IN AND BEFORE A SPECIAL MAGISTRATE

SUNNYSIDE LANDING/CITY OF LEESBURG

SECTION 70.51 F.S. PROCEEDING

SUNNYSIDE LAKE LANDING HOLDING, LLC, and CENIZO VENTURES FLORIDA, LLC,

Petitioners,

v.

CITY OF LEESBURG,

Respondent.

_____/

Special Magistrate Recommendation

Pursuant to the Florida Land Use and Environmental Dispute Resolution Act, Section 70.51, Florida Statutes (2023), ("Dispute Resolution Act") and more specifically, Section 70.51(19), Florida Statutes (2023), and after a one day evidentiary hearing held on July 19, 2023, pursuant to Section 70.51(15), Florida Statutes (2023), and a site visit to the property at issue and surrounding areas by the Special Magistrate in the above-captioned special magistrate proceeding, the Special Magistrate enters this Special Magistrate Recommendation ("SM Recommendation") pursuant to the guidelines set forth in Sections 70.51(18) and (19), Florida Statutes (2023).

STATEMENT OF THE ISSUE

The issue in this special magistrate proceeding is whether the denial of Petitioners Sunnyside Lake Land Holding Company, LLC, and Cenizo Ventures Florida, LLC ("Petitioners") rezoning application for the Sunnyside Landing Planned Unit Development in Case No. PUD 21-78 ("Sunnyside PUD") by Respondent City of Leesburg ("City") (Petitioners and the City are jointly referred to as the "Parties") was "unreasonable" or "unfairly burdens" the Petitioners' use of real property pursuant to the Dispute Resolution Act. In making this determination, the Special Magistrate is guided by the criteria listed in Section 70.51(18)(a)-(h) and (19), Florida Statutes (2023).

EXHIBITS & TRANSCRIPT

Exhibits admitted into evidence during the special magistrate hearing are referred to in this SM Recommendation by the exhibit number followed by the appropriate page number – e.g., Pet. Ex. 1 at 5. References to the July 19 hearing transcript are denoted herein as "T." followed by the appropriate page number – e.g., T. 10.

During the special magistrate evidentiary hearing, the Petitioners introduced pre-marked Exhibits 2, 3, 5A, 5B, 5C, 6A, 6B, 6C, 7, 10C, 10D, 11, 12A, 12B, 13, 14, 17, 19, 21, 21A, 21B, 22, 23, 24, 25, 26, 27, and 27A. The City did not introduce any exhibits, but instead relied upon the Petitioners' exhibits. Copies of all the exhibits introduced into evidence during the special magistrate evidentiary hearing are on file with the Special Magistrate and are listed on pages 4 and 5 of the hearing transcript and the Parties have copies of the exhibits. On August 2, 2023, the original hearing transcript was filed with the Special Magistrate and a copy was provided to each of the Parties.

ATTENDEES AND RELATED MATTERS

Attorney Brent Spain of Theriaque & Spain represented the Petitioners at the evidentiary hearing and presented the following witnesses: Greg Beliveau, AICP – who was qualified and testified as an expert in land use, comprehensive planning, and urban planning. (Pet. Ex. 7; T. 5).

Attorneys Stephanie Brionez and Mark Brionez of Brionez & Brionez represented the City at the evidentiary hearing and presented one witness: Dan Miller – the City's Planning Director.

Several members of the public attended the evidentiary hearing and were given the opportunity to testify on the issues relevant to this special magistrate proceeding. No member of the public requested to make any comments or introduce any documents or other exhibits into the record for the Special Magistrate's consideration. (T. 188).

Additionally, as disclosed at the outset of the July 19 special magistrate hearing, the Special Magistrate on July 18, 2023, conducted a site visit of the subject property and the surrounding area on Sunnyside Drive. (T. 12).

As requested by the Special Magistrate at the end of the special magistrate hearing, Petitioners and the City through their counsel filed Proposed Recommended Orders on October 23, 2023. (Referred to herein individually as "Petitioners PRO" and "City PRO")

All of the exhibits, testimony presented at the evidentiary hearing, and the Special Magistrate's site visit provide the necessary basis for this SM Recommendation.

INTRODUCTION AND PREFACE

The Special Magistrate is adopting most of the Petitioners PRO with some changes as part of the SM Recommendation. Most of these are found in the Findings of Facts, Conclusions of Law and Recommendation sections of this SM Recommendation. These sections along with this "Introduction and Preface" section constitute the SM Recommendation.

This "Introduction and Preface" is a brief discussion of some, not all, key factual and legal matters considered by the Special Magistrate in reaching a recommendation in this matter. It addresses the four areas the City asserts were the basis for denial of the Sunnyside PUD. As noted in the City PRO: "The City's denial (of the Sunnyside PUD) was based upon **non-compliance with the Sunnyside Task Force Study Report ("Sunnyside Task Force Study Report"), poor condition of the roads, citizen/resident complaints, and concerns regarding water supply**." City PRO, Paragraph (f), Pg. 7 (Emphasis added). This summary will briefly address each of those items in addition to the issue of land use compatibility of the Sunnyside PUD.

A full discussion of these items and other significant facts and law are found in the Findings of Facts and Conclusions of Law sections of this SM Recommendation.

The facts in this special magistrate proceeding are relatively straight forward and found in more detail in the Findings of Facts section in this SM Recommendation. Importantly, there are no significant facts in dispute between the Parties. There are no significant discrepancies between the Findings of Facts of Petitioners PRO and the City PRO although there are some facts in each not mentioned in the other. The core of the dispute between the Parties is the legal significance of those facts. Upon review and analysis, Petitioners are clearly correct on the legal significance of those facts based on established Florida law and as detailed in the Conclusions of Law section in this SM Recommended Order.

A. **Non-Compliance With Sunnyside Task Force Study Report**

This factor was clearly the most important factor cited by the City for the denial of the Sunnyside PUD.

A key factual finding that was undisputed at the Special Magistrate Hearing was noted as follows in the Petitioners PRO:

> "Since the adoption of Resolution No. 7158, (Sunnyside Task Force Study Report) it is undisputed that the City has not adopted or incorporated any of the density level recommendations from the Sunnyside Task Force Study Report (Sunnyside Task Force Study Report) into the City's Comprehensive Plan or the City's LDC. (T. 39-40, 139, 177). In other words, the City has never formally codified the recommendations of the Sunnyside Task Force Study Report. (T. 115). Additionally, there is no notation or asterisk on the City's Future Land Use Map indicating that properties within the Sunnyside Study Area are subject to density limitations other than those prescribed for the assigned future land use category. (T. 24-25)." Petitioners PRO, Pg. 9, Paragraph 21.

