IN THE TWELFTH JUDICIAL CIRCUIT COURT
IN AND FOR SARASOTA COUNTY, FLORIDA

LOURDES RAMIREZ,
Plaintiff,

v.

CASE NO. 2021 CA 005551 NC
DIVISION C CIRCUIT

SARASOTA COUNTY,
Defendant.

ORDER GRANTING IN PART AND DENYING IN PART
MULTIPLE MOTIONS FOR SUMMARY JUDGMENT

BEFORE THE COURT are Plaintiff, Lourdes Ramirez's ("Plaintiff") motion for summary judgment [DIN 139]; Defendant, Sarasota County's ("County") motion for summary judgment [DIN 108]; and Intervenor Defendants', Calle Miramar, LLC, and SKH 1, LLC's ("Intervenors") joinder in County's motion for summary judgment [DIN 140], together with each party's response to the opponent's motion for summary judgment.

These summary judgment motions originally were heard before a predecessor judge, the transcript of which the Court reviewed. After this case was reassigned, the Court conducted a further hearing on the cross-motions for summary judgment. After the hearing, and at the Court's direction, the County supplemented the record with Ordinance No. 75-38 and Ordinance No. 82-54. The Court invited further argument from the parties. Plaintiff and Intervenors filed additional argument. [DINs 207, 208].

In sum, the Court concludes that the Development Order violates Future Land Use Policy 2.9.1 because the County's zoning ordinances and regulations in existence as of March 13, 1989, allowed density at most of 36 hotel units per acre on this site on Siesta Key. Here, the Development Order allowed for 170 hotel units on a 0.96 acre site. The Development Order also violated the intensity requirement of that policy. Plaintiff is entitled to a declaration that the Development Order is inconsistent with Future Land Use Policy 2.9.1 of the County's existing Comprehensive Plan.

The Development Order, however, does not violate Coastal Policy 1.2.3 or Future Land Use Policy 1.2.6 because those policies contain permissive terms—i.e., encourage and discourage—instead of mandatory terms. The Court cannot address the other challenges due to the existence of disputed questions of fact.

1.
BACKGROUND

Plaintiff filed a single-count complaint against the County for "declaratory, injunctive, or other relief" against the County pursuant to section 163.3215(3), Florida Statutes. The Court permitted the Intervenors to intervene.

Plaintiff's complaint alleged that Resolution No. 2021-208 ("Development Order") of the Board of County Commissioners of Sarasota County, Florida ("Board") adopted October 27, 2021, is inconsistent with several provisions of the Sarasota County Comprehensive Plan ("Comprehensive Plan") and therefore is void. The Development Order approved a special exception permitting Intervenors to develop an eight-story, 170-room hotel with a restaurant, rooftop bar, retail shops, and 223 parking spaces on a 0.96 acre parcel located in the Siesta Village portion of Siesta Key (the "Subject Property"). The approved density of the hotel project is 177 hotel rooms per acre.

The County and Intervenors deny the Development Order is inconsistent with the Comprehensive Plan, and they allege as an affirmative defense that Plaintiff lacks standing under section 163.3215 to bring this consistency challenge. After engaging in discovery, each party moved for summary judgment.

2.
THE SUMMARY STANDARD

Florida's new summary judgment standard applies. In re: Amendments to Florida Rule of Civil Procedure 1.510, 317 So. 3d 72 (Fla. 2021). As that court explained:

> For several reasons, we are persuaded that the best way forward is to largely adopt the text of federal rule 56 as a replacement for rule 1.510. Doing so makes it more likely that Florida's adoption of the federal summary judgment standard will take root. Textual overlap between the Florida and federal rules will provide greater certainty and eliminate unproductive speculation and litigation over differences between those rules. And Florida litigants and judges will get the full benefit of the large body of case law interpreting and applying federal rule 56.

Id. at 74–75.

Newly revised rule 1.510(a) states in pertinent part: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. . . . The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard."

The Florida Supreme Court also made three overarching points when revising rule 1.510. The court explained:

> First, those applying new rule 1.510 must recognize the fundamental similarity between the summary judgment standard and the directed verdict standard. Both standards focus on whether the evidence presents a sufficient disagreement to require submission to a jury. And under both standards the substantive evidentiary burden of proof that the respective parties must meet at trial is the only touchstone that accurately measures whether a genuine issue of material fact exists to be tried.
>
> Second, those applying new rule 1.510 must recognize that a moving party that does not bear the burden of persuasion at trial can obtain summary judgment without disproving the nonmovant's case. Under Celotex [Corp. v Catrett, 477 U.S. 317 (1986)] and therefore the new rule, such a movant can satisfy its initial burden of production in either of two ways: If the nonmoving party must prove X to prevail at trial, the moving party at summary judgment can either produce evidence that X is not so or point out that the nonmoving party lacks the evidence to prove X. A movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial.
>
> And third, those applying new rule 1.510 must recognize that the correct test for the existence of a genuine factual dispute is whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Under our new rule, when opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment. In Florida it will no longer be plausible to maintain that the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the slightest doubt is raised.

In re Amendments, 317 So. 3d at 75–76 (internal citations, parentheticals, and quotations omitted).

A "court must draw all reasonable inferences in favor of the nonmovant and may not weigh evidence or make credibility determinations, which are jury functions, not those of a judge." Lewis v. City of Union City, Georgia, 934 F.3d 1169, 1179 (11th Cir. 2019) (internal quotations omitted).

3.

FACTS

Based on the supporting factual positions, there are disputed and undisputed facts. Each fact listed below is undisputed unless otherwise stated.

1. The Subject Property is an assemblage of properties located at 214, 220, and 226 Calle Miramar and 221 Beach Road on Siesta Key in unincorporated Sarasota County. The existing use of the properties are three single-family residences that will be demolished and removed. The Subject Property is designated "Commercial-General/Siesta Key Overlay District" (CG/SKOD) on the Sarasota County Zoning Map. Transient accommodations—*i.e.*, hotels—are not a principal use in the CG district but are permitted by special exception granted by the Board after public hearing. The area of the Subject Property is approximately 0.96 acre (41,656 sq. ft.). The Development Order includes a binding Development Concept Plan ("Concept Plan"). The Development Order, including the Concept Plan, is attached to Plaintiff's complaint as Exhibit A [DIN 2, Ex. A].

2. The Concept Plan shows building setbacks as two feet along Calle Miramar (with 40 foot setback for floor areas above 35 feet in height), with a podium cover to within two feet up to the 35 foot height. The east side setback adjoining condominium development is 20 feet, including a 15 foot landscaped buffer. Along Beach Road to the south, the building setback is two feet, with 11 feet 3 inch setback for building height above 35 feet. No setback up to 35 feet in building height is shown along the west property line adjoining commercially developed office and hotel properties.

3. The Development Order will allow approximately 125,000 square feet of development on the Subject Property.

4. Siesta Key is designated "Barrier Island" on the Comprehensive Plan's Future Land Use Map and is located in the Coastal High-Hazard Area (CHHA), with an Evacuation Zone designation of Category A. This category has the greatest exposure of citizens and properties to hurricane impacts. Evacuation Zone categories B through E are located on the County's mainland.

5. Plaintiff resides at a residential property on Siesta Key located on the north end of the island, approximately 0.65 miles from the Subject Property. She has lived at this address since 1999. From her residence, Plaintiff can hear noise, including amplified music, from existing restaurants and bars located in Siesta Village, where the proposed hotel will be situated.

6. Plaintiff walks or drives near the Subject Property in Siesta Village to engage in errands or activities such as banking, shopping, dining, picking up mail, appointments, going to the beach, or as part of her exercise routine. The walking route from her home to the Subject Property is about 1.3 miles and takes approximately 20-25 minutes. The County and Intervenors dispute the frequency of these activities.

