

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

CAPTIVA CIVIC ASSOCIATION, INC.,

Petitioner,

and

CITY OF SANIBEL,

Intervenor,

vs.

Case No. 24-1951GM

LEE COUNTY, FLORIDA; FLORIDA
DEPARTMENT OF COMMERCE; AND
WS SSIR OWNER, LLC D/B/A SOUTH
SEAS ISLAND RESORT,

Respondents.

FINAL ORDER

A final hearing in this case was held on August 19 through 23, 2024, in Ft. Myers, Florida, before Suzanne Van Wyk, an Administrative Law Judge with the Division of Administrative Hearings (“Division”).

APPEARANCES

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STATEMENT OF THE ISSUE

Whether Lee County Ordinance 23-22 ("the Ordinance"), adopted by Lee County ("the County") on September 5, 2023, is consistent with the Lee County Comprehensive Plan ("Comprehensive Plan").

PRELIMINARY STATEMENT

On March 22, 2024, Captiva Civic Association (“Petitioner” or “CCA”) filed a petition with the Department of Commerce (“Department”) under section 163.3213(3), Florida Statutes (2023),¹ alleging that the Ordinance is inconsistent with the Comprehensive Plan. The Department investigated the allegation, as required by section 163.3213(4), and conducted an informal hearing on April 4, 2024, at which Petitioner submitted written materials, and both Petitioner and the County presented oral testimony. Based on the investigation, on May 6, 2024, the Department determined that the Ordinance was consistent with the Comprehensive Plan.

On May 28, 2024, Petitioner filed an amended challenge with the Division, under section 163.3213(5)(a), challenging the Ordinance as inconsistent with specific goals, objectives, and policies of the Comprehensive Plan. On May 30, 2024, WS SSIR Owner, LLC, d/b/a South Seas Island Resort (“SSIR”), filed a Notice of Appearance as a Respondent.²

The final hearing was scheduled for August 19 through 23, 2024, in Ft. Myers, Florida.³ On July 12, 2024, Petitioner filed a Motion for Leave to File a Seconded Amended Petition, which was granted. On July 22, 2024, the undersigned granted the Department’s Motion to Appear Remotely at the Final Hearing.

¹ Except as otherwise provided, all citations herein to the Florida Statutes are to the 2023 version.

² Petitioner did not oppose SSIR’s appearance as a Respondent in this case. SSIR was not required to file a petition to intervene, but was rather accepted as a Respondent, pursuant to Florida Administrative Code Rule 28-106.205(3).

³ The hearing was rescheduled to August 19 through 22 and 26, 2024, due to Petitioner’s scheduling conflict, but was rescheduled to the originally-scheduled date when Petitioner’s conflict was resolved.

On July 29, 2024, the City of Sanibel (“City”) filed a Motion for Leave to Intervene, to which the County filed a Motion in Opposition. The undersigned granted the Motion for Leave to Intervene following a hearing via Zoom conference. The docket reflects that the parties actively engaged in discovery, and, upon occasion, called upon the undersigned to resolve discovery disputes.

The final hearing convened as scheduled. Petitioner presented the testimony of Charles Gauthier, an expert in land use planning; Gerald Murphy, a former urban planner for the County; and Jeffrey Alexander, an expert in emergency management and hurricane evacuation. Petitioner also filed the deposition transcripts of Lisa Riordan, President of the CCA Board of Directors; Anthony Rodriguez, the County’s zoning manager; and Joseph Saracino, a County planner. Petitioner’s Exhibits 1 through 4, 6, 7, 12 through 16, 25 through 27, 29 through 35, 54, 57, 65, 86 (pages 3444 through 3445), 92 (p. 15, lines 5 to 16 and 20); 93 (pages 3839 through 3857), 98, 103, and 104 were admitted into evidence. The deposition transcripts of Mr. Rodriguez and Mr. Saracino were admitted into evidence subject to the limitations discussed herein.

The City presented the testimony of William Dalton, its Chief of Police, but did not offer any exhibits into evidence.

The County presented the testimony of Robert Price, Director of the County’s Department of Transportation, who was accepted as an expert in traffic engineering and roadway planning; Daniel Trescott, who was accepted as an expert in emergency management planning and hurricane evacuation; and Brandon Dunn, who was accepted as an expert in land use planning. The County’s Exhibits 1 through 7, 9 through 13, 15, 19, and 20 were admitted into evidence.

The Department did not present any witnesses or offer any exhibits into evidence.

SSIR presented the testimony of Alexis Crespo, who was accepted as an expert in land use planning; Carl Barraco, who was accepted as an expert in engineering as it relates to land planning and land use; Christopher Wright, a Florida licensed professional engineer, who was accepted as an expert in building engineering and design; Michael Dennis, who was accepted as an environmental expert; Elizabeth Fountain, a Florida licensed professional engineer, who was accepted as an expert in coastal engineering with an emphasis on floodplain management; James von Rinteln, who was accepted as an expert in emergency management; and Joaquin Vargas, who was accepted as an expert in transportation engineering and hurricane evacuation timing. SSIR's Exhibits 1 through 10 were admitted into evidence.

The final hearing proceedings were recorded and a 9-volume Transcript of the hearing was filed on November 12, 2024. At the close of the final hearing, the parties agreed to an extended deadline of 30 days after the Transcript was filed, or December 12, 2024, for filing their proposed final orders. The parties timely filed their Proposed Final Orders, which have been considered by the undersigned in preparing this Final Order.

Admission of the Rodriquez and Saracino Deposition Transcripts

Admission of the deposition transcripts of Mr. Rodriquez and Mr. Saracino was opposed by Respondents, who alleged that Petitioner intended to offer them as expert witness depositions, although those witnesses were not properly disclosed as expert witnesses. The undersigned's Order of Pre-hearing Instructions ("OPI") required the parties to disclose testimonial expert witnesses not later than 30 days prior to the final hearing. Final

witness disclosures were due no less than 21 days prior to the final hearing, and were to include “all witnesses, both expert and non-expert, that the parties anticipated calling at final hearing.” Neither Mr. Rodriguez nor Mr. Saracino was disclosed as an expert witness for Petitioner in conformance with the OPI. Further, although Mr. Rodriguez and Mr. Saracino were included on Petitioner’s final witness list incorporated into the Joint Pre-hearing Stipulation, Petitioner’s summary of their expected testimony did not indicate they would be offering expert testimony of any kind.

Instead, Petitioner argues that its notices of deposition for both Mr. Rodriguez and Mr. Saracino, which were filed after the disclosure deadlines in the OPI, gave Respondents adequate notice of Petitioner’s intent to introduce these witnesses as experts. The Notices are titled “Notice of Taking Expert Witness Deposition” and include a section titled, “Requirements of Expert Witnesses,” which reiterates the portions of the OPI governing timely disclosure and formatting of the exhibits expert witnesses will rely upon during their deposition. Petitioner argues these titles and inclusions were sufficient to put Respondents on notice that Petitioner intended to use their deposition transcripts as expert witness testimony. Further, Petitioner posits that the deposition notices provided the notice and opportunity Respondents needed to cross-examine these witnesses in areas of expertise, or the bases for their expressed opinions.

