

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JONATHAN LIVINGSTON AND
LAKSHMI GOPAL,

Petitioners

and

RIGHT SIZE SAN MARCO, INC., A FLORIDA
NOT-FOR -PROFIT CORPORATION,

Intervenor,

vs.

Case No. 20-1594GM

CITY OF JACKSONVILLE, FLORIDA,

Respondent,

and

THE SOUTH JACKSONVILLE
PRESBYTERIAN CHURCH, INCORPORATED;
AND HARBERT REALTY SERVICES, LLC,

Intervenors.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held on May 28 and 29, 2020, via Zoom video conference, before Francine M. Ffolkes, a duly designated Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioners, Jonathan Livingston and Lakshmi Gopal and Intervenor,
Right Size San Marco, Inc.:

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For Respondent, City of Jacksonville:

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For Intervenor The South Jacksonville Presbyterian Church,
Incorporated and Harbert Realty Services, LLC:

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STATEMENT OF THE ISSUE

The issue to be determined in this proceeding is whether a small scale development amendment to the future land use map of the City of Jacksonville's 2030 Comprehensive Plan, adopted by Ordinance No. 2019-750-E on February 25, 2020 (the Ordinance), is "in compliance," as that term is defined in section 163.3184(1)(b), Florida Statutes.

PRELIMINARY STATEMENT

On March 26, 2020, Jonathan Livingston (Livingston), Lakshmi Gopal (Gopal) and Right Size San Marco, Inc. (Right Size) timely filed a petition for an administrative hearing challenging the Respondent City of Jacksonville's (City) adoption of the Ordinance. Intervenors, The South Jacksonville Presbyterian Church, Incorporated (South Jax) and Harbert Realty Services, LLC (Harbert) (Intervenors) intervened, joining the City in defense of the challenge. Petitioners Livingston and Gopal (Petitioners) subsequently filed a Second Amended Petition (Petition), and Right Size was allowed to change its status to an Intervenor on the side of Petitioners. Prior to the hearing, the parties filed an Amended Joint Pre-Hearing Stipulation, and Petitioners filed a Notice of Narrowing of Issues for Hearing.

At the final hearing, the parties' Joint Exhibits 1 through 21 and 23 through 50 were admitted into evidence. Intervenors presented the expert testimony of William B. Killingsworth, the City's planning and development director, accepted as an expert in land use planning and development, comprehensive planning, and zoning; Kristen D. Reed, chief of the City's community planning division, accepted as an expert in land use planning and development, and comprehensive planning; and Lindsay Haga, AICP, accepted as an expert in land use planning and development, comprehensive planning, and zoning. Petitioners and Right Size presented the fact testimony of Jonathan Livingston and Lakshmi Gopal; and the expert testimony of Thomas Atkins, accepted as an expert in land use planning.

The two-volume Transcript was filed with DOAH on June 18, 2020. The parties timely filed their proposed recommended orders, which were considered in the preparation of this Recommended Order.

All references to the Florida Statutes are to the 2019 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 and Standing

1. Petitioner Livingston is a Florida resident, who lives at 1507 Alexandria Place North, Jacksonville, Florida 32207. Livingston appeared at the adoption hearings for the Ordinance and submitted comments and objections on the record. Livingston is an affected person under section 163.3184(1)(a).

2. Petitioner Gopal is a Florida resident, who lives at 1535 Alexandria Place North, Jacksonville, Florida 32207. Gopal appeared at the adoption hearings for the Ordinance, and submitted comments and objections on the record. Gopal is an affected person under section 163.3184(1)(a).

3. Right Size is a Florida not-for-profit corporation that conducts business in the City, and its corporate address is 1507 Alexandria Place North, Jacksonville, Florida 32207. The specific purpose of Right Size, as stated in its Articles of Incorporation filed February 11, 2020, is to support, protect and preserve the historic character and beauty of San Marco, a historic residential neighborhood south of downtown Jacksonville and the St. Johns River. Officers of Right Size appeared at the adoption hearings for the Ordinance and submitted comments and objections on the record. Right Size is an affected person under section 163.3184(1)(a).

4. Respondent City is a municipal corporation of the state of Florida and is responsible for enacting and amending its comprehensive plan in accordance with Florida law. The City provided timely notice to the parties

and the process followed the provisions of the City's Ordinance Code and part II of chapter 163. The Ordinance relates to 2.87 acres of property located at 2137 Hendricks Avenue and 2139 Thacker Avenue (Property). The Property is located within the City's jurisdiction.

5. Intervenor Harbert is an Alabama limited liability company, registered to do business in Florida. Harbert is an applicant of record for the small scale development amendment and currently has the Property under a purchase contract pending the effective adoption of the Ordinance. Harbert is an affected person and intervenor under section 163.3187(5)(a).

