STATE OF FLORIDA
DEPARTMENT OF ECONOMIC OPPORTUNITY

PGSP NEIGHBORS UNITED, INC., CASE NO.: 20-4083GM

Petitioner,

v.

CITY OF ST. PETERSBURG, Florida,

Respondent.
_____/

PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

COMES NOW, Petitioner, PGSP NEIGHBORS UNITED, INC. (hereinafter "PGSP"), and files the following Exceptions to the Recommended Order issued and filed on March 3, 2021 in this case. Based on the facts found by the Administrative Law Judge (hereinafter "ALJ") and the correct interpretation of Chapter 163 of Florida Statutes (2020), the Department of Economic Opportunity (hereinafter "DEO") should forward this matter to the Administration Commission with a recommendation that the Future Land Use Map (hereinafter "FLUM") Amendment[1] be found "not in compliance" for failure to comply with statutory requirements to be based upon professionally accepted data and analysis and ensure internal consistency of the City of St. Petersburg's Comprehensive Plan. At a minimum, DEO must remand this matter back to the ALJ to render findings of fact and recommended conclusions of law on the material and dispositive factual and legal issues the Recommended Order failed to address.

LEGAL FRAMEWORK FOR EXCEPTIONS TO A RECOMMENDED ORDER

1. DEO is authorized to reject or modify conclusions of law that pertain to those statutes or rules over which the DEO has substantive jurisdiction, conditioned only upon a

1. Adopted by City of St. Petersburg through Ordinance 739-L.

statement of the reasons for the rejection or modification and a finding that the DEO legal determination is as reasonable as that espoused by the ALJ. Fla. Stat. § 120.57(1)(l). Each of these exceptions set forth herein satisfy these statutory requirements for rejection and modification of the Recommended Order.

2. An agency may properly reject a hearing officer's legal conclusions, which are drawn from findings of fact. Major v. Department of Professional Regulation, 531 So. 2d 441 (Fla. 3d DCA 1988). The label assigned to a statement is not dispositive as to whether it is a conclusion of law or a finding of fact. Kinney v. Department of State, 501 So. 2d 1277 (Fla. 5th DCA 1987). An agency may reject a legal conclusion, even though the statement is placed in the portion of the Recommended Order captioned "finding of fact." I.G. Fonte, Jr. v. Department of Environmental Regulation, 634 So. 2d 663 (Fla. 2d DCA 1994); Kinney v. Department of State, 501 So. 2d 129 (Fla. 5th DCA 1987); Bustillo v. Department of Professional Regulation, 561 So. 2d 610 (Fla. 4th DCA 1985); Heifetz v. Department of Business Regulation, 475 So. 2d 1277 (Fla. 1st DCA 1985); Leapley v. Board of Regents, 423 So. 2d 431 (Fla. 1st DCA 1982); Sapp v. Florida State Board of Nursing, 384 So. 2d 254 (Fla. 2d DCA 1980); Hernicz v. Department of Professional Regulation, 390 So. 2d 194, 195 (Fla. 1st DCA 1980).

3. An agency may reject or modify an ALJ's findings of fact if a review of the complete record reveals that they are not based upon competent substantial evidence. Fla. Stat. § 120.57(1)(b)(9); Pillsbury v. Department of Health and Rehabilitative Services, 744 So. 2d 1040 (Fla. 2d DCA 1999); Bay County School Board v. Bryan, 679 So. 2d 1246 (Fla. 1st DCA 1996); Dept. of Corrections v. Bradley, 510 So. 2d 1122 (Fla. 1st DCA 1987); Heifetz, 475 So. 2d at 1277 (Fla. 1st DCA 1985); Harry's Restaurant & Lounge, Inc. v. Department of Business Regulation;

Division of Alcoholic Beverages & Tobacco, 456 So. 2d 1286 (Fla. 1st DCA 1984); McDonald v. Department of Banking and Finance, 346 So. 2d 569 (Fla. 1st DCA 1977).

SUMMARY OF EXCEPTIONS

4. The Recommended Order erroneously recommends approval of a FLUM Amendment which violates §§ 163.3184, 163.3177 and 163.3187, Florida Statutes, and if adopted by the DEO, would eviscerate decades of precedent, materially deviate from proper growth management policy, and provide an improper avenue to circumvent the statutory requirements for adoption of comprehensive plan amendments. The Recommended Order sets forth that "Petitioner argues the Ordinance is not 'in compliance,' as defined in Sections 163.3184(1)(b) and 163.3187(4). Specifically, PGSP attacks the Amendment because it does not…provide for compatible land use transitions." Rec. Or. at ¶ 12. While the Recommended Order, in part, correctly characterizes the central issue of compatibility as being "dependent on the increased maximum density for the Property after the Amendment" the ALJ has misread the Respondent, City of St. Petersburg's (hereinafter "City") Comprehensive Plan, which, as a matter of law, authorizes a maximum allowable density of 30 dwelling units per acre (hereinafter "du/a"). Rec. Or. at ¶ 12. The Recommended Order's erroneous conclusion that the Plan, as amended, establishes upon the subject real property a "practical allowable density of…21 dwelling units per acre" mistakenly relies upon land development regulations[2] (hereinafter "LDRs") to limit the consideration of the maximum allowable density, as authorized by the City's Plan in conjunction with the FLUM Amendment, and as required by Florida law. Rec. Or. at ¶ 19.

5. The ultimate error in the findings and conclusions contained within the Recommended Order are in part due to a fundamental misunderstanding of the land use and legal

2. Land Development Regulations may be referred to as LDRs, LDC, zoning category, zoning code, or zoning.

dynamic between the Comprehensive Plan and LDRs as defined by § 163.3164, Florida Statutes. Specifically, the Recommended Order relied on the LDRs to cure the incompatibility created by the FLUM Amendment, and thus inconsistency issues within the City's Comprehensive Plan. However, neither the FLUM Amendment at issue, nor the existing Comprehensive Plan from which the LDRs derive authority, provide a basis for such "cure."

MATERIAL LEGAL FRAMEWORK

6. This matter arises from a challenge to a FLUM Amendment to the City of St. Petersburg's FLUM, part of the Comprehensive Plan and thus is subject to §§ 163.3184, 163.3177 and 163.3187, Florida Statutes. Rec. Or. ¶ 2; JPS[3], p. 5. Challenges to comprehensive plan amendments must be reviewed at the comprehensive plan level, as LDRs are separate from and not part of the comprehensive plan. See Little Club Condominium Association v. Martin County, 259 So. 3d 864, 868 (Fla. 2018); Graves v. City of Pompano Beach, DOAH Case No. 11-1206GM, Final Or. at p.12, 15–16 (DEO Oct. 22, 2013); see also Schember v. Department of Community Affairs, DOAH Case No. 00-2066GM, Rec. Or. at ¶¶ 59, 184 (DOAH July 16, 2001).

a. Relationship between LDRs and the Comprehensive Plan

7. Florida Statutes § 163.3177(1) delineates the independent existence and relationship between these two separate documents by providing that:

> [t]he sections of the comprehensive plan containing the principles and strategies, generally provided as goals, objectives, and policies, shall describe how the local government's programs, activities, and land development regulations will be initiated, modified, or continued **to implement the comprehensive plan in a consistent manner**. It is not the intent of this part to require the inclusion of implementing regulations in the comprehensive plan but rather to **require identification of those programs, activities, and land development regulations that will be part of the strategy for implementing the comprehensive plan** and the principles that describe how the programs, activities, and land development regulations will be carried out.