Not surprising given this present status of the Sunnyside Task Force Study Report is the admission by the City and Petitioners that the critical legal requirements for allowing the Sunnyside PUD to proceed **have been met**. The City PRO states, and it was undisputed at the Special Magistrate Hearing, that the following is correct: "**Although the Land Development Regulations and the City's Comprehensive Plan would permit the Petitioners' proposed PUD….**" City PRO, Pg. 6, Paragraph (c) (Emphasis added) The Petitioners PRO notes**:** "In 2021, Petitioners submitted the 2019 Sunnyside PUD application, proposing 159 units on 139 acres for approval. **This density was consistent with the City's Comprehensive Plan and their Land Development Code.**" Petitioners PRO Pg.12, Paragraph 29 (Emphasis added) As will be

discussed later in this SM Recommendation, Petitioners now seek even lower density for the Sunnyside PUD.

Also, the City contends it does not need to abide by the Sunnyside Task Force Study Report even though the Petitioners do have to abide by it if the City decides to apply it. The City PRO asserts: **"**The Sunnyside Report was adopted by the City by resolution in such a way that future City Commissions **could choose to apply it or not, but would not be bound by the requirements."** City PRO, Pg. 3, Paragraph 7 (Emphasis added) A former Leesburg City attorney has also publicly noted that the Sunnyside Task Force Study Report does not bind the City of Leesburg in any manner. (Pet. Ex. 25 at 5)

No criteria have ever been adopted and/or published by the City to specify when or when it will not apply the Sunnyside Task Force Study Report or when it "would not be bound by the requirements." And no evidence was presented at the special magistrate hearing as to what criteria are being used to apply the Sunnyside Task Force Study Report. It is not surprising that the City PRO cites no authority, either case law or statutory law, that allows for the discretionary enforcement of the Sunnyside Task Force Study Report that has never been codified.

The City correctly asserts that Petitioners had notice of the Sunnyside Task Force Study Report before submitting the rezoning application for the Sunnyside PUD. The City argues that because Petitioners had "notice", Petitioners are therefore bound by the Sunnyside Task Force Study Report <u>if the City, at its sole discretion, without any criteria and without any codification of the Sunnyside Task Force Study Report, decided to enforce the recommendations of the Sunnyside Task Force Study Report.</u> No legal authority has been cited by the City and none has been found to support this assertion. There is no land use regulation in Florida, and likely in any state, that is enforceable or valid under such circumstances. Such a scenario is the definition of "unreasonable"

and "arbitrary" and certainly "unfairly burdens' the use of property. Section 70.51(19)(b), Florida Statutes (2023). See Conclusions of Law section in this SM Recommendation

The mistaken notion of legal enforceability of the Sunnyside Task Force Study Report by simply "notice" of it has no better illustration than the undisputed fact that the City's Planning Staff, with full "notice" of the Sunnyside Task Force Study Report, recommended approval of an even higher density Sunnyside PUD than the one presently proposed as part of this special magistrate proceeding. And the City's Planning Director testified that "As a professional planner, I viewed [the Sunnyside PUD] as a project that is consistent with the City of Leesburg comp plan and land development regulations" and reaffirmed that he had applied the City's "adopted criteria." (T. 162, 180). The City's Planning Staff also concluded that this higher density project than the one now proposed was compatible with the surrounding land uses.

Almost without exception at the local government level in Florida, there is no governmental group more familiar with the legal regulatory framework affecting land use than a City's Planning Staff since the planning staff is tasked as the primary source for information and enforcement of local land use laws and regulations. If the Sunnyside Task Force Study Report determines the outcome, why didn't the City's Planning Staff apply it in its recommendation? The fact that the City Planning staff was unaware of the City Commission's position on the applicability and enforcement of provisions in the Sunnyside Task Force Study Report underscores the "unreasonable", "arbitrary" and "unfair burden on property" nature of enforcing the Sunnyside Task Force Study Report whenever the City Commission decides to do it. This is the case not only in regard to the Sunnyside PUD, but any development supposedly affected by the Sunnyside Task Force Study Report until the Sunnyside Task Force Study Report is properly added as enforceable provisions to the City's comprehensive land use plan and land development code, as applicable.

Finally, it is significant that unlike the City, Lake County, the other local government entity affected by the Sunnyside Task Force Study Report, has implemented the Sunnyside Task Force Study Report by appropriate amendments to its comprehensive plan. [1]

Details of this item appear later in this SM Recommendation.

B. **Citizen/Resident Complaints**

Equally as invalid and troublesome is the rationale that some nearby residents (despite notice of the special magistrate hearing and provided an opportunity to do so, no nearby resident or other persons testified or made a presentation at the special magistrate hearing) objected to the Sunnyside PUD. It is extremely salient and valuable to hear members of the public state objections or support for a particular land use matter. Such objections or support, however, must be based on applicable law and relevant facts for a governmental body (or a special magistrate) to consider it in making a decision. For obvious reasons, mere conjecture or unsupported opinion are a dangerous and legally invalid rationale to use to determine the legality of any legal matter and sets a baseless, perilous precedent. As noted, there were no presentations on any issues by neighbors or other individuals at the special magistrate hearing.

Details of this item appear later in this SM Recommendation.

[1] The mistaken belief that the Sunnyside Task Force Study Report carries the same legal status as comprehensive plans or land development codes is shown in the "Recommendation" within the City PRO that the City suggests the special magistrate enter in the SM Recommendation. In part, the City PRO suggest that the Special Magistrate recommend that: "If Petitioners submit a PUD application consistent with the Sunnyside Task Force Report, … (the special magistrate) recommend that the City approve such application, so long as it is otherwise compliant with all **other** City Land Development Regulations and Comprehensive Plan." City PRO. Pg. 8 (Emphasis added) The word "other" suggests that the Sunnyside Task Force Study Report carries the same legal significance as comprehensive plans and land development codes. It does not and no legal authority has been cited to support such treatment.

C. **Poor Condition of Roads**

Poor conditions of roads impacted by the Sunnyside PUD is another basis cited by the City to deny the Sunnyside PUD. No evidence was presented at the special magistrate hearing that either such impacts would be contrary to applicable law or standards or that such impacts would not be adequately addressed during the normal regulatory approval process for the Sunnyside PUD.

Details of this item appear later in this SM Recommendation.

D. **Concerns Regarding the Water Supply**

Neither the City PRO nor the Petitioners PRO provided any detail or argument on this item. It does not seem to be a material concern in terms of this special magistrate proceeding and cannot be relied upon to support any type of recommendation.

E. **Land Use Compatibility of the Sunnyside PUD**

Besides the above four items cited by the City as the reasons for the denial of the Sunnyside PUD, one other item deserves to be addressed, the compatibility of the Sunnyside PUD with surrounding land uses. The Petitioners PRO stated the following that, as correctly noted, was undisputed in the special magistrate hearing:

"It is also undisputed that the City's Planning Staff reviewed the Sunnyside PUD for compatibility and concluded that "[t]he proposed request for a PUD (Planned Unit Development) zoning is compatible with the current surrounding zoning districts" and "is consistent with the City's Growth Management Plan, Future Land Use Element, Goal I, Objective 1.6" – i.e., "Land Use Compatibility." (T. 47-49; Pet. Ex. 5A at 58; Pet. Ex. 3 at I-45). Moreover, on cross-examination during the evidentiary hearing, the City's Planning Director confirmed that the Sunnyside PUD with 159 units is "compatible" with the surrounding area.