6. Intervenor South Jax is a Florida not-for-profit corporation and is the owner of record of the Property that is the subject of the Ordinance. South Jax is also an applicant of record for the small scale development amendment. South Jax is an affected person under section 163.3184(1)(a).

The Property and Surrounding Parcels

7. The Property occupies the majority of one block in the San Marco neighborhood of the City. It is bounded on the north by Alford Place, on the east by Mango Place, on the south by Mitchell Avenue, and on the west by Hendricks Avenue (State Road 13). Hendricks Avenue is classified as an arterial road. The Property is currently home to The South Jacksonville Presbyterian Church.

8. The southern portion of the Property, comprising 1.89 acres, is currently designated Residential Professional Institutional (RPI) on the City's Future Land Use Map series (FLUM) of the Future Land Use Element (FLUE) in the 2030 Comprehensive Plan (Comp Plan). The northern portion of the Property, comprising 0.98 acres, is currently designated Community/General Commercial (CGC) on the FLUM.

9. The southern portion of the Property is currently zoned Commercial Residential Office (CRO) on the City's zoning map. The northern portion of the Property is zoned Commercial Community/General-1 (CCG-1) on the City's zoning map.

10. The FLUM shows that the Property is currently in the City's Urban Development Area (UDA), and abuts the boundary line of the City's Urban Priority Development Area (UPDA) to the north.

11. The parcel to the north of the Property was the subject of a small scale FLUM amendment in 2014 (Ordinance 2014-130-E). It is known as East San Marco, currently has a Comp Plan FLUM designation of CGC, and is in the UPDA that permits development of up to 60 residential units per acre (ru/acre).

12. Ordinance 2014-130-E for East San Marco included a FLUE text change, i.e., a site specific policy/text change under section 163.3187(1)(b). FLUE Policy 3.1.26 exempts East San Marco from specified UPDA characteristics.

13. The East San Marco property was recently rezoned from Planned Unit Development (PUD) to PUD (Ordinance 2019-799-E) for a mixed-use project known as the East San Marco development. The PUD provides that the maximum height for commercial buildings is 50 feet not including non-habitable space, and 48 feet for multifamily units.

14. Located south of the Property across Mitchell Avenue are parcels developed for single family residential use and currently designated as Low Density Residential (LDR) on the FLUM. These properties are zoned Residential Low Density-60 (RLD-60) on the City's zoning map.

15. Located east of the Property across Mango Place are parcels developed with a mix of single family residential and office uses and designated as a mix of CGC and RPI on the FLUM. These properties have a mix of zoning including CCG-1, Residential Medium Density-A (RMD-A), and Commercial Office (CO).

16. Located west of the Property at Hendricks Avenue/San Marco Boulevard are parcels developed with multifamily, restaurant and retail commercial uses and designated as a mix of Medium Density Residential (MDR) and CGC on the FLUM. These properties are zoned RMD-D and CCG-1.

17. Intervenors intend to develop the Property with a mixed-use project that will include 133 multifamily residential units and a parking garage. The existing church sanctuary will remain in use at the northeast corner of Hendricks Avenue and Mitchell Avenue.

The Ordinance

18. On August 27, 2019, Intervenors applied for a small scale development amendment proposing to change the Property from RPI and CGC to CGC, and to extend the UPDA to include the Property.

19. On the same date, Intervenors also filed a companion rezoning application seeking to change the zoning on the Property from CRO and CCG-1 to PUD. The rezoning application was processed concurrent with the small scale development amendment application.

20. The City's professional planning staff collected and reviewed data and information related to the small scale development amendment application, the Property, and the surrounding areas. The staff also conducted a site visit. The staff further sought review by, and received input from, a number of different City and state agencies and organizations regarding the proposed Ordinance.

21. On October 28, 2019, the City held a citizens' information meeting to discuss the proposed Ordinance. The meeting was attended by approximately nine residents.

22. After reviewing and analyzing the data and information gathered, City professional planning staff determined that the Ordinance was consistent with the Comp Plan and furthers the goals, policies, and objectives of the Comp Plan. The determination was memorialized in a staff report recommending approval of the Ordinance. The staff report was prepared for consideration by the City's Planning Commission prior to its regular meeting on January 23, 2020.

23. At its January 23, 2020, meeting, the Planning Commission held an approximately two and one-half hour hearing on both the Ordinance and the PUD. At the conclusion of the hearing, the Planning Commission recommended approval of the Ordinance by a unanimous vote.

24. The staff report and the Planning Commission's recommendation were forwarded to the City Council's Land Use and Zoning (LUZ) Committee.

25. The LUZ Committee held public hearings addressing the Ordinance on December 3, 2019; January 22, 2020; February 4, 2020; and February 19, 2020.