3. Citations to the Parties' Joint Pre-Hearing Stipulation herein will read as follows: "JPS, p. #."

Florida Statutes § 163.3177(1).

8. It is well settled law that the Comprehensive Plan is the controlling document and that Chapter 163 requires that LDRs implement the will of the Plan, **not the other way around**. See Fla. Stat. § 163.3177; see also Board of County Commissioners of Brevard v. Snyder, 627 So.2d 469, 473 (Fla. 1993); Gauthier, T-71:12–25; Pet'r Ex. 40, Kilborn Dep. 92:6–11. Thus, pursuant to Florida Statutes § 163.3177(1), it is axiomatic that **all** comprehensive plans shall be implemented through and in accordance with the LDRs. "The local plan must be implemented through the adoption of land development regulations that are consistent with the plan." Snyder, 627 So.2d at 473 (Fla. 1993). Specifically, Florida law states "[i]t is the intent of this act that . . . a land development code for an area shall be based on, be related to, and be a means of **implementation** for an adopted comprehensive plan as required by this act." Fla. Stat. § 163.3201. While the plan establishes the long-range maximum development potential, the present use of land may, by LDRs, continue to be more limited than the future use contemplated by the comprehensive plan. See Snyder, 627 So.2d at 475 (Fla. 1993). Simply put, local governments are permitted to allow or disallow the maximum development density authorized by the plan, so long as it is supported by substantial, competent evidence and consistent with the plan. Id. However, the LDRs' function of implementation is separate and distinct from the integrity of the comprehensive plan, proposed amendments thereto, and whether they are jointly and internally consistent for an "in compliance" determination. See Graves, DOAH Case No. 11-1206GM, Final Or. at p.12, 15–16 (DEO Oct. 22, 2013); see also Schember, DOAH Case No. 00-2066GM, Rec. Or. at ¶¶ 59, 184 (DOAH July 16, 2001). The LDR's implementation function has no place in the "in compliance" analysis of the present matter. Id.

9. In sum, comprehensive plans must establish the key binding standards; reliance on

the land development code for compliance determinations violates Chapter 163. This is also illustrated by the holding of the Administration Commission in DCA, et al. v. Monroe County, that:

> Rather than include environmental restrictions in the policies, the County argues that the use of the Habitat Evaluation Index (HEI) will adequately guide development. The HEI is not a part of the Plan; however, it is a land development regulation. **The Plan policies must be adequate without resort to criteria outside the Plan**. (See Department of Community Affairs v. Escambia County, ER FALR 92:138 (Final Order issued July 22, 1992).

DCA, et al. v. Monroe County, 1995 Fla. ENV LEXIS 129; 95 ER FALR 148 (Admin. Comm., Dec. 12, 1996) (Final Or. and Or. of Partial Remand) (emphasis added).

10. LDRs are not part of a local government's comprehensive plan and can be changed as a matter of policy at any time outside the statutory comprehensive plan amendment process. See Graves, DOAH Case No. 11-1206GM, Final Or. at p. 15–16 (DEO Oct. 22, 2013); see also Op. Att'y Gen. Fla. 89-51 (1989) (Part II, Ch. 163, F.S., does not purport to regulate the adoption of local ordinances implementing the comprehensive plan); see also Machado v. Musgrove, 519 So. 2d 629, 635 (Fla. 3rd DCA 1987) (**A Comprehensive Land Use Plan is not a "vest-pocket tool," for making individual zoning changes based on political vagary**…it is a broad statement of a legislative objective "to protect human, environmental, social, and economic resources; and to maintain, through orderly growth and development, the character and stability of present and future land use and development in this state) (emphasis added).

11. Therefore, in the context of conducting a plan amendment compliance determination, it is contrary to Florida law to rely on LDRs to minimize the ultimate potential development allowed under a comprehensive plan. See id.

b. "In Compliance" Requirements

12. Pursuant to Chapter 163, in order to be "in compliance," comprehensive plan amendments shall be based upon relevant and appropriate data and analysis by the local government.[4] Fla. Stat. § 163.3177(f). Additionally, as a matter of law, **compliance determinations must be based strictly on maximum impacts authorized by the amendment terms, not speculation of a lesser impact**. See Sheridan v. Lee Cnty, et al., DOAH Case No. 90-7791 ¶266 (DOAH Jan. 27, 1992; DCA June 28, 1993; Admin. Comm. Feb. 15, 1994). Simply put, Florida case law requires that when calculating allowable densities in determining whether a comprehensive plan amendment is compliant, the maximum allowable density must be used. See Sheridan, DOAH Case No. 90-7791 (DOAH Jan. 27, 1992; DCA June 28, 1993; Admin. Comm. Feb. 15, 1994); BG Mine v. City of Bonita Springs, DOAH Case No. 17-3871GM at Rec. Or. ¶¶ 70–71 (DOAH 2019); see Martin Cnty. Conservation Alliance, Inc., et al. v. Martin Cnty., et al., DOAH Case No. 10-0913GM (Fla. DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011).

13. When examining proposed amendments to a comprehensive plan, Chapter 163 also requires that internal consistency be maintained within the plan in order for the amendment to be "in compliance." Fla. Stat. §§ 163.3187(b), 163.3177(2). This statutory requirement cannot simply be delegated or deferred to the LDRs in order to avoid review of the above-mentioned required plan maximums. See Fla. Wildlife Fed'n Inc. v. Town of Marineland, DOAH Case No. 05-4402GM, Rec. Or. at ¶*72;* see also DCA v. Collier County, 22 F.A.L.R. 212 at ¶¶ 26–30; see also Tierra Verde Community Assoc. Inc. v. City of St. Petersburg, DOAH Case No. 09-003408GM (Admin. Comm. 2010); see also Graves, DOAH Case No. 11-1206GM, Final Or. at p. 12, 15–16

4. Amendments must be "clearly based" upon "best available," "professionally accepted" data and analysis. Fla. Stat. §§ 163.3177(8), & 163.3177(10)(e); Amendments unsupported by data and analysis are not in compliance. Wilson, et al. v. City of Cocoa and DCA, 1991 WL 832930 at 45, ER FALR 91:142 (DCA 1991); DCA, et al v. City of Islandia, 1990 Fla. ENV LEXIS 132; 90 ER FALR 44 (Admin. Comm. 1990); Palm Beach County et al v. DCA et al., DOAH Case Nos. 95-5939GM & 96-2563GM, WL 1052409 (DOAH 1997).

(DEO Oct. 22, 2013); Schember, DOAH Case No. 00-2066GM, Rec. Or. at ¶¶ 59, 184 (DOAH July 16, 2001).

14. This is especially true of the subject FLUM Amendment, which could properly contain, yet does not contain any limiting text or other means for achieving internal consistency and compatibility. Id. As detailed below, the ALJ relies upon a density which is less than the legally required maximum allowable density, for use in a compliance determination of a FLUM Amendment, and further avoids making a determination upon professionally acceptable data and analysis, as to whether the Amendment provides for compatibility as required by the Plan.

Exception No. 1: The ALJ's recommendation to allow the City's Comprehensive Plan to rely upon the LDR's to cure an internal inconsistency is legally erroneous. Florida law makes clear that the LDR's function is to implement the Comprehensive Plan, not to cure Comprehensive Plan inconsistencies. Without limiting language within the Comprehensive Plan or Amendment, the ALJ erroneously interpreted the law to allow the City to consider only the "practical allowable density," for purposes of this "in compliance" determination, rather than the maximum allowable density as is required by Florida law.