Mr. Rodriguez’s deposition was taken Friday, August 9, 2024, ten days prior to the start of the final hearing. After questioning Mr. Rodriguez regarding his education, training, and experience, Petitioner’s counsel did not seek to designate him as an expert in any field.⁴ The questions asked, and the

⁴ The County disclosed that this witness would not be available to testify at the final hearing. Nonetheless, Petitioner’s counsel indicated that he intended to offer the deposition, or parts

answers given, were mostly factual in nature, but, as with all growth management and urban planning cases, included some mixed questions of fact and law (because they necessitate interpretation of provisions of the Plan). As noted above, Petitioner's summary of Mr. Rodriguez's expected testimony included with the Pre-hearing Stipulation did not designate him as an expert witness.⁵

Mr. Saracino's deposition was taken on Tuesday, August 6, 2024, 13 days prior to the final hearing. As with Mr. Rodriguez, Petitioner's counsel asked questions regarding his education, training, and experience as a professional planner, but did not offer to designate him in any area of expertise. Mr. Saracino was asked whether he had opinions on certain issues, including the ultimate issue in this case: whether the challenged ordinance is consistent with the Plan. Neither the County, nor any other Respondent, cross-examined Mr. Saracino. At the conclusion of the deposition, Petitioner's counsel asked if the County would agree to use of Mr. Saracino's deposition as a method for authenticating the documents accepted as exhibits thereto, without calling Mr. Saracino to testify. Counsel for the County specifically stated, "I don't think we're in the position to agree to the deposition." He represented that the County could agree to authentication of the specified deposition exhibits without Mr. Saracino's direct testimony, but did not agree to Petitioner "trying to use his deposition for any substantive purposes."

thereof, in lieu of live testimony without indicating under what provision of Florida Rule of Civil Procedure 1.330(a)(3) such testimony might be allowed.

⁵ The summary of the nature of his testimony is problematic, in that it reads, "the specific nature of his testimony is as documented in his deposition which will be submitted into evidence." It almost appears that Petitioner was trying to bury its intent to offer this testimony as expert.

The undersigned has reviewed the deposition transcript of both witnesses. Without reservation, the undersigned accepts the factual testimony elicited from both witnesses.

The designated portions of Mr. Rodriguez's deposition transcript that are expert opinion in nature relate to his opinion as to the historic development pattern of South Seas, as well as what documents and approvals inform that opinion. Based on the undersigned's rulings herein, that testimony is irrelevant and has not been relied upon by the undersigned in making the required Findings of Fact and Conclusions of Law.

Petitioner designated page 15, lines 5 through 16 and 20 from Mr. Saracino's deposition. Mr. Saracino expressed no expert opinions in the designated page and lines. To the extent the undersigned has considered Mr. Saracino's testimony in making her Findings of Fact and reaching Conclusions of Law, she has not relied upon any expert opinion testimony from Mr. Saracino.

FINDINGS OF FACT

Parties and Standing

CCA

1. CCA is a not-for-profit corporation with its principal place of business in the County.
2. CCA has approximately 430 members, of whom approximately 45 are property owners within the South Seas Island Resort ("South Seas") on Captiva Island ("Captiva").
3. CCA's mission is to protect Captiva's ambiance, environment, and quality of life of its members. CCA works to ensure that any proposed changes to land uses on Captiva comply with its land use policy.

4. A primary mission of CCA is to “defend and preserve our comprehensive land use policy” and to “protect our residents’ safety, the island ecology, and the unique island ambiance[.]” This includes working to ensure adequate evacuation capability, prevent increasing road congestion, and preserving the island’s quality of life and fragile environment on the unique barrier island community of Captiva.

5. CCA has a land use committee authorized to monitor land use decisions that impact Captiva’s environment and quality of life. CCA’s Land Use Policy provides that “CCA, in accordance with its mission, shall work with governmental authorities, property owners and other associations to: ... Maintain the strict limits on density and height as currently stated in the ... Comprehensive Plan, and to oppose any exceptions sought through the variance process; Strictly enforce zoning and other regulations including those which have the effect of limiting traffic and excessive noise...[.]”

6. CCA has brought legal actions on behalf of its members to accomplish its mission and purpose.

7. CCA itself owns and operates the Captiva Civic Center, the Captiva Library (which it leases to the County for library services), and a residential dwelling unit which it leases to the Lee County Sheriff’s Department as a residence for a deputy sheriff and his family.

The Department

8. The Department is the state land planning agency with the duty to review and investigate petitions filed under section 163.3213, challenging land development regulations as inconsistent with the local government’s comprehensive plan. *See* § 163.3213(4), Fla. Stat.

City of Sanibel

9. The City is a municipal corporation located directly adjacent to Captiva, situated between Captiva and the County’s mainland. All vehicular traffic leaving Captiva headed for the mainland, and vice versa, must pass through

the City. Most traffic passes through the City on Sanibel-Captiva Road, a main east-west thoroughfare, which is a constrained two-lane road.

10. According to the 2020 Census, the City's population is 6,382, and the seasonal population is approximately 30,000. During the peak season, the City experiences 10,000 to 11,000 cars from the mainland traveling into the City. Those cars may be visiting beaches, hotels, restaurants, or other locations in either Sanibel or Captiva.

11. Evacuation from Captiva occurs on a narrow, two-lane, constrained roadway, beginning on Captiva Drive, then continuing through the City on Sanibel-Captiva Road, Tarpon Bay Road, Periwinkle Way, then Causeway Boulevard to the mainland. The intersection at Periwinkle Way and Causeway Boulevard, at the eastern end of Sanibel, is the critical link in the evacuation route, which ends after crossing a causeway, comprised of three bridges that cross over two separate spoil islands.

12. The intersection of Periwinkle Way and Causeway Boulevard is a four-way intersection that is governed only by a stop sign. Traffic queues at this intersection every day, all year long. Those traffic queues get much longer during peak season – Thanksgiving through Easter.

13. The sheer volume of traffic on Sanibel, especially on Sanibel-Captiva Road, sometimes presents life-safety issues for the City because it is often difficult for an ambulance to efficiently navigate through and off the island. The City's Police Chief, William Dalton, testified about a situation during which a person located on the west end of the island had a heart attack, and due to the delay in getting an ambulance through to him, the person passed away before the ambulance got him off the island.