7. Plaintiff is an active advocate on issues related to density, illegal residential rentals, and other land use and environmental issues on Siesta Key and has expended time,

energy, and financial resources in pursuit of such interests. She served as Vice President of The Alliance for Siesta Key's Future from 2001-2005 and as Zoning Chair from 2002-2003. Plaintiff also volunteers with the Siesta Key Association, a civic organization, the purpose of which is to protect Siesta Key homeowners and residents. She has served that organization as a board member since 2003 and as President from 2005-2007 and 2009-2011, as Vice President in 2008, as Treasurer in 2004, and as Zoning Committee Chair from 2004-2011. Plaintiff participated in the 2003 Sarasota County zoning code revision process and met with County officials about changes to the setbacks of tall buildings in the CG zoning district. She advocated that Sarasota County cease illegally issuing permits for duplexes on lots meant to have single-family homes, which led to a vote by the Board of County Commissioners in 2007 to prohibit changes to the Comprehensive Plan that would increase density on Siesta Key.

8. Plaintiff is concerned that the hotel project approved by the Development Order will adversely affect her quality of life and safety by increasing the number of people and vehicles on Siesta Key and thus the congestion and danger she encounters on Siesta Key when driving or walking, increasing the number of vehicles that will need to evacuate when she is also trying to evacuate, increasing competition for beach parking and access, increasing the noise heard from her residence by the operation of a rooftop bar with amplified music, increasing the amount of time it may take for emergency vehicles to reach her home if such a need arises, and increasing noise and crime impacts. The County and Intervenors admit that Plaintiff has expressed these concerns but dispute that the hotel project will impact her as she alleges.

9. The current version of the Comprehensive Plan was adopted effective October 25, 2016, through Sarasota County Ordinance No. 2016-016. The County divides the components of the Comprehensive Plan into two parts. Volume 1 contains the operative Primary Components, including Goals, Objectives, and Policies of each chapter and the Future Land Use Map Series. Volume 2, Data and Analysis, is the analytical background and additional support material for the Comprehensive Plan corresponding to its various chapters.

10. Volume 2, Data and Analysis, contains the following statements regarding the unique nature of the County's Barrier Islands and limits on their development:

> Barrier Islands are recognized as a unique land use category. Development on the Barrier Islands is of special concern due to problems associated with hurricane evacuation, potential for storm damage and the sensitive nature of coastal habitats. Previously, it was recognized that total preservation or conservation of the Barrier Islands was preferable, but development of one dwelling unit per acre was acceptable, consistent with development patterns on Manasota and Casey Key. 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.
>
> On the Future Land Use Map, the Barrier Islands are represented as a homogenous land use classification to underscore

> the special considerations attendant to any future development or redevelopment. 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. Thus, future land uses on the Barrier Islands will remain essentially the same as the land uses shown on the "Existing Land Use Map - Sarasota County, 2015" (Map 7-2). Concern for the future development and redevelopment of the Barrier Islands warrants special consideration, which necessitates treating the Barrier Islands differently than the urban areas. Thus, the reduction of densities on the Barrier Islands is encouraged particularly in locations where the number of platted lots of record or the underlying zoning is more intense than the existing use. There are vested rights attendant in both of these situations. The Zoning Ordinance establishes the Barrier Islands as a Sending Zone to facilitate the transfer of development rights. To date, however, there have been no rights transferred from the Barrier Islands.
>
> The definition of Coastal High Hazard Areas is coincident with the evacuation zone for a Category 1 hurricane, as established in the Southwest Florida Regional Planning Council Hurricane Evacuation Study, 2010. Map 1-0 illustrates this [sic] evacuation zones A and B for Sarasota County.
>
> Land use densities within the Coastal High Hazard Area are not being increased as part of the proposed Comprehensive Plan Update. The barrier island designation has not been modified and coastal residential densities are represented by existing development, and/or current zoning. The land use designations adjacent to the Myakka River are also unchanged.

Volume 2, Data and Analysis, pp. V2-320-321.

11. Volume 2, Data and Analysis, contains the following in Chapter 6 Coastal Disaster Management:

> Evacuation route capacity and road constraints can seriously impact hurricane evacuation times. Since several barrier island and coastal mainland evacuation routes serve as collectors and tie into US 41 and SR 776, smooth evacuation is impaired at points where bottlenecks occur along these routes. Siesta and Longboat Keys, with their higher densities, generate the longest evacuation times.

Volume 2, Data and Analysis, p. V2-290.

12. Volume 2, Data and Analysis, contains the following in Chapter 6 Coastal Disaster Management:

> The greatest route constrictions in the county are on exit routes from the barrier islands to the mainland, or from the Venice area, heading toward I-75.

Volume 2, Data and Analysis, p. V2-292.

13. The term "density" means "an objective measurement of the number of people or residential units allowed per unit of land, such as residents or employees per acre." §163.3164(12), Fla. Stat.

14. The term "intensity" means "an objective measurement of the extent to which land may be developed or used, including the consumption or use of the space above, on, or below ground; the measurement of the use of or demand on natural resources; and the measurement of the use of or demand on facilities and services." §163.3164(12), Fla. Stat.

15. Comprehensive Plan Coastal Objective 1.2 and related Coastal Policies in pertinent part state:

> Coastal Objective 1.2 ENCOURAGE APPROPRIATE DENSITIES IN THE CHHA
>
> To encourage low-density land uses in the Coastal High-Hazard Area (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.
>
> Coastal Policy 1.2.2
> Proposed land use plan amendments in Evacuation Zones A and B hurricane vulnerability zone (storm surge areas) may be considered if such increases in density and intensity do not adversely impact hurricane evacuation times and are consistent with Future Land Use Policy 2.9.1 and Appendix A, Article 4, Section 4.6, Residential District Intent Statement, Code of Ordinances of Sarasota County, Florida.

Coastal Policy1.2.3

Encourage hotel/motel development in the storm evacuation zones category C, D and E rather than evacuation zones A and B.

Volume 1 Comprehensive Plan, p. V1-188.

16. Comprehensive Plan Future Land Use Policy 1.2.6 states the County should:

Discourage the intensification of land uses within Hurricane Evacuation Zones A and B (Map 1-8, Environment Chapter), consistent with Future Land Use Policy 2.9.1, and Coastal Objective 1.2 and Policies 1.2.1 - 1.2.5.

Volume 1 Comprehensive Plan, p. V1-214.

17. Comprehensive Plan Future Land Use Objective 2.9 and related Future Land Use Policies state:

FLU Objective 2.9 Maintain governing regulations for Barrier Island land uses.

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, except that with respect to lands zoned RMF as of that date and consistently so thereafter, a non-conforming duplex whose density exceeds the density restrictions of the zoning regulations and restrictions may be rebuilt within the footprint of the structure, or a non-conforming multi-family structure may be demolished and a duplex rebuilt in its place within the prior footprint of the multi-family structure without violating this policy.

FLU Policy 2.9.2

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 zoning requirements existing as of March 13, 1989.

FLU Policy 2.9.3

The rezoning of additional lands on the Barrier Islands for commercial or office uses shall be prohibited.

Volume 1 Comprehensive Plan, p. V1-243.

4.
STANDING

The Court must first substantively address the threshold issue of Plaintiff's standing to bring this Comprehensive Plan consistency challenge to the Development Order. Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1081 n.2 (Fla. 2d DCA 2009). The County and Intervenors argue Plaintiff has not demonstrated an injury different in degree to that of the community as a whole—an essential element of standing under Florida's Community Planning Act to challenge a development order.

Section 163.3215(3), Fla. Stat. (2021), provides in pertinent part:

> Any aggrieved or adversely affected party may maintain a de novo action for declaratory, injunctive, or other relief against any local government to challenge any decision of such local government granting or denying an application for, or to prevent such local government from taking any action on, a development order, as defined in s. 163.3164, which materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan adopted under this part.

In turn, section 163.3215(2), Fla. Stat. (2021), defines "aggrieved or adversely affected party" as used in the section as

> any person or local government that will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, and environmental or natural resources. The alleged adverse interest may be shared in common with other members of the community at large but must exceed in degree the general interest in community good shared by all persons. The term includes the owner, developer, or applicant for a development order.

It has been repeatedly held that "the standing provisions of section 163.3215 were adopted to liberalize the standing requirements that would otherwise be applicable." City of Fort Myers v. Splitt, 988 So. 2d 28, 32 (Fla. 2d DCA 2008). This standard for standing relates to its primary purpose—"to remedy the governmental entity's failure to comply with the established comprehensive plan," not "to redress damage to particular plaintiffs." Nassau County v. Willis, 41 So. 3d 270, 276 (Fla. 1st DCA 2010) (internal citations omitted). The statute is intended to be

a remedial one construed to advance the intended remedy of liberalizing standing. Splitt, 968 So. 2d at 32.

