STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MAGALY L. GORDO,

Petitioner,

vs. Case No. 20-0190GM

CITY OF SUNNY ISLES BEACH, FLORIDA, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held on June 8 and 9, 2021, via Zoom videoconference, before the Honorable Francine M. Ffolkes, Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

The issue to be determined in this case is whether two amendments to the Sunny Isles Beach Comprehensive Plan (Comp Plan), adopted by Ordinance Nos. 2019-549 and 2019-550 (Plan Amendments) on December 19, 2019, are "in compliance," as that term is defined in section 163.3184(1)(b), Florida Statutes.

PRELIMINARY STATEMENT

On December 19, 2019, the City of Sunny Isles Beach (City) adopted two Plan Amendments. The Plan Amendments provided text-based amendments that created a Town Center South District Overlay (Town Center South), a Town Center North District Overlay (Town Center North), and amended the density and intensity in Town Center South. The Plan Amendments also amended the Future Land Use Map (FLUM) to reflect the Town Center North and Town Center South overlays and amended the land use designations for certain Town Center South properties.

On January 17, 2020, Petitioner, Magaly Gordo (Petitioner), filed a Petition for Administrative Hearing with DOAH challenging the Plan Amendments. Petitioner alleged that the Plan Amendments: (1) were not supported by relevant and appropriate data and analysis; (2) were internally inconsistent with the existing Comp Plan; (3) failed to discourage urban sprawl; (4) created the Town Center South district as a new land use category; and (5) should not have been reviewed under the state expedited review process. Prior to the hearing, Petitioner filed a notice striking the

urban sprawl allegation. The parties filed their Amended Joint Prehearing Stipulation on June 2, 2021.

At the hearing, Petitioner presented the expert testimony of Daniel Trescott, of Trescott Planning Solutions, LLC, and Petitioner testified on her own behalf. Joint Exhibits 1 through 23 were admitted into evidence. Petitioner's Exhibits 1 through 6, 69, 72, and 90 were admitted into evidence. Petitioner's Exhibits 7 through 68, 70, 71, 73 through 89, 91, and 92, were marked for identification, but were not admitted into evidence.

The City presented the expert testimony of Claudia Hasbun, AICP, the City's planning and zoning director; and Alex David, AICP, of Calvin, Giordano & Associates, Inc. Respondent's Exhibits 6 through 9 and 23 were admitted into evidence. Respondent's Exhibits 1 through 5, 10 through 22, and 24 through 28 were marked for identification, but were not admitted into evidence.

The three-volume Transcript of the hearing was filed with DOAH on July 14, 2021. The parties timely submitted proposed recommended orders on August 12 and 13, 2021, which were considered in the preparation of this Recommended Order.

References to the Florida Statutes are to the 2020 version, unless otherwise indicated.

FINDINGS OF FACT

The following Findings of Fact are based on the stipulations of the parties and the evidence adduced at the final hearing.

The Parties

1. Petitioner resides and owns property within the City. Petitioner provided oral comments and objections to the City during the period beginning with the transmittal hearing for the Plan Amendments and ending with the adoption of the same.

2. The City is a Florida municipal corporation with the authority to adopt and amend a comprehensive plan, pursuant to section 163.3167.

Land Use Designations

3. The City was incorporated in 1997. In 2000, the City adopted its initial Comp Plan.

4. As part of the initial Comp Plan, the City established the Town Center Planned Development District (Town Center) as an overlay area, which did not establish any densities or intensities.

5. However, the Town Center overlay did contain underlying land use designations for the area as set forth in Policy 14A and 14B of the Comp Plan, which had established densities and intensities.

6. The Mixed-Use Business land use category established a base density of 25 dwelling units per acre (du/acre), with a maximum density of 85 du/acre with density bonuses. Intensity was limited to a maximum of 2.0 floor area ratio (FAR).

7. Community Facilities land use category established a maximum density of 25 du/acre, with the intensity limited to a maximum 2.0 FAR.

8. Recreation Open Space land use category does not allow for development; therefore, there is zero density and intensity.

9. In addition to the densities and intensities permitted for the identified land use categories, pursuant to Policy 14C of the Comp Plan, locations within the Town Center were designated as receiver districts for Transferable Development Rights (TDRs). Specifically, subparagraph (c) of Policy 14C established the limits on the use of TDRs by providing that:

> In no case […] shall the density or intensity on a receiver site exceed thirty (30) percent increase in the maximum permitted by the land use category limitations set in Policy 15B . . .
>
> and
>
> . . . in no case shall the resulting density bonus increases on any given receiver site exceed the number of dwelling units attainable on the sender site(s) under [comprehensive plan] provisions so as to assure NO net increase in city-wide residential dwelling unit Comprehensive Plan capacities occurs.

