STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LOURDES RAMIREZ,

Petitioner,

vs. Case No. 22-1385GM

DEPARTMENT OF ECONOMIC OPPORTUNITY, AND SARASOTA COUNTY, FLORIDA, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA,

Respondents,

and

CALLE MIRAMAR, LLC; SKH 1, LLC; 1260, INC.; STICKNEY STORAGE, LLC; AND SIESTA KEY PARKING, LLC,

Intervenors.
_____/

AMENDED FINAL ORDER

A final hearing in this case was held on November 17 and 18, 2022, in Sarasota, Florida, before Suzanne Van Wyk, an Administrative Law Judge with the Division of Administrative Hearings ("Division").

APPEARANCES

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STATEMENT OF THE ISSUE

Whether Sarasota County Ordinance 2021-047 ("Ordinance"), adopted by Sarasota County ("the County") on October 22, 2021, is consistent with the Sarasota County Comprehensive Plan ("Comprehensive Plan").

PRELIMINARY STATEMENT

On February 18, 2022, Lourdes Ramirez ("Petitioner") filed a petition with the Department of Economic Opportunity ("Department") under section 163.3213, Florida Statutes (2022),[1] alleging that the Ordinance is

[1] Except as otherwise provided, all citations herein to the Florida Statutes are to the 2022 version.

inconsistent with the Comprehensive Plan. The Department investigated the allegation, as required by section 163.3213(4), and conducted an informal hearing on March 30, 2022, at which Petitioner and the County presented oral testimony and exhibits. Based on the investigation, on April 19, 2022, the Department determined that the Ordinance was consistent with the Comprehensive Plan.

On May 9, 2022, Petitioner filed a challenge with the Division, under section 163.3213(5)(a), challenging the Ordinance as inconsistent with specific goals, objectives, and policies of the Comprehensive Plan. On May 17, 2022, Calle Miramar, LLC; SKH 1, LLC, 1260, Inc.; Stickney Storage, LLC; and Siesta Key Parking, LLC ("Intervenors"), filed a Motion to Intervene, which was granted on May 26, 2022.

The final hearing was originally scheduled for September 6 and 7, 2022, in Sarasota, Florida, but was rescheduled to November 17 and 18, 2022, to allow the parties additional discovery time due to a dispute over which historic zoning ordinances, critical to the issue here, were in effect on the relevant date.

The final hearing convened as rescheduled. Joint Exhibits 1 through 11 were admitted into evidence. Petitioner testified on her own behalf and presented the testimony of Brett Harrington, the County planner who conducted the consistency review of the Ordinance; and Daniel Delisi, a consulting land-use planner. Petitioner's Exhibits 8-10, 12, 13, 22, 26, 27, 29-33, 35-39, 41, 42, and 44-57 were admitted into evidence. The County presented the testimony of Mr. Harrington, and County Exhibits 1 through 26 were admitted into evidence. The Department did not present any witnesses or exhibits. Intervenors presented the testimony of Daniel Trescott, a planner in hurricane evacuation analysis; and Kelly Klepper, a consulting

land-use planner. Intervenors' Exhibits 1, 3-5, 7-10, 20-23, 28, 29, and 33 were admitted into evidence.

The final hearing proceedings were recorded and a two-volume Transcript of the hearing was filed on December 8, 2022. At the close of the final hearing, the parties agreed to an extended deadline of January 13, 2023, for filing their proposed final orders. The parties requested, and were granted, a second extension to file proposed final orders by January 27, 2023.

The parties filed their Proposed Final Orders on January 27, 2023, which have been considered by the undersigned in preparing this Final Order.

FINDINGS OF FACT

Parties and Standing

1. Petitioner lives and owns property at 5131 Saint Albans Avenue on Siesta Key in the unincorporated County.

2. The County is a political subdivision of the State of Florida with the duty to adopt zoning regulations that implement, and are consistent with, its Comprehensive Plan. *See* § 163.3213(1), Fla. Stat.

3. The Department is the state land planning agency with the duty to review and investigate petitions filed under section 163.3213, challenging land development regulations as inconsistent with the local government's comprehensive plan. *See* § 163.3213(4), Fla. Stat. Following its review of Petitioner's challenge, on April 19, 2022, the Department found the Ordinance consistent with the Comprehensive Plan.

4. Intervenors, Calle Miramar, LLC, and SKH 1, LLC, initiated an amendment to the County zoning code which led to the County's adoption of the Ordinance.

5. Intervenor, Calle Miramar, LLC, owns land where a proposed hotel will be located on Siesta Key ("the Calle Miramar Hotel"). Intervenor, SKH 1, LLC, has leased the land owned by Intervenor, Calle Miramar, LLC.

6. Intervenors, 1260, Inc., and Stickney Storage, LLC, own the parcels on which a second hotel will be developed on Siesta Key ("the Old Stickney Point Hotel").

7. Intervenor, Siesta Key Parking, LLC, owns the parcel where a parking garage will be built associated with the Old Stickney Point Hotel.

8. Petitioner's home is about 0.61 miles as the crow flies from the closest Commercial General ("CG") zoning district on Siesta Key, known as the Siesta Key Village. By vehicle or pedestrian travel, Petitioner lives about 1.3 miles from Siesta Key Village.

9. Petitioner works from home, and often, if not daily, walks to visit her bank, the post office, and shops and restaurants in Siesta Key Village, as well as the beach. She has evacuated for hurricanes three times, and has experienced crowded roads when evacuating. From her home, Petitioner can hear music from existing commercial establishments in Siesta Key Village.

10. Petitioner is concerned that the Ordinance, which removes all residential density limitations from hotel development in CG zoning districts, will exacerbate hurricane evacuation delays, jeopardize pedestrian and public safety in Siesta Key Village, and increase noise and other nuisances from the Village to surrounding residential neighborhoods like her own.