"[A] person's standing to bring a challenge under section 163.3215(3) depends on (1) whether the interests the person alleges are 'protected or furthered by the local government comprehensive plan; if so, (2) whether those interests 'exceed in degree the general interest in community good shared by all persons; and (3) whether the interests will be adversely affected by the challenged decision." Save Homosassa River Alliance, Inc. v. Citrus County, 2 So. 3d 329, 337 (Fla. 5th DCA 2005). "The statute contains no requirement that a person own adjacent property, maintain a special business interest, or have some other quantifiable property status to challenge a land use decision as being inconsistent with a comprehensive plan." Willis, 41 So. 3d at 278.

In Willis, the court found individual citizen plaintiffs established standing to challenge a development order based on their demonstrated recreational interests in and environmental concerns over the natural resources of the area affected by the development order (a 207-acre island). Plaintiffs testified they utilized the waters surrounding the island by participating in land, canoe, and kayak tours for the purpose of observing habitat, ecological systems, fish, and wildlife. Plaintiffs claimed the increased density and intensity of development would cause increased runoff of lawn fertilizers, pesticides, and boat marina contaminants, and increased density on roads used for hurricane evacuation. Willis, 41 So. 3d at 274. In affirming plaintiffs' standing, the court construed the "exceed in degree" element of the standard:

> The Legislature used the phrase "exceeds in degree" when defining the required "adverse interest" to establish standing as a distinction between the public's "general interest in community good shared by all persons." The phrase "in degree" is significant, because degree is defined as "the extent, measure, or scope of an action, condition, or relation <different in degree but not in kind>." *Merriam–Webster Online Dictionary,* http://www.merriam-webster. com/dictionary/degree [1] (last accessed April 1, 2010). In comparison, "kind" is defined as "fundamental nature or quality: essence." *Merriam–Webster Online Dictionary,* http://www.merriam-webster.com/dictionary/kind [1] (last accessed April 1, 2010). Thus, section 163.3215 does not require an adverse interest different in kind, such as an adverse effect on property ownership or commercial interest, from that of the public's interest in the community. Rather, section 163.3215 requires only that the adverse interest exceed in degree that of the public's "interest in the community good shared by all persons." By its use of the measure "in degree," the Legislature demonstrated that only the intensity of the activity or interest must exceed that of the general public, rather than the fundamental nature or quality.

Willis, 41 So. 3d at 277. The court found that through their "active and continuing connection" to the affected land, the plaintiffs demonstrated an interest that exceeds in degree the general public's interest in the "community good" in Nassau County. *Id.* at 278.

The court in Imhof v. Walton County, 328 So. 3d 32 (Fla. 1st DCA 2021) similarly construed "exceed in degree" in the context of a non-profit civic organization's challenge to a development order:

> The one limitation on standing is simply a matter of degree. That is, standing under the statute stems from the significance of the interest to the party, not the particularity or distinctiveness of the interest. …
>
> A party can establish standing under the statute by showing that it engages in activities related to a protected interest that set it apart from the community at large. *Cf.* Willis, 41 So. 3d at 278 (agreeing that plaintiffs had standing because they engaged in recreational activities tied to the natural resources of the affected area).

Imhof, 328 So. 3d at 46-47. The court noted that the civic organization acted as a "watch dog" group engaging in activities to protect environmental interests in Walton County and seeking to ensure that the standards of the comprehensive plan are applied to development in the county. The court concluded that "[b]y its activities, [the organization] showed it is more animated or motivated by an affected interest protected by the plan than the average member of the public. This is enough to make the required showing of an elevated degree of interest." Id.

In the present case, Plaintiff alleged a routine of walking or driving from her home past the Subject Property through Siesta Village and to the beach, the frequency of which is disputed by the County and Intervenors. She alleged adverse impacts from the hotel project because of additional risk to her health and safety as a pedestrian and vehicle driver due to increased traffic and congestion on local roadways. She also alleged delays due to increased traffic congestion, delays for emergency responders due to increased traffic congestion, increased hurricane evacuation times due to traffic congestion, congestion and overcrowding of beaches, beach parking, and public beach access points, congestion and overcrowding of public restroom facilities serving public beaches, and increased noise from the rooftop bar to be included in the hotel project. Further, Plaintiff alleged that the Development Order increases the allowed density and intensity of the use of the Subject Property beyond that allowed by the Comprehensive Plan.

The County and Intervenors argue Plaintiff lacks standing because she failed to demonstrate an injury different in degree than that of the community as a whole. They contend she must show how she would suffer injuries greater than any other person in the community.

Couched in terms of concern over increased traffic congestion and use of public beach facilities, Plaintiff's allegations focus on an interest in increased density and intensity of land use on Siesta Key and of the Subject Property in particular. The County's Comprehensive Plan explicitly recognizes the unique character of Sarasota County's barrier islands, including Siesta

Key, and through several provisions limits increases to density and intensity of land use on barrier islands, including Siesta Key. This interest in limiting density and intensity of development is clearly "protected or furthered" by the Comprehensive Plan.

The Court need not resolve whether these facts demonstrate injury to Plaintiff from increased traffic congestion that exceeds the general interest in community good shared by all persons to conclude Plaintiff has standing. Plaintiff has demonstrated approximate 20 years of an active and continuing civic interest and engagement on issues pertaining to land use, and particularly density and intensity of use, on Siesta Key. Like the individual plaintiffs in Willis and the plaintiff organization in Imhof, Plaintiff showed she is more animated or motivated by an affected interest protected by the Comprehensive Plan than the average member of the public. This is enough to make the required showing of an elevated degree of interest for standing in a section 163.3215(3) challenge. Plaintiff has standing.

Finally, if the Development Order has the effect of increasing the allowable intensity and density of use of the Subject Property, Plaintiff's interest in retaining the status quo as to such intensity and density is adversely affected by the Board's approval of the Development Order. The parties' wildly disparate positions on the operation of Future Land Use Policy 2.9.1 and its effect on the status quo of hotel development on the County's Barrier Islands confirms the Court's conclusion on standing.

The Court finds Plaintiff is entitled to summary judgment as to the issue of her standing to challenge the Development Order's consistency with the County's Comprehensive Plan.

5.
DISPUTED ISSUES OF FACT PRECLUDE SUMMARY JUDGMENT TO CERTAIN INCONSISTENCY CLAIMS

Having concluded that Plaintiff has standing to raise a section 163.3215(3) claim, the Court quickly dispenses without substantial analysis those claims presenting disputed issues of fact. The parties filed approximately 4,000 pages of materials supporting their competing claims for summary judgment. The motions for summary judgment, and the opponents' responses, commendably direct the Court's attention to genuine disputes of material fact.

These genuine disputes of material fact render summary judgment inappropriate, for any party, regarding the consistency or inconsistency of the Development Order with several provisions of the Comprehensive Plan. These Comprehensive Plan provisions are:

1. Housing Policy 1.5.6 (regarding the compatibility of the hotel project with the neighborhood);

2. Coastal Objective 1.1 (limiting public expenditures in the Coastal High Hazard Area);

3. Coastal Policy 1.2.1 (regarding the use of Land Development Regulations and limits on urban infrastructure improvements to limit development on Barrier Islands);

4. Coastal Objective 1.3 (regarding reduction or maintenance of emergency evacuation clearance time from coastal areas);

5. Environmental Policy 4.2.2 (regarding protection of coastal resources from the impacts of pedestrian and vehicular traffic);

6. Environmental Policy 4.2.3 (regarding transit access to public beaches); and

7. Transportation Policy 1.1.4 (requiring coordination of transportation needs and land use decisions).

As discussed below, though, summary judgment is appropriate regarding certain other claims based on other provisions of the Comprehensive Plan.

