 163.3178 defines the CHHA as the "area below the elevation of the category 1 storm surge line as established by a Sea, Lake, and Overland Surges for Hurricanes (SLOSH) computerized storm surge model." § 163.3178(2)(h), Fla. Stat. The statute requires each local government comprehensive plan to designate the CHHA within its jurisdiction and "the criteria for mitigation for a comprehensive plan amendment in a [CHHA] as defined in subsection (8)." *Id.*

108. Section 163.3178(8) reads, as follows:

> (8)(a) A proposed comprehensive plan amendment shall be found in compliance with state coastal high-hazard provisions if:
>
> 1. The adopted level of service for out-of-county hurricane evacuation is maintained for a category 5 storm event as measured on the Saffir-Simpson scale; or
>
> 2. A 12-hour evacuation time to shelter is maintained for a category 5 storm event as measured on the Saffir-Simpson scale and shelter space reasonably expected to accommodate the residents of the development contemplated by a proposed comprehensive plan amendment is available; or
>
> 3. Appropriate mitigation is provided that will satisfy subparagraph 1. or subparagraph 2. Appropriate mitigation shall include, without limitation, payment of money, contribution of land, and construction of hurricane shelters and transportation facilities. Required mitigation may

> not exceed the amount required for a developer to accommodate impacts reasonably attributable to development. A local government and a developer shall enter into a binding agreement to memorialize the mitigation plan.

109. It is undisputed that the subject property, and indeed most of the island, is located in the CHHA.

110. The Plan Amendment allows residential density on the subject property, thereby increasing residential density in the CHHA.[12]

111. The County has adopted a 16-hour out-of-county evacuation time for a category 5 storm event (Level E storm surge).[13] Based on the 2017 Update to the Southwest Florida Regional Evacuation Study ("Regional Evacuation Study"), the base scenario (i.e., the analysis used for growth management purposes) out-of-county clearance time for Lee County is actually 84.5 hours for a category 5 storm.[14]

112. Because the County's adopted level of service ("LOS") for out-of-county evacuation in a Level 5 hurricane has not been attained, it certainly will not be maintained under a scenario which includes development allowed by the Plan Amendment.

113. The Plan Amendment does not meet the requirements of section 163.3178(8)(a)1. to be deemed compliant with state CHHA standards.

114. The Regional Evacuation Study projects Lee County's 2020 evacuation time-to-shelter for a Category 5 storm (Level E storm surge) as 96 hours, an increase of 11.5 hours from the 2017 projection.

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[12] No evidence was introduced to support a finding that the County has made a commensurate reduction in residential density in the CHHA.

[13] The County had initially adopted an 18-hour out-of-county hurricane evacuation time; however, in 2006, the Florida Legislature set a default 16-hour evacuation standard for certain local governments. *See* ch. 2006-68, § 2, Laws of Fla.

[14] That number has increased to 96 hours for 2020.

115. Because the County has not attained the state-mandated 12-hour evacuation time-to-shelter, the County cannot maintain that metric under the Plan Amendment.[15]

116. Dr. Depew testified that, based on his research, a Category 5 hurricane shelter is located approximately 28 miles from the subject property, which is an approximate 44-minute drive. In his opinion, then, the Plan Amendment "maintains the 12-hour evacuation time to shelter" as required by section 163.3178(8)(a)2.

117. Dr. Depew's testimony was uncontradicted, but is not credible. Evacuation time-to-shelter is defined in the Regional Evacuation Study as "the time necessary to safely evacuate vulnerable residents and visitors to a 'point of safety' with in the county based on a specific hazard (i.e., Category 5 hurricane), behavioral assumptions and evacuation scenario." Clearance time-to-shelter is "[c]alculated from the point in time when the evacuation order is given to the point in time when the last vehicle reaches a 'point of safety' within the county." Clearance time does mean, as suggested by Dr. Depew, merely the drive time between a particular residential development and an existing qualifying shelter on a normal traffic day. That testimony is inadequate for the undersigned to find that the Plan Amendment meets the state CHHA requirement under section 163.3178(8)(a)2.