In so doing, the City's Planning Director confirmed that in his opinion "[t]he parcel is suitable for the proposed use" and that "[t]he proposed use will not alter the character of the surrounding area." (T. 145-46). Further, when asked whether he had concluded that the proposal is compatible with the surrounding area, the City's Planning Director confirmed he had:

Q. [I]s it correct to say that you had concluded that the proposal was compatible with the surrounding area?

A. Yes, it is.

Q. And that would be at 159 units?

A. Yes.

(Emphasis added)

The present proposed density for the Sunnyside PUD is lower at 150 units.

The Special Magistrate's site visit to the general area where the Sunnyside PUD is located did not disclose any grounds why the residential nature and density of the Sunnyside PUD (consistent with the Revised Sunnyside PUD Concept Plan that the Petitioners introduced during the evidentiary hearing and subject to all conditions in the prior Staff Report for the Sunnyside PUD) would not be compatible with the surrounding residential land uses. The Special Magistrate has been practicing in the areas of environmental and land use law in Florida for over 48 years.

Details of this item appear later in this SM Recommendation.

FINDINGS OF FACT

Based upon the testimony and evidence introduced during the evidentiary hearing, the Special Magistrate makes the following findings of fact:

A. The Parties

1. The Petitioners are the owners of approximately 139± acres of real property generally located south of U.S. Highway 441 and west and east of Sunnyside Drive in Lake County, Florida ("Property"), as depicted on the maps in the record. (Pet. Ex. 5C at 5). The Petitioners were the parties that filed the application for the Sunnyside PUD. (Pet. Ex. 5A).

2. The City is a Florida municipal corporation and is the entity responsible for reviewing and approving or denying the Sunnyside PUD.

B. **The Petitioners' Property**

3. The Petitioners' Property consists of two (2) tracts of land. (Pet. Ex. 12A). The first tract consists of approximately 120± acres of land located to the south and west of Sunnyside Drive ("Parent Tract"). (Id.; T. 17). The second tract consists of 18.5± acres of land located to the east of Sunnyside Drive ("Additional Tract"). (Pet. Ex. 12A; T. 27).

4. The current future land use designation of the Parent Tract on the City's Future Land Use Map is "Estate Residential" with the wetland areas designated as "Conservation." (Pet. Ex. 14; T. 24). The current zoning of the Parent Tract on the City's Zoning Map is PUD (Planned Unit Development). (Pet. Ex. 13; T. 22).

5. Pursuant to Objective 1.1.a of the City's Future Land Use Element ("FLU"), the Estate Residential future land use category is "intended for single family detached residences in urbanized areas and some rural communities that have adequate infrastructure and public facilities to support the density of up to four (4) units per acre." (Pet. Ex. 3 at I-34). Similarly, FLU Policy 1.1.1 provides that "[t]he adopted Future Land Use Map shall contain and identify appropriate locations for the following land use categories" and specifies "Estate Density Residential" as "Up to 4 units/gross acre." (Id. at I-38 to I-39). In addition, FLU Policy 1.4.9 provides that "[d]evelopments may be allowed to transfer densities on the site from environmentally sensitive areas to upland areas that are more suitable for development permitted the project goes through the planned unit development process and does not exceed a transfer of density of 1 unit per acre." (Id. at I-43).

6. Section 25-274(b) of the City's Land Development Code ("LDC") provides that the purpose of the PUD zoning district is "to provide for proper private development of infill areas, as well as the comprehensive development of large areas of vacant or substantially vacant land that requires a flexible approach to development." (Pet. Ex. 2 at 4). The PUD zoning district is a standalone zoning district which "establishes the permitted uses, densities and intensities of the site as well as the basic district development standards as part of the rezoning process and the issuance of a development order." (Id.; T. 23).

7. The Additional Tract is in unincorporated Lake County, Florida. The current future land use designation of the Additional Tract on Lake County's Future Land Use Map is "Rural." (Pet. Ex. 14). The current zoning of the Additional Tract on Lake County's Zoning Map is R-1 (Rural Residential). (Pet. Ex. 13).

C. **Zoning And Land Use History of The Petitioners' Property**

8. In May 2005, the Petitioners' predecessor – William Herlong Jr., Baw Inc. – filed an annexation application with the City for the Parent Tract. (Pet. Ex. 21 at 1, 16). At the same time, the Petitioners' predecessor also filed an application seeking to rezone the Parent Tract from Lake County "Agriculture" to City of Leesburg "Planned Unit Development." (Id. at 1, 33). The proposed PUD consisted of 120 units on the Parent Tract, equating to a gross density of 1.0 dwelling units per acre and a net density of 1.7 dwelling units per acre. (Id. at 55).

9. The City's Planning Staff recommended approval of the annexation and the proposed PUD rezoning. (Id. at 16, 19). The City's Planning Commission held a public hearing on the proposed PUD on July 7, 2005, and, at the conclusion thereof, voted unanimously to approve the proposed PUD. (Id. at 32-34).

10. On December 12, 2005, the City Commission held a public hearing on the annexation. (Id. at 36-37). By a vote of 5-to-0, with no public comment in opposition, the City Commission approved the annexation. (Id. at 36). The City Commission's approval of the annexation of the Parent Tract is memorialized in Ordinance No. 05-123 ("Annexation Ordinance"). (Id. at 38-40). The Annexation Ordinance imposes no restrictions on the development of the Parent Tract.

11. At its meeting on December 12, 2005, the City Commission also held a public hearing on the proposed PUD. (Id. at 51-52). By a vote of 5-to-0, with no public comment in opposition, the City Commission approved the proposed PUD. (Id. at 52). The City Commission's approval of the proposed PUD is memorialized in Ordinance No. 05-124 ("2005 PUD"). (Id. at 53-62; Pet. Ex 23). The 2005 PUD authorized the Parent Tract to be developed with 120 units, which, as previously noted, equates to a gross density of 1.0 dwelling units per acre and a net density of 1.7 dwelling units per acre. (Pet. Ex. 21 at 55).

12. Subsequent to the City Commission's approval of the 2005 PUD, the Petitioners' predecessor filed an application for preliminary subdivision plan approval for the Parent Tract. (Id. at 83). The preliminary subdivision plan was for the development of 120 units on the Parent Tract. (Pet. Ex. 21B).

13. On June 22, 2006, the City's Planning Commission held a public hearing on the proposed preliminary subdivision plan. (Pet. Ex. 21 at 82-83). The City's Planning Staff recommended approval of the proposed preliminary subdivision plan. (Id. at 83). By a vote of 6-to-0, the City's Planning Commission approved the proposed preliminary subdivision plan ("2006 PSP"). (Id.).