6.
DEFERENCE IN A SECTION 163.3215(3), CHALLENGE?

A comprehensive plan is essentially "a constitution for all future development within the governmental boundary." Machado v. Musgrove, 519 So. 2d 629, 632 (Fla. 3d DCA 1987). The purpose of comprehensive planning is to "establish meaningful and predictable standards for the use and development of land and provide meaningful guidelines for the content of more detailed land development and use regulations." §163.3177(1), Fla. Stat. (2021). All development on land covered by a local government's comprehensive plan, and all action taken by the government regarding that development, must be consistent with the comprehensive plan. §163.3194(1)(a), Fla. Stat. (2021); see Mojito Splash, LLC v. City of Holmes Beach, 326 So. 3d 137, 141 (Fla. 2d DCA 2021) ("Compliance with a comprehensive plan is mandatory.").

In a consistency challenge to a development order, the burden of proof is upon the proponents of the development order to demonstrate that it is consistent with the comprehensive plan. United States Sugar Corp. v. 1000 Friends of Florida, 134 So. 3d 1052, 1053 (Fla. 4th DCA 2013); Village of Key Biscayne v. Dade County, 627 So. 2d 1180, 1182 (Fla. 3d DCA 1993); Machado v. Musgrove, 519 So. 2d at 632.

In order to determine whether a development order is consistent with a policy of a comprehensive plan, a court must look to the language of the policy. "Rules of statutory construction are applicable to the interpretation of comprehensive plans." Katherine's Bay, LLC v. Fagan, 52 So.3d 19, 28 (Fla. 1st DCA 2010). Additionally, "all provisions on related subjects [must] be read in pari materia and harmonized so that each is given effect." Id.; seeCricket Properties, LLC v. Nassau Pointe at Heritage Isles Homeowners Association, Inc., 124 So. 3d 302, 306 (Fla. 2d DCA 2013) ("[A] court should interpret a statute so as to give effect to every provision therein and to harmonize all of its parts. And a court must read related statutory

provisions 'together to achieve a consistent whole' so as to 'give full effect to all statutory provisions and construe related statutory provisions in harmony with one another'").

Recently, in Conage v. United States, 346 So. 3d 594 (Fla. 2022), the Florida Supreme Court criticized the following passage from its prior decision Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) that "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction." That criticism recognized that "[i]n practice, following this maxim often leads the interpreter to focus on a disputed word or phrase in isolation; the maxim also leaves the interpreter in the dark about how to determine whether a particular word or phrase has a clear meaning." Conage, 346 So. 3d at 598.

Instead, that court explained "judges must 'exhaust all the textual and structural clues' that bear on the meaning of a disputed text . . . because '[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" Id.(Internal citations omitted); see Ham v. Portfolio Recovery Assocs., LLC, 308 So. 3d. 942, 946 (Fla. 2020) (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 56 (2012) ("[T]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.")). The Court will apply this directive here.

The Community Planning Act provides "[a] development order . . . shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development permitted by such order . . . 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), Florida Statutes (2021).

In evaluating a consistency challenge to a development order, a reviewing court uses the "strict scrutiny" standard of review to compare the development order to the comprehensive plan's policies. Board of County Commissioners of BrevardCounty v. Snyder, 627 So. 2d 469, 475 (Fla. 1993); Machado v. Musgrove, 519 So. 2d at 632.

Intervenors argue that, even though the Legislature directed a "de novo" challenge to the Development Order under section 163.3215(3), the Court must afford "great weight" to the County's administrative construction of its codes, and the Court may only depart from such a construction when it is an unreasonable interpretation or clearly erroneous. [DIN 140, pp. 5-6]. The case authorities cited for these propositions—Vanderbilt Shores Condo. Assoc., Inc. v. Collier County, 891 So. 2d 583 (Fla. 2d DCA 2004) and Pruitt v. Sands, 84 So. 3d 1267 (Fla. 4th DCA 2012)—are distinguishable in that neither involved a consistency challenge to a development order. In fact, the Pruitt decision cited Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191, 202 (Fla. 4th DCA 2001), in explaining that the deferential standard advocated by Intervenors here does not apply in a challenge to a development order based on consistency with the comprehensive plan.

The Court holds that it is not required to defer to a local government's interpretation of its own comprehensive plan. Pinecrest Lakes, 795 So. 2d at 202 ("When an affected property owner

in the area of a newly allowed development brings a consistency challenge to a development order, a cause of action—as it were—for compliance with the Comprehensive Plan is presented to the court, in which the judge is required to pay deference only to the facts in the case and the applicable law. In light of the text of section 163.3215 and the foregoing history, we reject the developer's contention that the trial court erred in failing to defer to the County's interpretation of its own Comprehensive Plan."); see Dixon v. City of Jacksonville, 774 So. 2d 763, 765 (Fla. 1st DCA 2000) ("We reject, moreover, the City's argument that deference should be given to the City's interpretation of a law which it administers, thereby requiring its approval so long as its construction falls within the range of possible interpretations.").

7.
ANALYSIS OF CONSISTENCY CHALLENEGES TO FLU POLICY 2.9.1, COASTAL POLICY 1.2.3, AND FLU POLICY 1.2.6

The seven elements of the Comprehensive Plan are divided into chapters, such as Coastal Disaster Management (Chapter 6) and Future Land Use (Chapter 7). Each chapter begins with a discussion of "core principles" and lists the chapter's Goals, Objectives, and Policies.

> A goal is a general statement about a desired future outcome. Goals provide the long-term vision and serve as the foundation of the plan, but do not indicate specific actions to be taken to achieve the desired outcomes. Goals provide the basis for the more specific direction provided by the objectives and policies.
>
> An objective is a more specific statement that provides direction to achieve a given goal. There are typically several objectives associated with each goal contained in the plan.
>
> Policies are specific courses of action or rules of conduct used to achieve the goals and objectives of the plan. They are intended to be used regularly to guide day-to-day decision making and direct actions to be taken by the County to implement the plan.
>
> Goals, objectives and policies should be applied within the context of the overall intent of the plan; no policy should be applied in isolation.

Volume 1 Comprehensive Plan, p. V1-12.

Plaintiff claims the Development Order is inconsistent with certain Policies of the Comprehensive Plan. These are Coastal Policy 1.2.3 (encourage hotel/motel development in the storm evacuation zones category C, D, and E rather than evacuation zones A and B), Future Land Use Policy 1.2.6 (discourage intensification of land use within Hurricane Evacuation zones A and B), and Future Land Use Policy 2.9.1 (limiting the density and intensity of future development of the Barrier Islands).

The Court elects first to address the Development Order's consistency with FLU Policy 2.9.1.

A.
FLU Policy 2.9.1

Plaintiff contends, and the County and Intervenors dispute, that the Development Order is inconsistent with FLU Policy 2.9.1, which provides, in pertinent part:

> 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*[.]**

(Emphasis added.)

Because Siesta Key is a designated Barrier Island under the 2016 Comprehensive Plan, development there is subject to the intensity and density limits provided in FLU Policy 2.9.1. Plaintiff argues that the Development Order approves hotel development on Siesta Key in excess of that allowed by the County's zoning ordinances and regulations existing as of March 13, 1989. The County and Intervenors disagree. They interpret the zoning ordinances and regulations existing at that time as allowing the hotel project contemplated by the Development Order. The inconsistency claim turns on what the County's zoning ordinances and regulations allowed as of March 13, 1989.

Presently, zoning and land development matters in the unincorporated County are governed by a codified Unified Development Code ("UDC") that merges the County's historic zoning ordinances and land development regulations into one chapter of the Sarasota County Code. Unfortunately, the same was not true in 1989.

The analysis necessary to determine the correct intensity and density limits existing as of March 13, 1989, requires an examination of a number of ordinances, none of which had been incorporated into a codified version of its ordinances pertaining to zoning district uses and land development. Instead, reference must be made to an ordinance "as amended" by later ordinances. The parties agree on the zoning ordinances in effect on March 13, 1989, but they strongly disagree on the proper interpretation of those ordinances.

The operative zoning ordinance in effect as of March 13, 1989, was Ordinance No. 75-38, as amended on May 18, 1982, by Ordinance No. 82-54 and as amended on February 15, 1983, by Ordinance No. 83-08.

Based on two arguments, the County and Intervenors contend the intensity and density of the hotel project approved by the Development Order do not exceed that allowed by those zoning ordinances in effect on March 13, 1989.