118. Assuming, arguendo, that Dr. Depew's testimony was credible and reliable, it would not be sufficient alone to establish that the Plan Amendment meets the standards of paragraph 2. The application of section 163.3178(8)(a)2. does not end with an analysis of evacuation time-to-shelter. The statute also requires that shelter space "reasonably expected to

[15] The County has not adopted an LOS for "evacuation time-to-shelter"; instead, the County has adopted an LOS for shelter capacity: "in-county and on-site shelter for 10% of the population at risk in the Hurricane Vulnerability Zone under a Category 5 storm hazard scenario."

accommodate the residents of the development contemplated by" the Plan Amendment be "available."

119. The Regional Evacuation Study analyzes public shelter capacity and projects public shelter demand for each county in the region. For Lee County, the capacity of all shelters is 42,659 (for both the 2017 and 2020 base scenarios). The projected 2020 public shelter demand for a category 5 hurricane (Level E storm surge risk) is 47,018. That is an increase of 13,799 from the 2017 projection of 33,219.

120. The data does not support a finding that the County has available shelter space to accommodate any new residents, yet alone those evacuating from development at the density allowed by the Plan Amendment.

121. Dr. Depew attempted to undermine the reliability of the shelter demand projections, testifying that "there's a very high error margin in these projections. In some instances, it's as high as 50 percent from the anticipated demand[.]"[16] Dr. Depew did not identify any documentation of the margin-of-error in the study, or offer any more reliable data from which the County (or the undersigned) could pull more accurate projections. On cross-examination, when asked to look at a specific operational demand projection, Dr. Depew was unable to identify whether it was "one of the ones with the 50 percent error margin."

122. Dr. Depew also criticized use of the base scenario because it "anticipates a hundred percent evacuation," while the operational scenario anticipates something "closer to reality." This attempt to persuade the undersigned that the base scenario shelter demand numbers are either unreliable, or inappropriate to use for purposes of evaluating the Plan Amendment, was likewise unpersuasive. The Evacuation Study Report defines the public shelter demand scenarios as follows:

[16] The Regional Evacuation Study was introduced by Intervenor, for whom Dr. Depew was testifying.

- The Base Scenarios – *which are used for planning and growth management purposes* assume that 100% of the population-at-risk evacuates plus a (smaller) percentage of non-vulnerable population (shadow evacuation).

- The Operational Scenarios used in operations use the planning assumptions determined by the behavioral analysis which are assumed to be a more realistic set of assumptions. Although they do not reflect 100% evacuation of vulnerable residents, there is a significant percentage of shadow evacuation especially in major storm events.

According to the study, the base scenarios are specifically designed for use in planning and growth management decisions, such as the one made by the County when it adopted this Plan Amendment.

123. The Plan Amendment does not meet state CHHA standards by way of section 163.3178(8)(a)2.

124. Finally, the statute provides that a plan amendment may be deemed to meet state CHHA standards via mitigation. The developer may mitigate hurricane evacuation impacts of development in the CHHA by payment of money, contribution of land, or construction of hurricane shelters or transportation facilities.

125. Intervenor has committed, through the mediated settlement agreement, to mitigation in the form of either construction of an on-site shelter to withstand category 5 hurricane winds and storm surge, or a fee-in-lieu thereof pursuant to the County's requirements. The settlement agreement contains detailed specifications for shelter construction should the County choose that option. The settlement also requires the developer to submit a post-storm recovery plan for review and approval by Lee County Emergency Management.

126. The settlement provides that "[p]rior to any redevelopment of the site … an agreement must be executed between the county and the property

owners" to require the mitigation. Petitioners argue that this commitment is not sufficient to meet the statutory mitigation requirements because the developer has not yet executed a written mitigation agreement with the County to provide any specific mitigation construction or payment. They criticize the process for "put[ting] off the mitigation plan until redevelopment of the site."