10. Policy 14B of the Comp Plan set forth the Town Center's goals and objectives, including:

> The Town Center is encouraged to become the hub for future urban development intensifications around which a more compact and efficient urban structure will evolve. The Town Center is intended to be a moderate to high intensity design-unified area which will contain a concentration of different urban functions integrated both horizontally and vertically. The center will be characterized by physical cohesiveness, direct accessibility by mass transit services and high quality urban design. The Town Center is located to have direct connections to the 167th Street Causeway and Collins Avenue to ensure a high level of accessibility to the northeast Miami-Dade/bi-county area.

Background

11. In 2004, the City established the Town Center Zoning District in its Land Development Regulations (LDRs), which provided a maximum FAR of 5.2, and a maximum density of 75 du/acre. The intensity in the LDRs, as reflected by the FAR, exceeded the amount in the Comp Plan. However, the density in the LDRs was less than what was allowed in the Comp Plan.

12. In 2007, the City proposed a comprehensive plan amendment that

would have assigned density and intensity to the Town Center Planned Development District in its entirety. The state land planning agency objected to the proposed plan amendment in part because of a lack of data and analysis related to concurrency, emergency services, and hurricane evacuation routes.

13. Beginning in 2005, the City approved a number of site plans for various development projects in the southern portion of the Town Center with underlying Mixed-Use Business land use designations. At that time, the City reviewed those developments solely for compliance with the City's LDRs for the Town Center Zoning District and without consideration of the maximum density and intensity allowable for the underlying land uses in the Comp Plan. As a result, all the approved projects in the southern portion of the Town Center with an underlying land use of Mixed-Use Business were permitted to be developed with intensities up to 5.2 FAR, which exceeded the allowable intensity of 2.0 FAR set forth in the Comp Plan for the Mixed-Use Business land use category.

14. However, the densities allowed for those approved projects followed the Comp Plan, as the maximum density for the Mixed-Use Business land use category was 85 du/acre, whereas the maximum density allowable in the LDRs was 75 du/acre. Therefore, even though the City had not been evaluating the proposed site plans for compliance with the Comp Plan, all of the developed projects had densities that complied with the Comp Plan.

15. In December 2018, a public hearing was conducted by the City Commission to consider the site plan for a development known as the Infinity Project. The proposed site for the Infinity Project was in the northern half of the Town Center.

16. The City Commission unanimously voted to defer the matter to the January 2019 City Commission Meeting. To date, the application for site plan

approval for the Infinity Project in the northern portion of the Town Center has not been approved or considered by the City Commission.

17. While the City was considering the Infinity Project, the City became aware of the inconsistency between its Comp Plan and its LDRs with respect to the density and intensities within the entire Town Center area. As a result, the City began to take actions to remedy this inconsistency.

18. In July 2019, the City Commission considered an ordinance to transmit to the state land planning agency, the Department of Economic Opportunity (DEO), a text-based comprehensive plan amendment to modify the FAR in the entire Town Center area. The City Commission voted to defer the matter.

19. Instead, on August 28, 2019, the City Commission adopted on first reading an ordinance establishing a 12-month moratorium on the submission and consideration of any zoning applications in the Town Center District. The City Commission adopted the ordinance on second reading on September 19, 2019.

20. On August 28, 2019, the City Commission also adopted a resolution declaring zoning in progress relating to development and redevelopment in the Town Center Zoning District.

The Plan Amendments

21. On October 17, 2019, the City Commission adopted on first reading Ordinance No. 2019-549, transmitting to DEO text-based amendments to the Town Center District that divided the Town Center into two overlay development districts: Town Center South and Town Center North.

22. The text-based amendments also provided for density and intensity in the Town Center South overlay for the first time. Specifically, the maximum

density was established at a maximum of 75 du/acre, and the intensity was established at a maximum of 5.2 FAR. These were the same as the LDRs.

23. The Plan Amendments did not amend any portions of Policy 14C of the Comp Plan with respect to TDRs.

24. The purpose of these amendments was to grandfather the various developments within Town Center South, which were previously approved with intensities that were inconsistent with the Comp Plan.