First, they interpret the zoning ordinances as not imposing a maximum unit per acre limit for transient accommodations on the CG-zoned Subject Property because the County's 1981 Future Land Use Map does not include the Barrier Islands in an "Intensity Level Band."

Second, they argue that based on the zoning ordinance's definition of "Dwelling Unit," transient accommodations without kitchens were not subject to a limit on residential density expressed in units per acre. Because the hotel rooms approved by the Development Order will not have kitchens, the County and Intervenors conclude no density limit applies, so the hotel project does not exceed the intensity and density level allowed by the zoning ordinances in effect on March 13, 1989. According to the County and Intervenors, at that time, special exception standards and other regulations governing maximum building height, open space requirements, setbacks and buffering, minimum lot size, and the like regulated the development of kitchen-less transient accommodations.

Plaintiff counters by arguing that the Barrier Islands were excluded from the Intensity Level Bands referenced in the zoning ordinances to limit, or perhaps even prohibit, any increase in transient accommodations on the Barrier Islands. She contends that, based on the effect of ordinances amending the foundational zoning ordinance, either no new hotel room development is authorized on the Barrier Islands or, if allowed at all, there could be at most, a maximum of 36 hotel rooms per acre are permitted. [DIN 158, pp. 51-53].

Plaintiff further argues that the County and Intervenors' focus on the definition of "Dwelling Unit" ignores that the zoning ordinances categorically apply residential density limits to hotels, and then adjust for the fact that some hotel rooms have kitchens by creating two maximum density categories depending on the percentage of rooms in a hotel with kitchens. Plaintiff argues that an interpretation that results in no applicable density limit for hotel rooms on the Barrier Islands would allow hotel development in excess of that allowed by ordinances in effect on March 13, 1989, and is otherwise inconsistent with the Comprehensive Plan. The Court considers these arguments below.

To resolve these differences, the Court undertakes an ordinance by ordinance review.

1.
Ordinance No. 75-38

Ordinance No. 75-38 defined hotels and motels in section 28 of the ordinance:

> 63. Hotel, Motel, Boatel, Motor Hotel, Motor Lodge, Tourist Court. The terms hotel, motel, boatel, motor hotel, motor lodge, tourist court, are to be considered synonymous, and to mean a building or group of buildings in which sleep accommodations are offered to the pubic and intended primarily for rental to transients with daily charge, as distinguished from multiple family dwellings (apartments) and rooming or boarding houses, where rentals are for periods or a week or longer and occupancy is generally by residents rather than transients. ***Where more than***

> ***twenty-five (25%) percent of the units in a hotel, motel, motor hotel, boatel, motor lodge or tourist court have cooking facilities, such an operation shall be deemed a multiple family dwelling and shall be subject to these zoning regulations as a multiple family dwelling. For the purpose of calculating residential density, each hotel, motel, etc., unit shall be considered a dwelling unit.***

(Emphasis added.) [Ord. No. 75-38, p. 141, found at DIN 205, pdf p. 162]. Hotels and motels were permitted by special exception in the CG zoning district "as for RMF-4." [Schedule of District Regulations, p. 46, found at DIN 205, pdf p. 229.] The Schedule of District Regulations were adopted by reference in Ordinance 75.38. [Ord. No. 75-38, Sect. 6.1, p. 16, found at DIN 205, pdf. p. 37].

Thus, a hotel or motel was permitted by special exception in the CG district "as for RMF-4," with each hotel unit considered as a dwelling unit for the purpose of calculating residential density. If more than 25% of the units had cooking facilities, the hotel or motel was treated as a "multiple family dwelling" under Ordinance No. 75-38.

In turn, the Residential, Multiple Family ("RMF") district standards in Ordinance No. 75-38 provided the following maximum residential density for both multiple family dwellings and hotels/motels/boatels:

F. Maximum Residential Density:
(Dwelling units per acre. See Sec. 28.33)

	Multiple Family Dwellings	Hotel, Motel, Boatel
RMF-1:	6	
RMF-2:	9	
RMF-3:	13	26
RMF-4:	18	36

Schedule of District Regulations, p. 26 [DIN 205, pdf. p. 209].

The confluence of these zoning provisions resulted in hotel development permitted by special exception in the CG district at a maximum density of 36 hotel units per acre, but if 25% or more of a hotel's units had cooking facilities, the hotel was treated as a multiple family dwelling and the maximum density was reduced to 18 units per acre.

Ordinance No. 75-38 originally defined "Density, Residential" and "Dwelling Unit" in Section 28 as follows:

> 33. Density, Residential. The term density refers to the number of residential dwelling units permitted per gross acre of land and is determined by dividing the number or units by the total

area of land within the boundaries of a lot or parcel not including dedicated rights-of-way and except as otherwise provided for in these regulations. In the determination of the number or residential dwelling units to be permitted on a specific parcel of land, a fractional unit shall not entitle an applicant to an additional unit.

. . .

42. Dwelling Unit. A dwelling unit is a room or rooms connected together, constituting a separate, independent housekeeping establishment for a family, for owner occupancy or rental or lease on a weekly, monthly, or longer basis, and physically separated from any other rooms or dwelling units which may be in the same structure, and containing sleeping and sanitary facilities and one kitchen.

[Ord. No. 75-38, pp. 136, 138; found at DIN 205, pdf pp. 157, 159].

2.
Ordinance No. 82-54

On May 18, 1982, the Board adopted Ordinance No. 82-54, which, among other things, amended Ordinance No. 75-38 to establish a new zoning district entitled "RTR"—Residential Tourist Resort. The Court pauses to note that Ordinance No. 82-54 did not repeal any prior ordinance; it simply amended the text of specifically identified provisions in Ordinance No. 75-38 and its annexed Schedule of District Regulations. Section 4 of Ordinance No. 82-54 made clear that its provisions "shall prevail in the event of conflict or with the provisions of any existing ordinance." [p. 9; see DIN 205, pdf p. 262].

The RTR district was intended to provide for "tourist and other transient accommodations and facilities." Hotels, motels, and interval occupancy accommodations were the permitted principal uses. The Schedule of District Regulations for the RTR district provided for maximum residential density, minimum lot requirements, maximum lot coverage, minimum common open space, minimum yard requirements, and maximum height of structures. [pp. 1-4; DIN 205, pdf. pp. 254-257]. The residential density provision adopted the two-tiered scheme for hotels and motels, depending upon the percentage of units with cooking facilities, located within the Intensity Level Bands.

Ordinance No. 82-54 also amended Item F, Maximum Residential Density for the CG Schedule of District Regulations to provide maximum residential density for hotels, motels, and interval occupancy accommodations of 36 units per acre. [p. 8; DIN 205, pdf. pp. 261].

3.
Ordinance No. 83-08

Ordinance No. 83-08, adopted February 15, 1983, amended Ordinance No. 75-38 in several ways. [DIN 128]. Like Ordinance No. 82-54, Ordinance No. 83-08 did not contain any broad repeal language. Instead, it provided that the "provisions of this ordinance shall prevail in the event of conflict with the provisions of nay existing ordinance. [p. 7; DIN 128, pdf. p. 9]. There were four main changes relevant here.

First, it deleted, "Definition 63, Hotel, Motel, Boatel, Motor Hotel, Motor Lodge, Tourist Court." [p. 6; DIN 128, p.7]. It added a new definition, "Definition 135c, Transient Accommodation," which included references to hotels and motels. [pp. 6-7; DIN 128, pp. 7-8]. Definition 135c read:

> 135c. Transient Accommodation. 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, boatels, and other similar uses. A transient accommodation shall be considered a residential use.***
>
> An accommodation is not a transient accommodation if it is rented, leased, or sub-leased for monthly periods or longer but with a beginning or ending period of less than a month. An accommodation is not a transient accommodation if it is being rented or leased for less than monthly periods by the seller of the accommodation prior to his vacating the premises after sale to a purchaser.

(Emphasis added.] [Ordinance No. 83-08, Sec. III F., pp. 6-7; DIN 128, pp. 7-8]. Notably, the new definition of "transient accommodation" omitted reference to "cooking facilities" or "kitchens" but provided that a transient accommodation shall be considered a residential use.