127. The statute requires that the "local government and a developer shall enter into a binding agreement to memorialize the mitigation plan," but does not address the timing of the binding agreement relative to the adoption of the Plan Amendment.

128. The Comprehensive Plan, at CME Policy 101.1.4, contains provisions very similar to section 163.3178(8) for plan amendments that increase density in the CHHA. With regard to mitigation, Policy 101.1.4 requires the applicant to "enter into a development agreement to memorialize the mitigation plan prior to adoption of the plan amendment."

129. Petitioners have not challenged the Plan Amendment as inconsistent with Policy 101.1.4, but rather with the statutory provision. In contrast to the policy, the plain language of the statute does not require the mitigation agreement to be executed prior to adoption of the Plan Amendment.

130. Finally, section 163.3178(8) allows for "[a]ppropriate mitigation [] provided that will satisfy subparagraph 1. or subparagraph 2." By referencing the subparagraphs requiring maintenance of out-of-county evacuation time and 12-hour evacuation time to shelter, the statute requires mitigation to the extent necessary to meet, in this case, the 16-hour out-of-county evacuation clearance time or the 12-hour time-to-shelter standard.

131. However, the statute also limits the developer's mitigation to "the amount required for a developer to accommodate impacts reasonably attributable to development." The statute does not require the developer to build shelters, make transportation improvements, contribute land, or make payments to reduce the county's existing deficit to achieve out-of-county

evacuation clearance time or address the County's overall shelter space deficit. The statute clearly limits the developer's contribution to that required to address the impacts "reasonably attributable to the [specific] development."

132. Intervenor argues that providing the mitigation to offset hurricane evacuation or sheltering impacts associated with the particular development is sufficient to meet the statutory requirement. However, to allow a developer to construct residential density in the CHHA and mitigate only the hurricane evacuation or time-to-shelter impacts associated with that particular development, when the adopted out-of-county hurricane evacuation clearance time has not been achieved, is contrary to the statutory requirement. The same is true for allowing shelter construction to mitigate only the impacts of the particular development when the adopted time-to-shelter has not been achieved or a shelter deficit exists.

133. If the undersigned were to accept the County's and Intervenor's proffered interpretation of subparagraph 3., that would render meaningless the first sentence, which references to subparagraphs 1. and 2. and requires the mitigation to "satisfy" subparagraphs 1. and 2. Those subparagraphs directly address "maintaining" the adopted out-of-county and time-to-shelter clearance times. Under the proffered reading of section 163.3178(8)(a)3., any developer could satisfy the state requirements for CHHA construction by mitigating the impacts of the specific development on a local government's hurricane evacuation clearance time regardless of whether the adopted out-of-county clearance time is met. That interpretation is unworkable and is rejected.

134. Alternatively, Intervenor maintains that the Plan Amendment meets the state requirements for increased density in the CHHA under section 163.3178(8)(a)3. Because: (1) the Comprehensive Plan anticipates additional residential development in the Iona/McGregor planning community, which is

within the CHHA; and (2) the impact of the Plan Amendment on both the out-of-county hurricane evacuation time and time-to-shelter is "de minimis."

135. To the first point, according to Table 1(b) of the Comprehensive Plan, the County has allocated a total of 375 acres of residential development in the Central Urban category within the planning community through the year 2030. Mr. Dunn testified that the County has approved residential development of 360 acres, leaving a balance of 15 acres available for residential development. His conclusion is that the County anticipated additional residential density in the CHHA because almost the entire planning community is located in the CHHA.

136. Mr. Dunn's conclusions appear valid based on the data and analysis in the Comprehensive Plan. However, the logic is circular. The County's decision to locate more residential development within the CHHA is not dispositive of the question of whether that decision meets the state requirements for residential density in the CHHA.[17] That determination is the subject of the instant de novo proceeding.

137. To prove their second point, the County and Intervenor introduced into evidence a memorandum prepared by Daniel Trescott, a professional planner with the firm of Trescott Planning Solutions, Inc., analyzing the impact of the Plan Amendment at its maximum residential buildout (113 total dwelling units) on the County's out-of-county evacuation clearance time and time-to-shelter ("the Trescott memo").