26. Certain concerns were raised by citizens at public hearings both before and during the February 19, 2020, LUZ Committee meeting. In response, the LUZ Committee requested that Mr. Killingsworth draft a site specific policy/text amendment to adopt limitations on the number of residential units, the non-residential floor area permitted on the Property, and the maximum height of structures on the Property, with measurable criteria for determining the height of structures within the proposed use on the Property.

27. During the February 19, 2020, public hearing, the LUZ Committee recommended addition of FLUE Policy 4.4.16, a site specific policy/text amendment, which states:

- (i) Multi-family residential uses shall be limited to 133 units.
- (ii) Non-residential floor area shall be limited to 96,000 square feet (garage, all floors) and 25,000 +/-

square feet (existing church, all floors).

(iii) To ensure compatibility with adjacent uses and to protect neighborhood scale and character through transition zones, bulk, massing, and height restrictions, new building height shall be limited to the calculated weighted average, not to exceed 35 feet, across the length of the development from Alford Place to Mitchell Avenue as follows: A sum of the height to the predominant roof line (ridge or parapet wall) of that portion of a building multiplied by the length of that portion of a building divided by the overall length of that portion of a building divided by the overall length of permissible building within the minimum setback.

28. After approximately six hours of testimony and discussion, the LUZ Committee unanimously recommended approval of the Ordinance with the site specific policy/text amendment.

29. The City Council held public hearings to address the Ordinance on November 26, 2019; December 10, 2019; January 28, 2020; February 11, 2020; and February 25, 2020. After approximately five and a half hours of testimony and discussion, the City Council adopted the Ordinance on February 25, 2020, by a vote of 17 to one.

30. There was significant citizen input regarding the Ordinance throughout the hearing process. This included emails and letters to City staff, to Planning Commissioners and City Council members, and submittal of verbal and written comments at the hearings.

Petitioners' and Right Size's Objections

31. Following their filing of the Petition and other stipulations mentioned above, Petitioners and Right Size jointly presented their case during the final hearing. They argued that the Ordinance was not "in compliance" because: (i) it created internal inconsistencies based upon Comp Plan Policies 1.1.20A, 1.1.20B, 1.1.21 and 1.1.22; (ii) it was not based on relevant and

appropriate data and an analysis by the City; (iii) it did not react to data in an appropriate way and to the extent necessary indicated by the data available at the time of the adoption of the Ordinance; and (iv) subsection (c) of FLUE Policy 4.4.16 related to height failed to establish meaningful and predictable standards for the use and development of land and provide meaningful guidelines for the content of more detailed land development and land use regulations.

32. Each argument is generally addressed below. However, the primary underlying premise of Petitioners' and Right Size's challenge was that the Ordinance would allow a density in excess of 40 ru/acre and permit a height in excess of 35 feet.

Internal Consistency

33. In the Amended Joint Pre-hearing Stipulation, as modified by the Notice of Narrowing Issues for Hearing, Petitioners and Right Size identified specific policies in the Comp Plan, which they assert rendered the Ordinance inconsistent with the Comp Plan.

34. FLUE Policy 1.1.20A states that "[e]xtensions of the Development Areas will be noted in each land use amendment where an extension is needed or requested concurrent with a Future Land Use Map Amendment. In addition, plan amendments shall meet the requirements as set forth in Policy 1.1.21 and 1.1.22."

35. The definitional section of the FLUE explains that the City is divided into five tiers of Development Areas which include the UPDA and the UDA. These areas are depicted on the City's FLUM series and control "the density, development characteristics, and other variables within plan categories."

36. The first sentence of Policy 1.1.20A affords applicants the ability to request an extension of a development area concurrent with a land use amendment application. Consistent with the policy, the small scale

development amendment application included a request for an extension of the UPDA. The request was submitted concurrent with the request to designate the Property as CGC on the FLUM. The adopted Ordinance makes note of the extension of the UPDA as required by Policy 1.1.20A.

37. The second sentence of Policy 1.1.20A requires that when an amendment application includes a request to extend a development area, the City must ensure consistency with Policies 1.1.21 and 1.1.22. The City's analysis is reflected in the staff report, which finds that the amendment application meets Policies 1.1.20, 1.1.20A, and 1.1.20B.

38. Petitioners and Right Size did not offer any testimony regarding consistency with Policy 1.1.20A. Their expert, Mr. Atkins, testified that he was familiar with Policy 1.1.20A, but did not explain how or why the Ordinance was internally inconsistent with Policy 1.1.20A. Instead, Mr. Atkins testified about data and analysis regarding Policy 1.1.21.

39. Petitioners and Right Size did not prove beyond fair debate that the Ordinance was inconsistent with Policy 1.1.20A.

40. FLUE Policy 1.1.20B states:

Expansion of the Development Areas shall result in development that would be compatible with its surroundings. When considering land areas to add to the Development Areas, after demonstrating that a need exists in accordance with Policy 1.1.21, inclusion of the following areas is discouraged;

1. Preservation Project Lands
2. Conservation Lands
3. Agricultural Lands, except when development proposals include Master Planned Communities or developments within the Multi-Use Future Land Use Category, as defined in this element.