11. With limited exception, the Ordinance applies uniformly to commercial zoning districts throughout the County. Yet Siesta Key is the only key in the County with property zoned CG. Thus, the Ordinance will affect the residents of Siesta Key differently from any other barrier island.

Siesta Key

12. Siesta Key is designated as a Barrier Island within the Comprehensive Plan Future Land Use Map ("FLUM"). Barrier Islands are so

designated because they help protect the mainland from storm damage in hurricanes and other storms.

13. The entirety of Siesta Key is a designated Coastal High Hazard Area ("CHHA") and is within the County's Hurricane Evacuation Zone A, which is required to evacuate for a Category 1 hurricane.

14. There are only two bridges–Siesta Drive Bridge and Stickney Point Road Bridge–that provide access and evacuation routes to the mainland from Siesta Key.

15. Both of the bridges are designated as constrained roads by the Comprehensive Plan. A constrained road is defined by the Comprehensive Plan as a road with "a level of service lower than the adopted standard ... ."

16. The level of service provided by the bridges is classified as "D." This means that while on the bridges, "[s]peed and freedom to maneuver are severely restricted . . . . Small increases in traffic will generally cause operational problems at this level."

17. The Comprehensive Plan states that constrained roads are common throughout the County and therefore the County has accepted "an additional responsibility . . . in its review and approval of LDRs [land development regulation]." Therefore, the County must base approvals of LDRs on "maintaining the existing level of service of [constrained] roadways and to not allow the existing operating conditions to be degraded."

18. There are about 44 acres of CG-zoned properties on Siesta Key, found in different areas of the island. Siesta Key Village is the largest CG-zoned area with commercial uses such as restaurants, bars, and retail shops.

19. There are around 10,000-11,000 dwelling units on Siesta Key. Out of this total, about 6,000 house permanent residents. Approximately 40 to 46 percent of all dwelling units on Siesta Key are seasonal or short-term rentals.

20. Siesta Key attracts thousands of tourists every year to visit the beaches. There is a high demand for rentals of periods less than 30 days.

Ordinance No. 2021-047

21. The subject Ordinance removes residential density limits (measured in dwelling units per acre – "du/acre") from transient accommodations (i.e., hotels and motels) within the commercial zoning districts throughout the County.[2] The Ordinance strikes language limiting the density of transient accommodations, which include kitchens in more than 25% of the units, to 13 du/acres; and those with kitchens in up to 25% of the units, to 26 du/acre.

22. The Ordinance also changes the definition of "transient accommodations" as follows:

> *Transient Accommodations*. A transient accommodation means a dwelling unit or other accommodation used as a dwelling unit or other place of human habitation with sleeping accommodations (hereinafter collectively referred to as 'an accommodation') which is rented, leased or sub-leased for less than monthly periods or which is subject to time sharing pursuant to general law for less than monthly time share periods. 'Monthly' shall mean either a calendar month or 30 days. Transient accommodations shall include hotels, motels, inn, extended-stay facility, bed and breakfasts, boatels, or other similar uses. A transient accommodation shall be considered a non-residential use for ~~density~~ all purposes. However, a transient accommodation located in the BRR/PD District or the Nokomis Center Revitalization Plan U.S. 41 Corridor shall be considered a residential use for density purposes. ~~Each transient unit not having a kitchen shall be equal to ½ dwelling unit. Each transient unit having kitchen facilities shall be equal to one dwelling unit.~~

23. Under the zoning code, there are no intensity standards (i.e., floor-to-area ratio, or FAR), which typically govern non-residential development, to limit hotel and motel development on the barrier islands.

[2] Except for a specific commercial designation which does not apply here.

24. Transient accommodations are not a use by right in commercial zoning districts. These uses are allowed as a "special exception," which requires an individual site-specific development review by the County. The County's special exception process does not provide for any density or intensity standards. Instead, it relies on standards such as bulk, mass, and height of structures.

25. Intervenors, Calle Miramar, LLC, and SKH 1, LLC, initiated the Ordinance concurrently with their "special exception" application to approve development of the Calle Miramar Hotel. Applying the zoning code changes from the Ordinance, the County has approved the hotel for a total of 170 units on a one-acre parcel, along with a restaurant, bar, and retail shops.[3]

26. Contrary to Intervenors' position that the Ordinance is a mere "clarification" of the zoning code, the Ordinance is a material change which County staff found "will allow for greater development of [hotels and motels] within the County."

27. The Calle Miramar Hotel approval is an example of increased density of hotel development allowed under the Ordinance. Development of a hotel at 170 units on one acre is a significant increase over prior policy, limiting hotels to either 13 or 26 du/acre (depending on the number of units containing kitchens). Since the County adopted the Ordinance, four applications for special exception approval of hotels on Siesta Key have been submitted to the County. Together, the applicants are requesting about 630 new hotel rooms.

28. It is easy to understand why Petitioner is concerned with the intensity of new hotel development on the barrier island. This hotel, which planning staff characterized as "out-of-scale" with surrounding commercial uses, will generate automobile traffic in areas she walks regularly, contribute to more

[3] The development order approving the hotel is the subject of a separate circuit court challenge under section 163.3215 alleging it is inconsistent with the Comprehensive Plan.

beach traffic, and produce noise from a planned rooftop bar which may disturb her neighborhood.

29. Even so, it is not the undersigned's role to determine whether allowing a six-and-one-half fold increase in hotel development on a barrier island in the CHHA within Hurricane Evacuation Zone A (the area most vulnerable to both wind and flood damage) is good policy. The undersigned's sole duty is to determine whether the policy change represented by the Ordinance is consistent with the existing Comprehensive Plan, under section 163.3213.

Alleged Inconsistencies with the Comprehensive Plan

FLU Policies 2.9.1. and 2.9.2.