The Court pauses to note that neither Ordinance No. 75-38 nor Ordinance No. 83-03 defined the terms, "cooking facilities" or "kitchen." When a term used in a statute is undefined, a court may look to a dictionary to discern its plain meaning. West Florida Regional Medical Center, Inc. v. See, 79 So. 3d 1, 9 (Fla. 2012). Merriam-Webster.com defines "kitchen" as follows:

> **kitchen** > noun 1: a place (such as a room) with cooking facilities 2: the people who prepare, cook, and serve food especially in a restaurant, cafeteria, etc. 3: a style of cooking

Merriam-Webster.com, https://www.merriam-webster.com/dictionary/kitchen (last visited Aug. 20, 2023).

Second, Ordinance No. 83-08 amended the Schedule of District Regulations for the CG district. Regarding the list of permissible uses by special exception, Item E 7 was amended to provide, "7. Transient Accommodations (Principal Permitted and Accessory Uses as per "RTR" District, See S-60-a & b.)" [p. 4; DIN 128, pdf p. 5]. Thus, the transient accommodation use in the CG district was to be regulated per the standards for principal permitted uses of the new RTR district created by Ordinance No. 82-54.

Third, the CG district regulations were amended to create a two-tiered maximum residential density scheme for transient accommodations, depending upon the percentage of units with cooking facilities, located within the Intensity Level Bands. These regulations also included reference to the County's 1981 comprehensive plan entitled "Apoxsee," the Seminole word for "tomorrow."

> **MAXIMUM RESIDENTIAL DENSITY**:
> (Dwelling units per acre, see Sec. 28.33, "Density, Residential" definition.)
>
> 1. MultipleFamilyDwellings: 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 Map in Apoxsee)	Maximum Density (subject to provisions of 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 Map in Apoxsee)	Maximum Density (subject to provisions of Apoxsee)
Band B	18
Band C	13
Band D	9
Band E	6

[p. 4; DIN 128, p.5].

Fourth, Ordinance No. 83-08 amended the definition of "Dwelling Unit" in Section 28 to read:

> 42. Dwelling Unit. A dwelling unit is a room or rooms connected together, containing a separate, independent housekeeping establishment for a family, for owner occupancy or rental or lease, and physically separated from any other rooms or dwelling units which may be in the same structure and containing sleeping and sanitary facilities and one kitchen.

[p. 6; DIN 128, pdf. p. 7.]

4.
Resolution of Density with respect to FLU Policy 2.9.1

Regarding the first consistency argument, it is correct that the 1981 Future Land Use Map in *Apoxsee* did not include the Barrier Islands in any Intensity Level Band. Similarly, Intensity Level Bands did not cover some properties in the County along the I-75 corridor, although those properties were within the "Urban" Future Land Use category. [The 1981 FLUM is at DIN 108, p. 534]. The Intensity Level Bands were established in *Apoxsee*, so resort to that plan is necessary to properly interpret their meaning and effect. Indeed, the legend on the 1981 Future Land Use Map includes the admonition, "Note: This map cannot be correctly interpreted independently of the land use plan text."

The County and Intervenors argue that *Apoxsee* is no longer applicable as it was superseded by the County's 1989 Comprehensive Plan adopted March 13, 1989, via Ordinance No. 81-30. However, per Section 10 of Ordinance No. 81-30, the 1989 Comprehensive Plan became effective 90 days ***after*** its adoption on March 13, 1989—meaning, it became effective June 12, 1989. Recall FLU Policy 2.9.1 provided that intensity and density on the barrier islands "shall not exceed that allowed by zoning ordinances and regulations existing as of March 13, 1989." Thus, FLU Policy 2.9.1 plainly included reliance on ordinances that were adopted under *Apoxsee* as the governing comprehensive plan.

The County and Intervenors variously claim any reliance on *Apoxsee* impermissibly goes beyond the plain language of Ordinance Nos. 75-38 and 83-08 as a form of statutory interpretation based on "legislative history" and "pari materia" considerations or that Plaintiff is attempting to enforce the provisions of *Apoxsee* rather than the current 2016 Comprehensive Plan. The Court disagrees. *Apoxsee* is the source of the Intensity Level Bands referenced in Ordinance No. 83-08. Interpreting in isolation the exclusion of the Barrier Islands from any Intensity Level Band, without resort to *Apoxsee*, runs counter to the teachings of Conage that the Court "exhaust all the textual and structural clues that bear on the meaning of a disputed text."

The Future Land Use ("FLU") chapter of *Apoxsee* summarizes the "urban containment policy" begun in the County's Land Use Plan of 1975 as an approach espousing "the combination of a geographically compact urban area with low-density urban development." [p.

96; DIN 133, pdf p. 111]. The FLU chapter recognizes problems with prior implementation of the County's 1975 plan and establishes several policies for allocating growth to appropriate areas. The first provision is the division of the county into three general land use categories—rural, semi-rural, and urban. The FLU chapter explains the concept of Intensity Level Bands and their refinement with "activity centers" as

> the concentration of a majority of residents around an urban core (e.g., town centers) which contains major employment and retailing centers. The rings or bands emanating from the urban core represent "intensity levels," of which each succeeding band proceeding away from the urban center contains a lower average residential density per acre than the preceding one. In addition, although the average value (in dwelling units per acre) assigned to each intensity level varies (see the Future Land Use Map legend), the objective is to maintain a minimum overall urban area density of 3.0 du/ac.
>
> While this concept (concentrating population around an urban core (town center)) produces efficient access to major employment and retailing centers, it does not effectively address the needs of residents removed from the core who must travel some distance to satisfy more mundane requirements—shopping for groceries, stopping by the cleaners, filling a prescription at a drugstore, [illegible]. Ideally, and to reduce energy consumption, "secondary" activities centers (i.e., community, village, and neighborhood) should be within walking or bicycling distance of people's homes.
>
> With this consideration in mind, this Chapter recommends the refinement of the intensity level (band) concept discussed above for the entire urban area, through the establishment of "activity centers" of commercial and more intensive residential development within each of the various intensity levels (Illus. 186). These secondary activity centers will be located at the intersections of major thoroughfares already planned to serve the urban areas. The intensity of development allowed in each activity center will be a function of three factors: the capacity of the roads, the intensity level band in which the intersection is located, and the availability of supportive utilities and facilities.

Apoxsee, p. 105 [DIN 133, p. 120].

After discussing this use of Intensity Level Bands and activity centers, the FLU Chapter addresses the characteristics and functions of the semi-rural and rural areas and the use of sector plans and planned unit development (PUD) to implement the policies of the plan.

Under the heading, "Areas of Special Concern," the *Apoxsee* FLU Chapter recognizes that a number or areas of the County, due to their "unique nature," require treatment "separate from the three general land uses (urban, semi-rural, and rural) discussed earlier." These areas include the barrier islands, extra-urban enclaves, and specialized commercial categories (e.g., commercial developments and I-75 interchanges). Particularly regarding the barrier islands, the FLU Chapter further provides:

> The Barrier Islands. Problems associated with development on the barrier islands (the keys) are discussed in both the Environment Chapter (p. 32, Volume 1) and the Traffic Circulation Chapter (p. 276, Volume 1). More specifically, these problems relate to the detrimental effect of building along the active beach areas; to the potentially adverse impact that over development of the keys could have on the County's resort-retirement economy; and to the difficulties in evacuating large numbers from the keys in times of emergency. ***Were the keys not already developed, the proposed plan would include them in the semi-rural area to be developed at semi-rural intensities.*** Generally, development on Manasota Key and Casey Key has been very low and is not, therefore, sharply in conflict with the densities associated with the semi-rural area. ***Siesta Key, however, has been highly developed—***it contains some of the unincorporated County's most intensive residential development.
>
> While acknowledging the problems with development on the barrier islands, ***this plan recognizes the existing development and existing zoning levels as representing the maximum levels of development desirable on the keys.*** In addition to prohibiting future increases in development intensity on the keys, it is recommended that ***reductions in zoning be considered*** to lessen the consequences that any development may have on the identified problem. Areas already developed at densities lower than the zoning district within which they are located should be appropriately ***downzoned***. (See June 7, 1979, report prepared by the Department of Planning entitled "An Overview of Existing and Potential Development Trends on Siesta Key").

(Emphasis added.) *Apoxsee*, p. 113 [DIN 133, p. 113].