14. The Planning Commission's approval of the 2006 PSP is memorialized in a letter from the City's former Planning and Zoning Manager to the project engineer dated July 17, 2006. (Id. at 66). The approval letter does not specify any expiration date for the 2006 PSP. (Id.; T. 156). Additionally, as attested to by the Petitioners' planning expert and the City's Planning Director at the evidentiary hearing in this matter, Section 25-443 of the City's LDC, which governs preliminary subdivision plans, does not impose an expiration date for approved plans. (T. 21, 174; Pet. Ex. 2 at § 25-443).

15. On December 18, 2006, the City Commission held a public hearing on a proposed large-scale comprehensive plan amendment to change the future land use designation of the Parent Tract from Lake County "Urban Expansion" and Lake County "Suburban" to City "Estate Residential" and "Conservation." (Pet. Ex. 21 at 94-95). The City's Planning Staff recommended approval of the proposed comprehensive plan amendment. (Id. at 91). By a vote of 4-to-0, with no public comment in opposition, the City Commission approved the proposed plan amendment. (Id. at 95). The City Commission's approval of the plan amendment is memorialized in Ordinance No. 06-149 ("2006 Plan Amendment"). (Id. at 86-90). The 2006 Plan Amendment does not contain any language restricting the density on the Parent Tract lower than the allowable density in the Estate Residential future land use category – i.e., up to four (4) dwelling units per acre. (T. 152).

16. Notwithstanding the above-referenced approvals and presumably because of the housing market crash in 2008, the Petitioners' predecessor did not construct the development authorized by the 2005 PUD and the 2006 PSP on the Parent Tract. (T. 19). The Petitioners acquired the Parent Tract subsequent to the City's approval of the 2005 PUD, 2006 PSP, and 2006 Plan Amendment.

D. **Sunnyside Task Force Study Report**

17. In 2003, the City Commission adopted Resolution No. 6983 directing the City's Planning Staff to "begin a study of the development patterns in the Sunnyside area and formulate a plan to guide future annexation and development in the area." (Pet. Ex. 21A at 3). In so doing, the City Commission authorized the formation of a "Task Force" to prepare a study with "recommendations on appropriate levels of density, infrastructure, and transportation design for the Sunnyside area." (Id.). The parties do not dispute that the Petitioners' Property is located within the Sunnyside Study Area.

18. With respect to the issue of density, the Sunnyside Task Force Study Report recommended the following density levels within the Sunnyside Study Area: High (8 du/ac), Medium (3 du/ac), Low (1 du/ac), and Very Low (3 ac/du). (Id. at 6). Pursuant to Figure 4 (Recommended Density Levels) in the Sunnyside Task Force Study Report, the Parent Tract is split between the "Low" and "Very Low" recommended density levels. (Id.; T. 138). The northern portion of the Parent Tract – roughly 60 acres – is located in the "Low (1 du/ac)" recommended density level, and the southern portion – roughly 60 acres – is located in the "Very Low (3 ac/du)" recommended density level. (T. 138). According to the City's Planning Director, if the Sunnyside Task Force Study Report were applied to the Parent Tract, it would authorize a maximum of eighty (80) dwelling units. (T. 138).

19. The Sunnyside Task Force Study Report stated that the recommendations therein would be forwarded to both the Leesburg City Commission and the Lake County Board of County Commissioners for their consideration. (Pet. Ex. 21A at 10).

20. On June 28, 2004, the City Commission approved Resolution No. 7158, thereby purporting to accept the recommendations of the Sunnyside Task Force Study Report and directing City Staff to implement those recommendations in considering any proposed annexation or proposed development within the study area. (Pet. Ex. 22). In so doing, Resolution No. 7158 provided that "development within the study area, over which the City of Leesburg has control, will proceed in accordance with the recommendations set forth in the Sunnyside Task Force Study Report, unless otherwise approved by the City Commission." (Id.).

21. Since the adoption of Resolution No. 7158, it is undisputed that the City has not adopted or incorporated any of the density level recommendations from the Sunnyside Task Force Study Report into the City's Comprehensive Plan or the City's LDC. (T. 39-40, 139, 177). In other words, the City has never formally codified the recommendations of the Sunnyside Task Force Study Report. (T. 115). Additionally, there is no notation or asterisk on the City's Future Land Use Map indicating that properties within the Sunnyside Study Area are subject to density limitations other than those prescribed for the assigned future land use category. (T. 24-25).

22. Unlike the City, Lake County specifically adopted guidelines into the Lake County Comprehensive Plan pursuant to the Sunnyside Task Force Study Report. (T. 41; Pet. Ex. 17 at 61-62). To establish a density reducing gradient of residential development from U.S. 441 to Lake Harris, Lake County's Comprehensive Plan authorizes the following future land use categories in the Sunnyside Study Area: Urban Low Density (4 du/ac), Urban Medium Density (7 du/ac), Urban High Density (min. 4 du/ac, max. 12 du/ac), and Rural Transition (1 du/5 ac, 1 du/3 ac, and 1 du/1 ac). (Id. at 20-21, 62; T. 41-42).

E. **The Sunnyside PUD**

23. In 2018, the Petitioners retained Greg Beliveau, AICP, of LPG Urban & Regional Planners, Inc., to assist with development entitlements for the Property. (T. 16). During the application process, the City's Planning Staff advised Mr. Beliveau that the 2005 PUD had expired pursuant to Section 6.F of the Sunnyside Landing Planned Unit Development Conditions ("2005 PD Conditions"). (T. 25).

24. Section 6.F of the 2005 PD Conditions states in its entirety:

> Implementation of the project shall substantially commence within 24 months of approval of this Planned Unit Development. In the event, [sic] the conditions of the PUD have not been implemented during the required time period, the PUD shall be scheduled with due notice for reconsideration by the Planning Commission at their [sic] next available regular meeting. The Planning Commission will consider whether to extend the PUD approval or rezone the property to RE-1 (Estate Density Residential) or another appropriate zoning classification less intense than the development permitted by these PUD Conditions.

(Pet. Ex. 23 at § 6.F).

25. According to the City's Planning Director, the City interpreted the above-quoted language to mean that an approved PUD automatically expired after twenty-four (24) months if the project had not substantially commenced – which the City's Planning Director indicated the City viewed as "turning dirt and spending a significant amount of money" or "beginning physical construction." (T. 179). On cross-examination, however, the City's Planning Director admitted that there is no language in Section 6.F of the 2005 PD Conditions stating that the PUD would automatically expire after twenty-four (24) months if physical construction had not started. (T. 149, 179). The City's Planning Director further admitted that the City never took any of the steps specified in Section 6.F of the 2005 PD Conditions to formally rescind or terminate the 2005 PUD.

(T. 149-50). Moreover, when asked by the City's counsel on redirect whether the predecessor owner "was ever noticed of the expiration of the PUD itself," the City's Planning Director stated, "No, I do not think they were ever noticed – I don't think they were ever noticed of any expiration." (T. 184). The City Planner also admitted that he had "no evidence" that the 2006 PSP ever expired. (T. 156).