30. First, Petitioner challenges the Ordinance as inconsistent with Future Land Use ("FLU") Policies 2.9.1 and 2.9.2, which address existing land use patterns, hurricane evacuation planning, and disaster mitigation efforts. Policy 2.9.1 reads, in pertinent part, as follows:

> FLU Policy 2.9.1. Barrier islands are designated on the Future Land Use map to recognize existing land use patterns and to provide a basis for hurricane evacuation planning and disaster mitigation efforts. *The intensity and density of future development on the Barrier Islands of Sarasota shall not exceed that allowed by zoning ordinances and regulations existing as of March 13, 1989*[.][4]

(emphasis added).

31. Petitioner contends the Ordinance allows for development on the Barrier Islands that exceeds the intensity and/or density allowed by the County's zoning ordinances as of March 13, 1989. The issue turns on what the County's zoning ordinances allowed as of that date.

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[4] Similarly, FLU Policy 2.9.2 states, "Barrier Island residential density shall be in accordance with FLU Policies 2.9.1 and 1.2.3 and shall not exceed the maximum gross density requirements existing as of March 13, 1989."

32. The parties agree on the zoning ordinances in effect on that date, but significantly disagree on the correct interpretation of those ordinances.

33. The zoning ordinance in existence as of March 13, 1989, is Ordinance No. 75-38, as amended by Ordinance No. 83-08, on February 15, 1983.

34. Ordinance No. 83-08 contains the following pertinent density standards:

> **MAXIMUM RESIDENTIAL DENSITY**:
> (Dwelling units per acre, see Sec. 28.33, "Density, Residential" definition.)
>
> 1. Multiple Family Dwellings;
> Nine (9) units per acre.
>
> 2. Transient accommodations where not more than twenty-five percent (25%) of the units have cooking facilities:
>
> | Intensity Level Band (see Future Land Use Plan provisions Map in Apoxsee[5]) | Maximum Density (subject to Apoxsee) |
> |---|---|
> | Band B | 36 |
> | Band C | 26 |
> | Band D | 18 |
> | Band E | 12 |
>
> 3. Transient accommodations where more than twenty-five percent (25%) of the units have cooking facilities:
>
> | Intensity Level Band (see Future Land Use Plan provisions Map in Apoxsee) | Maximum Density (Subject to Apoxsee) |
> |---|---|
> | Band B | 18 |
> | Band C | 13 |
> | Band D | 9 |
> | Band E | 6 |

[5] Upon original adoption, the County titled the Comprehensive Plan "Apoxsee."

35. The corresponding intensity level bands did not cover the Barrier Islands. Likewise, they did not cover some properties in the County along the I-75 corridor, although that property was within the "Urban" FLU category.

36. Petitioner argues, relying on significant legislative history, that by excluding the Barrier Islands from the intensity bands, any increase in transient accommodations was prohibited on Barrier Islands. Respondents and Intervenors contend that, to accept Petitioner's interpretation, all property outside the intensity bands along the I-75 corridor would also be excluded from increased hotel development.

37. On the other hand, Respondents and Intervenors argue that, since Barrier Islands were excluded from the intensity bands, there was no density or intensity limit on transient accommodations on the Barrier Islands, except the limitations provided through the special exception review process. The County has shown, through its approval of the Calle Miramar Hotel development, that the special exception process, as applied to that one-acre parcel, allows up to 170 units per acres in an eight-story building.

38. The intensity level bands are not established in Ordinance 83-08. They are established in the 1981 comprehensive plan ("1981 plan"), which illustrates how to interpret the intensity bands. The text of the 1981 FLU element discusses the population projections for the relevant planning period and describes strategies to allocate that population to appropriate areas. The 1981 plan discusses a "refinement of the intensity level band concept" by incorporating "activity centers" throughout the intensity bands in urban, semi-rural, and rural areas, then describes strategies like sector planning and planned unit developments to provide flexibility within activity centers.

39. After 11 pages of that discussion, the 1981 plan provides that "a number of … areas of the County, which, because of their unique nature, require treatment separate from the three general land uses (urban, semi-rural, and rural) discussed earlier." The 1981 plan names Barrier Islands, and large tracts of land under specialized commercial categories, such as

commercial developments at I-75 interchanges, as examples of those areas requiring separate treatment. It is clear from the plain text of the 1981 plan that the intensity bands cover only urban, semi-rural, and rural land use areas, and are further refined by criteria for location of activity centers within those bands. The plain language does not support Respondents and Intervenors' contention that the absence of an intensity band means a free-for-all on hotel intensity.

40. The 1981 plan states quite the opposite. The 1981 plan specifically discusses the Barrier Islands as an area of special concern, acknowledging the "problems associated with development on the barrier islands," including "the detrimental effect of building along the active beach areas" and "difficulties of evacuating large numbers of people from the Keys in time of emergency."

41. The 1981 plan describes Siesta Key as "highly developed" and "contain[ing] some of the County's most intensive residential development." The 1981 plan then states that it "recognizes the existing development *represents the maximum levels of development on the Keys*[.]" (emphasis added). The 1981 plan also states that it "prohibit[s] future increases in development intensity on the Keys." The 1981 plan does not prohibit new hotel development on Siesta Key, but rather an increase in density or intensity of development beyond what existed at that time.

42. Further, it is axiomatic that a local government's land development regulations are "in compliance" with its comprehensive plan, unless challenged under section 163.3213, and found to violate the comprehensive plan. *See* § 163.3213(6), Fla. Stat. ("If a land development regulation is not challenged within 12 months, it shall be deemed to be consistent with the adopted local plan."). Ordinance 83-08 was not challenged and is "in compliance" with the 1981 plan. Respondents and Intervenors' interpretation of Ordinance 83-08 to provide unlimited intensity of hotel development (subject to the special exception review process) on Barrier Islands conflicts

with the 1981 plan's direction that it "represents the maximum levels of development on the Keys." The ordinance cannot be interpreted in a way that would render it inconsistent with the 1981 plan.