25. Contrary to Petitioner's allegation, the density of each of these developments complied with the Comp Plan at the time of each's approval.

26. On October 17, 2019, the City Commission also adopted on first reading Ordinance No. 2019-550, transmitting to DEO the FLUM Plan Amendments reflecting the creation of the Town Center South and Town Center North overlay districts, and providing for amendment of the land use designation for certain properties located in Town Center South.

27. Amendments to land use designations for specific properties in the Town Center South overlay area included changing the Bella Vista Park and Gateway Park from Mixed-Use Business to Recreation and Open Space. The Gateway Park Parking Garage changed from Recreation and Open Space to Community Facility. The Miami-Dade County Water and Sewer Facility changed from Mixed-Use Business to Community Facility. All these FLUM changes reflected a decrease in density.

28. On October 17, 2019, the City Commission passed Resolution 2019-3006 (Plan of Action), adopting a schedule to bring the City's LDRs into conformity with the provisions of the amended Comp Plan, as provided by section 163.3194(1)(b).

29. On October 30, 2019, the Florida Department of Transportation issued a letter to Alex David, the City's planning and land use consultant, advising that it had reviewed the proposed text-based Plan Amendments and "found

that the amendment will not have an adverse impact on transportation resources and facilities of State importance."

30. On November 15, 2019, the South Florida Water Management District sent correspondence advising that there are "no regionally significant water resource issues" and offered only technical guidance regarding regional water supply planning.

31. On November 25, 2019, the South Florida Regional Planning Council found that the proposed Plan Amendments were generally consistent with the Strategic Regional Policy Plan for South Florida.

32. On November 22, 2019, the City's Mayor received correspondence from DEO advising that it had reviewed the proposed Plan Amendments and "identified no comment related to adverse impacts to important state resources and facilities within the [DEO's] authorized scope of review." DEO did provide a technical assistance comment.

33. On December 19, 2019, the City Commission adopted both Ordinances on second reading. DEO's technical assistance comment directed the City to clarify that Town Center South and Town Center North were overlay districts and not separate land use categories. The City incorporated that clarification in bold text in the body of the adopted ordinance. The City then forwarded the adoption package of Plan Amendments to DEO for its review.

34. On December 30, 2019, DEO issued a letter to Mr. David advising that the Plan Amendments package was complete and would be reviewed in accordance with section 163.3184(3).

35. On January 28, 2020, DEO issued a letter to the City's Mayor advising that it had completed its review "and identified no provision that necessitates a challenge of the Ordinances adopting the amendment."

36. Petitioner challenged the Plan Amendments on four grounds: (1) the City failed to submit relevant and appropriate data and analysis; (2) the Plan

Amendments were internally inconsistent with the existing Comp Plan; (3) the Town Center South District was a new land use category; and (4) the Plan Amendments should not have been reviewed under the expedited review process pursuant to section 163.3184(2).

Relevant and Appropriate Data and Analysis

37. Petitioner alleged that the City did not provide any data or analysis to show it considered the impacts of alleged "massive increase of density and intensity in Town Center South on hurricane evacuation times [. . .]".

Hurricane Evacuation Times and CHHA

38. Petitioner's expert witness, Daniel L. Trescott, an expert in comprehensive planning and hurricane evacuation, opined that only increases in density would impact hurricane evacuation times, and that increases in intensity would not adversely affect hurricane evacuation times.

39. Specifically, Mr. Trescott testified that if there was no increase in density then, in his expert opinion, the Plan Amendments would not trigger the need to evaluate the other policies and issues related to hurricane evacuation and Coastal High Hazard Areas (CHHA).

40. Petitioner did not introduce any evidence that would support a finding that the Plan Amendments would actually increase density in Town Center South. Mr. Trescott testified that he did not perform an analysis that would demonstrate potential impacts on density resulting from the Plan Amendments.

41. Also, Petitioner did not introduce any evidence to support a finding that the Plan Amendments would diminish future hurricane evacuation times, in the absence of a density increase. In fact, the undisputed testimony of the City's experts established that the Plan Amendments actually decreased the net density allowed in Town Center South.

42. Claudia Hasbun, the City's planning and zoning director, was accepted as an expert in land use planning. Ms. Hasbun testified that the Plan

Amendments would decrease the potential maximum allowable density in Town Center South by 462 dwelling units. Ms. Hasbun's analysis demonstrated that after consideration of the density provided by the Plan Amendments, including the land use changes reflected in the FLUM amendment, there was a significant reduction in potential maximum allowable density in Town Center South.