Earlier, *Apoxsee's* FLU Chapter described the function of the semi-rural areas as "a transition zone between the urban and rural areas" where development may occur at a maximum density of one dwelling unit per two acres. *Apoxsee*, p. 110 [DIN 133, p. 125].

This review of *Apoxsee's* text demonstrates that the Barrier Islands, including Siesta Key, were regarded as unique and requiring special treatment in relation to the density and intensity of future development. That is why the Barrier Islands were

excluded from any Intensity Level Band shown on the 1981 Future Land Use Map. As to the significance of the absence of an Intensity Level Band, the plain language of the text does not support the County and Intervenors' position that the ordinances in effect on March 13, 1989, set no maximum density for transient accommodation units on the CG-zoned Subject Property. Siesta Key was then described as "highly developed" with existing development and existing zoning levels recognized as "representing the maximum levels of development desirable on the keys." The FLU Chapter even recommended ***downzoning*** properties already developed at densities lower than allowed in the zoning district within which they are situated.

Were the Barrier Islands not already developed, *Apoxsee* in 1981 would have designate the Barrier Islands as semi-rural, to be residentially developed at the density of one dwelling unit per two acres. This is not the language of open-ended hotel development, limited only by special exception standards and other site development regulations. ***All textual and contextual clues reject the County and Intervenors' argument there is no limit as to density to build hotels on Siesta Key.***

Interpreting Ordinance No. 75-38, as amended by Ordinance No. 83-08, as imposing hotel density limits on CG-zoned property everywhere in the county ***except*** the Barrier Islands is contrary to the clear, unambiguous intent of *Apoxsee*. The Court, therefore, rejects the County and Intervenors' position that because no Intensity Level Band covered the Barrier Islands, the ordinances in effect on March 13, 1989, did not set a maximum unit/acre density for transient accommodations on CG-zoned property located on the Barrier Islands, including the Subject Property. At most, the density limit for the Subject Property would be 36 hotel units per acre (assuming no kitchen), far less than the 170 hotel units—at a density of 177 hotel units per acre—approved for this 0.96 acre parcel by the Development Order.

Turning to the County and Intervenors' argument related to the definition of "Dwelling Unit," the Court must again construe Ordinance No. 75-38, *as amended*. The County and Intervenors contend that the zoning ordinances and regulations existing on March 13, 1989, do not treat transient accommodations as having residential density where such transient accommodations do not include a kitchen. They argue the interplay between the defined terms "Density, Residential," "Dwelling Unit," and "Transient Accommodation" results in an interpretation that a transient accommodation without a kitchen is not a dwelling unit, and if not a dwelling unit, then the transient accommodation has no residential density to be governed by a maximum density cap. In contrast, Plaintiff argues the zoning ordinances categorically apply residential density limits to transient accommodations, and then adjust for the fact that some hotel rooms have kitchens and some do not by creating two maximum density categories, depending on the percentage of rooms in a hotel with kitchens.

From Ordinance No. 75-38, as amended by Ordinance Nos. 82-54 and 83-08, the County and Intervenors reason that only a dwelling unit has residential density, and if a transient accommodation does not satisfy the ordinance's definition of "Dwelling Unit" because it lacks a kitchen, then the transient accommodation has no residential density to be governed by the

density cap. Therefore, the number of kitchen-less transient accommodations permitted on CG-zoned property is limited only by special exception standards and other applicable site development regulations.

The Court finds the ordinances in effect on March 13, 1989, reveal an intent to regulate the density of transient accommodations or hotel rooms whether or not they all meet the literal definition of "Dwelling Unit." The language in the definition of "Transient Accommodation" recognized that a transient accommodation included an "accommodation used as a dwelling unit *or other place of human habitation* with sleeping accommodations*."* That contemplated that accommodations that do not meet the literal definition of "Dwelling Unit" because they lack a kitchen are included in the definition, and not just "Dwelling Units" that are leased for short terms. This conclusion is supported by the unambiguous language in the definition of Transient Accommodation, which makes no reference to kitchens or cooking facilities, that "[a] transient accommodation shall be considered a residential use." There is no other purpose to be served by categorizing transient accommodations a "residential use" if not to subject them to the residential density caps.

The Court pauses to note that Coastal Objective 1.2 by its terms addresses the encouragement of low-density land uses in the Coastal High Hazard Area (CHHA) "in order to direct population concentrations away from this area." In furtherance of this objective, Coastal Policy 1.2.3 specifically addresses hotel/motel development under this barrier island density provision.

Returning to the interpretation issue of the ordinances in effect on March 13, 1989, based on the definition of "Dwelling Unit," as imposing density limits only on hotel rooms with kitchens is contrary to both the clear, unambiguous intent of *Apoxsee* and the admonition that "judges must exhaust 'all the textual and structural clues" that bear on the meaning of a disputed text." Conage, 346 So. 3d at 598. FLU Policy 2.9.1, and the ordinances it incorporates to limit Barrier Island development, cannot reasonably be read in the context of the 2016 Comprehensive Plan to allow 177 hotel rooms per acre on a CG-zoned property on the Barrier Island of Siesta Key.

To avoid this outcome, the Intervenors again urge the Court to defer to the County's construction of the ordinances, contending the Court may only reject the County's construction if it is "clearly erroneous." Pruitt v. Sands, 84 So. 3d 1267, 1268 (Fla. 4th DCA 2012). However, as noted earlier, the court in Pruitt cited Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191 (Fla. 4th DCA 2001), and acknowledged that consistency challenges to development orders are treated differently, with no deference shown to the local government's interpretation. This is consistent with the "strict scrutiny" standard discussed earlier. The Court does not defer to the County's construction in the consistency challenge.

5.
Resolution of Intensity with respect to FLU Policy 2.9.1

FLU Policy 2.9.1 also provides that the ***intensity*** 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. Recall that intensity is defined as "an objective measurement of the extent to which land may be developed or used, including the consumption or use of the space above, on, or below ground; the measurement of the use of or demand on natural resources; and the measurement of the use of or demand on facilities and services." §163.3164(12), Fla. Stat. Evaluating the intensity of land development implicates matters of minimum lot size, maximum lot coverage by buildings, minimum open space, minimum setbacks, and maximum height of structures.

As shown above, the development of transient accommodations on CG-zoned property on March 13, 1989, was governed by Ordinance No. 75-38, as amended by Ordinance No. 82-54. Transient accommodations at that time were to be developed subject to the RTR district standards for principal use. In turn, the RTR Schedule of District Regulations, in pertinent part, provided:

> G. Minimum Lot Requirements: (Area and width, see Section 28.72, "Lot Measurement Width" definition.)
>
> None, provided no RTR district shall contain less than one (1) acre.
>
> H. Maximum Lot Coverage By All Buildings: (Includes accessory buildings, see Section 28.30, "Coverage of a Lot by Buildings" definition.)
>
> 1. Up to 35 ft. in height: 30%
>
> 2. 36 to 45 ft. in height: 28%
>
> 3. 46 to 55 ft. in height: 26%
>
> 4. 56 to 65 ft. in height: 24%
>
> 5. 66 to 75 ft. in height 22%
>
> 6. 76 to 85 ft. in height 20%
>
> I. Minimum Common Open Space: (See Section 28.90A, "Open Space" definition.)
>
> 30%
>
> J. Minimum Yard Requirements: (Depth of Front and Rear Yards, Width of Side Yards, See Section 28.141-28.146, "Yard" definitions, see Section 17.14, "Base Setback Line Requirements.")

1. Front: *25 ft.

2. Side: *15 ft.

3. Rear: *15 ft.

4. Waterfront: *20 ft.
(see Section 7.11.c, "Minimum Gulf Front Setback and see Ordinance 79-03, Gulf Beach Setback Line.)

*Provided building above 35 ft. shall provide additional side and rear yards at a ratio of one (1) ft. of yard for each three (3) ft. of building height and front yard of twenty-five (25) ft. or one half (1/2) of building height, whichever is greater.

K. Maximum Height of Structures: (See Section 7.3, "Exclusions from Heights Limits".)

Intensity Level Band
(See Future Land Use
Plan Map in Apoxsee)

Band B *85 ft.
Band C *45 ft.
Band D *35 ft.
Band E *35 ft.