The following areas are deemed generally appropriate for inclusion in Development Areas subject to conformance with Policy 1.1.21:

1. Land contiguous with the Development Area and which would be a logical

extension of an existing urban scale and/or has a functional relationship to development within the Development Area.

2. Locations within one mile of a planned node with urban development characteristics.

3. Locations within one-half mile of the existing or planned JTA RTS.

4. Locations having projected surplus service capacity where necessary facilities and services can be readily extended.

5. Public water and sewer service exists within one-half mile of the site.

6. Large Scale Multi-Use developments and Master Planned Communities which are designed to provide for the internal capture of daily trips for work, shopping and recreational activities.

7. Low density residential development at locations up to three miles from the inward boundary of the preservation project lands. Inward is measured from that part of the preservation project lands closest to the existing Suburban Area such that the preservation lands serves to separate suburban from rural. The development shall be a logical extension of residential growth, which furthers the intent of the Preservation Project to provide passive recreation and low intensity land use buffers around protected areas. Such sites should be located within one-half mile of existing water and sewer, or within JEA plans for expansion.

41. After the City makes a determination that there is a need for the expansion of a Development Area pursuant to Policy 1.1.21, the City next looks to see if the property is discouraged under Policy 1.1.20B. The subject Property does not fall into one of the discouraged lands. The City's expert, Ms. Reed, explained that if the questions of need and discouraged lands are satisfactorily answered, the Policy then describes lands that are generally deemed appropriate for inclusion in a particular Development Area.

42. The first question is whether the Property is contiguous to the UPDA and whether the extension is logical. The staff report notes that the Property is immediately adjacent to the UPDA to the north and that an extension of the boundary is logical because it permits an infill project. Ms. Reed and Ms. Haga testified that the proposed extension of the UPDA to include the Property is also logical because there is a functional relationship to the proposed mixed-use development to the north.

43. The next question is whether the Property is within one mile of a planned node with urban development characteristics. Petitioners and Right Size stipulated that the Property is within a node which was confirmed by Mr. Atkins.

44. The next criterion under Policy 1.1.20B is whether there are mass transit services available near the Property. The staff report notes that mass transit Routes 8 and 25 are available at the Property and this fact was confirmed by Ms. Reed.

45. The fourth and fifth criteria under Policy 1.1.20B address whether there is sufficient water, sewer and other services available to serve the Property. The City requested information from various agencies and utilized the responses to analyze the impact of the Ordinance. The City sought confirmation from the Jacksonville Electric Authority, Transportation Planning, the Duval County School Board, Florida Department of Transportation, and the Concurrency and Mobility Management System Office to determine whether the systems serving the Property, i.e. water, sewer, schools, and roads, had available capacity to serve the site if the UPDA was expanded to include the Property. All the agencies consulted responded that there was sufficient capacity available.

46. In addition, Ms. Reed testified that the Ordinance met Policy 1.1.20B because there is capacity for water and sewer, there is transit available, the area is very walkable, and there is access to a lot of neighborhood services nearby.

47. Ms. Reed and Ms. Haga persuasively testified that the Ordinance met the criteria for land deemed appropriate for inclusion in the UPDA as set forth in Policy 1.1.20B. Petitioners and Right Size did not offer any evidence regarding the consistency of the Ordinance with Policy 1.1.20B and their expert did not offer any opinions or otherwise discuss consistency of the Ordinance with Policy 1.1.20B.

48. Petitioners and Right Size did not prove beyond fair debate that the Ordinance was not consistent with FLUE Policy 1.1.20B.

49. FLUE Policy 1.1.21 requires the City to analyze need for all land use map amendments. The Policy states:

Future amendments to the Future Land Use Map series (FLUMs) shall include consideration of their potential to further the goal of meeting or exceeding the amount of land required to accommodate anticipated growth and the projected population of the area and to allow for the operation of real estate markets to provide adequate choices for permanent and seasonal residents and business consistent with FLUE Policy 1.1.5. The projected growth needs and population projections must be based on relevant and appropriate data which is collected pursuant to a professionally acceptable methodology. In considering the growth needs and the allocation of land, the City shall also evaluate land use need based on the characteristics and land development pattern of localized areas. Land use need identifiers include but may not be limited to, proximity to compatible uses, development scale, site limitations, and the likelihood of furthering growth management and mobility goals.

50. Petitioners and Right Size stipulated that they did not object to a density on the Property of 40 ru/acre or 114 total units, but object to the additional 19 units permitted by the Ordinance.

51. Petitioners' and Right Size's expert, Mr. Atkins, testified that need to expand the UPDA to encompass the Property was not demonstrated, and that need for the "additional number of units" was not demonstrated.