43. Ms. Hasbun testified that the net total number of dwelling units that could ever be developed would decrease by 462 dwelling units for Town Center South because of the Plan Amendments. This analysis encompassed the absolute maximum redevelopment potential, and still reflected a reduction in density in Town Center South.

44. Mr. Trescott confirmed that the potential maximum allowable density that existed under the current Comp Plan was actually greater than would be allowed under the Plan Amendments. He also acknowledged that land use changes reflected on the FLUM amendment would result in a decrease in density within Town Center South. Therefore, the uncontroverted evidence showed that the Plan Amendments decrease density.

45. The City also presented the expert witness testimony of Alex David, the planning consultant with Calvin, Giordano & Associates, Inc. Mr. David testified that there would not be any impact on hurricane evacuation times resulting from the Plan Amendments. The reason was that the potential maximum allowable density resulting from the Plan Amendments was significantly reduced from the existing maximum potential density. Mr. David's testimony was undisputed, and Petitioner's expert witness conceded that there would be a net decrease in maximum potential density resulting from the Plan Amendments.

46. Mr. David testified that a map created from a 2016 Sea, Lake, and Overland Surges for Hurricanes (SLOSH) computerized storm surge model was utilized to determine whether any portions of Town Center South were

in the CHHA. The referenced SLOSH map was incorporated into the Comp Plan in 2016.

47. Mr. David testified that the SLOSH model does depict five very minimal areas of Town Center South within the CHHA. However, those areas either have an underlying land use designation of Recreation Open Space, cannot be developed for residential purposes and have no density, or they are located on parcels that have already been developed (or in one case is currently being developed) at higher elevations. The parcels developed or being developed at higher elevations have the appropriate mitigation to remove them from the CHHA. As a result, under the 2016 SLOSH model map in the Comp Plan, none of the property affected by the Plan Amendments was located in the CHHA.

48. During the hearing, Mr. Trescott suggested that the City should utilize the map developed from the 2017 version of the SLOSH model, rather than the 2016 version adopted in the Comp Plan.

49. Despite testifying that the City was required to use the 2017 version of the SLOSH map, Mr. Trescott admitted that Miami-Dade County, the entity responsible for emergency management, had not adopted the 2017 SLOSH map. Mr. Trescott also admitted that the State of Florida had not adopted the 2017 SLOSH map into the State's Emergency Plan.

50. In addition, Mr. David testified that he was unaware of any jurisdiction in Florida that had adopted the 2017 SLOSH map. Thus, it was reasonable for the City to rely on the data contained in the 2016 SLOSH map incorporated in its Comp Plan.

51. Consistent with Mr. Trescott's testimony, since there is no increase in density, the Plan Amendments would not trigger the need to evaluate the other policies and issues related to hurricane evacuation and CHHA.

52. Petitioner did not prove beyond fair debate that the City failed to provide relevant and appropriate data or analysis with respect to impact on

hurricane evacuation times. The evidence adduced at the hearing established that such an evaluation was not required because density was decreased by the Plan Amendments. Even so, the evidence established that since density was decreased by the Plan Amendments, hurricane evacuation times would not be impacted, and that, pursuant to the 2016 SLOSH model map adopted in the Comp Plan, none of the property affected by the Plan Amendments was located within the CHHA.

Concurrency Analysis

53. Petitioner also contended that the City failed to submit any data or analysis to show the impacts on sewer and water capacities, traffic/transportation, coastal management, infrastructure, and schools. However, the memorandum incorporated into Ordinance No. 2019-549 clearly demonstrated that an analysis was conducted. The analysis determined that the City did meet its level of service (LOS) standards for each of those areas.

54. In addition, Mr. David testified to the methodology used to analyze concurrency for each of the areas and the conclusions reached with respect to them. His testimony was not contradicted and demonstrated that the Plan Amendments meet the City's LOS standards.

55. Mr. David testified that in completing the concurrency analysis, he utilized data based upon the existing development in Town Center South. He opined that the methodology was a conservative approach for evaluating concurrency. Mr. David also testified that all the projects developed in Town Center South had been individually and separately reviewed for concurrency purposes during the site plan approval process.