15. **Finding 18** correctly concludes that "[t]he RM category allows medium density residential development and has a maximum density of 15 dwelling units per acre, *with a possibility maximum density of 30 dwelling units per acre* with the qualification of a density bonus." Rec. Or. at ¶ 18. This density bonus is referred to as the Missing Middle Housing (hereinafter "MMH") density bonus.

16. **Finding 19** incorrectly asserts a conclusion of law that "[a]s explained below, the *practical allowable density* of 15 dwelling units per acre with a Workforce Housing Bonus of six, or 21 dwelling units per acre." Rec. Or. at ¶ 19. This error is due to the ALJ's improper reliance on the LDRs, prompted by misinterpretation of language in the Comprehensive Plan as illustrated in **Finding 21,** which states:

"[w]hile NTM[5] is an available [zoning] category for RM, the Plan specifically states

5. NTM refers to the zoning category Neighborhood Traditional Mixed Residential.

> that 30 dwelling units is *only*[6] 'permitted in accordance with the Land Development Regulations [LDRs].' Per the LDRs, the NTM designation could not be placed over this parcel because the designation is used as a transitional zoning category in St. Petersburg's traditional neighborhoods."
>
> Rec. Or. at ¶ 21.

17. **Findings 20** and **21** then erroneously reduce the maximum allowable density, from 30 du/a to 21 du/a, by relying upon language from the LDRs based upon categorizing the subject property as "suburban" rather than "traditional."[7] This reliance on the classification of the subject property, to calculate the maximum allowable density for a compliance determination, lacks any basis in the Comprehensive Plan or Florida law. Rec. Or. at ¶¶ 20, 21.

18. As stated above, it is well established that as a matter of law, **compliance determinations must be based strictly on maximum impacts** authorized by the amendment terms, which in the instant matter is the **maximum allowable density.** See Sheridan, DOAH Case No. 90-7791 (DOAH Jan. 27, 1992; DCA June 28, 1993; Admin. Comm. Feb. 15, 1994); BG Mine, DOAH Case No. 17-3871GM at Rec. Or. ¶¶ 70–71 (DOAH 2019); see also Martin Cnty. Conservation Alliance, Inc., et al., DOAH Case No. 10-0913GM (Fla. DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011); Wade v. DCA and Miami Dade, DOAH Case No. 03-0150GM, Rec. Or. at ¶192; Graves, DOAH Case No. 11-1206GM, Final Or. at p.12. It is improper for this determination to speculate of a lesser impact See Sheridan, DOAH Case No. 90-7791 (DOAH Jan. 27, 1992; DCA June 28, 1993; Admin. Comm. Feb. 15, 1994); BG Mine, DOAH Case No. 17-3871GM at Rec. Or. ¶¶ 70–71 (DOAH 2019); see also Martin Cnty. Conservation Alliance, Inc., et al., DOAH Case No. 10-0913GM (Fla. DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011);

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6. It should be noted the term "only," cited by the Recommended Order as a basis for this misplaced contention, is not contained in City Plan's definition of RM.
7. This determination of whether the subject property was within a "traditional" or "suburban" setting was purportedly made to determine the applicability of a "traditional" zoning category that provided for 30 du/a.

Wade v. DCA and Miami Dade, DOAH Case No. 03-0150GM, Rec. Or. at ¶192; Graves, DOAH Case No. 11-1206GM, Final Or. at p.12. The Recommended Order's fundamental misunderstanding of what is legally required in a compliance determination, results in the use of the "practical allowable density" instead of the maximum allowable density of 30 du/a, which is required by law, thus speculating a lesser impact under the FLUM Amendment. See Sheridan, DOAH Case No. 90-7791 (DOAH Jan. 27, 1992; DCA June 28, 1993; Admin. Comm. Feb. 15, 1994); BG Mine, DOAH Case No. 17-3871GM at Rec. Or. ¶¶ 70–71 (DOAH 2019); see also Martin Cnty. Conservation Alliance, Inc., et al., DOAH Case No. 10-0913GM (Fla. DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011); Wade v. DCA and Miami Dade, DOAH Case No. 03-0150GM, Rec. Or. at ¶192; Graves, DOAH Case No. 11-1206GM, Final Or. at p.12.

19. It was legal error for the ALJ to consider the LDRs as a limitation on density, for purposes of determining whether the Amendment was "in compliance," without specific language within the Comprehensive Plan[8] authorizing such a limitation. See Graves, DOAH Case No. 11-1206GM, Final Or. at p.12; BG Mine, DOAH Case No. 17-3871GM at Rec. Or. ¶112 (DOAH 2019); Martin Cnty. Conservation Alliance, Inc., et al., Case No. 10-0913GM, Rec. Or. (Fla. DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011); Schember, DOAH Case No. 00-2066GM, Rec. Or. at ¶ 184 (DOAH July 16, 2001) ([W]hen considering density for purposes of determining the amount of residential development allowed by a plan, it is appropriate to consider the maximum prospective residential uses).

20. As stated above, LDRs can be **amended at any time outside the comprehensive**

8. The Respondent, City of St. Petersburg's Comprehensive plan does not provide for or contain any language that would restrict the use of the maximum allowable density of 30 du/acre upon the subject property. See Pet'r Ex. 25, Comp. Plan. To the contrary, the Comprehensive Plan authorizes a maximum allowable density of 30 du/acre for use in the Residential Medium Land Use Category, the very land use category that the subject Amendment would apply to the subject property. Rec. Or. at ¶ 18.

plan amendment process, and thus not appropriate to rely upon in determining maximum potential development authorized by the City's Plan. See Graves, DOAH Case No. 11-1206GM, Final Or. at p. 15–16 (DEO Oct. 22, 2013). Thus, it was legal error for the Recommended Order to make a determination upon whether or not the property was within traditional versus suburban setting, as such factors have no bearing on the maximum allowable density upon the subject property, as authorized by the Comprehensive Plan. See id. Simply put, the Comprehensive Plan authorizes the use of the MMH density bonus upon the subject property in conjunction with the subject Amendment, the Amendment and Comprehensive Plan make no mention of a suburban or traditional setting limitation with respect to the application of the MMH density bonus, and therefore this "limitation" should not have been considered in making a compliance determination. See id.

21. Florida law does not in any way provide that implementation of the comprehensive plan is limited by currently available LDRs. On the contrary, the plain language of § 163.3177(1) Fla. Stat. dictates that all comprehensive plans govern development standards which are then be implemented by the LDRs. Fla. Stat. § 163.3177(1).

22. As a practical matter, whether or not NTM is the only available zoning category that allows MMH, as concluded by the ALJ, has no bearing upon whether the amendment is "in compliance." Assuming *arguendo*, that compliance could be determined by whether or not there is an existing zoning category at the time that contemplated the bonus, **the City could simply amend its LDRs, as a policy matter, at a later time to allow the MMH density bonus on the subject property by creating another zoning category or amending an already existing category to include "suburban" settings**. See Graves, DOAH Case No. 11-1206GM, Final Or. (DEO Oct. 22, 2013) (emphasis added). "The maximum potential development allowed under an

existing future land use category is determined by reference to the comprehensive plan goals, objectives, and policies governing that future land use designation." Id. at p. 12.