26. The Petitioners' planning expert and the City's Planning Director both confirmed during the evidentiary hearing that the Parent Tract has continued to be designated PUD on the City's Zoning Map. (T. 22, 137). However, when asked whether the Petitioners "could walk into the building department today and pull a building permit on this property" the City's Planning Director stated, "No, sir." (T. 153). Rather, to do any development on the Parent Tract, the City's Planning Director indicated that the Petitioners would need to obtain a new PUD approval. (Id.).

27. Based upon the City's position that the 2005 PUD had expired and a new development application was needed, the Petitioners filed an application for approval of a new PUD in 2019 – i.e., the Sunnyside PUD. (T. 27). In conjunction with the application for the Sunnyside PUD, the Petitioners also filed applications to annex the Additional Tract and to change the future land use designation of the Additional Tract from Lake County "Rural" to City of Leesburg "Estate Residential." (Pet. Ex. 5A at 1-2, 9-10). The initial 2019 submittal for the Sunnyside PUD proposed more than 200 units but was subsequently reduced to 159 units on 139 acres – equating to a density of 1.14 dwelling units per acre. (T. 28). The City's Planning Staff reviewed the 2019 Sunnyside PUD submittal and recommend approval of the same, concluding the proposal was consistent with the City's Comprehensive Plan and the City's LDC. (Id.).

28. During the review of the 2019 Sunnyside PUD submittal, the applicability of the Sunnyside Task Force Study Report to the project was raised. (T. 29). On this point, the City's

late attorney – Fred Morrison – advised the City's Planning Commission at its meeting on August 13, 2020, that, "although the study was adopted in 2004, it is not considered binding on future City Commissions." (Pet. Ex. 25 at 5). Similarly, when the City Commission considered the 2019 Sunnyside PUD submittal at its meeting on December 21, 2020, attorney Morrison advised the City Commission that "[t]his Commission has the authority notwithstanding the Task Force report to approve this if that is the desire of the Commission." (Pet. Ex. 26 at 15). Ultimately, the City Commission took no formal action on the 2019 Sunnyside PUD submittal. (T. 34).

29. Thereafter, the Petitioners resubmitted for the Sunnyside PUD in 2021. (T. 43-44). Like the 2019 submittal, the 2021 Sunnyside PUD submittal proposed 159 units on 139 acres – equating to a density of 1.14 dwelling units per acre. (T. 45; Pet. Ex. 5B). The City's Planning Staff recommend approval of the 2021 Sunnyside PUD, concluding the revised proposal was consistent with the City's Comprehensive Plan and the City's LDC and compatible with the surrounding area and land uses. (T. 45; Pet. Ex. 5A at 31). The City's Planning Staff also recommended approval of the proposed annexation and land use change for the Additional Tract. (Pet. Ex. 5A at 1, 13). At no time did the City's Planning Staff recommend denial upon or otherwise indicate that the proposed Sunnyside PUD was inconsistent with the Sunnyside Task Force Study Report. (T. 143, 147, 162).

30. On March 28, 2022, the City Commission held a public hearing on the 2021 Sunnyside PUD submittal. (Pet. Ex. 19). Notwithstanding the City Planning Staff's recommendation of approval and the absence of any testimony or evidence in opposition, the City Commission, by a vote of 3-to-1, denied the proposed annexation and land use change of the Additional Tract at the outset of the March 28 public hearing. (Id. at 6-7). As result thereof, the

Additional Tract was removed from the proposed Sunnyside PUD and the number of units was reduced to 155 units on 120 acres – equating to a density of 1.29 units per acre. (T. 112).

31. At the conclusion of the March 28 meeting, the City Commission voted 2-to-2 on the motion to approve the proposed Sunnyside PUD with 155 units on the Parent Tract. (Id.; Pet. Ex. 19 at 22). The acting City Attorney advised the City Commission that "a tie vote is an effective denial." (Id.).

32. On April 26, 2022, the Petitioners timely filed their Request for Relief with the City. Pursuant to the Dispute Resolution Act, a mediation conference was held on August 16, 2022, between the Petitioners and the City with the undersigned Special Magistrate acting as a mediator to discuss potential negotiated settlement solutions to the issues in this matter. A mediated settlement, however, was not reached. Accordingly, pursuant to the Dispute Resolution Act, the undersigned Special Magistrate conducted the required evidentiary hearing in this matter on July 19, 2023, to gather the information "necessary to understanding" the facts and law applicable to this matter and to be able to development this Report and Recommendation.[2]

ANALYSIS AND CONCLUSIONS OF LAW

In their Request for Relief, the Petitioners assert that the City Commission's denial of the Sunnyside PUD was unreasonable and unfairly burdens the use of the Parent Tract. The evidence and testimony introduced during the public hearing focused on three primary issues: (1) traffic concerns on Sunnyside Drive; (2) compatibility; and (3) the Sunnyside Task Force Study Report. Each of these issues is addressed separately below.

[2] The City Commission's denial of the annexation and future land use change of the Additional Tract does not constitute a "development order" for purposes of the Dispute Resolution Act, and, thus, is not part of this Report and Recommendation. *See* § 70.51(2)(a), Fla. Stat. (2022).

A. **Purpose And Scope Of The Dispute Resolution Act**

The Dispute Resolution Act requires that a special magistrate make the following determination:

> [T]he special magistrate shall consider the facts and circumstances set forth in the request for relief and any responses and any other information produced at the hearing in order to determine whether the action by the governmental entity or entities is unreasonable or unfairly burdens the real property.

§ 70.51(17)(b), Fla. Stat. (2022) (emphasis supplied).

The terms "action by the governmental entity," "unreasonable," and "unfairly burdens the real property" are not defined in the Dispute Resolution Act. The Dispute Resolution Act intends for a special magistrate to weigh and balance all relevant facts and law involving the action by the governmental entity and the land use at issue and make a decision based upon an "unreasonable" or "unfairly burdens the real property" standard.

This weighing and balancing approach is indicated by the broad array of "circumstances" the Dispute Resolution Act permits a special magistrate to consider pursuant to Section 70.51(18)(a)-(h), Florida Statutes, in making the determination of whether the governmental entity's action was "unreasonable" or "unfairly burdens" the real property at issue. In this regard, it is important to emphasize that while the facts presented and conclusions reached in the hearings that preceded the special magistrate proceeding may be relevant for a special magistrate to review, the special magistrate proceeding is a de novo process to consider the wide array of matters detailed in the Dispute Resolution Act.

Ultimately, the underlying purpose of the Dispute Resolution Act is to determine whether an owner should be permitted to make use of its property subject to such conditions and limitations which would minimize intrusion or impact upon adjoining or nearby properties – which, in essence, would ensure the compatibility of the proposed use with the surrounding land uses. To that end, Section 70.51(17), Florida Statutes, states:

> The object of the hearing is to focus attention on the impact of the governmental action giving rise to the request for relief and to explore alternatives to the development order or enforcement action and other regulatory efforts by the governmental entities in order to recommend relief, when appropriate, to the owner.

(Emphasis supplied).