43. The current Comprehensive Plan provides more evidence that the County's interpretation of the Ordinance—to allow hotel and motel development in GC at intensities limited only by the special exception process—is inconsistent with the Comprehensive Plan.

44. The data and analysis supporting the current Comprehensive Plan indicate that the Barrier Island designation in itself limits development to existing densities and intensities of use, not just to the existing types of use. "Intensification of use and density on the barrier islands would be contrary to the standing policies of this Comprehensive Plan.[6]" With regard to FLU Goal 2 and its implementing policies (including Policy 2.9.1 and 2.9.2), the plan provides, "The future distribution, extent, and location of generalized land uses are not portrayed for the Barrier Islands, because it is the continued policy of Sarasota County that the intensity and density of future development not exceed that allowed by existing zoning.[7]" "The barrier island designation has not been modified and coastal residential densities are represented by existing development, and/or current zoning.[8]"

45. Regarding Siesta Key, the Comprehensive Plan provides, "The higher densities found on Siesta Key were recognized, yet prohibited from further increases by a 1979 Planning Department Study, and subsequent down zoning in 1982.[9]"

46. The preponderance of the evidence supports a finding that the Ordinance, as interpreted and applied by the County, allows for increased

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[6] Sarasota County Comprehensive Plan, p. V2-26 (Oct. 25, 2016).

[7] *Id.* at p. V2-321.

[8] *Id.*

[9] *Id.*

intensity of hotel development on Siesta Key over that established by Ordinance 89-03.

47. On October 3, 1989, through enactment of Ordinance No. 89-76, the County removed the reference to intensity level bands from the zoning ordinance, instead limiting transient accommodations, where not more than 25% of the units have kitchens, to a maximum density of 26 du/acre; and those where more than 25% of the units have cooking facilities, to 13 du/acre. From that date until the adoption of the Ordinance at issue, the County has limited transient accommodations to the 26 and 13 du/acre maximum density.[10]

Coastal Objective 1.2 and Coastal Policy 1.2.1

48. Next, Petitioner contends that the Ordinance is inconsistent with Coastal Objective 1.2 and Policy 1.2.1, which read as follows:

> COASTAL — Encourage Appropriate Densities in the CHHA
>
> OBJ 1.2 — To encourage low-density land uses in the [CHHA] in order to direct population concentrations away from this area.
>
> Coastal Policy 1.2.1
> Land Development Regulations and limits on urban infrastructure improvements shall both be used to limit development on coastal barrier islands and other high-hazard coastal areas to prevent a concentration of population or excessive expenditure of public and private funds.

[10] The undersigned has contemplated that the County simply failed to update Policy 2.9.1 when it adopted the comprehensive plan update after 1989, and has carried forward in the current Comprehensive Plan an outdated reference to March 13, 1989, rather than October 3, 1989. County staff have consistently applied the density standards adopted on October 3, 1989, to new public accommodations in CG zoning districts, and, based on staff reports, intended to apply them to the Calle Miramar Hotel application, until Calle Miramar representatives raised the issue of the March 13, 1989 date.

49. Petitioner contends that the Ordinance is inconsistent with these provisions because the addition of hotel guests on Siesta Key constitutes a concentration of population on a coastal barrier island.

50. Rather, the County's population encompasses only the permanent and seasonal populations.[11] The Comprehensive Plan does not include hotel guests within the County's seasonal population count.[12]

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[11] The excerpts below demonstrate that the Comprehensive Plan consistently refers to the County's permanent and seasonal residents when addressing population:

> "Sarasota County is home to over 390,000 residents, in addition to the estimated 90,000 seasonal residents who may live in the county for a portion of the year." Introduction, p. V1-44.
>
> "Long-term projections show that the county's population could reach over 480,000 full-time residents by 2040." Introduction, p. V1-46
>
> "Consistently recognized as one of the best places in the country to retire, Sarasota County is home to a large share of residents aged 65 and over, who make up nearly one-third of its full-time population." Introduction, p. V1-51
>
> "Sarasota County continues to experience periods of rapid population growth and seasonal fluctuations in populations[.]" Mobility Element, p. V1-414.
>
> "Resident Population … includes persons at their usual place of residence. Usual residence is defined as the place where a person lives and sleeps most of the time." Definitions, p. V1-590.
>
> The County discourages the expansion of existing transportation facilities on or onto the urbanized Barrier Islands, which will not be approved unless "the expansion will assist in the safe evacuation of the resident and seasonal population." Transportation Policy 1.1.3.

[12] "Sarasota County Planning Services views seasonal population from a housing and residential land use perspective, and therefore, calculates the seasonal population based on the number of housing units identified by the Census Bureau as being for seasonal or occasional use." Definitions, p. V1 590. "The seasonal population is thus calculated by multiplying the number of seasonal units times the average household size, or persons per household. This provides an estimate of the additional number of persons in the county if all the seasonal housing units were occupied." Introduction, p. V1-48. "Census data from the American Community Survey (ACS) indicate almost 40,000 housing units (or approximately 17% of the total units) in the county are for seasonal or temporary use which amounts to almost 85,000 seasonal residents." *Id*.

51. Petitioner introduced testimony that tourists in hotels on barrier islands are a part of the "evacuating population," thus the Ordinance does not prevent a concentration of population on the barrier islands. This testimony was not persuasive. The Comprehensive Plan includes only permanent and seasonal residents within the definition of population, and bases that determination on dwelling units, used for either temporary or permanent residences. Transient residents in hotel and motel units are not considered part of the population of the County.

52. Petitioner did not introduce any evidence to support a finding that the Ordinance will result in an excessive expenditure of public funds on the coastal barrier islands.