14. The City utilizes both sworn police officers and specially-trained civilians to direct traffic at its two most congested intersections: Periwinkle Way and Causeway Boulevard, as well as Periwinkle Way and Casa Ybel, where a supermarket is located. The focus is on off-island traffic (those traveling east to leave the island in the afternoon peak hour), and the officers

are trained to allow approximately 70 percent of the traffic go through traveling east before signaling traffic in other directions.

Lee County

15. The County is a Florida political subdivision with the duty and authority to adopt land development regulations consistent with its comprehensive plan. Ordinance 23-22, which is challenged in the instant case, was adopted by the County.

SSIR

16. SSIR purchased approximately 120 acres of South Seas in 2021, and has applied to the County for rezoning that portion of the resort area.

Captiva Island

17. Captiva is a barrier island comprised of approximately 725 acres.

18. Captiva is located completely within the Coastal High Hazard Area (“CHHA”), the Level “A” hurricane evacuation zone.

19. Captiva lies within an Area of Special Flood Hazard as indicated by the Federal Emergency Management Agency’s (“FEMA’s”) Flood Insurance Rate Maps (“FIRM”).

20. Captiva sustained serious damage from Hurricane Charley in 2004 and Hurricane Ian in 2022.

South Seas

21. South Seas is a 302-acre resort at the north end of Captiva in the County.

22. South Seas was approved by the County in 1973 as a resort, and is currently almost completely developed according to that approval, with a small number of residential units remaining to be built, and with 247 units to be rebuilt—107 hotel units destroyed by Hurricane Ian, and most of the 140 employee-housing units demolished pre-hurricane.

23. On November 20, 1973, a zoning application was filed with the County by the then-owner of South Seas for a rezoning from RU-3 and RU-2, to RU-3.

24. The County adopted Resolution Z-73-202 (the “Resolution”) approving the rezoning to “RU-3 using a PUD Concept Plan as a guide with a special limitation of [three] units per acre (“3u/acre”) and a special permit for up to [five] acres of commercial property,” and limited the development density for this zoning district to 912 units. This unique zoning district was named the South Seas Resort District (“SSRD”). The resolution describes clustering of higher density groups of beach homes and villas with open “green belt” separations and undisturbed mangrove and bayou preserves. However, the resolution contains an overall density of 3u/acre with a total of 912 units. The 912 units are inclusive of 120 requested “guest accommodation” units, and the beach homes and guest villas.

25. In conjunction with the Resolution, the County approved a master development plan (“SSRMDP”) for South Seas which detailed existing developed and future development areas with the SSRD.

The ADD

26. On July 30, 2002, the County issued Administrative Interpretation 2002-00098 (“the ADD”). The purpose of the ADD is to “summarize and clarify all prior approvals into one comprehensive document detailing what development currently exists, clarify what additional development may be permitted, and provide for a reasonable method for the County to review requests for future development approvals to modify or change the [SSRMDP].” The ADD includes the following “enforceable conditions of the SSRD”:

- a. Development of the SSRD will evolve over a number of years in line with several very basic guidelines: very low-density development utilizing a number of small-scale clusters; carefully planned and tightly-controlled development; preservation of bayou shoreline and mangrove areas; [and] emphasis on pedestrian traffic, not automobiles.

b. The project will be limited to 912 residential units (304 acres at three units per acre) and five (5) acres of commercial development.

c. Four (4) miles of mangrove and bayou shoreline will be preserved by clustering higher density into smaller development areas with greenbelt separations.

d. A 20-acre *Plantation Preserve* parcel, a natural area to be accessible by wooden walkways that will include instructional stopping points describing the origin and type of vegetation in the bayou area will be set aside.

e. Employee housing accommodations will be developed.

27. The ADD approves development standards for open space, landscaping, buffers, setbacks, building heights, parking, construction, stormwater management, and requires traffic impact statements for developments over a specified threshold. Building height is limited to the lesser of 35 feet above the building grade or 42 feet above mean sea level.

28. The ADD contains a chart of the number of residential units allocated to each of the 19 named sections of South Seas (e.g., Bayside Villas, Tennis Villas, and The South Seas Club), and concludes that 877 of the total allocated dwelling units have been developed, leaving a total of 35 units to be developed.

29. The ADD addresses the developer's plans for future improvements to "guest facilities" as well as development of additional small-scale clusters of residential units.

30. The competent, substantial evidence supports a finding that South Seas' approval for 912 residential units includes "guest facilities," which is synonymous with hotel and motel units in today's language. Hotels were developed on the property, prior to the 1973 rezoning, which the County did not exclude from the unit count.

The Ordinance

31. On September 5, 2023, the County adopted amendments to the Land Development Code (“LDC”) by the Ordinance.

32. The Ordinance, while County-initiated, was at least partially drafted to accommodate SSIR’s redevelopment plans for the 120 acres it has purchased within South Seas.

33. The Ordinance repeals the requirement that, in order to be exempt from chapter 33 of the LDC, development at South Seas must be consistent with the ADD. In other words, the Ordinance exempts South Seas from the entire land development code chapter establishing building regulations for the Captiva Planning Community, without the default application of the ADD.

34. The Ordinance also deletes the height restrictions applicable to South Seas and instead subjects the development to the requirements of code section 34-2175, which establishes maximum building heights for each future land use category in the Plan. South Seas has a future land use designation of “Outlying Suburban.”

35. In the Coastal Building Zone, which includes most of Captiva, building height is measured from the minimum required flood elevation (“BFE”), rather than grade. The Ordinance changes that standard to “from the lowest minimum habitable floor elevation for which a building permit may be issued[,]” allegedly, to standardize the language of the land development code with that of the building code.

36. This change allows for a third habitable floor in dwellings located in Captiva, both in South Seas and elsewhere.⁶

⁶ Evidence was admitted and testimony given about the existing historic hotels on Captiva which exceed the height limits in the modern land development code. However, those hotels are non-conforming structures that pre-exist and were not properly permitted under the County’s existing regulations.

37. The Ordinance also adds a new code section 34-2172, “Exceptions to height limitations for resiliency,” which applies to buildings within the CHHA. It allows for an increase in the height of the lowest minimum habitable floor by a maximum of four feet, exceeding the height limitation proportionally, without requiring a deviation or variance.

38. The Ordinance also exempts South Seas from the density limitations and height limitations established for Captiva in sections 34-1805 and 34-2175(a)(2).

39. Finally, the Ordinance defines the geographical boundaries of South Seas and includes a boundary map. The definition and the map include more area than that which is commonly known as “South Seas Island Resort.”

Applicable Height Standards

40. Under code section 34-2175(b), building height for the Outlying Suburban category is capped at 45 feet.

41. But, under the challenged Ordinance, the County could issue building permits in South Seas for buildings at heights of 49 feet above BFE, rather than 35 feet above grade, or 45 feet above mean sea level, without a rezoning, a code variance, or other development approval. Depending on the BFE on the particular parcel, additional height of six to ten feet could be achieved.