52. The City's experts, Ms. Reed and Mr. Killingsworth explained that Table L-20 of the FLUE identifies land use categories and their projected need at the end of the 2030 planning horizon. Mr. Killingsworth testified that Table L-20 demonstrates that at the end of the planning horizon the RPI land use will be at 119 percent of need, while the CGC land use will be at 84 percent of need. This indicates a need for additional CGC designated lands by 2030, as well as an over-abundance of RPI-designated lands. Since the Ordinance includes a request to change existing RPI-designated lands to CGC, it addresses both the need to increase CGC-designated lands and to decrease RPI-designated lands.

53. Mr. Killingsworth testified that Table L-20 was prepared by the City to comply with section 163.3177(6), which requires all local governments to project need and to assure that there is market availability to respond to such need. The Table, along with the underlying data and analysis used to support it, was reviewed by the Florida Department of Community Affairs (n/k/a the Department of Economic Opportunity) and found to comply with state law.

54. Mr. Killingsworth also testified that the City considered testimony by the San Marco Merchants Association, local residents, and the applicant presented during the hearings. The testimony demonstrates that the Ordinance would address current economic and housing needs in the area. Mr. Killingsworth opined that the testimony and Table L-20 demonstrate a need for the Ordinance to accommodate anticipated growth and the projected population of the area.

55. With regard to the land use need identifiers of proximity, compatibility, and scale, Mr. Killingsworth testified that "compatibility" as defined in the FLUE "doesn't mean you have to have the same uses adjacent to each other, it doesn't mean that you have to have the same density adjacent to each other." Instead it means that "those uses have to operate in conjunction with each other and there has to be [] some sense to the scale,

the mass, and bulk of the structure." *See Tr.* at pg. 203, lines 11-17.

56. Mr. Killingsworth also testified that although the City's analysis was that the Ordinance met the land use need identifiers, the limitations included in the site specific policy/text amendment were an additional way to ensure compatibility with adjacent uses with regard to use, scale, and height.

57. The CGC portion of the Property is currently permitted to be developed up to 40 ru/acre. The site specific policy/text amendment limits the Property to a total of 133 residential units (or approximately 46 ru/acre), which the City Council determined is compatible, particularly given the fact that the East San Marco property directly north of the Property can be developed with up to 60 ru/acre.

58. The Comp Plan FLUE does not establish height limitations for any of the land use categories, including CGC and RPI. Mr. Killingsworth testified that the site specific policy/text amendment provides for standards related to height that are otherwise not in the FLUE. The East San Marco project to the north has a height limit of 50 feet, and the low density residential neighborhood to the south has a height limit of 35 feet. Mr. Killingsworth opined that the limitation in the site specific policy/text amendment, restricting the height on the Property to an average of 35 feet, allows for an appropriate transition between the uses to the north and the uses to the south, thus ensuring compatibility.

59. Petitioners and Right Size did not prove beyond fair debate that the Ordinance was not consistent with FLUE Policy 1.1.21.

60. FLUE Policy 1.1.22 states: "Future development orders, development permits and plan amendments shall maintain compact and compatible land use patterns, maintain an increasingly efficient urban service delivery system and discourage urban sprawl as described in the Development Areas and the Plan Category Descriptions of the Operative Provisions."

61. Petitioners' and Right Size's expert Mr. Atkins testified that he did not review Policy 1.1.22. However, in an abundance of caution, the City and Intervenors presented evidence to establish that the Ordinance was consistent with Policy 1.1.22.

62. Mr. Killingsworth pointed to the definition of compact development from the FLUE, which includes the efficient use of land primarily by increasing intensity, density, and reducing surface parking. He testified that the Ordinance accomplished these criteria.

63. Mr. Killingsworth testified that the height averaging in the site specific policy/text amendment assisted with ensuring compatibility, and that the proposed development's mix of commercial, residential, and institutional uses on a small site met the definition of compact development.

64. Ms. Reed testified that the Property is in an area with full urban services, has access to transit, and fronts on an arterial roadway. Furthermore, it promotes a compact and compatible land use pattern through redevelopment and infill.

65. Petitioners and Right Size did not prove beyond fair debate that the Ordinance was not consistent with FLUE Policy 1.1.22.

Data and Analysis

66. The parties agreed in the Amended Joint Pre-Hearing Stipulation that the facts remaining for adjudication with regard to "data and analysis" were exclusively related to subsection (c) of Policy 4.4.16, the site specific policy/text amendment that addressed only building height. However, Petitioners' and Right Size's expert Mr. Atkins did not discuss data and analysis specifically related to subsection (c) of Policy 4.4.16. Mr. Atkins testified about data and analysis related to the Ordinance generally.

67. The City addressed the data and analysis supporting the Ordinance, and the City's response to that data and analysis. The City considered data from professionally accepted sources and applied an analysis based on

established procedures set forth in the Comp Plan.