<u>Internal Inconsistency</u>

56. Petitioner alleged that the Plan Amendments were internally inconsistent with two provisions of the City's existing Comp Plan. Objective 3C, which reads as follows:

> The City of Sunny Isles Beach shall not increase maximum densities and intensities in the Coastal

> High Hazard Area beyond that which is permitted in the Comprehensive Plan and Land Development Regulations as of May 1, 2016, including bonuses and transfer of development rights provided therein. The provision of facilities and services to accomplish the timely evacuation of the City's residents in advance of approaching hurricanes shall be a priority of the Sunny Isles Beach's transportation and hurricane preparedness programs.

57. The City's Comp Plan did not assign densities and intensities in the Town Center Development District overlay as of May 1, 2016. However, as previously found, the City's LDRs did include densities and intensities for the Town Center as of May 1, 2016. These Plan Amendments did not increase the densities and intensities contained in the LDRs as of that date, and therefore, are not internally inconsistent with the City's existing Comp Plan.

58. Petitioner also asserted that the Plan Amendments were inconsistent with Policy 5C, which provides as follows:

> All planning activities pertaining to development and redevelopment and the provision of public services and facilities in the City of Sunny Isles Beach shall be consistent with the "Population Estimates and Projections" outlined below, as they are periodically amended and updated.

59. During the hearing, the City introduced the 2019 population estimates derived from the U.S. Census Bureau. The census data reflected that the 2019 population estimate was 21,804, which was below the 2020 estimates set forth in Policy 5C. Further, the unrebutted testimony of the City's experts, Ms. Hasbun and Mr. David, was that the Plan Amendments would decrease the maximum potential density that could be developed in Town Center South.

60. Petitioner did not introduce any evidence that the population estimates and projections would increase because of the Plan Amendments.

61. Petitioner did not prove beyond fair debate that the Plan Amendments were internally inconsistent with Objective 3C and Policy 5C of the City's existing Comp Plan.

New Land Use Category

62. Petitioner alleged that Town Center South was a new land use category. Petitioner referenced the comments from DEO that the City should consider amending the FLU text to clarify that Town Center North and Town Center South are overlay districts, not separate land use categories.

63. However, the City did specifically incorporate those comments in Ordinance No. 2019-549, where the word "overlay" appears in bold text to reflect said clarification.

64. Petitioner's claim that the City created a new land use category called "Town Center South" was not supported by the evidence.

Expedited Review Process

65. Petitioner alleged that the City should not have proceeded with the expedited review process because of the City's alleged past failures to comply with the law.

66. Section 163.3184(2) provides for an expedited review process for adoption of comprehensive plans and amendments. The two exceptions to this expedited review process are contained in section 163.3184(2)(b) and (c), neither of which are applicable to the Plan Amendments.

67. Petitioner suggested that the Plan Amendments should have been treated as an evaluation and appraisal review (EAR) under section 163.3191. However, the determination of whether the comprehensive plan should be evaluated under this provision is the responsibility of the City. Also, the City's last EAR was conducted in 2016, so the City is not required to perform the analysis again until 2023.

68. Petitioner failed to introduce any evidence to support a finding that the City is precluded from proceeding pursuant to section 163.3184(3).

Summary

69. Petitioner failed to carry her burden of proving beyond fair debate that the City of Sunny Isles Beach Plan Amendments adopted by Ordinance Nos. 2019-549 and 2019-550 on December 19, 2019, are not in compliance, as that term is defined in section 163.3184(1)(b).

CONCLUSIONS OF LAW

Jurisdiction

70. DOAH has jurisdiction over the subject matter and the parties to this proceeding under sections 120.569, 120.57(1), and 163.3184, Florida Statutes.

Standing

71. To have standing to challenge a plan amendment, a person must be an "affected person," as defined in section 163.3184(1)(a). The parties stipulated that Petitioner is an "affected person" within the meaning of the statute.

Burden and Standard of Proof

72. "In compliance" means, in pertinent part, "consistent with the requirements of sections 163.3177, 163.3178, 163.3180, 163.3191, 163.3245, and 163.3248." *See* § 163.3184(1)(b), Fla. Stat.

73. Petitioner bears the burden of proving beyond fair debate that the challenged Plan Amendments are not in compliance. This means that "if reasonable persons could differ as to its propriety," a plan amendment must be upheld. *See Martin Cty. v. Yusem*, 690 So. 2d 1288, 1295 (Fla. 1997).