23. Otherwise, this would allow the City to bypass the statutory requirements of Chapter 163 to consider the maximum allowable density on the subject property, required by Florida to consider the maximum impacts of comprehensive plan amendments. See Graves, DOAH Case No. 11-1206GM, Final Or. at p. 15–16 (DEO Oct. 22, 2013); Tierra Verde Community Assoc. Inc., To allow consideration of a standard beyond the Comprehensive Plan, such as the LDRs, would allow the City to bypass the Chapter 163 requirements of Chapter that maximum allowable density be considered in examination of maximum impacts of comprehensive plan amendments. Id. The LDRs merely represent one possible development scenario for which the landowner obtained one particular local government approval. Id. A compliance analysis that considers anything other than the maximum density allowed by the Comprehensive Plan, as the Recommended Order suggests, would eviscerate the very purpose of Chapter 163's process and requirements for amending a comprehensive plan as shown above. See id. The Recommended Order would allow for this evisceration, precisely what *Graves* warned against, by rejecting the maximum allowable density and concluding that it is **only**[9] permitted in accordance with the one currently available zoning category for Residential Medium (hereinafter "RM"), Neighborhood Traditional Mixed Residential (hereinafter "NTM"). See id. This is a heavily misplaced reliance upon the superfluous language "in accordance" within the definition of RM, interpreting it in a manner inconsistent with Florida law and clearly erroneously. Id.; see also Sheridan, DOAH Case No. 90-7791 (DOAH Jan. 27, 1992; DCA June 28, 1993; Admin. Comm. Feb. 15, 1994); BG Mine, DOAH Case No. 17-3871GM, Rec. Or. at ¶¶ 70–71 (DOAH 2019); see also Martin Cnty.

9. As stated above, the term "only," cited by the Recommended Order as a basis for this misplaced contention, is not contained in City Plan's definition of RM.

Conservation Alliance, Inc., et al., Case No. 10-0913GM (Fla. DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011).

24. Finally, the Recommended Order further demonstrates a fundamental misunderstanding of the requirements for an "in compliance" determination of a comprehensive plan amendment by making erroneous legal conclusions in **Finding 24**[10], **25**, and **26**, wherein it improperly limits the Plan, through the LDRs, and concludes the maximum allowable density is 21 du/a. Rec. Or. at ¶¶ 24–26. The Recommended Order seemingly suggests that compatibility issues could be cured at the time of a site plan review, wherein height restrictions and spacing requirements, among limitations found within the LDRs, would preclude the 30 du/acre, and further that "the maximum number of dwelling units [even under NTM] would be less than the numbers asserted by Petitioner." Rec. Or. at ¶ 25. This improper consideration of the LDRs, without authority from the FLUM Amendment or Comprehensive Plan, is legal error. See Graves, DOAH Case No. 11-1206GM, Final Or. at p. 12, 15–16 (DEO Oct. 22, 2013); Schember, DOAH Case No. 00-2066GM, Rec. Or. at ¶ 59, 174 (DOAH July 16, 2001); Tierra Verde Community Assoc. Inc., DOAH Case No: 09-003408GM, Rec. Or. at ¶ 53 (DOAH 2010).

25. City Plan Policy LU 3.4 requires that "[t]he Land Use Plan shall provide for compatible land use transition through orderly land use arrangement, proper buffering, and the use of physical and natural separators." Pet'r Ex. 25, Comp. Plan at 001090. Therefore, as admitted by

10. The Recommended Order adopts the erroneous legal argument offered by the City that it would be "impossible for the Property to qualify for the Missing Middle Housing bonus, because the parcel at issue is not in the NTM zoning category. Rather, as explained by Mr. Kilborn's testimony and based on the LDRs and the Comprehensive Code, the RM category only allows a maximum of 15 dwelling units per acre." See Rec. Or. at ¶ 24. The second sentence of Finding 24 goes as far as to accept the improper legal theory that for a compliance determination the Plan and LDRs are both to be used in determining maximum allowable density. See Graves v. City of Pompano Beach, DOAH Case No. 11-1206GM, Final Or. at p. 12, 15–16 (DEO Oct. 22, 2013). However, as explained above, whether or not the zoning category of NTM is applicable does not have any relevance to the maximum allowable density allowed by the Comprehensive Plan and whether the FLUM Amendment is "in compliance". Id.; Schember v. Department of Community Affairs, DOAH Case No. 00-2066GM, Rec. Or. at ¶ 59, 174 (DOAH July 16, 2001).

the Recommended Order's recognition of maximum allowable density as the threshold issue for an "in compliance," determination, the Plan Amendment must provide for compatibility to achieve internal consistency at the City Plan level, and ultimately Chapter 163 compliance. See Tierra Verde Community Assoc. Inc., DOAH Case No: 09-003408GM, Rec. Or. (DOAH 2010).

26. As set forth by *Graves* and further stated below, this reliance on a later stage LDR application to a site plan has no place in a comprehensive plan amendment compliance determination. Tierra Verde Community Assoc. Inc., DOAH Case No: 09-003408GM, Rec. Or. at ¶ 53 (DOAH 2010). In *Tierra Verde Community Assoc. Inc. v. City of St. Petersburg*, a strikingly similar challenge to a FLUM Amendment, found to be **not** "in compliance," the ALJ made clear and even admonished the City of St. Petersburg that "[a] compatibility analysis is required for this 'in compliance' determination for the Plan Amendment. Although a compatibility analysis for a comprehensive plan amendment is a more 'macro' or general evaluation than at the time of a specific development application, *the issue is not one that can be put off until the City reviews a development proposal for the subject properties*." Id. *Tierra Verde* included not only the same Respondent, the City of St. Petersburg, but the same issue of compatibility with the same exact definition of compatibility as found in this case. See generally id. Here, the Recommended Order seeks to allow the City to defer consideration of this compatibility requirement by concluding that "if the Church had applied for a rezoning for the Property to NTM, the maximum number of dwelling units would be less than the numbers asserted by Petitioner due to the requirements of spacing, alleyways, and height restrictions required in the NTM zones." Rec. Or. at ¶ 25. This is clear legal error. See Tierra Verde Community Assoc. Inc., Case No: 09-003408GM at Rec. Order ¶ 53 (DOAH 2010). As made clear in *Tierra Verde* the City of St. Petersburg, once again, may not put off applying legally required analysis until they receive a zoning application, the maximum

allowable densities must be used when making the legal determinations of compatibility and compliance. See id.

27. For the forgoing reasons, **Finding 27**, wherein the Recommend Order concludes that "PSGP did not prove beyond fair debate that the actual density of 21 units per acre is an erroneous calculation or contrary to the Comprehensive Plan", is in error. Rec. Or. at ¶ 27.

Exception No. 2: The ALJ erroneously concluded that the City relied upon professionally accepted data and analysis in relying upon a "practical allowable density", a density less than the maximum allowed under the Amendment and Comprehensive. Florida law provides that it is not professionally acceptable to rely on some lesser density, other than the maximum allowable under the Comprehensive Plan. However, the ALJ erroneously interpreted the law, relying on the LDRs to limit the maximum allowable density authorized by the Plan in conjunction with the Amendment, which is not professionally accepted data and analysis.