53. The undersigned infers from the evidence that the Ordinance will result in a significant expenditure of private funds on the Siesta Key barrier island, in the form of hotel development by private entities. But no evidence was introduced to support a finding that the expenditure will be "excessive." Nor was there any evidence to determine what type or amount of expenditure would be "excessive."

Coastal Policy 1.2.3

54. Petitioner next contends that the Ordinance is inconsistent with Coastal Policy 1.2.3, which reads, "Encourage hotel/motel development in the storm evacuation zones category C, D, and E, rather than evacuation zones A and B."

55. Intervenors offered testimony that the Ordinance does not implicate this policy because the Ordinance applies uniformly to hotel and motel development in commercial districts throughout the County in all hurricane evacuation zones. They introduced evidence that, out of the approximately 5,200 acres of commercially zoned property to which the Ordinance applies, around two-thirds of that acreage is outside of evacuation zones A and B. Thus, their experts testified that, since more of the commercial property

subject to the Ordinance is in evacuation zones C, D, and E, it does not encourage hotel development in zones A and B over C, D, and E.

56. That testimony was neither credible nor persuasive. That opinion assumes that demand for hotel development is equal among all evacuation zones. It ignores findings that Siesta Key brings in thousands of tourists each year to visit the beaches, which drives demand for rentals of less than 30 days, and that Siesta Key is the only barrier island with GC zoning to which the Ordinance applies. Demand for hotel units will be higher closer to the beach, which is almost exclusively in evacuation zones A and B.

57. The best evidence of the effect the Ordinance has had on hotel development is the actual hotel development proposals which have been brought forward since the Ordinance was adopted. It is uncontroverted that the Ordinance was proposed by Intervenors, Calle Miramar, LLC, and SKH 1, LLC, along with the special exception application for the Calle Miramar Hotel, in order to maximize the number of units to be built. Since adoption of the Ordinance, three[13] additional hotel special exception applications have been filed for development on Siesta Key, for more than 600 hotel units.

58. Adoption of the Ordinance has encouraged hotel development in evacuation zone A on Siesta Key.

59. No evidence was introduced to support a finding that any special exception hotel application has been filed in any area of the County outside of either evacuation zone A or B since adoption of the Ordinance.

60. The preponderance of the evidence supports a finding that the Ordinance encourages hotel development in evacuation zones A and B, rather than C, D, and E.

[13] One of the three applications was later withdrawn.

Coastal Objective 1.3

61. Finally, Petitioner contends that the Ordinance is inconsistent with Coastal Objective 1.3, which requires the County "to protect the public safety during emergency evacuation by reducing or maintaining emergency evacuation clearance time; maintaining an adequate emergency evacuation roadway system; and ensuring adequate shelter space."

62. The objective is implemented by 11 specific policies directing the County to take the following actions:

> Policy 1.3.1 – "Strive toward community preparedness for each storm category using Best Management Practices, safe and timely evacuation, and appropriate sheltering" that will be incorporated into the County's Comprehensive Emergency Management Plan ("CERP").
>
> Policies 1.3.2 and 1.3.3 establish a level of service of 12 hours emergency evacuation time for in-County evacuation in a Category 5 hurricane, and 16 hours for out-of-county evacuation.
>
> Policy 1.3.4 requires County to include emergency services recommendations when reviewing and approving new residential development plans; and requires County emergency management to approve the plans for new shelter facilities.
>
> Policy 1.3.5 establishes specific criteria for the County to improve designated evacuation routes.
>
> Policy 1.3.6 identifies the data the County must use to update the hurricane evacuation components of the Comprehensive Plan.
>
> Policy 1.3.7 deals with evacuation and education plans for residents of manufactured home developments.
>
> Policy 1.3.8 prohibits the approval of emergency storm shelters on barrier islands.

> Policy 1.3.9 directs the County to consider protective processes when replacing or building critical infrastructure.
>
> Policy 1.3.10 encourages cities located in the County to coordinate with the County on disaster planning and requiring an annual process to coordinate planning activities related to the County and cities' CEMP.
>
> Policy 1.3.12 states that the County should pursue mitigation of identified shelter deficiencies.

63. None of these policies requires a hurricane evacuation study prior to approving zoning ordinances that impact density or intensity of development on barrier islands. None of these policies relates to the connection between approving new development and hurricane evacuation studies.

64. The County did not analyze the impact the Ordinance would have on evacuation times. In fact, it would be impossible to conduct such an analysis without knowing where new hotel development will occur and how much traffic will be generated by said development.

65. A consultant for Calle Miramar, Inc., conducted a hurricane evacuation study for the special exception applications for the Calle Miramar and Old Stickney Point hotels. There was some testimony that the impact on the County's hurricane evacuation clearance times from evacuation of those hotel guests would be *de minimis*. The evidence does not support a finding of the exact impact development of the two hotels would have on hurricane evacuation times.

66. Petitioner contends that, since there is no exception in the Comprehensive Plan for *de minimis* increases, the Ordinance is inconsistent with the objective.

67. The objective directs the County to protect public safety during emergency evacuation by (1) reducing or maintaining emergency evacuation

clearance times; (2) maintaining an adequate emergency roadway system; and (3) ensuring adequate shelter space.

68. The Statewide Regional Evacuation Study Program undertaken by the Florida Department of Emergency Management, along with the regional planning councils, is the information relied upon by counties for emergency management planning and operational procedures. A comparison of the 2010, 2017, and 2020 studies show a decline in overall hurricane evacuation times for the County, and the projections for 2025 include additional declines. For example, the 2017 clearance times for the County in a Category 5 hurricane base scenario (i.e., assumes all residents and visitors evacuate) was 78.5 hours for clearance time to shelter, and 89 hours for both in-county and out-of-county clearance times. In 2020, the clearance times for that same scenario were down to 69.5 hours for clearance time to shelter, and 81.5 hours for both in-county and out-of-county clearance time. The study projects further reductions in 2025, with 67.5 hours for time to shelter, and 75 hours for both in-county and out-of-county clearance times. Similar reductions are both documented and forecast for the County under the operational scenario (i.e., assumes that not all residents and visitors evacuate), showing a decline from 53.5 hours for time-to-shelter in 2017, to 37.5 hours in 2020, and a projection of 21 hours by 2025.