68. The process of data collection began with the submittal of the application, which included a survey, a legal description and an owner's affidavit. Mr. Killingsworth testified that chapter 640 of the City's Ordinance Code sets out the process by which FLUM amendment applications are processed and reviewed by the planning staff. Section 650.404(b) requires that the City hold a Citizens Information Meeting that allows receipt of additional data from the affected community.

69. Ms. Reed explained that all amendments are evaluated based upon standards and methodologies established in the FLUE for the assessment of data and analysis, which includes public facilities, school impacts, population, and development impacts.

70. The City planning staff collected background data for the initial analysis of the Ordinance. The background section of the staff report goes through an analysis of the characteristics of the site, including the location, acreage, and surrounding uses; describes the site in general; identifies the Council district; identifies the Planning District; and notes if there are any applicable vision plans. The City planning staff also did research on applications and amendments that have occurred in proximity to the Property. The background information is part of the data and analysis that the City used to determine whether the Ordinance Amendment was consistent with the City's policies.

71. In addition, FLUE Policy 1.2.16 requires the City to assume maximum development potential when analyzing the impacts of amendments to the FLUM unless there is a site-specific policy limiting density or intensity.

72. In this instance, the staff report was completed prior to the addition of the site specific policy/text amendment to the Ordinance, which specifically limits the density and intensity permitted on the Property. The City's staff followed the guidelines of Policy 1.2.16 and utilized the maximum development potential for the Property in reviewing the

application, i.e., 2.87 acres of CGC designated property in the UPDA. Ms. Reed testified that the site specific policy/text amendment "added parameters and limitations that were not there before, so it really lessened the impact based on what we analyzed versus what was ultimately approved." *See Tr. at pg. 291, lines 8-17.*

73. Under Policy 1.2.16, the City developed a table entitled "Development Standards for Impact Assessment," which is used to collect and analyze specific impact data.

74. The data gathered by the City for the table included the analyses provided by various advising agencies and entities. The data and analyses provided by the other agencies and entities are summarized in the table in the staff report.

75. The table also includes a section where the City staff identifies and reviews other appropriate plans and studies. These plans and studies have not been adopted into the City's Comp Plan, but they are utilized as data and analysis when the planning staff reviews a FLUM amendment.

76. The staff report identifies three plans applicable to the site, the Southeast Jacksonville Vision Plan, the North San Marco Action Plan, and the Strategic Regional Policy Plan. Ms. Reed explained that the Ordinance was consistent with the Southeast Jacksonville Vision Plan which provides for new development along Hendricks Avenue compatible with existing neighborhoods. The staff report notes that design details can be addressed in the companion PUD rezoning application.

77. Likewise, the staff report concludes that the Ordinance is generally consistent with the features of the North San Marco Action Plan and that design details would be handled through the PUD review and implementation.

78. Finally, Ms. Reed explained that the City found that the Ordinance would achieve the Strategic Regional Policy Plan's goals of improving quality-of-life with appropriate infill and redevelopment and by providing diverse housing options.

79. Additional evidence and testimony offered by the applicant and the citizens during the Planning Commission, LUZ Committee, and City Council hearings was collected and analyzed by the City prior to final action on the amendment application.

80. The additional data and information gathered during the many different hearings on the Ordinance resulted in the recommendation of the LUZ Committee to add the site specific policy/text amendment to the Ordinance.

81. The site specific policy/text amendment limits the development potential on the Property. Mr. Killingsworth testified that the site specific policy/text amendment was a direct result of the City's analysis of input from the public related to intensity, density, and compatibility. Ms. Reed testified that "all of these things were considered together as a whole in order to come up with a recommendation, both in the staff report and final approval by Council as amended."

82. Petitioners and Right Size did not prove beyond fair debate that the Ordinance was not supported by data and analysis, and that the City's response to that data and analysis was not appropriate.

Meaningful and Predictable Standards

83. Section 163.3177(1) requires that a Comp Plan "establish meaningful and predictable standards for the use and development of land and provide meaningful guidelines for the content of more detailed land development and use regulations."

84. Petitioners' and Right Size's expert, Mr. Atkins, opined that subsection (c) of the site specific policy/text amendment is "vague in its

application and certainty in its outcome," in that "[t]here is no defined limit of what the height might be in violation of the requirements of section 163.3177(1)." Mr. Atkins acknowledged that the Comp Plan FLUE does not otherwise address height and that "[i]t all seems to be handled at the PUD or LDR level." This fact was confirmed by the City's expert, Mr. Killingsworth.

85. Mr. Killingsworth explained that the objective of the site specific policy/text amendment, as a whole, is to establish a maximum development potential or otherwise restrict development on the Property consistent with Objective 4.4 of the FLUE. The density limitations, combined with the height limitation, restrict the development potential on the Property.