Lastly, the Florida Legislature has specifically instructed that the Dispute Resolution Act "shall be liberally construed to effect fully its obvious purposes and intent, and governmental entities shall direct all available resources and authorities to effect fully the obvious purposes and intent of this section in resolving disputes." See id. at § 70.51(29). Accordingly, the Special Magistrate interprets and applies the Dispute Resolution Act with that legislative directive in mind. See Nettles v. State, 850 So. 2d 487, 493 (Fla. 2003) (noting that legislative intent is the "polestar that guides the Court's inquiry").

B. **Alternatives To The Sunnyside PUD**

At the evidentiary hearing, the Petitioners' planning expert discussed the Sunnyside Landing Concept Plan dated January 21, 2022, that was submitted as part of the 2021 Sunnyside PUD submittal that the City Commission ultimately denied. (T. 49; Pet. Ex. 5B). The Petitioners, however, also introduced a revised conceptual plan for the proposed Sunnyside PUD during the evidentiary hearing ("Revised Sunnyside PUD Concept Plan"). (T. 69-71; Pet. Ex. 11).

The Revised Sunnyside PUD Concept Plan is appropriate for consideration in this special magistrate proceeding. The Dispute Resolution Act encourages such revisions to an original development proposal and provides that, in determining whether a development order is unreasonable or unfairly burdens the use of the property, a special magistrate may consider "alternative development orders or enforcement action conditions that would achieve the public purpose and allow for reduced restrictions on the use of the property." See § 70.51(18)(f), Fla. Stat. (2022). In other words, given the land use regulatory concerns of the City and other interested persons, is there some alternative to the original development plan proposed by the Petitioners that satisfies those concerns?

Briefly summarized, the Revised Sunnyside PUD Concept Plan does the following: (1) removes the Additional Tract from the Sunnyside PUD; (2) reduces the number of dwelling units to 150; and (3) increases perimeter buffers and distances to the nearest existing residential uses. (T. 69-75; Pet. Exs. 11, 24). The overall density pursuant to the Revised Sunnyside PUD Concept Plan is 1.25 dwelling units per acre. (T. 71-72).

C. **Traffic Concerns Regarding Sunnyside Drive**

First, to the extent the City Commission's denial of the Sunnyside PUD was premised upon traffic concerns or the condition of Sunnyside Drive, the Petitioners maintain that such determination was unreasonable or unfairly burdens the use of the Parent Tract. The Petitioners' argument is well taken based upon the evidence and testimony presented during the evidentiary hearing.

As part of the Sunnyside PUD application, it is undisputed that the Petitioners submitted a traffic impact study which evaluated the impacts of the proposed development on the surrounding

roadway network, including Sunnyside Drive. (T. 58-60; Pet. Ex. 6C). The traffic impact study, which was based upon a development program of 219 single-family dwelling units, concluded that "the studied roads will have sufficient capacity to accommodate background growth and project traffic in the future condition." (Pet. Ex. 6C at 1, 12). During the PUD review process, the Petitioners also submitted updated 2021 traffic counts utilizing a revised development program of 159 single-family dwelling units. (T. 59-60; Pet. Ex. 5C at 19-20). The updated 2021 traffic data also showed no deficiencies on the roadway network, including Sunnyside Drive. (T. 60).

The Petitioners' traffic impact study was reviewed by the City as well as Lake County and the Lake-Sumter Metropolitan Planning Organization. (T. 117). Significantly, neither the City nor the other reviewing entities raised any issue with the Petitioners' traffic impact study. (Id.).

During the evidentiary hearing, the City's counsel asked the Petitioners' planning expert whether the Petitioners' traffic impact study analyzed the number of accidents on roadways, including Sunnyside Drive. (T. 102-03). According to the Petitioners' planning expert, traffic engineers are not required to analyze accidents in a traffic impact study. (T. 117). However, even if that were not the case, the City introduced no evidence or testimony during the special magistrate hearing to substantiate any alleged accident history on the surrounding roadway network that would somehow be relevant to this case. It is well settled that speculation and conjecture do not constitute competent substantial evidence pursuant to Florida law. See Dep't of Highway Safety & Motor Vehicles v. Trimble, 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002) ("Surmise, conjecture or speculation have been held not to be substantial evidence" and "findings must be based on something more than mere probabilities, guesses, whims, or caprices.").

Lastly, the Petitioners offered unrefuted evidence during the evidentiary hearing regarding the current road ratings of Sunnyside Drive. (T.61-67; Pet. Exs. 27, 27A). Such evidence

establishes that Sunnyside Drive is a county road and is designated as a "urban collector," not a "local road." (T. 62-63). Further, such evidence establishes that almost all segments of Sunnyside Drive have a sufficient pavement rating. (T. 63). The only segment of Sunnyside Drive that currently does not have a sufficient pavement rating is the segment that fronts the proposed Sunnyside PUD. (T. 64). It is undisputed, however, that the Petitioners would be required to repave this segment of Sunnyside Drive as a condition of the proposed PUD, thereby eliminating such pavement deficiency. (T. 64, 118). In fact, the City's Planning Director confirmed on cross-examination that the Petitioners would be required to repave this portion of Sunnyside Drive as part of the proposed PUD and, as such, Sunnyside Drive would be adequate to support the anticipated traffic from the proposed development. (T. 145).

In sum, the unrefuted testimony and evidence introduced at the evidentiary hearing, including from the City's Planning Director, establish that Sunnyside Drive has sufficient capacity to accommodate the anticipated traffic from the Sunnyside PUD and that all segments of Sunnyside Drive will have a sufficient pavement rating following the development of the Sunnyside PUD, as conditioned. Accordingly, to the extent the City Commission's denial of the Sunnyside PUD was based upon traffic concerns or the perceived condition of Sunnyside Drive, such denial is "unreasonable" or "unfairly burdens" the Petitioners' use of the Parent Tract pursuant to the Dispute Resolution Act.

D. **Compatibility With the Surrounding Area**

Next, to the extent the City Commission's denial of the Sunnyside PUD was premised upon "compatibility" concerns with the surrounding area, the Petitioners maintain that such determination was unreasonable or unfairly burdens the use of the Parent Tract. The Petitioners'

argument is well taken based upon the evidence and testimony presented during the evidentiary hearing.

The term "compatibility" is not defined in the City's Comprehensive Plan or the City's LDC. Rather, as attested to by the Petitioners' planning expert, such term is defined in Section 163.3164(9), Florida Statutes, as follows:

> "Compatibility" means a condition in which land uses or conditions can coexist in relative proximity to each other in a stable fashion over time such that no use or condition is unduly negatively impacted directly or indirectly by another use or condition.

(Pet. Ex. 10D; T. 81). By definition, "compatibility" does not require that a proposed development result in no negative impacts upon another use. Rather, a project can have some negative impact on another use and still be compatible.

With respect to compatibility, FLU Policy 1.6.5 of the City's Comprehensive Plan states:

> Compatibility. Compatibility with surrounding established neighborhoods shall be considered during the Comprehensive Plan amendment process. This compatibility will include consideration of surrounding housing types, neighborhood stability, transitional uses and scheduled infrastructure improvements, including those planned improvements stated in the city's 10-Year Water Supply Facilities Work Plan.