28. The ALJ's erroneous interpretation of the law to allow the City to only consider the "practical allowable density" and not the maximum allowable density, as demonstrated by Exception 1, also results in a failure to rely upon professionally accepted data and analysis, required by Florida law. See BG Mine, Case No. 17-3871GM at ¶¶ 71, 112 (DOAH 2019); Graves, DOAH Case No. 11-1206GM, Final Or. at p. 12, 15–16 (DEO Oct. 22, 2013); Martin Cnty. Conservation Alliance, Inc., et al., Case No. 10-0913GM (Fla. DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011; Sheridan, Case No. 90-7791GM ¶ 266; Wade, DOAH Case No. 03-0150GM, Rec. Or. at ¶192.

29. The Department may reject a legal conclusion, even though the statement is placed in the portion of the Recommended Order captioned "findings of fact." See Sapp v. Florida State Board of Nursing, 384 So. 2d 254 (Fla. 2d DCA 1980); Hernicz v. Department of Professional Regulation, 390 So. 2d 194, 195 (Fla. 1st DCA 1980).

30. Florida law requires, when calculating allowable densities to ensure compliance of a comprehensive plan amendment, that a local government must use the maximum density for

each future land use category **because it is not professionally acceptable to assume development would be approved at some lesser density**. See BG Mine, Case No. 17-3871GM at ¶¶ 71, 112; Graves, DOAH Case No. 11-1206GM Final Or. at p.12; Martin Cnty. Conservation Alliance, Inc., et al., Case No. 10-0913GM (Fla. DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011) (reflecting that local governments are required to use theoretical maximum densities unless there are policies in the comprehensive plan prohibiting landowners from attaining the theoretical maximum densities); Sheridan, DOAH CASE No. 90-7791GM at ¶ 266 (The reduction, by an undisclosed amount, of the maximum population that can be accommodated by the amended future land use map series to reflect historic densities **precludes a finding that the designated densities on the amended future land use map series are supported by data and analysis**) (emphasis added).

31. **Finding 89** of the Recommended Order contends that "PGSP failed to prove beyond fair debate that the Ordinance is not based on relevant and appropriate data and analysis by the City;" however, this conclusion, which is based upon the preceding findings 86 through 88, is plain legal error as set forth in detail below. Rec. Or. at ¶ 86–89.

32. **Findings 87** and **88** of the Recommended Order erroneously conclude that the City Council properly relied upon the Staff Report in adopting the Ordinance, and that there was extensive data and analysis taken from professionally accepted sources and gathered through professionally accepted methodologies. Rec. Or. at ¶¶ 87–88. On the contrary, this is legally erroneous as it is undisputed that the maximum allowable density relied upon by the City, which is contained within the Staff Report, was only 21 du/acre. Pet'r Ex. 4, Staff Report at 0001040. The City's Comprehensive Plan's goals, objectives, and policies governing the RM future land use designation, authorize 30 du/a, and therefore as a matter of law, 21 du/acre is not

professionally acceptable to rely upon. Rec. Or. at ¶ 87; Resp't Prop. Rec. Or. at ¶ 41, 87; see Graves, DOAH Case No. 11-1206GM, Final Or. at p. 12; see also BG Mine, Case No. 17-3871GM, Rec. Or.; see also Wade, Case No. 03-0150GM, Rec. Or.; see also Sheridan, Case No. 90-7791GM; Martin Cnty. Conservation Alliance, Inc., et al., Case No. 10-0913GM (Fla. DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011).

33. It is not professionally acceptable to assume that future city councils would never approve development at a density authorized by its own Plan therefore the City must utilize the maximum allowable density authorized by the Comprehensive Plan for each FLU category. BG Mine, DOAH Case No. 17-3871GM at ¶¶ 71, 112; Graves, DOAH Case No. 11-1206GM Final Or. at p. 12; Martin Cnty. Conservation Alliance, Inc., et al., Case No. 10-0913GM (Fla. DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011); Sheridan, Case No. 90-7791GM at ¶ 266. Therefore, pursuant to well settled Florida law, it was legal error for the Recommend Order to blindly adopt the City's argument that they may rely on this fictional "practical allowable" lesser density of 21 du/a, when the maximum allowable as authorized by the City's Comprehensive Plan's goals, objectives, and policies governing that future land use designation, is 30 du/a.

34. **Finding 86** in the Recommended Order contends that "PGSP was required to specifically identify the best available existing data it claims the City could have used but failed to do so", citing Envt'l Coalition of Fla., Inc. v. Broward Cty., 586 So. 2d 1212, 1215 (Fla.1st DCA 1991). Rec. Or. at ¶ 86.

35. This conclusion is legally erroneous as demonstrated above by paragraphs 32 and 33, and puzzlingly ignores the Petitioner's steadfast contention throughout the entire case that the Comprehensive Plan's goals, objectives, and policies governing the RM future land use designation, in conjunction with this Amendment, provide that the best available data regarding

the maximum allowable density upon the subject property is 30 du/acre. Pet'r Prop. Rec. Or. at ¶¶ 109–110.[11].

36. **Finding 59** in the Recommended Order erroneously concludes as a matter of law that the City explained the reasons supporting its *maximum* density figure of 21 du/a and asserts in footnote No. 10, "that exact density calculations would be finalized during the site plan review process." As a result, **Finding 61** concludes that Petitioner failed to prove beyond fair debate that the Ordinance was not supported by data and analysis, and/or that the City's response to that data and analysis was not appropriate. Rec. Or. at ¶¶ 59, 61.

37. Review of **Finding 59** reveals that the Recommended Order asserts a maximum density of 21 du/acre, but simultaneously states that "exact density calculations would be finalized during the site plan review process." Rec. Or. at ¶ 59. As stated above, and pursuant to *Tierra Verde* and *Graves*, putting off a density calculation required by a Chapter 163 compliance determination, until site plan review is plain legal error. See Tierra Verde, DOAH Case No: 09-003408GM; Graves, DOAH Case No. 11-1206GM Final Or. at p. 12. It should be noted that the Recommended Order concludes that the City explained the reasons and sources supporting its maximum density of 21 du/a, which is contradicted by **Finding 18** that states "[t]he RM category allows medium density residential development and has a maximum density of 15 dwelling units per acre, with a possible maximum density of 30 dwelling units per acre with the qualification of a density bonus." Rec. Or. at ¶ 18.

38. Pursuant to the above-mentioned authority, **Finding 61** is legally erroneous as it

11. Pet'r Prop. Rec. Or. at ¶¶ 109–110 (For the reasons discussed above, Petitioner has proved beyond a preponderance of the evidence, and beyond fair debate, that the Amendment **is not supported by professionally accepted data and analysis as the City relies upon a lesser density, by operation of the LDRs, instead of theoretical maximum density of 30 units per acre, without any policies in the comprehensive plan prohibiting the subject landowner from attaining the theoretical maximum densities**. Martin Cnty. Conservation Alliance, Inc., et al., Case No. 10- 0913GM (Fla. DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011) (emphasis added)).

is a conclusion based entirely upon the improper use of a less than maximum allowable density as authorized by the Comprehensive Plan, in direct contravention with Florida law. Rec. Or. at ¶ 61; BG Mine, Case No. 17-3871GM at ¶¶ 71, 112; Graves, DOAH Case No. 11-1206GM Final Or. at p. 12; Martin Cnty. Conservation Alliance, Inc., et al., Case No. 10-0913GM (Fla. DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011); Sheridan, Case No. 90-7791GM at ¶ 266; Wade, DOAH Case No. 03-0150GM, Rec. Or. at ¶192.