69. Many factors help reduce hurricane evacuation times, even with a growing population—building more shelters, hardening existing structures, designating evacuation routes for one-way traffic, widening roadways, etc. The County has undertaken a mix of these approaches to reduce its hurricane evacuation times.

70. Even accepting hearsay testimony[14] that the Calle Miramar and Old Stickney Point hotels will increase hurricane evacuation time, the evidence could not support a finding that the Ordinance conflicts with the direction in

[14] The consultant's study was not introduced in evidence.

Objective 1.3 for the County to reduce or maintain its hurricane evacuation times.

71. No competent evidence was introduced from which the undersigned could find that, by adopting the Ordinance, the County will be unable to maintain an adequate emergency roadway system or ensure adequate shelter space. Just because the Siesta Key evacuation route consists of constrained roadways (i.e., limited ability to widen or otherwise improve), does not prove that allowing new hotel units on the key will prevent the County from maintaining an adequate emergency roadway system.

72. No evidence was introduced on which the undersigned could find that the Ordinance prevents the County from ensuring adequate shelter space.

CONCLUSIONS OF LAW

73. The Division has jurisdiction over the subject matter and parties to this proceeding. *See* §§ 120.569, 120.57, and 163.3213, Fla. Stat.

74. Section 163.3213 provides that "substantially affected persons have the right to maintain administrative actions which assure that [LDRs] implement and are consistent with the local comprehensive plan." § 163.3213(1), Fla. Stat.

75. The Ordinance is an LDR under section 163.3213(2)(b), which provides that an LDR is "an ordinance enacted by a local governing body for the regulation of any aspect of development, including … a general zoning code."

Standing

76. A "substantially affected person," as that term is used in section 163.3213, "means a substantially affected person as provided pursuant to chapter 120." § 163.3213(2)(a), Fla. Stat. To be "substantially affected" for purposes of the Administrative Procedure Act, a person must show a substantial injury caused by the disputed action. *See* § 120.52(12)(b), Fla. Stat.

77. To meet the substantial injury test, a party must show that (1) the proposed action will result in injury-in-fact of sufficient immediacy to justify a hearing, and (2) the injury is of the type or nature that the proceeding is designed to protect.[15] *Palm Beach Cnty. Env't Coal. v. Fla. Dep't of Env't Prot.*, 14 So. 3d 1076, 1077 (Fla. 4th DCA 2009) (citing *Agrico Chem. Co. v. Dep't of Env't Regul.*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

78. The injuries alleged by Petitioner are an increased number of evacuating vehicles during hurricanes, increased pedestrian and vehicle traffic, and increased noise.

79. The first prong of the *Agrico* test is whether the proposed action will result in an injury-in-fact of sufficient immediacy to justify a hearing. *Id.* This prong "deals with the degree of injury." *Id.* This means that a party must suffer an injury that is "beyond [what] might be sustained by the general public." *St. Joe Paper Co. v. Dep't of Cmty. Aff.*, 657 So. 2d 27, 28 (Fla.1st DCA 1995). A party must merely demonstrate that her "substantial interests *could* reasonably be affected by the proposed activities"; the party need not demonstrate she will prevail on the merits. *Id.* at 1078 (internal quotation marks omitted); *see also Reily Enters., LLC v. Dep't of Env't Prot.*, 990 So. 2d 1248 (Fla. 4th DCA 2008) (warning against "confus[ing] standing and the merits such that a party would always be required to prevail on the merits to have had standing.").

80. Here, Petitioner demonstrated she suffered an injury-in-fact sufficient to justify an administrative hearing because the ordinance could further deteriorate the evacuation conditions of the barrier island. Petitioner is not complaining of an ordinary increase in traffic that comes any time a community goes through growth and development. Instead, Petitioner has alleged specific facts demonstrating how the only evacuation route available is already functioning poorly and the development encouraged by the

[15] This two-prong test is known as the *Agrico* test, and will be referred to as such herein. *See, e.g., S. Broward Hosp. Dist. v. State, Ag. for Health Care Admin.*, 141 So. 3d 678, 681 (Fla. 1st DCA 2014).

Ordinance may exacerbate that issue. Petitioner's injury is beyond what is sustained by the general public because she lives on the only barrier island to be affected by the Ordinance. Admittedly, the Ordinance will affect other residents of the barrier island, however the standing requirement is not that the plaintiff be the only person injured, but that the plaintiff will suffer an injury greater than the general public.

81. The County and Intervenors claim that "increased traffic [is] not an injury in fact different in kind from those of the community."[16] In support of this claim, Respondents and Intervenors cite several cases, each of which involves increased traffic as an alleged injury. Each of the cited cases is distinguishable and is not controlling in the case at hand.

82. First, the County and Intervenors cite *Gagliardi v. City of Boca Raton*, 2017 WL 5239570 (S.D. Fla. 2017). The plaintiffs in *Gagliardi* alleged that a city's approval of a plan to build a place of worship violated the First and Fourteenth Amendments of the U.S. Constitution. *Id.* at *4. The plaintiffs' alleged injuries included increased traffic, change in the character of the neighborhood, and potential for increased flooding. *Id.* The court held that the plaintiffs failed to allege an injury-in-fact because their injuries would be "suffered in some indefinite way in common with people generally." *Id.* at *6.