138. The relevant findings of the Trescott memo are as follows: (1) development of 113 dwelling units results in an additional 124 vehicles to evacuate and the need for an additional 48 shelter beds; (2) the Plan Amendment will increase out-of-county evacuation time by 1.2 minutes; and

[17] Moreover, the Plan Amendment represents a decision to locate more Central Urban within the CHHA which was not reflected on the FLUM when the 2030 "residential by future land use category" allocations were made, as reflected in Table 1(b). The table reflects the overall acreage to be developed for residential use of the total acreage in the Central Urban category at that time.

(3) the estimated clearance time-to-shelter would increase one-fifth of 1.2 minutes based on a projection that 21 percent of project residents would evacuate to a public shelter rather than out-of-county. The Trescott memo concludes, "This small increase will not cause the out-of-county evacuation time to increase incrementally above 84 hours,"[18] and that the impact on clearance time-to-shelter would be "even more de minimis."

139. The Regional Evacuation Study calculates hurricane evacuation impacts in 30-minute increments. Based on that model, the impact from development allowed under the Plan Amendment will not result in an incremental increase in either out-of-county hurricane evacuation clearance time or time-to-shelter.

140. Section 163.3178(8)(a)3. does not contain an exception for "de minimis" impacts. Furthermore, the statutory standard is not based on the Regional Hurricane Evacuation projected times for out-of-county and time-to-shelter in a Category 5 hurricane (both of which are projected at 96 hours for 2020), but on the adopted LOS for out-of-county evacuation clearance time of 16 hours, and the statutory time-to-shelter time of 12 hours.

141. The alternative argument by the County and Intervenor that the Plan Amendment meets the state standard for increased residential density in the CHHA is rejected.

CONCLUSIONS OF LAW

142. The Division has jurisdiction over the subject matter and parties hereto pursuant to sections 120.569, 120.57(1), and 163.3187(5), Florida Statutes.

143. To have standing to challenge a plan amendment, a person must be an "affected person," as defined in section 163.3184(1)(a).

[18] The Trescott Memo was prepared in 2016, prior to the 2017 update to the Regional Evacuation Study. The edition of the Regional Evacuation Study available to Mr. Trescott included only the 2017 projection of 84 hours. The 2017 update contains the year 2020 projection of 96 hours.

144. An "affected person" is defined in the Act to include "persons owning property, residing, or owning or operating a business, within the boundaries of the local government whose plan is the subject of the review[.]" § 163.3184(1)(a), Fla. Stat. In addition to this geographical requirement, the statute requires an "affected person," to have "also submitted oral or written comments, recommendations, or objections to the local government" during its consideration of the plan amendment. *Id*.

145. Petitioners are "affected persons" with standing to bring this action pursuant to section 163.3184(1)(a).

146. "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.

147. The County's determination that the Plan Amendment is "in compliance" is presumed to be correct and must be sustained if the County's determination of compliance is fairly debatable. *See* § 163.3184(5)(c), Fla. Stat.

148. In *Martin County v. Yusem*, 690 So. 2d 1288 (Fla. 1997), the Court said, "The fairly debatable standard of review is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety." *Id*. at 1295. Quoting from *City of Miami Beach v. Lachman*, 71 So. 2d 148, 152 (Fla. 1953), the Court stated further that "[a]n 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." Put more simply, in the context of a challenge to a comprehensive plan amendment, the amendment is fairly debatable if its validity can be defended with a sensible argument.

149. The mere existence of contravening evidence is not sufficient to establish that a land planning decision is "fairly debatable." It is firmly established that:

> [E]ven though there was expert testimony adduced in support of the City's case, that in and of itself does not mean the issue is fairly debatable. If it did, every zoning case would be fairly debatable and the City would prevail simply by submitting an expert who testified favorably to the City's position. Of course that is not the case. The trial judge still must determine the weight and credibility factors to be attributed to the experts. Here the final judgment shows that the judge did not assign much weight or credibility to the City's witnesses.