(Pet. Ex. 3 at I-46) (emphasis supplied).

As previously discussed, pursuant to the 2006 Plan Amendment, the City changed the future land use designation of the Parent Tract from Lake County "Urban Expansion" and Lake County "Suburban" to City "Estate Residential" and "Conservation." (Pet. Ex. 21 at 86-90). The

City's Estate Residential future land use designation allows "up to 4 units per gross acre." (Pet. Ex. 3 at I-34). Thus, pursuant to FLU 1.6.5, the City presumably determined that development of "up to 4 units per gross acre" on the Parent Tract is "compatible" with the surrounding area in adopting the 2006 Plan Amendment. (Pet. Ex. 3 at I-46).

Even assuming the City had not already determined that a density of "up to 4 units per gross acre" on the Parent Tract is compatible with the surrounding area, the unrefuted expert testimony establishes that the Sunnyside PUD is compatible with the surrounding area. In this regard, the Petitioners' planning expert testified that he had reviewed the Sunnyside PUD, which involved 159 units, and it was his opinion that the Sunnyside PUD was consistent with the City's Comprehensive Plan and the City's LDC. (T. 28). The Petitioners' planning expert also reiterated that the Sunnyside PUD and the proposed densities were consistent and compatible with existing development in the Sunnyside area.[3] (T. 68-69; Pet. Ex. 5C at 24-34).

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[3] On cross-examination, the City's counsel asked whether the existing, surrounding residential developments that the Petitioners' planning expert examined were located in the City or Lake County. (T. 93-94). The Petitioners' planning expert acknowledged that such developments were in Lake County. (T. 93-94). However, when asked, "[a]s a land use planner in evaluating compatibility, do you just ignore existing developments based on their jurisdictional boundaries?," the Petitioners' planning expert responded:

> No, I do not. They exist where they exist, and you can't ignore what jurisdiction they're in because they're existing in proximity to the project. You can't draw a line that says, okay, if these projects are in one jurisdiction, they exist; and if they exist on another jurisdiction, they don't' exist. You can't. They exist in – in fact, that's where they are. And, you know, their existence and the type of the development that exists, they're there. That's – that's a fact. They don't disappear. They exist, and the type of developments that exists are facts. . . ."

(T. 119).

It is also undisputed that the City's Planning Staff reviewed the Sunnyside PUD for compatibility and concluded that "[t]he proposed request for a PUD (Planned Unit Development) zoning is compatible with the current surrounding zoning districts" and "is consistent with the City's Growth Management Plan, Future Land Use Element, Goal I, Objective 1.6" – i.e., "Land Use Compatibility." (T. 47-49; Pet. Ex. 5A at 58; Pet. Ex. 3 at I-45). Moreover, on cross-examination during the evidentiary hearing, the City's Planning Director confirmed that the Sunnyside PUD with 159 units is "compatible" with the surrounding area.

In so doing, the City's Planning Director confirmed that in his opinion "[t]he parcel is suitable for the proposed use" and that "[t]he proposed use will not alter the character of the surrounding area." (T. 145-46). Further, when asked whether he had concluded that the proposal is compatible with the surrounding area, the City's Planning Director confirmed he had:

> Q. [I]s it correct to say that you had concluded that the proposal was compatible with the surrounding area?
>
> B. ***Yes, it is***.
>
> Q. And that would be at 159 units?
>
> A. Yes.

(T. 161) (emphasis supplied). The City's Planning Director further acknowledged on cross-examination, "As a professional planner, I viewed [the Sunnyside PUD] as a project that is consistent with the City of Leesburg comp plan and land development regulations" and reaffirmed that he had applied the City's "adopted criteria." (T. 162, 180).

Simply put, no evidence or testimony was introduced during the evidentiary hearing that would support a finding that the Sunnyside PUD would create a legitimate compatibility concern regarding any surrounding land uses. Further, as the Petitioners' planning expert detailed during his testimony, the Revised Sunnyside PUD Concept Plan increases perimeter buffers and distances to the nearest existing residential uses, thereby further enhancing compatibility with the surrounding area. (T. 70-77, 80; Pet. Ex. 24).

In this regard, the Petitioners' planning expert explained how the Revised Sunnyside PUD Concept Plan reconfigured or removed lots in order to have the same or fewer residential lots next to properties with existing residential homes than the approved 2006 PSP. (T. 78-79). For example, along the western side of the northern cul-de-sac, the Revised Sunnyside PUD Concept Plan has four (4) lots – the same number as the approved 2006 PSP. (T. 78). Along the northern boundary, the Revised Sunnyside PUD Concept Plan has four (4) lots, whereas the approved 2006 PSP had five (5) lots. (T. 79). Lastly, along the southern boundary, the Revised Sunnyside PUD Concept Plan has four (4) lots, whereas the approved 2006 PSP had six (6) lots. (Id.). Thus, from a strict compatibility standpoint, the Revised Sunnyside PUD Concept Plan is not only an improvement over the 2021 Sunnyside PUD submittal with 159 units – which the City's Planning Staff deemed compatible with the surrounding area – but it is an improvement over the 2006 PSP that the City approved.

In sum, the unrefuted testimony and evidence introduced at the evidentiary hearing, including from the City's Planning Director, establishes that the Sunnyside PUD is compatible with the surrounding area and uses. Accordingly, to the extent the City Commission's denial of the Sunnyside PUD was based upon compatibility concerns, such denial is "unreasonable" or "unfairly burdens" the Petitioners' use of the Parent Tract pursuant to the Dispute Resolution Act.

E. **The Sunnyside Task Force Study Report**

Lastly, to the extent the City Commission's denial of the Sunnyside PUD was premised upon the Sunnyside Task Force Study Report, the Petitioners maintain that such determination was unreasonable or unfairly burdens the use of the Parent Tract. The Petitioners' argument is well taken based upon the testimony and evidence introduced during the evidentiary hearing, as well as the City's prior land use and zoning approvals for the Parent Tract. Further, as discussed below, the Petitioners' argument is supported by well-established Florida law.

First and foremost, the testimony and historical evidence introduced during the evidentiary hearing establish that the City did not apply the Sunnyside Task Force Study Report to the Parent Tract in approving the 2005 PUD and the 2006 PSP. Indeed, the Petitioners' planning expert and the City's Planning Director both testified that the approved 2005 PUD did not comply with the Sunnyside Task Force Study Report. (T. 112-13, 137). Significantly, the City Commission approved the 2005 PUD in December 2005 more than a year and a half after the City Commission's adoption of Resolution No. 7158, which purported to "accept" the recommendations of the Sunnyside Task Force Study Report. (Pet. Exs. 22 and 23).

Likewise, as previously discussed, the City adopted a future land use map amendment in December 2006 – more than two and a half years after the City Commission's adoption of Resolution No. 7158 – changing the future land use classification of the Parent Tract to Estate Residential, which allows up to four (4) units per acre. (T. 39; Pet. Ex. 21 at 86-90). Notably, the 2006 Plan Amendment contains no language restricting the density on the Parent Tract below the maximum allowable density in the Estate Residential future land use category or otherwise subjecting the Parent Tract to the Sunnyside Study Task Force Report. (T. 152; Pet. Ex. 21 at 86-87).