Exception No. 3: As set forth above in Exceptions Nos. 1 and 2, the Recommended Order erroneously calculated and relied upon the "practical allowable density" permitted by the City Plan in conjunction with the FLUM Amendment, inconsistent with Florida law, materially altering further conclusions and findings based upon it.

39. **Finding 38** erroneously concludes that "PGSP argues a parcel categorized as RM (15 unit density) cannot abut a parcel categorized as RU (7.5 unit density) because it violates Policy LU 3.4." Rec. Or. at ¶ 38. The Department may reject a legal conclusion, even though the statement is placed in the portion of the Recommended Order captioned "findings of fact." See Sapp, 384 So. 2d at 254 (Fla. 2d DCA 1980); Hernicz, 390 So. 2d at 195 (Fla. 1st DCA 1980). This finding is legally incorrect as Petitioner utilized the maximum allowable density of 30 du/a, as authorized by the Comprehensive Plan in conjunction with the FLUM Amendment, required by law, and set forth in detail above.[12] The proper maximum allowable density of 30 du/a abutting RU 7.5 du/a violates Plan Policy LU 3.4.[13]

40. **Finding 41** makes the erroneous legal conclusion that "the maximum possible density under the Amendment is 21 dwelling units per acre" which should be rejected by the

12. See Sheridan, 1992 WL 880138, 16 F.A.L.R. 654, 688–89; BG Mine, Case No. 17-3871GM at ¶¶ 71, 112; Martin Cnty. Conservation Alliance, Inc., et al., Case No. 10-0913GM (Fla. DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011). Tierra Verde Community Assoc., Inc., Case No. 09-003408GM; Graves, DOAH Case No. 11-1206GM Final Or. at p. 12; 6; Schember, No. 00-2066GM at ¶ 184; Wade, DOAH Case No. 03-0150GM, Rec. Or. at ¶ 192.

13. See Sheridan, 1992 WL 880138, 16 F.A.L.R. 654, 688–89; BG Mine, Case No. 17-3871GM at ¶¶ 71, 112; Martin Cnty. Conservation Alliance, Inc., et al., Case No. 10-0913GM (Fla. DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011). Tierra Verde Community Assoc., Inc., Case No. 09-003408GM; Graves, DOAH Case No. 11-1206GM Final Or. at p. 12; 6; Schember, No. 00-2066GM at ¶ 184; Wade, DOAH Case No. 03-0150GM, Rec. Or. at ¶ 192.

Department, even though the statement is placed in the portion of the Recommended Order captioned "findings of fact." Rec. Or. at ¶ 41; See Sapp, 384 So. 2d at 254 (Fla. 2d DCA 1980); Hernicz, 390 So. 2d at 195 (Fla. 1st DCA 1980). This finding is legally incorrect as the maximum allowable density, as a matter of law, is of 30 du/a, as authorized by the Comprehensive Plan in conjunction with the FLUM Amendment, as set forth in detail within paragraph 18, above.[14]

41. **Finding 45** of the Recommended Order concludes that "Petitioner did not prove beyond fair debate that the Ordinance is inconsistent with Policy LU 3.4." Rec. Or. at ¶ 45. However, this conclusion is based upon the use of the "practically allowable density" of 21 du/a instead of the maximum allowable density, as required by law, which is 30 du/a, as authorized by the Comprehensive Plan in conjunction with the FLUM Amendment, as set forth in detail above.[15] Id.

42. **Findings 62, 63**, and **64** of the Recommended Order conclude that "PGSP did not prove beyond fair debate that the Ordinance is not in compliance. Rec. Or. at ¶¶ 62–64. All other contentions not specifically discussed have been considered and rejected; The City has provided a preponderance of the evidence, which is both competent and substantial, which supports the findings in the Staff Report and the City Council's adoption of the Ordinance; The City's determination that the Ordinance is in compliance is fairly debatable." These ultimate

14. See Sheridan, 1992 WL 880138, 16 F.A.L.R. 654, 688–89; BG Mine, Case No. 17-3871GM at ¶¶ 71, 112; Martin Cnty. Conservation Alliance, Inc., et al., Case No. 10-0913GM (Fla. DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011); Tierra Verde Community Assoc., Inc., Case No. 09-003408GM; Graves, DOAH Case No. 11-1206GM Final Or. at p. 12; 6; Schember, No. 00-2066GM at ¶ 184; Wade, DOAH Case No. 03-0150GM, Rec. Or. at ¶ 192.

15. See Sheridan, 1992 WL 880138, 16 F.A.L.R. 654, 688–89; BG Mine, Case No. 17-3871GM at ¶¶ 71, 112; Martin Cnty. Conservation Alliance, Inc., et al., Case No. 10-0913GM (Fla. DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011); Tierra Verde Community Assoc., Inc., Case No. 09-003408GM; Graves, DOAH Case No. 11-1206GM Final Or. at p. 12; 6; Schember, No. 00-2066GM at ¶ 184; Wade, DOAH Case No. 03-0150GM, Rec. Or. at ¶ 192.

findings are erroneous as they are based upon the flawed legal conclusions detailed in **Exceptions 1** and **2**, and thus are inconsistent with Florida law.[16]

43. **Findings 81, 90** and **92** of the Recommended Order conclude that Petitioner did not prove inconsistency with Plan Policy LU 3.4, beyond fair debate, that FLUM Amendment is in Compliance, and that Petitioner did not prove beyond fair debate that the Ordinance is not "in compliance." These ultimate findings are erroneous as they are based upon the flawed legal conclusions detailed in **Exceptions 1** and **2**, and thus are inconsistent with Florida law.[17]

Exception No. 4: The Recommended Order erroneously fails to make any finding or conclusion as to whether the Amendment provides for a limited variation in net density, and thus whether the Amendment provides for compatibility, as required by Comprehensive Plan Land Use Policy 3.4. The ALJ erroneously concluded that the Comprehensive Plan Land Use Policy 3.4 "simply requires an 'orderly land use arrangement.'" This finding erroneously interprets the plain language of the policy.

44. **Finding 40** is an erroneous conclusion of law. It states "[t]he plain language of Policy LU 3.4, however, simply requires an 'orderly land use arrangement.' It does not explicitly or implicitly state that the City must use a 'step up' approach when determining the appropriate Future Land Use category." Rec. Or. at ¶ 40.

45. The Department should reject **Finding 40** as an erroneous legal conclusion, even though the statement is placed in the portion of the Recommended Order captioned "findings of fact." See Sapp, 384 So. 2d at 254 (Fla. 2d DCA 1980); Hernicz, 390 So. 2d at 195 (Fla. 1st DCA 1980). The ALJ incorrectly interpreted the plain language of Policy LU 3.4 which states

16. See Sheridan, 1992 WL 880138, 16 F.A.L.R. 654, 688–89; BG Mine, Case No. 17-3871GM at ¶¶ 71, 112; Martin Cnty. Conservation Alliance, Inc., et al., Case No. 10-0913GM (Fla. DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011); Tierra Verde Community Assoc., Inc., Case No. 09-003408GM; Graves, DOAH Case No. 11-1206GM Final Or. at p. 12; 6; Schember, No. 00-2066GM at ¶ 184; Wade, DOAH Case No. 03-0150GM, Rec. Or. at ¶ 192.