42. Section 34-2175 also contains the following exception:

Buildings may be as tall as 75 feet when the applicant demonstrates *through a zoning action* that the additional height is required to preserve environmentally sensitive land, secure areas of native vegetation and wildlife habitat, or preserve historical, archaeological or scenic resources.

(emphasis added).

43. If areas were rezoned, and the applicant met the requirements for clustering in section 34-2175(b), South Seas development could reach as tall as 79 feet plus allowances for BFE.

Applicable Density Standard

44. The Ordinance leaves South Seas subject to no particular development density standard in the land development code. Because development would no longer have to comply with the ADD, which establishes density at three units per acre, and exempts South Seas from the applicable requirements in chapter 33, there is no applicable density standard in the LDC.

45. Since adoption of the ADD, the County has treated the unique SSRD zoning district as a Planned Unit Development (“PUD”) zoning district. PUD zoning districts allow for flexibility in a planned mixed-use development like South Seas.

46. PUDs are governed by subdivision IV of the Code, sections 34-1031 through 34-1041. The Code does not contain a density limitation for PUDs. Instead, density of development is achieved by a combination of requirements for setbacks, open space, lot coverage, and lot size.

47. The County does not use floor-to-area ratios (“FARs”) to regulate intensity of non-residential development within a PUD, or elsewhere (with a few minor exceptions). Instead, intensity is generally limited by other land development regulations including maximum height, open space percentages, parking requirements, minimum building setbacks, and required buffers between different types of use.

48. Petitioner introduced Intervenor’s recent PUD application as an example of the density and intensity of development SSIR is seeking to develop at South Seas under the challenged Ordinance. SSIR is requesting approval of a master planned development on its 120 acres with 272 residential units and 435 hotel units in two three-story buildings (planned at a height of 45 feet).

49. The parties strongly disagree on the density of the proposed PUD development. Petitioner argued that hotel development should be counted as residential density, given the historic development of the property. The County and SSIR argued that the hotel development, proposed to be located

in the five-acre “commercial” area of South Seas, is commercial development with no density standard. Under the County’s approach, intensity of the hotel development would be regulated solely by other standards, such as setbacks, buffers, building height, parking, and other requirements.

50. Petitioner further argued, and introduced evidence that, the historic five-acre commercial designation within South Seas is intended, and has been developed as, ancillary commercial—bars, restaurants, shopping—to support the residential development. Petitioner relied upon this historic pattern of approvals and development to argue that hotel units built even in the commercial area of South Seas are still subject to the 912 residential unit cap.

51. If the hotel units were counted as residential density, SSIR’s rezoning application proposes development of 707 units and 8.7 units/acre.

52. Petitioner’s land use expert, Charles Gautier, calculated potential density for the PUD if the hotels were built to the maximum of 75 feet (a possibility if sought in the PUD rezoning), or six stories. Mr. Gautier calculated a total of 1,142 units at 14 units/acre. Mr. Gautier calculated the possible density based on buildout scenarios for the 120 acres owned by SSIR, as well as proportional development of the remaining acreage at South Seas. Mr. Gauthier even calculated a “worse-case scenario” buildout that included converting the golf course acreage to residential use developed as 75-foot hotel buildings. However, none of the resulting density numbers are actually allowable under the challenged Ordinance. These calculations are dependent on approval by the County through a rezoning process.

53. The PUD rezoning is not at issue in this case. Only the challenged Ordinance. Any analysis based on projected development density is pure speculation.

54. The question before the undersigned is whether the removal of a density standard, per se, is inconsistent with the Comprehensive Plan.

The Comprehensive Plan, Community Plans, and LDC Chapter 33

55. The Comprehensive Plan creates community plans to address specific conditions unique to defined areas of the County. The Goal for each community plan sets the vision for that area of the County.

56. Future Land Use Element (“FLUE”) Goal 17 is the County’s Community Planning chapter. Captiva is one of 34 uniquely-defined areas of the County designated with its own community plan.

57. The Captiva Community Plan (“CCP”) is set forth in Goal 23 and its implementing objectives and policies.

58. The Goal of the CCP is to “protect the coastal barrier island community’s natural resources” through regulations that “create mixed use development of traditionally commercial properties, and enforce development standards that maintain the historic low-density residential development pattern of Captiva.”

59. The CCP calls for protection of community resources, including its “existing land-use patterns, unique neighborhood style commercial activities, infrastructure capacity, and historically significant features[.]”

60. The CCP contains an objective that addresses building height, as well as requiring land development regulations and evacuation standards, and protection of natural resources.

61. The CCP is implemented by Chapter 33 of the Code, the land development regulations called for in the Plan.

62. The challenged Ordinance exempts South Seas from Article IX of the Code: the Captiva Community Area Plan, without the alternative regulation provided by the ADD.

Alleged Inconsistencies with the Comprehensive Plan

63. Petitioner alleges the Ordinance is inconsistent with the following Goals, Objectives, and Policies of the Plan.

Policies 17.1.2. and 17.1.3.

64. Policy 17.1.2. provides:

Community Plans must address specific conditions unique to a defined area of the County. Conditions may be physical, architectural, historical, environmental or economic in nature.

65. Policy 17.1.3. provides:

Community Plans should consist of long-term objectives and policies that are not regulatory in nature. If needed, land development regulations may be adopted to implement the community plan.

66. Neither of these policies is implicated by the challenged Ordinance. The Ordinance does not amend the CCP. Policy 17.1.3. does not require that land development regulations be adopted to implement the CCP.

67. Petitioner did not establish that the Ordinance is inconsistent with Policies 17.1.2 and 17.1.3.

Goal 23, Objective 23.2, and Policies 23.2.3. and 23.2.4.

68. Petitioner alleges the Ordinance is inconsistent with Goal 23 and specified objectives and policies of the CCA, as follows:

Goal 23: Captiva Community Plan. The goal of the [CCA] is to protect the coastal barrier island community's natural resources such as beaches, waterways, wildlife, vegetation, water quality, dark skies and history. *This goal will be achieved through environmental protections and land use regulations that preserve shoreline and natural habitats, enhance, water quality, encourage the use of native vegetation, maintain the mangrove fringe, limit noise, light, water, and air pollution, create mixed use development of traditionally commercial properties, and enforce development standards that maintain the historic low-density residential development pattern of Captiva.*

Objective 23.2.: Protection of Community Resources. *To continue the long-term protection and enhancement of community facilities, existing land use patterns, unique neighborhood style commercial activities, infrastructure capacity, and historically significant features on Captiva.*

Policy 23.2.3.: Building Heights. *Maintain building height regulations that account for barrier island conditions, such as mandatory flood elevation and mean-high sea level, for measuring height of buildings and structures.*

Policy 23.2.4.: Historic Development Pattern. Limit development to that which is in keeping with the historic development pattern on Captiva including the designation of historic resources and the rehabilitation or reconstruction of historic structures. *The historic development pattern on Captiva is comprised of low-density residential dwelling units, as defined in LDC, Chapter 10, minor commercial development and South Seas Island Resort.*

(emphasis added)

Building Height

69. Petitioner alleges that the Ordinance is inconsistent with Policy 23.2.3. because it does not maintain the building heights for South Seas set forth in the ADD and the historic zoning approvals consolidated and updated therein.