Boca Raton v. Boca Villas Corp., 371 So. 2d 154, 159 (Fla. 4th DCA 1979).

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

Internal Consistency

151. Section 163.3177(2) provides, "Coordination of the several elements of the local comprehensive plan shall be a major objective of the planning process." To that end, the statute provides that the elements of the comprehensive plan "shall be consistent." *Id.*

152. Based on the foregoing Findings of Fact, Petitioners did not establish beyond fair debate that the Plan Amendment renders the Comprehensive Plan internally inconsistent, in violation of section 163.3177(2).

Data and Analysis

153. Section 163.3177(1)(f) provides, "All … plan amendments shall be based upon relevant and appropriate data and an analysis by the local government" that may include "surveys, studies, community goals and vision, and other data available at the time of adoption" of the plan amendment. "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" when the plan amendment was adopted. § 163.3177(1)(f), Fla. Stat.

154. Many of Petitioners' arguments that the Plan Amendment was not based on data were grounded in the theory that the concurrent rezoning of the subject property constitutes "data" which "informs" the Plan Amendment for purposes of determining consistency with the Act. That theory is incorrect.

155. Evidence of a related or concurrent rezoning of the property subject to a challenged plan amendment is irrelevant to the issue of whether the plan amendment is "in compliance." *See Burson v. City of Titusville*, Case No. 08-0208 (Fla. DOAH June 20, 2008; Fla. DCA Jan. 30, 2009). As the Florida Supreme Court held in *Yusem*, 690 So.2d at 1293, "[W]e expressly conclude that amendments to comprehensive land use plans are legislative decisions." The review of a proposed plan amendment requires the local government to engage in policy reformulation. *Martin Cty. v. Yusem*, 644 So. 2d 976, 981 (Fla. 4th DCA 1995) (Pariente, J., dissenting; specifically approved by the majority in *Yusem*, 690 So.2d at 1293-94).

156. In the case at hand, the Plan Amendment represents a policy determination by the County to retreat from the designation of the subject property for industrial use and allow residential in addition to commercial, retail, and light industrial uses. It is not a formulation of policy to allow a particular building height, a particular light-industrial use, or impose particular screening, setbacks, or buffers. "[A] comprehensive plan only establishes a long-range maximum limit on the possible intensity of land use; a plan does not simultaneously establish an immediate minimum limit on the possible intensity of land use." *City of Jacksonville Bch. v. Grubbs*, 461 So.2d 160 (Fla. 1st DCA 1984) (citing *Maracci v. City of Scappoose*, 552 P.2d 552, 553 (Or.Ct.App. 1976)). The decisions regarding height, buffers, and screening are made by the County in the development order process (i.e., rezoning, permitting). If the Plan Amendment is not found "in compliance," it does not become effective. *See* § 163.3187(5)(c), Fla. Stat. In that case, the PD rezoning is likewise null. The rezoning is contingent upon the Plan

Amendment, not vice versa. *See Bd. of Cty. Comm'rs of Brevard Cty. v. Snyder*, 627 So.2d 469, 475 (Fla. 1993). By the same token, if the Plan Amendment is determined to be "in compliance," based, in part, on consideration of terms of the PD rezoning, any subsequent changes to the rezoning would, in effect, be an amendment to the Comprehensive Plan without going through the plan amendment process and its attendant public participation requirements and points of entry.[19]

157. Petitioners cannot rely upon the specifics of the concurrent rezoning to bolster their contentions that the Plan Amendment is not "in compliance." For example, Petitioners' contention that the Plan Amendment is internally consistent with FLUE Policies 2.2.1, 6.1.1, 6.1.3, and 6.1.4 was rejected because each of those policies pertains to rezonings, not plan amendments. "Subsections (3) and (4) [of section 163.3215, Florida Statutes, provide the exclusive methods for an aggrieved or adversely affected party to appeal and challenge the consistency of a development order with a comprehensive plan." § 163.3215, Fla. Stat.