17. See Sheridan, 1992 WL 880138, 16 F.A.L.R. 654, 688–89; BG Mine, Case No. 17-3871GM at ¶¶ 71, 112; Martin Cnty. Conservation Alliance, Inc., et al., Case No. 10-0913GM (Fla. DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011); Tierra Verde Community Assoc., Inc., Case No. 09-003408GM; Graves, DOAH Case No. 11-1206GM Final Or. at p. 12; 6; Schember, No. 00-2066GM at ¶ 184; Wade, DOAH Case No. 03-0150GM, Rec. Or. at ¶ 192.

"[t]he Land Use Plan shall provide for compatible land use transition through an orderly land use arrangement, proper buffering, and the use of physical and natural separators." Pet'r Ex. 25, Comp. Plan at 001090. This results from the ALJ limiting the analysis to whether there is a "simply requires an orderly land use arrangement" when Policy LU 3.4 requires a "compatible land use transition" and "compatibility" is defined by the City's Comprehensive Plan to require "limited variations from adjacent uses in net density". See Pet'r Ex. 25, Comp. Plan at 001036. It is clear legal error for the Recommended Order to conclude that Policy LU 3.4 "simply requires an orderly land use arrangement" and avoid a determination on whether the FLUM Amendment results in "limited variations from adjacent uses in net density" as the plain language demonstrates this is only but one factor in determining compatibility. See id; see also Tierra Verde Community Assoc., Inc., Case No. 09-003408GM.

46. The ALJ is required by statute to make findings of fact. Fla. Stat. § 120.57(1)(k). Under Florida law, when an ALJ fails to make a finding of fact, it is not the responsibility of the agency to reach its own conclusion but instead, the agency shall remand the case for the officer to do so. State v. Murciano, 163 So. 3d 662, 665 (Fla. 1st DCA 2015) (citing Cohn v. Dep't of Prof'l Regulation, 477 So.2d 1039, 1047 (Fla. 3d DCA 1985). Further, the Second District held that when an ALJ incorrectly interprets or applies the law, it is proper for the agency to remand the case back to the ALJ for additional findings in light of the agency's explanation of the law. Murciano, 163 So. 3d at 665; see Charlotte County v. IMC Phosphates Co., 18 So.3d 1089, 1093 (Fla. 2d DCA 2009); see also Harun v. Dep't of Children & Families, 837 So.2d 537, 538–39 (Fla. 4th DCA 2003) ("We must remand the case because the hearing officer failed to make necessary findings of fact" regarding whether DCF complied with an administrative rule).

47. Here, the ALJ erroneously interpreted the law and failed to make a finding of fact or conclusion of law as to **whether the Amendment provides for a limited variation in net density**. This is clear error and requires that the agency remand the case back to the ALJ to make a finding consistent with the agency's interpretation of the law. See Murciano, 163 So. 3d at 665; Charlotte County, 18 So.3d at 1093 (Fla. 2d DCA 2009); Harun, 837 So.2d at 538–39 (Fla. 4th DCA 2003); see also Tierra Verde Community Assoc., Inc., Case No. 09-003408GM.

48. In addition, **Finding 41** incorrectly and unjustifiably asserts that the maximum possible density under the Amendment is 21 du/a. Rec. Or. at ¶ 41. However, as previously stated, **Finding 18** correctly asserts that the proper *maximum* density on the subject property is 30 du/a.[18]

49. In support of **Finding 42**, the Recommended Order asserts that the mobile home park to the south of the subject property has an actual density of approximately 20 du/a, therefore the transition from 20 to 21 "is an orderly land use arrangement." Rec. Or. at ¶ 42. As stated above, an orderly land use arrangement is but one factor in determining compatibility. Pet'r Ex. 25, Comp. Plan at 001090. In addition, the Recommended Order erroneously seeks to make a determination of consistency with Plan Policy LU 3.4 by comparing a current, non-conforming density[19], outside the City's jurisdiction, to the legally fictitious "practical allowable density" under the FLUM Amendment. Rec. Or. at ¶ 42. The Recommended Order erroneously compares apples to oranges. Specifically, by using an on the ground density from outside the jurisdiction of the Comprehensive Plan which is being examined, and practical allowable density, instead of maximum allowable density. Further, the conclusion ignores the maximum allowable density

18. See Sheridan, 1992 WL 880138, 16 F.A.L.R. 654, 688–89; BG Mine, Case No. 17-3871GM at ¶¶ 71, 112; Martin Cnty. Conservation Alliance, Inc., et al., Case No. 10-0913GM (Fla. DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011); Tierra Verde Community Assoc., Inc., Case No. 09-003408GM; Graves, DOAH Case No. 11-1206GM Final Or. at p. 12; 6; Schember, No. 00-2066GM at ¶ 184; Wade, DOAH Case No. 03-0150GM, Rec. Or. at ¶ 192.

19. The underlying maximum allowable density allowed by the Pinellas County Comprehensive Plan's FLUM, upon the mobile home park to the south, is **7.5 du/a**, the same as the other adjacent land to the subject real property, within the City's jurisdiction. See Gauthier, T-63 – 64.

under the FLUM Amendment of 30 du/a[20] and of the land adjacent to the subject property, to the north, east, and west, which is all RU 7.5 du/a.

50. The City's Comprehensive Plan defines compatibility as:

> Not having significant adverse impact. **With limited variation from adjacent uses in net density**, in type and use of structures (unless highly complementary), and with limited variation in visual impact on adjacent land uses. In the instance of certain adjacent or proximate uses, compatibility may be achieved through the use of mitigative measures.
>
> Pet'r Ex. 25, Comp. Plan at 001036.

51. The *Tierra Verde* case held that 30 du/a maximum allowable density adjacent to a 5 du/a maximum allowable density does not provide for a limited variation, as required by the City of St. Petersburg's Comprehensive Plan. See Tierra Verde Community Assoc., Inc., Case No. 09-003408GM; see also Graves, DOAH Case No. 11-1206GM, Final Or. In fact, in *Tierra Verde* the ALJ found a change of maximum theoretical density allowable to 30 units per acre, adjacent to the surrounding low density, single and multi-family residences, of which some property was designated as Residential Low, 5 units per acre, would not be a limited variation from adjacent densities, not compatible, and would render the term "limited variation" meaningless in the City of St. Petersburg's Comprehensive Plan. Id. The legal conclusions of contained within the Recommended Order cannot be reconciled with the precedent set forth in *Tierra Verde Community Assoc., Inc.*, and instead the Recommended Order erroneously ignores the definition of compatibility in the City's Comprehensive Plan, ultimately avoiding a proper determination of internal consistency.

52. Finally, **Finding 44** of the Recommended Order erroneously applies the wrong standard to compatibility. It states "[t]he City presented adequate evidence establishing the change

20. As demonstrated above in above **Exceptions 1** and **2**.

from Institutional to a residential category **fits with surrounding residential use**." Rec. Or. at ¶ 44.

53. As stated above, the subject Amendment must be compatible to provide for internal consistency with Policy LU 3.4, and thus be "in compliance." Further, compliance requires compatibility which is defined as **limited variation from adjacent uses in net density**. Pet'r Ex. 25, Comp. Plan at 001036. Policy LU 3.4 does not require that the use "fit with surrounding residential uses" as applied in the Recommended Order. It is clear legal error to apply any other standard than what is provided for in the Comprehensive Plan. See id.

Exception No. 5: The Recommended Order's finding of fact that Mr. Gauthier based his calculations of density and formulated his opinions upon the City's map set and GIS data is unsupported by the record, which instead reflects that he relied upon several data sources in reaching his conclusions, including the City's Comprehensive Plan, FLUM, and Florida Statutes.