70. However, the language of this policy does not speak to historic patterns, but rather to height regulations that “account for barrier island conditions, such as mandatory flood elevation and mean-high sea level” for measuring height of buildings.

71. As discussed above, the Ordinance changes the lowest point from which building height is measured from “grade” or “sea-level” to “base flood elevation” for all of Captiva. In addition, the Ordinance allows an additional

four feet from BFE for the first habitable floor in FEMA V zones. The purpose of these changes was to comply with the FEMA flood insurance program and to standardize the measurement of building height regulations across the County land development codes and building codes.

72. All three expert planning witnesses who testified at the final hearing agreed that these changes were important for protection of structures and resiliency of structures from flooding during a storm.

73. Petitioner's planning expert, Charles Gauthier, testified that he was "less concerned" about the change to allow 45 feet above BFE, although he recognized it "enables more hotel units through taller buildings" than under the ADD.

74. The "inconsistency" concern raised by Mr. Gauthier was with the allowance to 75 feet, which would allow for a concentration of hotel units and "stick out like a sore thumb" because it would be inconsistent with the historic development pattern and out of proportion with the existing development at South Seas.

75. As discussed above, the 75-foot (or higher) limits are not available as a right under the Ordinance itself. For a developer to attain those heights, the County must approve a comprehensive development plan through a rezoning process.

76. Petitioner did not prove that the Ordinance is inconsistent with Policy 23.2.3. On the contrary, the Ordinance complies with the policy by updating the County's building height regulations on Captiva to account for barrier island conditions, including the FEMA V flood zone, and the updated BFE for the FEMA flood insurance program.

Historic Development Pattern

77. Petitioner next contends the Ordinance is inconsistent with Goal 23, Objective 23.2., and Policy 23.2.4. because the building heights and development densities allowable under the Ordinance for South Seas are contrary to the historic development pattern of the resort.

78. In Goal 23, the County expresses that the goal of the CCA is to “enforce development standards that maintain the historic low-density residential development pattern of Captiva.” The Goal does not single out South Seas, but rather speaks to Captiva as a whole. Likewise, Objective 23.2 speaks to long-term protection of “existing land-use patterns” on Captiva as a community as a whole, and does not speak to the resort specifically.

79. Policy 23.2.4., one of the policies implementing the Goal and Objective, limits development to that in keeping with Captiva’s historic development pattern. The policy specifically defines Captiva’s “historic development pattern” as “low-density residential dwelling units, as defined in LDC, Chapter 10, minor commercial development, and South Seas Island Resort.”

80. Petitioner interprets that policy to require the County to limit development within South Seas to that which is consistent with the historic development pattern of South Seas.

81. The plain language of the policy does not say that the County must limit development of South Seas to that which has been historically developed at South Seas. The policy sets out three characteristics of the historic development of Captiva: low-density residential, minor commercial, and the resort.⁷ The resort itself is a separate and distinct component of the historical development of the island. The County’s planning expert, Brandon Dunn, testified to the planning reasons that South Seas is treated separately: it encompasses a large area of Captiva, some 304 acres; it is somewhat insulated or secluded from the rest of Captiva, located behind security gates at the very north end of the island; and it has developed in a sort of flexible planned development scenario (although predating specific PUD zoning regulations) since at least the 1973 rezoning, different and apart from other properties on the island, which have developed according to traditionally-defined zoning categories.

⁷ Both the County’s and the Intervenor’s planning experts referred to these as three “buckets” of development.

82. The competent, substantial evidence supports a finding that the Ordinance does not change the regulations to allow development beyond the historic development pattern of Captiva. The Outlying Suburban Land Use category, and implementing residential zoning categories, will limit residential development to low densities. The land use category and implementing commercial zoning categories still limit commercial to that which is considered minor. Development of South Seas will continue to be approved through a rezoning “PUD”-type process. That process may, or may not, approve densities, intensities, or heights of development which are a departure from the historic development approved and built at South Seas. But, the evidence does not support a finding that, even if higher densities, intensities, or heights of development are approved and developed, that development would be inconsistent with the historic development pattern of Captiva, as defined in Policy 23.2.4.

Emergency Management and Hurricane Evacuation

83. Petitioner alleges the Ordinance is inconsistent with the following objectives of the Community Services Element of the Plan related to Emergency Management and Hurricane Evacuation.

Objective 72.2.: Development Regulations. Maintain land development regulations that reduce the vulnerability of development from the threats of natural and man-made disasters.

* * *

Objective 73.1.: Evacuation. Work towards attaining out of County hurricane evacuation for a Category 5 storm event (Level E storm surge threat) that does not exceed the timeframes referenced in the Statewide Regional Evacuation Study. Lee County will work to improve clearance times by increasing shelter availability within the County, improving evacuation routes, and increasing public awareness and citizen preparedness.

84. Objective 72.2. is implemented by the following policies:

Policy 72.2.1.: Maintain land development regulations that provide for additional setbacks in critical erosion areas, conservation and enhancement of dunes and vegetation, flood proofing of utilities, structural wind resistance and floodplain management.

Policy 72.2.2.: Assess the impact of all new residential development upon the projected hurricane evacuation network and upon projected hurricane evacuation times, and require mitigation either through structural (on-site or off-site shelter) provisions or through nonstructural methods or techniques. Pursuant to Policy 24.7.5, all new residential development and redevelopment within the Hurricane Vulnerability Zone in Greater Pine Island must mitigate hurricane sheltering and evacuation impacts in accordance with the LDC, Chapter 2, Article XI.

Policy 72.2.3.: Maintain and update, as necessary, provisions for the protection of life and property from fire related impacts.

Policy 72.2.4.: Maintain regulations that are consistent with, or more stringent than, the flood resistant construction requirements in the Florida Building Code and applicable floodplain management regulations set forth in 44 C.F.R. Part 60.

85. No evidence was introduced that the challenged Ordinance is inconsistent with any of the foregoing policies. On the contrary, the record supported a finding that the Ordinance updates the County's building height standards to be consistent with federal requirements, as required by Policy 72.2.4.

86. To support its argument that the Ordinance is inconsistent with Objective 72.2., Petitioner introduced testimony that increased building heights increase the vulnerability of property to threats from disasters, such

as hurricanes. However, Respondents introduced more credible testimony that taller buildings are not necessarily more vulnerable to hurricane damage. In fact, Respondents presented credible evidence that buildings built to the current building code, regardless of height, have to meet modern the wind-speed standards and wind-born debris requirements, making them less vulnerable to storm damage than existing construction built to older code standards.