158. By the same token, the County and Intervenor cannot rely on the PD rezoning to support their own arguments that the Plan Amendment meets the requirements of the Comprehensive Plan. For example, the County and Intervenor introduced testimony that the approved PD includes a recreational marina to support a finding that the Plan Amendment complies with the water-dependent overlay requirements set forth in Goal 32 and its implementing policies. The Plan Amendment stands or falls on its own terms.

[19] In contrast, if a plan amendment incorporates specific development requirements of, or restrictions imposed by, a concurrent rezoning, a declaration of covenants, or other document, then those requirements or restrictions are relevant to the plan amendment compliance determination. *See Bracker v. Cemex Constr. Materials Fla., LLC,* Case No. 18-3597 (Fla. DOAH May 1, 2019; Fla. DEO May 23, 2019); *Morgan v. City of Miramar*, Case No. 18-6103 (Fla. DOAH Jun. 26, 2019; Fla. DEO Sept. 23, 2019). The instant Plan Amendment does not incorporate any of the requirements (e.g., recreational marina) or restrictions (75 dwelling units) from the PD zoning approval.

159. The Plan Amendment is supported by data and analysis regarding the availability of infrastructure, including utilities, recreation, solid waste, drainage, and emergency services, to the subject property; the location of the subject property outside of the area designated by the Waterfronts Florida partnership; its location as a specifically-identified subarea in the Iona-McGregor planning community, which, according to the Comprehensive Plan, is "anticipated to grow substantially from today to 2030," and "will continue to develop its infill areas while maintaining its marine oriented nature"; and to the transitional state of development on the island from intensive industrial to more commercial and mixed use.

160. Petitioners would clearly prefer the subject property remain in the Industrial land use category and be developed exclusively for marine-industrial uses. As well stated by Administrative Law Judge Stevenson in *Geraci v. Department of Community Affairs*, Case No. 95-0259 (Fla. DOAH Oct. 14, 1998; Fla. DCA Jan. 13, 1999), aff'd, 754 So. 2d 35 (Fla. 1st DCA 1999), "Petitioner's burden was not to show that [Petitioner's preferred land use classification] was better, but that [the assigned land use classification] was noncompliant to the exclusion of fair debate."

161. Petitioners did not prove beyond fair debate that the Plan Amendment is not supported by data and analysis as required by section 163.3177(1)(f).

State Standards for Density in the CHHA

162. Based on the Findings of Fact herein, the Plan Amendment does not meet the state standards for increased density in the CHHA through section 163.3178(8)(a)1. The County has not attained, and cannot maintain, a 16-hour out-of-county hurricane evacuation clearance time in a Category 5 hurricane (Level E storm surge) with the Plan Amendment.

163. Nor does the Plan Amendment meet the state standards for increased density in the CHHA through section 163.3178(8)(a)2. The County

has not attained, and cannot maintain, a 12-hour time-to-shelter for a Category 5 hurricane (Level E storm surge) with the Plan Amendment.

164. The undersigned rejects Intervenor's interpretation of section 163.3178(8)(a)3., which would allow the developer to mitigate only that portion of the hurricane evacuation impacts associated with the particular development (through either payment of fees, contribution of land, or construction of transportation improvements or shelters), when the County cannot otherwise "satisfy" the statutory requirement of subparagraphs 1. or 2., to "maintain adopted [LOS] for out-of-county hurricane evacuation," or maintain "a 12-hour evacuation time to shelter," respectively. That interpretation would render the first sentence of subparagraph 3. essentially meaningless.

165. "It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of [a] statute, if possible, and words in a statute should not be construed as mere surplusage." *Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs*, *Inc.*, 948 So. 2d 599, 606 (Fla. 2006) (*citing Hechtman v. Nations Title Ins. of N.Y*, 840 So. 2d 993, 996 (Fla. 2003)). The only interpretation which gives effect to each subpart of section 163.3178(8)(a), is to allow mitigation in those situations in which the local government cannot maintain either (1) the adopted out-of-county hurricane evacuation clearance time; or (2) a 12-hour time-to-shelter, if the plan amendment is adopted; but the developer can provide mitigation of the impacts associated with the development which will allow the local government to meet one (or both) of those adopted levels of service.