83. *Gagliardi* is distinguishable from the case at hand because it construes a different legal standard. A "major legislative purpose" of chapter 120 standing is the "[e]xpansion of public access to the activities of government." *NAACP, Inc. v. Fla. Bd. of Regents*, 863 So. 2d 294, 298 (Fla. 2003). By contrast, federal constitutional standing is a "limit on [the Court's] power" that precludes claims that merely assert the Government is not acting in accordance with the law. *Hollingsworth v. Perry*, 570 U.S. 693, 700, (2013). The contrast between chapter 120, Florida Statutes', expansive standing and federal court's limited standing, particularly with relation to public access to

[16] County's Answer, at ¶ 13; *see also* Intervenors' Proposed Final Order, at 79.

reviewing government activity, demonstrates how the standing doctrines are different. Although federal constitutional standing and chapter 120 standing both require an injury-in-fact, overall, the standing doctrines are distinct. An injury-in-fact analysis conducted under the constitutional standing test cannot inform an injury-in-fact analysis under the chapter 120 test. "[S]tanding in federal court is a question of federal law, not state law." *Hollingsworth*, 570 U.S. at 715. The standing analysis in *Gagliardi* was a question of federal law and not Florida law under chapter 120.

84. Second, the County and Intervenors cite *Skaggs-Albertson's Properties, Inc. v. Michels Bellair Bluffs Pharmacy, Inc.*, 332 So. 2d 113 (Fla. 2d DCA 1976). The plaintiff in *Skaggs* was a business which sued a neighboring business for violating a zoning ordinance. *Id.* at 114. The court held that the plaintiff lacked standing because his alleged injuries, including increased traffic, did not satisfy the required standing element of "special damages" to enforce a zoning ordinance. *Id.* at 116-17. *Skaggs* is distinguishable for two reasons. First, *Skaggs* involves a different standing analysis. Standing to enforce a zoning ordinance requires a showing of "special damages." *City of Ft. Myers v. Splitt*, 988 So. 2d 28, 32 (Fla. 2d DCA 2008) (citing *Renard v. Dade Cnty.*, 261 So. 2d 832, 837 (Fla. 1972)). This test is "derived from the law of public nuisance." *Id.* Because the standing test to bring a land development regulation challenge is statutorily created by chapters 163 and 120, it is distinguishable from the common law derived standard used in *Skaggs*.[17] Second, the plaintiff in *Skaggs* is not in the same unique position as Petitioner to be affected by increased traffic. The plaintiff in *Skaggs* was

[17] Florida courts have repeatedly rejected the theory that common law tests for standing apply to administrative challenges. For example, section 163.3215 establishes standing for development order challenges, and is "closely related" to section 163.3213. *Veal v. Escambia Cnty.*, 773 So. 2d 625, 626 (Fla. 1st DCA 2000). Courts have made clear that section 163.3215 was a rejection of the common law standing test and that it "liberalizes standing requirements and demonstrates a clear legislative policy in favor of the enforcement of comprehensive plans[.]" *Sw. Ranches Homeowners Ass'n, Inc. v. Broward Cnty.*, 502 So. 2d 931 (Fla. 4th DCA 1987); *see also Splitt*, 988 So. 2d at 32; *Parker v. Leon Cnty.*, 627 So. 2d 476, 479 (Fla.1993).

simply neighboring another business and therefore his complaint about increased traffic was the same injury suffered by all property owners when there is "normal, urban growth and development." *Skaggs*, 332 So. 2d at 117. By contrast, Petitioner is on the only barrier island which can be affected by the Ordinance and that currently suffers from hurricane evacuation concerns. Therefore, it cannot be said that Petitioner's injury is merely the result of urban growth and development. Instead, her injuries relate to her specific location that is not shared by the public at large.

85. Third, the County cites *Citizens for Responsible Development, Inc. v. City of Dania Beach*, 2023 WL 1999800 (Fla. 4th DCA 2023), in its Notice of Supplemental Authority, as additional support for its position that Petitioner lacks standing. It is irrelevant on the same basis as *Skaggs*—it construes the common law standing requirement for "special damages."

86. Petitioner met the first prong of the *Agrico* test that her alleged injuries differ in degree from those of the general public.

87. The second prong of the *Agrico* test is whether the injury is of the type or nature which the proceeding is designed to protect. *Palm Beach Cnty. Env't Coal.,* 14 So. 3d at 1077. This prong deals with "the nature of the injury" rather than the degree of injury. *Id.*

88. Section 163.3213 provides that "substantially affected persons have the right to maintain administrative actions which assure that land development regulations implement and are consistent with the local comprehensive plan." § 163.3213, Fla. Stat. A challenge under this section is meant to protect against a person's injury related to inconsistency with the local comprehensive plan. The nature of Petitioner's alleged injuries all relate to claimed inconsistencies between the Ordinance and Comprehensive Plan, the type of injury that section 163.3213 is designed to protect.

Determination of Consistency

89. The Community Planning Act, sections 163.3164-163.3217, requires local governments to implement a comprehensive plan through the adoption and enforcement of LDRs that are consistent with the comprehensive plan. *See* §§ 163.3167(1)(c), 163.3194(1)(b), 163.3201, 163.3202(1) and (2), and 163.3213, Fla. Stat. Therefore, all LDRs must be consistent with an adopted comprehensive plan. *See* § 163.3194(1)(b), Fla. Stat. The adoption of an LDR by a local government is legislative in nature. *See* § 163.3213(5)(a), Fla. Stat.

90. An LDR is consistent with a comprehensive plan "if the land uses, densities or intensities … permitted by [the] … regulation are *compatible with and further the objectives, policies, land uses, and densities or intensities* in the comprehensive plan and if it meets all other criteria enumerated by the local government." § 163.3194(3)(a), Fla. Stat. (emphasis added).

91. The adoption of an LDR by a local government is legislative in nature and shall not be found to be inconsistent with the local comprehensive plan if it is "fairly debatable" that the LDR is consistent with the comprehensive plan. *See* § 163.3213(5)(a), Fla. Stat.