87. In furtherance of Objective 72.2., the Ordinance reduces the vulnerability of development on Captiva to damage from storm-surge experienced during hurricanes by measuring building height from base flood elevation, thus elevating the lowest habitable floor above expected storm surge in vulnerable areas.

88. Petitioner did not demonstrate that the Ordinance was inconsistent with Objective 72.2.

89. Objective 73.1 is implemented by the following Plan policies:

Policy 73.1.1.: Coordinate periodic updates of the hurricane evacuation portion of the CEMP with the Lee County MPO Long Range Transportation Plan to identify critical transportation routes for evacuation.

Policy 73.1.2.: Design, construct and operate new or replacement bridges on evacuation routes spanning major or marked navigable waterways to adequately accommodate the safe and timely evacuation needs of both motor vehicle and marine traffic. For the purposes of accommodating hurricane evacuation, a new bridge to Pine Island is strongly discouraged due to the costs, design constraints, and potential impacts to growth patterns within Greater Pine Island.

90. The County introduced copious evidence that it has improved evacuation routes in order to decrease evacuation times in the County since 1987. Since that date, the County has invested almost \$930 million in

improvements on the County's hurricane evacuation routes which has increased capacity on those roadways. Those include improvements to Summerlin Road, which is part of the evacuation route from Sanibel and Captiva, as well as Sanibel-Captiva road itself. With respect to bridge replacements on evacuation routes, as required by Policy 73.1.2., the County completed the replacement of the Sanibel-Captiva Bridge in 2007 at a cost of \$121,821,000; the Matlacha Bridge in 2016 at a cost of almost \$25 million; and the Blind Pass Bridge in 1990, at a cost of \$4.6 million.

91. The County's Capital Improvements Plan contains projects for continued improvements to the County's evacuation routes, as required by Objective 73.1. For example, the Alico Road connector project is planned to eliminate congestion on Colonial Boulevard and Daniels Parkway for traffic evacuating from the southwest portions of the County, including the rapidly-developing Lehigh Acres area. This project will provide a four-lane road to Interstate 75. Furthermore, the County coordinates with and petitions the state to improve the state roads which serve as evacuation routes in the County.

92. The County provides for increased shelter availability in two ways. First, the County requires new development, including new hotel development, to provide monetary mitigation based on a formula, which funds County shelters. Second, the County has set up a property taxing mechanism, a Municipal Services Taxing Unit ("MSTU") that allocates public funds to increasing hurricane shelter space.

93. The County has undertaken a number of efforts to increase public awareness and citizen preparedness for hurricane evacuation, including conducting hurricane expos, providing and distributing informational literature, production of the know-your-zone mobile application, and the Lee Alert system.

94. Finally, based on a comparison of the 2017 and 2021 Statewide Regional Evacuation Study, the out-of-county hurricane evacuation times in

Lee County have decreased (i.e., have improved). Mr. Trescott credits that decrease to improvements on the County's hurricane evacuation routes, as well as improvements to the in-county shelters, which removes cars from the out-of-county evacuation counts.

95. Petitioner and Respondents introduced expert witnesses, and their hurricane evacuation studies and reports, to support or refute the theory that the Ordinance will increase the County's out-of-county hurricane evacuation time in a Category 5 storm, contrary to Objective 73.1., because the Ordinance allows for increased density of development.

96. As noted by Petitioner in its Proposed Final Order, "[t]here is no realistic way to determine the out-of-county evacuation impacts from a single development on Captiva." Despite this acknowledgement, Petitioner posits that the Ordinance will not move the County in the direction of maintaining its out-of-county hurricane evacuation times because no mitigation can be made by hotel developers on Captiva and no shelters can be built there. In essence, the argument is that by allowing greater height and density of development at South Seas, future development and redevelopment at South Seas will only increase the off-island evacuation time. Petitioner is correct that there is no meaningful mitigation the potential hotel developer could offer—no amount of money will increase capacity on Sanibel-Captiva Road, no shelters exist on either Sanibel or Captiva, and none can be improved with MSTU funds.

97. This argument, while certainly pertinent to the County's analysis when making its policy decision on what types of development it will approve on Captiva, is not controlling in the determination of consistency with Objective 73.1. The County's out-of-county hurricane evacuation times, which have been improving in recent years, is not solely dependent on the off-island evacuation of Captiva and Sanibel residents and visitors. Any increased time it takes those residents and visitors to evacuate from the island may be offset by increased evacuation route capacity on the mainland, or shelter capacity

which removes them from the traffic counts. Further, Petitioner’s evidence as to the increased evacuation times under an assumed development scenario, while pertinent to a challenge to a specific development order, are based on assumptions under the challenged Ordinance.

FLUE Objective 23.1.

98. Finally, Petitioner alleges the Ordinance is inconsistent with Objective 23.1. regarding the protection of natural resources:

Objective 23.1.: Protection of Natural Resources. To continue the long-term protection and enhancement of wetland habitats, water quality, native upland habitats (including rare and unique habitats), and beaches on Captiva.

99. Here Petitioner’s arguments are based on the sensitivity and vulnerability of the natural areas surrounding South Seas. Petitioner presented testimony that increased density and height of buildings will increase the incidence of building debris from major storms and hurricanes being deposited into wetlands and other sensitive areas. Further, Petitioner posits that building materials (e.g., wood, plastic, PVC) from break-away walls within the BFE, and items stored below the first habitable floor (e.g., beach chairs, bicycles, kayaks), are likely to be carried away by storm surge and deposited in coastal mangroves and other sensitive areas.

100. Again, Petitioner’s contentions depend upon higher density of development being approved for South Seas, which cannot be done without a PUD-type rezoning application. Petitioner presented no evidence that the only self-executing provision of the Ordinance—a height increase from 42 feet above mean high water to 45 feet above BFE—would prevent the County from achieving the objective to “continue the long-term protection and enhancement of wetland habitats, water quality, native upland habitats, and beaches on Captiva.” That objective is implemented by six specific policies, and Petitioner introduced no testimony that the Ordinance conflicts with or prevents the County from achieving the specified policies.

CONCLUSIONS OF LAW

101. The Division has jurisdiction over the subject matter and parties to this proceeding. *See* §§ 120.569, 120.57, and 163.3213, Fla. Stat. (2024).

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

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

Standing

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

105. To meet the substantial injury test, a party must show that: (1) the proposed action will result in injury-in-fact of sufficient immediacy to justify a hearing, and (2) the injury is of the type or nature that the proceeding is designed to protect.⁸ *Palm Beach Cnty. Env’t Coal. v. Fla. Dep’t of Env’t Prot.*, 14 So. 3d 1076, 1077 (Fla. 4th DCA 2009) (citing *Agrico Chem. Co. v. Dep’t of Env’t Regul.*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981)).