86. Mr. Killingsworth testified that subsection (c) represents a policy statement by the City Council that height should be no more than an average of 35 feet, and it provides guidance as to how the height is to be calculated, which will ultimately be implemented in the LDRs and the PUD. Subsection (c) provides more specificity regarding height than would otherwise be achieved through a Comp Plan land use category without a site specific policy/text amendment.

87. Mr. Killingsworth also testified that although the height limitation in subsection (c) may not dictate that the higher heights should be on the northern portion of the Property and transition to the lower heights on the southern portion of the Property, the PUD and the development of the Property will need to comply with other parts of the Comp Plan that require a transition between uses.

88. Petitioners and Right Size did not prove beyond fair debate that the Ordinance does not guide future development decisions in a consistent manner, and does not establish meaningful and predictable standards for the use and development of land.

Ultimate Findings

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

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

CONCLUSIONS OF LAW

Scope of Review and Standing

91. Chapter 163, part II (Community Planning Act), Florida Statutes, and the case law developed pursuant thereto, are the applicable law in this proceeding. *See Amelia Tree Conservancy, Inc. v. City of Fernandina Beach*, Case No. 19-2515GM (Fla. DOAH Sept. 16, 2019; Fla. DEO Oct. 16, 2019). A hearing on a plan amendment is a de novo proceeding. *Id.*

92. To have standing to challenge a comprehensive plan amendment, a person must be an "affected person" as defined in the Community Planning Act's section 163.3184(1)(a). Petitioners and Right Size are affected persons and have standing to challenge the Ordinance.

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

Burden and Standard of Proof

94. As the parties challenging the Ordinance, Petitioners and Right Size have the burden of proof.

95. The City's determination that the Ordinance is "in compliance" is presumed to be correct and must be sustained if the City's determination of compliance is fairly debatable. *See* § 163.3187(5)(a), Fla. Stat.; *Coastal Dev. of N. Fla. v. City of Jacksonville Beach*, 788 So. 2d 204, 210 (Fla. 2001).

96. The term "fairly debatable" is not defined in chapter 163. In *Martin County v. Yusem*, 690 So. 2d 1288, 1295 (Fla. 1997), the Florida Supreme Court explained "[t]he fairly debatable standard is a highly deferential standard requiring approval of a planning action if a reasonable person could differ as to its propriety." The Court further explained, "an ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity." *Id.* Put another way, where there is "evidence in support of both sides of a comprehensive plan amendment, it is difficult to determine that the County's decision was anything but 'fairly debatable.'" *Martin Cty. v. Section 28 P'shp, Ltd.*, 772 So. 2d 616 (Fla. 4th DCA 2000).

97. "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 RO ¶ 149 (Fla. DOAH Sept. 1, 2015; Fla. DEO Dec. 30, 2015). Moreover, in a compliance determination, the motives of the local government are not relevant. *See Pacetta, LLC v. Town of Ponce Inlet*, Case No. 09-1231GM (Fla. DOAH Mar. 20, 2012; Fla. DEO June 19, 2012).

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

Internal Consistency

99. Section 163.3177(2) requires the several elements of the comprehensive plan to be consistent. A plan amendment creates an internal inconsistency when it conflicts with an existing provision of the comprehensive plan.

100. The City's Comp Plan is formatted with goals, objectives, and policies that describe how the City's programs, activities, and land development regulations will be initiated, modified, or continued, to implement the Comp Plan in a consistent manner. *See* § 163.3177(1), Fla. Stat. In the context of

the Community Planning Act, goals are statements of long-term vision or aspirational outcomes and are not measurable in and of themselves. Goals must be implemented by intermediate objectives and specific policies to carry out the general plan goals. *See* § 163.3164(19), (34), and (37), Fla. Stat.

101. Internal consistency does not require a comprehensive plan amendment to further every goal, objective, and policy in the comprehensive plan. It is enough if a plan provision is "compatible with," i.e., does not conflict with, other goals, objectives, and policies in the plan. If the compared provisions do not conflict, they are coordinated, related and consistent. *See Melzer, et al. v. Martin Cty.*, Case Nos. 02-1014GM and 02-1015GM, RO ¶¶ 194-195 (Fla. DOAH July 1, 2003; Fla. DCA Oct. 24, 2003).

102. Consistency of the Ordinance with the City's LDRs was not an issue of law to be determined in this proceeding. *See Amelia Tree Conservancy, Inc. v. City of Fernandina Beach*, Case No. 19-2515GM (Fla. DOAH Sept. 16, 2019; Fla. DEO Oct. 16, 2019).

103. Likewise, many communities have free-standing vision plans "which may, in part, inform future planning decisions." *See 1182/3526S Rouse LLC and 1185/3626N Rouse LLC v. Orange Cty.*, Case No. 18-5985GM RO ¶ 63 (Fla. DOAH Oct. 14, 2019). The evidence demonstrates that the City has vision plans that fall within this category and which were reviewed by the City's planning staff. However, these vision plans have not been adopted as part of the Comp Plan. Therefore, while the vision plans may be considered as data and analysis available for review by staff, they are not part of the "in compliance" determination in this case. *See Amelia Tree Conservancy, Inc.*, RO at ¶ 137 (plan not adopted as part of Comp Plan is not reviewed for compliance).