*Provided an additional 10 ft. for each story devoted primarily to parking within the structure up to a maximum additional height of 20 ft. may be added to the limit.

Ordinance No. 82-54, pp. 3-4 [DIN 205, pdf. pp. 256-257].

Applying the applicable RTR standards to the hotel project approved by the Development Order, the Court finds the Development Order permitted development more intense than that allowed by the ordinances and regulations existing as of March 13, 1989. There are three core reasons for this conclusion.

First, the RTR district standards required a minimum lot size of one acre. The area of the Subject Property is 0.96 acre, or 41,656 square feet, which is less than one acre. Thus, the Development Order approves development more intense than that allowed on March 13, 1989.

Second, for a hotel building 80 feet in height, the RTR district standards permitted maximum lot coverage by all buildings of 20% of the lot's area. It is plain from examination of

the diagram included in the binding Concept Plan that the approved hotel building will cover more than 20% of the Subject Property's area—by a lot.

Third, the setbacks (minimum yard requirements) shown in the binding Concept Plan are far smaller than those required for front, side, and rear yards by the RTR district standards.

In sum, the Development Order is inconsistent with the 2016 Comprehensive Plan's FLU Policy 2.9.1 because it approves hotel development on the Barrier Island of Siesta Key at intensity and density levels in excess of that allowed by ordinances in effect on March 13, 1989. Accordingly, Plaintiff is entitled to summary judgment regarding this particular claim of inconsistency and the County and Intervenors are not entitled to summary judgment.

B.
Coastal Policy 1.2.3 & Future Land Use Policy 1.2.6

Coastal Policy 1.2.3 and Future Land Use Policy 1.2.6 are considered jointly in that they both address development in Evacuation Zone A (*i.e.*, the Barrier Islands):

> Coastal Policy 1.2.3
> Encourage hotel/motel development in the storm evacuation zones category C, D and E rather than evacuation zones A and B.

> Future Land Use Policy 1.2.6
> Discourage the intensification of land uses within Hurricane Evacuation Zones A and B (Map 1-8, Environment Chapter), consistent with Future Land Use Policy 2.9.1, and Coastal Objective 1.2 and Policies 1.2.1 - 1.2.5.

Plaintiff essentially contends that if the Development Order is inconsistent with FLU Policy 2.9.1 then it is necessarily also inconsistent with Coast Policy 1.2.3 and Future Land Use Policy 1.2.6. The County and Intervenors counter that the Development Order does not approve development on the Subject Property more intense than that allowed by ordinances in effect on March 13, 1989. Further, they argue the terms "encourage" and "discourage" used in the policies are permissive, rather than mandatory, to allow for flexibility and the possibility of development. Because hotel development on the Barrier Islands is not prohibited outright, they reason the Development Order is not inconsistent with these two policies.

The Court agrees with the County and Intervenor that "encourage" and "discourage" are not directory but rather are permissive. SeeB.B. McCormick & Sons, Inc. v. City of Jacksonville, 559 So. 2d 252 (Fla. 1st DCA 1990) (use of proposed site as location for sanitary landfill was consistent with comprehensive plan's provisions for conservation/coastal zone protection; plan's statement that there should be no filling in of wetlands was not meant to literally prohibit all filling of wetlands and policies discouraging certain activities did not totally proscribe those activities); County of Volusia, et al. v. Department of Community Affairs et al., 2009 WL

3049355, at *18 (Fla. Div. Admin. Hrgs. Sept. 22, 2009) ("encourage" plainly indicates an intent to stop short of establishing a requirement from which there can be no deviation." A plan provision which states that Putnam County shall encourage infill, is not an absolute prohibition against any development that is not infill; plan amendment found "in compliance"); *Cf.* Boca Center at Military, LLC v. City of Boca Raton, 312 s. 3d 920, 923 (Fla. 4th DCA 2021) (in Bert J. Harris litigation, amendment to city's comprehensive plan merely expressed an expectation that, in the future, residential development *may* be permitted, as the plan "encourages" (and therefore does not require) "a mixture of land uses"; city's failure to rezone commercial properties in midtown area did not inordinately burden an existing use or vested right or property owner).

The County and Intervenors are entitled to summary judgment as to the claim that the Development Order is consistent with Coastal Policy 1.2.3 and Future Land Use Policy 1.2.6.

8.
CONCLUSION

Plaintiff Lourdes Ramirez has standing to challenge the County's Development Order as being inconsistent with the County's Comprehensive Plan. The Development Order permitted 170 hotel units on less than an acre on Siesta Key, where there currently are three single family houses. FLU Policy 2.9.1 of the Comprehensive Plan, however, limited density at this aggregated site to a maximum of 36 hotel units per acre, assuming there were no kitchens in those units. It also placed a number of intensity requirements, which also were violated by the Development Order.

In coming to this conclusion, the Court rejects the County's and Intervenors' position that the Comprehensive Plan placed no density limits at all for the development of hotels on Siesta Key. All textual and contextual clues of the applicable ordinances in effect as of March 13, 1989, reject that argument. The Development Order is inconsistent with FLU Policy 2.9.1 as to both density and intensity, and she is entitled to summary judgment on this basis.

Ms. Ramirez, though, is not entitled to summary judgment as to Coastal Policy 1.2.3 and Future Land Use Policy 1.2.6. Use of terms "encourage" and "discourage" are not mandatory but instead are permissive. The County and Intervenors are entitled to summary judgment as to these policies.

There are a number of other challenges made in this case that cannot be resolved on summary judgment due to the existence of disputed issues of fact.

IT IS THEREFORE ORDERED:

1. Plaintiff has standing to bring this consistency challenge to the Development Order pursuant to section 163.3215(3), Florida Statutes.

2. The Court grants Plaintiff's motion for summary judgment with respect to FLU Policy 2.9.1. Plaintiff is entitled to a declaration that the Development Order is

inconsistent with FLU Policy 2.9.1 of the County's Comprehensive Plan. The County and Intervenors' summary judgment motions on this basis are denied.

3. The Court grants the County and Intervenors' motions for summary judgment with respect to Coastal Policy 1.2.3 and Future Land Use Policy 1.2.6. They are entitled to a declaration that the Development Order is consistent with Coastal Policy 1.2.3 and Future Land Use Policy 1.2.6. Plaintiff's summary judgment motion on this basis is denied.

4. There are disputed issues of fact precluding the parties' summary judgment motions with respect to: (1) Housing Policy 1.5.6 (regarding the compatibility of the hotel project with the neighborhood); (2) Coastal Objective 1.1 (limiting public expenditures in the Coastal High Hazard Area); (3) Coastal Policy 1.2.1 (regarding the use of Land Development Regulations and limits on urban infrastructure improvements to limit development on Barrier Islands); (4) Coastal Objective 1.3 (regarding reduction or maintenance of emergency evacuation clearance time from coastal areas); (5) Environmental Policy 4.2.2 (regarding protection of coastal resources from the impacts of pedestrian and vehicular traffic); (6) Environmental Policy 4.2.3 (regarding transit access to public beaches); and (7) Transportation Policy 1.1.4 (requiring coordination of transportation needs and land use decisions).

5. In the light of the Court's ruling with respect FLU Policy 2.9.1, the parties shall meet and confer as to the next steps, including whether the parties desire the Court to enter at this time a final judgment invalidating the Development Order and precluding the County from permitting development activities pursuant to that Development Order, or if they wish to proceed to adjudicate the other portions of Plaintiff's challenges first. The parties shall advise the Court in writing filed with the Court (with copy to the Court's Judicial Assistant) within 30 days as to the parties' position or positions.

DONE AND ORDERED in Sarasota, Sarasota County, Florida, on August 21, 2023.

8/21/2023 8:51 AM 2021 CA 005551 NC

e-Signed 8/21/2023 8:51 AM 2021 CA 005551 NC

HUNTER W CARROLL
Circuit Judge

SERVICE CERTIFICATE

On August 21, 2023, the Court caused the foregoing document to be served via the Clerk of Court's case management system, which served the following individuals via email (where

indicated). On the same date, the Court also served a copy of the foregoing document via First Class U.S. Mail on the individuals who do not have an email address on file with the Clerk of Court.

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