106. The injuries alleged by Petitioner are increased density and intensity of development, an increased number of evacuating vehicles during

⁸ This two-prong test is known as the *Agrico* test, and will be referred to as such herein. *See, e.g., S. Broward Hosp. Dist. v. State, Ag. for Health Care Admin.*, 141 So. 3d 678, 681 (Fla. 1st DCA 2014).

hurricanes, increased vehicle traffic, increased noise, and adverse impacts to environmentally-sensitive areas.

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

108. Petitioner alleged standing as an association acting on behalf of the interest of its members, all of whom are residents of Captiva. Based on the testimony of Mr. Riordan, and other evidence adduced at hearing, Petitioner demonstrated its associational standing under *Florida Homebuilders Association v. Department of Labor and Employment Security*, 412 So. 2d 351 (Fla. 1982), and its progeny.

109. Here, Petitioner demonstrated it met the first prong of the *Agrico* test: it suffered an injury-in-fact sufficient to justify an administrative hearing because the Ordinance allows greater building height for new construction and redevelopment at South Seas, and on Captiva as a whole, than under the previous LDRs. Further the Ordinance removes the density limit of 3u/acre historically applicable to South Seas, paving the way for approval of development proposals at higher densities than previously allowed. Thus, Petitioner established that its substantial interests—to “defend and preserve our comprehensive land use policy” and to “protect our

residents' safety, the island ecology, and the unique island ambiance"—could reasonably be affected by the Ordinance.

110. By the same token, Sanibel proved that its substantial interests in managing hurricane evacuation of Sanibel residents and visitors, as well as those evacuating from Captiva through Sanibel, could be impacted by the Ordinance. The impact on Sanibel would undoubtedly be greater than that of the general public because evacuation through Sanibel is the only route from the islands to mainland Lee County.

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

112. Section 163.3213 is designed to prevent, or guard against, local government adoption of LDRs which are inconsistent with the local government's comprehensive plan. A challenge under this section is meant to protect against a person's injury related to inconsistency with the local comprehensive plan. The nature of Petitioner's and Intervenor's alleged injuries all relate to claimed inconsistencies between the Ordinance and Plan, the type of injury that section 163.3213 is designed to protect.

113. Respondents maintain that Petitioner and Intervenor cannot meet the first prong of the *Agrico* test because the injuries complained of are speculative in nature. In support of their argument, Respondents cite *Washington County v. Northwest Florida Water Management District*, 85 So. 3d 1127 (Fla. 1st DCA 2012), in which the court held that the petitioner did not have standing to challenge the District's regional water supply plan, because, in itself, the plan did not permit or authorize anything that would harm petitioner. Respondents also cite *Village Park Mobile Home Association v. Department of Business and Professional Regulation*, 506 So. 2d 426 (Fla. 1st DCA 1987), in which the court held that petitioner's allegations that a

published prospectus could increase costs and reduce services to residents was not sufficient to establish standing under *Agrico*.

114. The cited cases are not persuasive under the facts of the case *sub judice*. First, not all of the potential injuries alleged by Petitioner are dependent upon a subsequent approval by the County. The Ordinance, in and of itself, increases the permissible height of buildings at South Seas from the lesser of 35 feet above the building grade or 42 feet above mean sea level, to 45 feet above BFE, which varies depending on the flood zone, with an allowance of up to an additional four feet for the lowest habitable floor in FEMA V zones. Under the Ordinance, a developer could obtain a building permit for buildings up to 49 feet, or higher, depending on the BFE of the particular property, without any further land development approval. Further, the Ordinance increases the permissible height of buildings in Captiva generally, from 45 feet above BFE to include the additional four feet for the lowest habitable floor in FEMA V zones.

115. Second, while it is true that the Ordinance does not, in and of itself, approve building heights up to 75 feet, it allows consideration of construction at that height through rezoning for the first time in the County's permitting history, constituting a significant departure from historic building regulations (excluding four hotels which exceed existing height standards because they are "non-conforming" with the County's LDRs.).

116. By the same token, the Ordinance removes the density cap of 3u/acre for residential development, which allows for development applications at higher densities.

117. The challenged Ordinance is distinguishable from both the sales prospectus construed in *Village Park*, and the water supply plan construed in *Washington County*.

118. Respondents’ argument that Petitioner and Intervenor cannot meet the standing requirement of *Agrico* because the injuries they allege are speculative, is not persuasive.⁹

Consistency with the Plan

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

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

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

122. In *Martin County v. Yusem*, 690 So. 2d 1288, 1295 (Fla. 1997), the Florida Supreme Court has described the “fairly debatable” standard as “a highly deferential standard requiring approval of a planning action if

⁹ Moreover, SSIR’s position that Petitioner and Intervenor’s complaints are mere speculation is incongruous with its position that it has standing in this case as a “specifically-named person” whose “substantial interests are being determined in the proceeding.” Fla. Admin. Code R. 28-106.205(3). Throughout this proceeding, SSIR vehemently opposed discussion of its pending rezoning application proposal as irrelevant to the question of whether the Ordinance itself is consistent with the Plan; yet SSIR repeatedly indicated that the Ordinance itself allows it to apply for the very rezoning which is pending. Thus, SSIR believes its substantial interests in future development of South Seas are being adjudicated in this challenge to the Ordinance, regardless of any subsequent rezoning decision by the County or challenge thereto. SSIR cannot have its proverbial cake and eat it too. SSIR’s position is an admission that the Ordinance, while not approving any specific development, allows future development at heights, densities, or intensities, that were not allowed under the previous LDR.

reasonable persons could differ as to its propriety.” The definition requires the import of both logic and reason. “In other words, an ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity.” *Id.* See also, *Lee Cnty. v. Sunbelt Equities, II, Ltd. P’ship*, 619 So. 2d 996, 1002 (Fla. 2d DCA 1993) (“the ‘fairly debatable’ rule is a rule of reasonableness which answers whether, upon the evidence presented to the local government, the local government’s action was reasonably based.”).

123. The mere existence of contravening evidence is not sufficient to establish that a land planning decision is “fairly debatable.” It is firmly established that:

[E]ven though there was expert testimony adduced in support of the City’s case, that in and of itself does not mean the issue is fairly debatable. If it did, every zoning case would be fairly debatable and the City would prevail simply by submitting an expert who testified favorably to the City’s position. Of course that is not the case. The trial judge still must determine the weight and credibility factors to be attributed to the experts. Here the final judgment shows that the judge did not assign much weight or credibility to the City’s witnesses.

Boca Raton v. Boca Villas Corp., 371 So. 2d 154, 159 (Fla. 4th DCA 1979). (citations omitted).