92. In *Martin County v. Yusem*, 690 So. 2d 1288, 1295 (Fla. 1997), the Florida Supreme Court has described the "fairly debatable" standard as "a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety." The definition requires the import of both logic and reason. "In other words, an ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity." *Id*. *See also*, *Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship*, 619 So. 2d 996, 1002 (Fla. 2d DCA 1993) ("the 'fairly debatable' rule is a rule of reasonableness which answers

whether, upon the evidence presented to the local government, the local government's action was reasonably based.").

93. 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). (citations omitted).

94. Because comprehensive plans and LDRs are legislative enactments, they are interpreted in the same manner as statutes, with the plain language of the documents controlling such interpretations. *See 1000 Friends of Fla., Inc. v. Palm Beach Cnty.*, 69 So. 3d 1123, 1126 (Fla. 4th DCA 2011). Rules of statutory construction apply with equal force and effect to local ordinances as they do to statutes. *See, e.g., Rinker Materials v. City of N. Miami*, 286 So. 2d 552, 553 (Fla. 1973); *Surf Works, LLC v. City of Jacksonville Beach*, 230 So. 3d 925, 930 (Fla. 1st DCA 2017).

FLU Policies 2.9.1 and 2.9.2

95. It is beyond fair debate that the Ordinance is inconsistent with these FLU policies. The policies limit the density and intensity of development on the Barrier Islands to those allowed by zoning regulations in place on March 13, 1989. Ordinance 83-08 authorized varying density and intensity of development depending on the location of property relative to the intensity

bands. The Barrier Islands are not included in an intensity band, which are established by the 1981 plan. The 1981 plan clearly and plainly explains that Barrier Islands were excluded from intensity bands because they deserve special treatment. That treatment specifically limits densities and intensities of development to those developed on the Barrier Islands as they existed at that time.

96. Neither Ordinance 83-08 nor the 1981 plan prohibits new development on the Barrier Islands. As Intervenors stress in their Proposed Final Order, Ordinance 83-08 allows transient accommodation development by special exception in the CG zoning district, thus Ordinance 83-08 cannot be interpreted to prohibit new hotel development. Intervenors are correct on this point. However, the plain language of the 1981 plan explains that the Barrier Islands are limited to the existing uses *and* maximum densities and intensities of development. New hotel development can take place on the Barrier Islands, but it is limited to the maximum intensity already on the ground. Intervenors' interpretation, expressed in the testimony of its witnesses, is illogical and unreasonable.

97. The Ordinance, which deletes maximum density and intensity limits for transient accommodations, is plainly contrary to Policies 2.9.1 and 2.9.2, which defer to Ordinance 83-08, which must be construed consistent with the 1981 plan. The Ordinance is not consistent with and does not further the direction of these policies.

<u>Coastal Objective 1.2 and Coastal Policy 1.2.1</u>

98. It is at least fairly debatable that the Ordinance is consistent with Objective 1.2 and Policy 1.2.1. The Ordinance increases hotel and motel intensity, thus bringing more visitors for short-term stays on Siesta Key. It does not clearly create a "concentration of population" on the key. The Comprehensive Plan does not include these visitors as part of the County's population. Petitioner's contention that the visitors are part of the

"evacuating population," is insufficient to overcome the fairly debatable standard. The position of both sides was supported by witness testimony that was both logical and reasonable.

Coastal Policy 1.2.3

99. It is beyond fair debate that the Ordinance is inconsistent with Coastal Policy 1.2.3. The Ordinance is not consistent with and does not further this policy. The Ordinance has encouraged at least three applications for intense hotel development on Siesta Key, which is in Hurricane Evacuation Zone A. The parties introduced no evidence that the County has received any application for new hotel development outside of Evacuation Zone A. Intervenors' testimony that the Ordinance is not inconsistent with this policy because it applies uniformly to all CG-zoned property in the County, and more CG acreage is located outside of zones A and B, was neither logical nor reasonable.

Coastal Objective 1.3

100. It is at least fairly debatable that the Ordinance is consistent with Coastal Objective 1.3. Comprehensive Plan objectives must be construed with their implementing policies. *See Hills v. Hernando Cnty.*, Case No. 21-3808GM (Fla. DOAH Apr. 11, 2022; Fla. DEO May 10, 2022) ("Without knowing the strategies [adopted as policies] the County is required to undertake to implement [the] broad [objective], the undersigned cannot determine that the Plan Amendment violates that provision."). Petitioner did not prove that the Ordinance prevents the County from accomplishing any of the implementing policies. Although some evidence indicated the development of the Calle Miramar and Old Stickney Point hotels would cause a slight increase in the County hurricane evacuation time, substantial competent evidence showed a downward trend in the hurricane evacuation time, as well as projections for continued improvement. Petitioner did not introduce any evidence that the County could not overcome a slight increase

in evacuation time with future evacuation improvements. The testimony given by both sides was both logical and reasonable.

Conclusion

101. Petitioner proved beyond fair debate that the Ordinance is inconsistent with FLU Policies 2.9.1 and 2.9.2, and Coastal Policy 1.2.3.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Sarasota County Ordinance No. 2021-047 is inconsistent with the Sarasota County Comprehensive Plan.

DONE AND ORDERED this 5th day of April, 2023, in Tallahassee, Leon County, Florida.

SUZANNE VAN WYK
Administrative Law Judge
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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to sections 120.68 and 163.3213, Florida Statutes. Judicial review may not be commenced until the Administration Commission takes action to determine whether sanctions are warranted pursuant to section 163.3213(6)("If the administrative law judge in his or her order finds the land development regulation to be inconsistent with the local comprehensive plan, the order will be submitted to the Administration Commission … [which shall] hold a hearing no earlier than 30 days or later than 60 days after the administrative law judge renders his or her final order.").

Upon completion of the Administration Commission hearing, judicial review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings, accompanied by any filing fees prescribed by law, with the clerk of the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.