104. Based on the foregoing Findings of Fact, Petitioners and Right Size did not prove beyond fair debate that the Ordinance is internally inconsistent with Comp Plan FLUE Policies 1.1.20A, 1.1.20B, 1.1.21, and 1.1.22.

Data and Analysis

105. Section 163.3177(1)(f) requires that all plan amendments be "based on relevant and appropriate data and an analysis by the local government." § 163.3177(1)(f)2., Fla. Stat. "The statute explains that to be based on data 'means to react to it in an appropriate way and to the extent necessary indicated by the data available on that particular subject at the time of adoption of the . . . plan amendment at issue.'" *222 Lakeview LLC v. City of West Palm Beach*, Case Nos. 18-4743GM and 18-4773GM RO ¶ 84 (Fla. DOAH Dec. 26, 2019), *aff'd per curiam*, 295 So.3d 1185 (Fla. 4th DCA 2020).

106. All data available to the local government and in existence at the time of adoption of the plan amendment may be presented. *See 1182/3526S Rouse LLC.*, RO at ¶ 62.

107. Relevant analyses of data need not have been in existence at the time of adoption of a plan amendment. Data existing at the time of adoption may be analyzed through the time of the administrative hearing. *See 222 Lakeview LLC*, RO at ¶ 86.

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

109. Petitioners and Right Size argued both that the City did not have any data to support the Ordinance, and that the City did not look at enough data to support the Ordinance. However, consistent with the burden of proof, it is not enough for a petitioner to simply allege that a land use amendment is not based upon the best available existing data. A petitioner must specifically identify the best available existing data that the local

government failed to use. *See Env't'l. Coalition of Fla., Inc. v. Broward Cty.*, 586 So. 2d 1212, 1215 (Fla. 1st DCA 1991).

110. Based upon the foregoing Findings of Fact, Petitioners and Right Size did not identify the data that the City allegedly failed to use. "The fact that other data may be available is irrelevant, as long as the data upon which the City's decision to adopt the FLUM Amendment is based is taken from professionally accepted sources and gathered through professionally accepted methodologies." *Amelia Tree Conservancy, Inc.*, RO at ¶ 152.

111. The evidence demonstrated that there was extensive data and analysis, taken from professionally accepted sources, and gathered through professionally accepted methodologies to support the Ordinance.

112. Based upon the foregoing Findings of Fact, Petitioners and Right Size did not prove beyond fair debate that the Ordinance is not based on relevant and appropriate data and an analysis by the City, as required by section 163.3177(1)(f).

Meaningful and Predictable Standards

113. Comprehensive plans must provide "meaningful and predictable standards for the use and development of land and provide meaningful guidelines for the content of more detailed land development and use regulations." § 163.3177(1), Fla. Stat.

114. Petitioners' and Right Size's argument was limited solely to subsection (c) of the site specific policy/text amendment. Policy 4.4.16(c) limits the height of the proposed use on the Property and sets out guidelines for the calculation of height.

115. A challenged plan amendment must be viewed in the context of the guidance provided by the entire Comp Plan. The LDRs should contain the details, and it is not necessary to add these details to the Comp Plan.

See Kingswood Manor Ass'n, Inc. v. Town of Eatonville,

Case No. 15-0308GM RO ¶ 20 (Fla. DOAH June 3, 2015; Fla. DEO

Aug. 13, 2015)("[T]he Plan Amendment is guidance for the content of more detailed land development and use regulations.").

116. Subsection (c) of the site specific policy/text amendment limits height on the Property. This sets a standard for the use and development of the Property that is not otherwise generally addressed by the Comp Plan and its land use categories, and is something that can be implemented through the City's LDRs. Subsection (c) guides future decisions regarding the regulation of the use of the Property in a consistent, predictable and meaningful manner.

117. The preponderance of the evidence shows that the Ordinance establishes meaningful and predictable standards. Petitioners and Right Size failed to prove beyond fair debate that the Ordinance does not satisfy the requirements of section 163.3177(1).

Summary

118. For the reasons stated above, the City's determination that the Ordinance, "in compliance" is fairly debatable.

119. For the reasons stated above, Petitioners and Right Size did not prove beyond fair debate that the Ordinance is not "in compliance," as that term is defined in section 163.3184(1)(b).

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Economic Opportunity enter a final order finding Ordinance No. 2019-750-E "in compliance," as defined by section 163.3184(1)(b).

DONE AND ENTERED this 10th day of August, 2020, in Tallahassee, Leon County, Florida.



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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.