74. The Plan Amendments shall be determined to be in compliance if the local government's determination that the amendments are in compliance is "fairly debatable." *See* § 163.3184(5)(c)1., Fla. Stat. The "fairly debatable" standard mandates deference to the local government's disputed decision and applies to any challenge filed by an affected person. *See, e.g., Machado v. Musgrove*, 519 So. 2d 629, 632 (Fla. 3d DCA 1987) (aff'd en banc 1988), *rev. denied* 529 So. 2d 694 (Fla.1988).

75. The mere existence of contravening evidence is not enough 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 that 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).

76. 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 purpose." *See Martin Cty. Land Co. v. Martin Cty.*, Case No. 15-0300GM, at RO ¶149 (Fla. DOAH Sept. 1, 2015; Fla. DEO Dec. 30, 2015).

77. The standard of proof for findings of fact is a preponderance of the evidence. *See* § 120.57(1)(j), Fla. Stat.

Data and Analysis

78. Section 163.3177(1)(f) requires all plan amendments to be based on relevant and appropriate data and an analysis by the local government. Pursuant to the statute, "[t]o 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 or plan amendment at issue." § 163.3177(1)(f), Fla. Stat. "However, the evaluation may not include whether one accepted methodology is better than another." § 163.3177(1)(f)2., Fla. Stat. While data supporting a comprehensive plan

amendment must be taken from professionally accepted sources, local governments are not required to collect original data. *Id.*

79. 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 challenged amendments, may be presented. *See Zemel v. Lee Cty.*, 15 F.A.L.R. 2735 (Fla. Dep't of Cmty. Aff. 1993)(Final Order), *aff'd*, *Zemel v. Dep't of Cmty. Aff.,* 642 So. 2d 1367 (Fla. 1st DCA 1994).

80. Section 163.3178 defines the CHHA as the "area below the elevation of the category 1 storm surge line as established by a [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.*

81. 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.

82. The evidence adduced at the hearing established that such an evaluation of impact on hurricane evacuation times was not required because density was decreased by the Plan Amendments. Even so, the evidence established that since density was decreased by the Plan Amendments, hurricane evacuation times would not be impacted, and that pursuant to the 2016 SLOSH model map adopted in the Comp Plan, none of the property affected by the Plan Amendments was located within the CHHA.

83. The evidence adduced at hearing demonstrated that the City analyzed data to show the impacts on sewer and water capacities, traffic/transportation, coastal management, infrastructure, and schools. The analysis determined that the City did meet its LOS standards for each of those areas.

84. Based on the foregoing Findings of Fact, Petitioner did not prove beyond fair debate that the Plan Amendments were not supported by relevant and appropriate data and an analysis by the local government.

Internal Inconsistency

85. 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. "If the objectives do not conflict, they are coordinated, related, and consistent." *Melzer, et al. v. Martin Cty.*, Case Nos. 02-1014GM and 02-1015GM, at RO ¶194 (Fla. DOAH July 1, 2003; Fla. DCA Oct. 24, 2003). "If an amendment expressly creates an exception or waiver to a general rule set forth in the plan, it does not create an internal inconsistency." *Id.* at ¶ 195.

86. Based on the foregoing Findings of Fact, Petitioner did not prove beyond fair debate that the Plan Amendments were inconsistent with the identified goals, objectives, or policies of the City's Comp Plan.

New Land Use Category

87. Based on the foregoing Findings of Fact, Petitioner did not prove beyond fair debate that the Plan Amendments constituted a new land use category.

Expedited Process

88. Based on the foregoing Findings of Fact, Petitioner did not prove beyond fair debate that the City was precluded from processing the Plan Amendments in accordance with section 163.3184(3). Beyond the allegations in the petition, Petitioner did not submit any evidence to demonstrate that the expedited review process did not apply to these Plan Amendments. In addition, the plain language of section 163.3184(1)(b) does not list failure to comply with section 163.3184 itself as part of the "in compliance" determination.

Summary

89. The City's determination that the Plan Amendments were "in compliance" was fairly debatable.

90. Petitioner failed to carry her burden of proving beyond fair debate that the challenged Plan Amendments were not in compliance.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Economic Opportunity enter a final order determining that the City of Sunny Isles Beach Plan Amendments adopted by Ordinance Nos. 2019-549 and 2019-550 on December 19, 2019, are "in compliance," as that term is defined in section 163.3184(1)(b).

DONE AND ENTERED this 3rd day of September, 2021, in Tallahassee, Leon County, Florida.

FRANCINE M. FFOLKES
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of September, 2021.

COPIES FURNISHED:

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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.