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

125. Petitioner alleges the Ordinance is inconsistent with the following goals, objectives, and policies of the Plan.¹⁰

Policies 17.1.2. and 17.1.3.

126. Petitioner did not prove beyond fair debate that the Ordinance is inconsistent with these policies. Policy 17.1.2. requires community plans to address specific conditions unique to a defined area of the County. The evidence did not support a conclusion that the Ordinance, although exempting development on South Seas from the CCP, rendered the Ordinance inconsistent with Policy 17.1.2. Expert witnesses testified that the CCP addresses specific conditions on Captiva as required by the policy.

127. Petitioner did not prove beyond fair debate that the Ordinance is inconsistent with Policy 17.1.3., which requires community plans to consist of long-term objectives and policies that are not regulatory in nature, and allows the County to adopt LDRs to implement the community plan. There was insufficient evidence to establish that the CCP fails to consist of long-term objectives and policies, as required by the policy, even after adoption of the Ordinance.

Goal 23, Objectives 23.1 and 23.2, and Policies 23.2.3 and 23.2.4

128. Petitioner did not prove beyond fair debate that the Ordinance is incompatible with, or fails to further, the specified goal, objectives, and policies of the Plan. Petitioner presented a strong case that the Ordinance

¹⁰ Lee County Plan Policy 1.1.6. describes Outlying Suburban as “rural in nature or contains existing low-density development,” and provides that the “standard density range is from one dwelling unit per acre (1 du/acre) to three dwelling units per acre (3 du/acre). Bonus densities are not allowed.” However, Petitioner did not allege that the Ordinance was inconsistent with this Policy. Nor, apparently was this issue tried by consent. Although Mr. Gauthier included this policy in his expert report, Petitioner’s counsel did not elicit any testimony from him, or any other expert, expressing the opinion that the Ordinance, which eliminates the 3du/acre cap for South Seas, is inconsistent with Policy 1.1.6 which caps standard density range at 3du/acre). Had Petitioner presented that evidence, the undersigned would have likely found that the Ordinance is not “compatible with” or does not “further” Policy 1.1.6 and the density limits set therein. However, the undersigned is limited to the evidence presented at the hearing and is not free to insert her own findings.

would allow development at South Seas which departs from the historical development pattern, at least for density and height. However, the success of Petitioner's argument from a consistency perspective hinged on an interpretation that, together, Goal 23, Objective 23.2., and Policy 23.2.4. prohibited land development regulations that would allow development contrary to the historic development pattern of South Seas. The plain language of the Plan, specifically Policy 23.2.4., did not support Petitioner's interpretation. The evidence showed that it was at least fairly debatable that the historic development pattern of Captiva, referenced in Policy 23.2.4., singled out South Seas as a separate land use subject to its own regulations.

129. As discussed at length in the Findings of Fact, Petitioner did not establish that the Ordinance was inconsistent with Policy 23.2.3., which requires the County to maintain building height regulations that account for barrier island conditions, such as mandatory flood elevation and mean-high sea level, for measuring height. All the expert witnesses agreed that the Ordinance adopted the starting point for measuring building height necessary to bring the County's LDR in compliance with the FEMA regulations for elevating construction above the base flood elevation and providing for additional elevations in FEMA V zones to prevent structural damage from storm surge.

130. Finally, Petitioner failed to prove beyond fair debate that the Ordinance is inconsistent with Objective 23.1, which requires the continued long-term protection and enhancement of wetland habitats, water quality, native upland habitats, and beaches on Captiva. While Petitioner introduced evidence that taller buildings may suffer damage that produces wind-borne debris (from either higher floors or items stored beneath the first habitable floor), which may be deposited in area wetlands, beaches, or other habitats addressed in this policy, that evidence was insufficient to prove beyond fair debate that the Ordinance is incompatible with, or fails to further, the stated policy.

Objectives 72.2. and 73.1.

131. As defined in the Community Planning Act, a comprehensive planning goal is a “long-term end toward which programs or activities are ultimately directed.” An Objective is “a specific, measurable, intermediate end that is achievable and marks progress toward a goal.” Policies are “the way in which programs and activities are conducted to achieve an identified goal.”

132. A comprehensive planning objective is implemented by specific policies in the local government’s plan. Those policies identify “the way in which” the local government program and activities will be “conducted to achieve an identified goal.” As applied to the case at hand, unless the challenging party can prove that the challenged LDR prohibits or impedes the local government’s progress toward the stated goal as specified in the policies, proving inconsistency with the objective will be very difficult, if not impossible.

133. Petitioner failed to prove beyond fair debate that the Ordinance is inconsistent with Objective 73.1., which requires the County to “work toward attaining out of County hurricane evacuation for a Category 5 storm event that does not exceed the timeframes referenced in the statewide regional evacuation study”; and to “work to improve clearance times by increasing shelter availability within the County, improving evacuation routes, and increasing public awareness and citizen preparedness.”

134. The County introduced copious evidence that it has invested significantly in improvement of hurricane evacuation routes, including those used by residents and visitors evacuating from Captiva and Sanibel; increasing shelter availability; and increasing awareness and citizen preparedness. Petitioner did not introduce evidence to contradict those findings.

135. Moreover, as noted in the Findings of Fact, Objective 73.1. is implemented by two specific policies which lay out “the way in which the local

government programs and activities are conducted to achieve” the goal. The County introduced evidence of how it implements these policies, and continues to pursue the programs outlined therein.

136. Petitioner introduced hurricane evacuation studies based on particular buildout scenarios of South Seas that it argues could be allowed under the Ordinance, in order to prove that the Ordinance prevents the County from maintaining hurricane evacuation times that do not exceed the timeframes in the statewide regional study. However, that evidence was based on projections of specific buildout densities and was insufficient to prove, beyond fair debate, that the Ordinance will not allow the County to maintain the specified evacuation timeframes.

137. Finally, Petitioner failed to prove beyond fair debate that the Ordinance was inconsistent with Objective 72.2., which requires the County to maintain land development regulations that reduce the vulnerability of development from the threats of natural and man-made hazards. All the expert witnesses agreed that the changes to measurement of building height reflected in the Ordinance, would reduce the vulnerability of development from damage due to storm surge during a hurricane. While Petitioner introduced opinion testimony that other aspects of development allowed under the Ordinance, such as taller buildings, would not reduce vulnerability of development from threats of natural disaster, that testimony was met with other expert testimony that buildings built to the new building codes were less vulnerable to the threat of wind damage and other hazards.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner failed to prove that Lee County Ordinance No. 23-22 is inconsistent with the cited provisions of the Lee County Comprehensive Plan.

DONE AND ORDERED this 3rd day of February, 2025, in Tallahassee,
Leon County, Florida.



SUZANNE VAN WYK
Administrative Law Judge
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.