54. Findings 55 and 56 of the Recommended Order appear to blindly adopt paragraphs 59 and 60 of Respondent's Proposed Recommended Order, which have no basis in any competent, substantial evidence in the record itself. Rec. Or. at ¶ 55–56; see Resp't Prop. Rec. Or. at ¶¶ 59, 60. The Recommended Order provides:

> 55. Mr. Gauthier testified that in calculating his density and formulating his opinions, he used the City's map set and GIS data from the City's website.
>
> 56. In contrast, the City relied on several data sources in reaching its conclusions regarding compliance in the Staff Report, in the presentations at the City Council meeting, and at the final hearing. These sources include the Comprehensive Plan and maps; LDRs; GIS aerials and maps; application materials; a narrative from the property owner; plat records; the Pinellas Countywide Plan Rules; and an outside Traffic Impact Statement by a traffic engineering firm, Kimley-Horn.
>
> Rec. Or. at ¶ 55–56.

55. The record however, provides that Mr. Gauthier, in addition to his live testimony, reduced his opinions to his report. Gauthier, T-55 2:7. Mr. Gauthier's report, which was admitted

into evidence as Petitioner's Exhibit 11, reveals that Mr. Gauthier "reviewed information from the following sources to assist with preparation of this report":

- Application for a Future Land Use Plan Change, December 16, 2019.
- Staff Report for St. Petersburg Community Planning & Preservation Commission Public Hearing, February 11, 2020.
- Video recording of St. Petersburg Community Planning & Preservation Commission Public Hearing, February 11, 2020.
- Agenda Package for St. Petersburg City Council Public Hearing, August 13, 2020.
- Video recording of St. Petersburg City Council Public Hearing, August 13, 2020.
- City of St. Petersburg Ordinance No 739-L.
- City of St. Petersburg Comprehensive Plan.
- Pinellas County Comprehensive Plan.
- City of Gulfport Comprehensive Plan.
- City of St. Petersburg LDC at:
- https://library.municode.com/fl/st._petersburg/codes/code_of_ordinances?nodeId=PTIISTPECO_CH16LADERE
- Fogarty & Finch, Inc, Appraisal Report, October 22, 2018.
- CHHA Frequently Asked Questions Pamphlet, July 9, 2020.
- Transmittal package for City Text Amendment LGCP 2019-03, dated August 21, 2020.
- Pinellas County Hurricane Preparedness Guide 2020.
- Florida Statewide Regional Evacuation Study Program, Storm Tide Atlas, Pinellas County, June 2010.
- 2016 Supplemental Summary Statewide Regional Evacuation Study.
- "Recent increases in tropical cyclone intensification rates", Nature Communications, 2019.
- National Oceanic and Atmospheric Administration Hurricane Workshop Presentation, 2019.
- National Weather Service Presentation on Hurricane Rapid Intensification for the Florida Keys, 2019.
- National Hurricane Center Presentation on Water Impacts from Recent U.S. Landfalling Tropical Cyclones, 2019.
- National Hurricane Center Presentation on Tropical Cyclone Intensity Forecasting, 2017.
- "Will Global Warming Make Hurricane Forecasting More Difficult, Kerry Emanuel, 2017.
- National Hurricane Center Presentation on Forecast Accuracy, 2012.
- City of St. Petersburg Zoning & Future Land Use GIS Viewer at: https://egis.stpete.org/portal/apps/webappviewer/index.html?id=f0ff270cad0940a2879b38e955319dfa
- Pinellas County Emergency Management GIS Viewer at: http://egis.pinellascounty.org/apps/StormSurgeProtector/
- Pinellas County Tax Parcel Viewer at: https://www.pcpao.org/PaoTpv/
- Google Earth Website at: https://earth.google.com/web/@27.76331726,82.72470789,13.47188209a,847.0939743d,35y,0h,0t,0r
- SeaLevelRise.org Website at: https://sealevelrise.org/states/florida/

- PGSP Neighbors United, Inc., Website at: https://www.pgsp-neighbors.org/
- On October 6, 2020, I viewed the Property and drove the surrounding neighborhoods.

See Pet'r Ex. 11.

56. The City's attempt to mischaracterize the basis for Mr. Gauthier's opinions, which were reduced to writing in his report upon the materials cited above, adopted by the Recommended Order, is not based upon competent substantial evidence, or any evidence whatsoever. The record of final hearing reflects Mr. Gauthier testified to a literal list of sources relied upon in formulating his opinions:

> Mr. Ozery: Can you tell me what documentation -- or what did you review in formulating your opinion?
>
> Mr. Gauthier: A Yes. I have my report in front of me with page tabs, a series of information sources. I mean certainly the focus is on the City's Comprehensive Plan, the adoption ordinance, 739-L; but I also reviewed the Staff Report, the agenda package that was prepared for the City's Planning and Preservation Commission. I viewed the video of that commission meeting. I reviewed the agenda package for the City Council adoption hearing, as well as the video recording of that. I reviewed the Pinellas County Comprehensive Plan as it related to this amendment. I reviewed the City of St. Petersburg's land development code. There was an appraisal report that I've listed that reviewed that was prepared on behalf of the City. And there's a realm of information that's identified in my report relating to hurricane vulnerability and storm surge hazard. I won't go through the list, but it's itemized in the report. And I also want to mention that I found the time to view the subject property. I viewed it from the established right of ways, drove the surrounding neighborhoods. I did that on October 6th. I thought it was a very important step, given the nature of the issues, to develop a detailed report, to take a first-hand look.[21]

Gauthier, T-55:9 – 56:11; see also Pet'r Ex. 11.

57. The unsupported finding that Mr. Gauthier relied upon only the City's map set and GIS data, in contrast to the numerous sources testified to by Respondent's expert planners, unfairly prejudices the Petitioner to the extent that any material portion of the Recommendation is based upon that finding. Troublingly, as a practical matter, Petitioner has no ability to discover the weight

21. Mr. Gauthier goes on to describe additional sources of information. See Gauthier, T-56:19 – 57:9.

this finding was given in the resulting recommendations made to the DEO. The DEO should reject Findings 55 and 56, which are inconsistent with a plain review of the record, as not being supported by competent substantial evidence. See Payne v. City of Miami, 52 So. 3d 707, 735 (Fla. 3d DCA 2010).

CONCLUSION

The DEO should:

a. Make an explicit ruling on each of the above – stated exceptions, per §120.57 (1)(k), Fla. Stat.;

b. Grant each of the above – stated exceptions, and remand the matter back to the ALJ;

c. Instruct the ALJ to revise the conclusions of law related to the failure to rely upon professionally accepted data and analysis in the Amendments and use the maximum allowable densities are required by law;

d. Instruct the ALJ to make findings on the issue of compatibility and data and analysis support for the Amendment, based on the legally correct interpretations of the statutory requirements, as set forth above;

e. Upon receipt of an Amended Recommended Order, forward this matter to the Administration Commission with a recommendation that it issue a Final Order finding the FLUM Amendment to be not in compliance as the City failed to rely on professionally accepted data and analysis, examine the maximum allowable densities as authorized by the Comprehensive Plan in conjunction with the FLUM Amendment, and failed to maintain internal consistency within its Comprehensive Plan.

Respectfully Submitted on this 18th day of March 2021,

By: /s/Shai Ozery

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing has been served on all counsel of record identified on the attached Service list on this 18th day of March 2021.

By: /s/Shai Ozery

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