166. Likewise, the undersigned rejects the County's and Intervenor's alternative conclusion that the Plan Amendment meets the operative section because of the "absence of additional residential acreage for development in the [CHHA] of the Iona-McGregor planning community resulting from the Plan Amendment coupled with the de minimis and immeasurable effect on

evacuation times[.]"[20] The County's decision, reflected in its current Comprehensive Plan, to allocate additional residential development within the planning community is not dispositive of the issue whether allocation of that residential density meets the state statutory standards for increased density in the CHHA. Only circular logic would support such a conclusion.

167. Furthermore, the Trescott Memo is pure hearsay. *See* § 90.801, Fla. Stat. ("'Hearsay' is a statement, other than one made by the declarant while testifying at the … hearing, offered in evidence to prove the truth of the matter asserted."). Although hearsay is admissible in an administrative hearing, it is inadequate, in and of itself, to support a finding of fact, unless it falls within an exception to the hearsay rule found in section 90.801-.805, Florida Statutes *See* Fla. Admin. Code R. 28-106.213(3). There is no applicable exception to the hearsay rule for the Trescott Memo.

168. At the final hearing, some of the other expert witnesses restated Mr. Trescott's conclusion that the Plan Amendment's impact on hurricane evacuation and shelter times was de minimis, but their testimony, which was a recitation rather than an independent analysis, is insufficient corroboration of the hearsay statements in the memo. *See Pierre-Charles v. State*, 67 So.3d 301, 305 (Fla. 2d DCA 2011); *Luciano v. Adecco/Broadspire*, 194 So.3d 587 (Mem) (Fla. 1st DCA 2016) ("merely repeating a statement in the courtroom does not convert a hearsay statement into non-hearsay."). Mr. Trescott did not testify at the final hearing and the undersigned, as the trier of fact, was denied the opportunity to observe his demeanor during either direct or cross-examination. The Trescott Memo is not credible evidence to support a finding that the impact of the Plan Amendment on either the out-of-county hurricane evacuation clearance time or time-to-shelter is de minimis.

169. Assuming, arguendo, the undersigned could find, based on the Trescott Memo, that the Plan Amendment would have only a de minimis impact on the County's hurricane evacuation and shelter times, that finding

[20] Intervenor's and Respondent's Joint Proposed Recommended Order at ¶ 48.

would not be dispositive of the legal issue. Section 163.3178(8)(a)3. does not include an exception for plan amendments creating a de minimis impact. Under the separation of powers, the undersigned cannot alter the wording of the statute. *See Fla. Dep't of Rev. v. Fla. Mun. Power Agency*, 789 So.2d 320, 322 (Fla. 2001). The interpretation advanced by the Intervenor would require the undersigned to add words to the statute which do not exist on its face. The undersigned may not interpret section 163.3178(8)(a) in a way that would extend or modify its express terms. *See Herman v. Bennett*, 278 So.3d 178, 179 (Fla. 1st DCA 2019).

170. Petitioners demonstrated that the Plan Amendment is inconsistent with section 163.3178(8)(a), which provides the state standards for increased density in the CHHA, and that conclusion is not open to debate based on any grounds that are sensible.

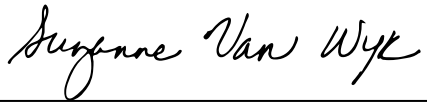
Conclusion

171. For the reasons stated above, Petitioner has proven beyond fair debate that the Plan Amendment is not "in compliance," as that term is defined in section 163.3184(1)(a).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Administration Commission enter a final order determining that the Comprehensive Plan Amendment adopted by Ordinance 20-07 on June 17, 2020, is not "in compliance," as that term is defined in section 163.3184(1)(b).

DONE AND ENTERED this 4th day of March, 2021, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
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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.