Additionally, the historical evidence introduced during the evidentiary hearing reflects that the Sunnyside Study Task Force Report was never intended to restrict the density of the Parent Tract below the amount of density otherwise allowed in June 2004. For example, during the Planning Commission on the 2005 PUD, the City's former Director of Planning – Laura McElhanon – explained that "the density in place at the time the Sunnyside report was approved are still valid." (Pet. Ex. 21 at 33; T. 157-60). At the time of the Sunnyside Task Force Study Report, it is undisputed that the Parent Tract had a future land use designation of Lake County "Urban Expansion" on the northern half, which authorized four (4) dwelling units per acre, and Lake County "Suburban" on the southern half, which allowed up to three (3) dwelling units per acre if certain so-called "timeliness" requirements were met. (T. 42-43, 157-58; Pet. Ex. 21 at 33-34; Pet. Ex. 21A at 5). Thus, it is irrefutable that the "density in place at the time the Sunnyside report was approved" greatly exceeded the density level recommendations in the Sunnyside Task Force Study Report. Indeed, both the Petitioners' planning expert and the City's Planning Director agreed that the density in place on the Parent Tract when the Sunnyside Task Force Study Report was accepted would allow more than the 150 dwelling units proposed on the Revised Sunnyside PUD Concept Plan – which equates to only 1.25 dwelling units per acre. (T. 43, 72, 161).

Based upon the above-referenced testimony and historical evidence, the Special Magistrate finds that the density level recommendations in the Sunnyside Task Force Study Report were never intended to govern or limit the density of the Parent Tract. Consistent with this finding, it bears noting that the City's Planning Staff never recommended denial of the Sunnyside PUD based upon the Sunnyside Task Force Study Report during more than two (2) years and multiple reviews of the project. (T. 143, 147). Moreover, when asked by the City's counsel during the evidentiary

hearing if he believed the City's Planning Staff made a mistake in recommending approval of the Sunnyside PUD, the City's Planning Director replied, "No." (T. 168).

Second, even assuming the Sunnyside Task Force Study Report was intended to apply to development of the Parent Tract, it would be unlawful to apply them because the density level limitations recommended therein are not codified in the City's Comprehensive Plan or the City's LDC, or otherwise delineated on the City's Future Land Use Map. By statute, a local government's comprehensive plan is required to include a future land use element "designating proposed future general distribution, location, and extent of the uses of land for residential uses" and specifying the "general range of density or intensity of use . . . in each existing land use category." See § 163.3177(6)(a), Fla. Stat. (2022). Further, "[t]he proposed distribution, location, and extent of the various categories of land use shall be shown on a land use map or map series which shall be supplemented by goals, policies, and measurable objectives." See id. at § 163.3177(6)(a)1. Additionally, by statute, "each county and each municipality shall adopt or amend and enforce land development regulations that are consistent with and implement their adopted comprehensive plan." See § 163.3202(1), Fla. Stat. (2022).

In the instant case, it is undisputed that the City has not adopted or incorporated any of the density level recommendations from the Sunnyside Task Force Study Report into the City's Comprehensive Plan or the City's LDC. (T. 39-40, 115, 139, 177). Likewise, nothing on the City's Future Land Use Map indicates that property within the Sunnyside Study Area, including the Parent Tract, is subject to any density limitations other than those established for the assigned future land use category. (T. 24-25). The absence of such formal adoption begs the question of how property owners, like the Petitioners, would know or have notice that the density level

recommendations from the Sunnyside Task Force Study Report would or could apply to their property.

Rather than formally codifying the recommendations of the Sunnyside Task Force Study Report, the City purported to accept the recommendations by virtue of Resolution No. 7158. A "resolution," however, is "an expression of a governing body concerning matters of administration, an expression of a temporary character, or a provision for the disposition of a particular item of the administrative business of the governing body." See § 166.041(1)(b), Fla. Stat. (2022). An "ordinance," by contrast, is "an official legislative action of a governing body, which action is a regulation of a general and permanent nature and enforceable as a local law." See id. at § 166.041(1)(a).

In broad terms, "an ordinance differs from a resolution in that the latter is often nonbinding in nature." See Patrick John McGinley, Florida Municipal Law and Practice § 3.3 (West 2023 ed.). Moreover, "[a] resolution cannot be substituted for and have the force and effect of an ordinance, nor can a resolution supply initial authority which is required to be vested by ordinance." Wallace v. Leahy, 496 So. 2d 970, 971 (Fla. 3d DCA 1986). In this regard, it bears emphasizing that a comprehensive plan, comprehensive plan amendments, and land development regulations are required to be adopted by ordinance. See, e.g., § 163.3187(11)(a), Fla. Stat. (2022) ("The adoption of a comprehensive plan or plan amendment shall be by ordinance.").

Given the undisputed fact that the City has never formally codified the recommendations of the Sunnyside Task Force Study Report into the City's Comprehensive Plan or the City's LDC, the density level limitations set forth therein are not legally binding and do not apply to the Parent Tract. Rather, the Parent Tract is governed by the maximum allowable density in the Estate Residential future land use category assigned to the property – i.e., "up to four (4) units per acre."

(Pet. Ex. 3 at I-34). On this point, it deserves emphasis that the late City Attorney similarly opined during the City's review of the Sunnyside PUD that, "although the study was adopted in 2004, it is not considered binding on future City Commissions." (Pet. Ex. 5C at 23).

Third, even assuming the Sunnyside Task Force Study Report was applicable to the Parent Tract or could somehow be viewed as binding, the City Commission's reliance upon the Sunnyside Task Force Study Report as grounds to deny the Sunnyside PUD would be improper under Florida law. Accordingly, on this additional basis, the Special Magistrate concludes that the Sunnyside Task Force Study Report does not govern the use and development of the Parent Tract.

As discussed at the evidentiary hearing, Resolution No. 7158 reads, in pertinent part, that "all further development within the study area, over which the City of Leesburg has control, will proceed in accordance with the recommendations set forth in the Sunnyside Task Force Study Report, unless otherwise approved by the City Commission." (Pet. Ex. 22) (emphasis supplied). Both the Petitioners' planning expert and the City's Planning Director agreed that there are no objective criteria in Resolution No. 7158 for when the Sunnyside Task Force Study Report would or would not apply. (T. 127, 139-40). In fact, when asked on cross-examination "how would a private property owner know what the city commission is going to do?," the City's Planning Director candidly admitted, "They wouldn't." (T. 147). Rather, based upon his conversations with the late City Attorney, the City's Planning Director stated, "it's the city commission's decision to use it or not use it." (T. 176; see also T. 146).

As observed in City of Homestead v. Schild, 227 So. 2d 540, 543 (Fla. 3d DCA 1969), "the law of Florida is committed to the doctrine of the requirement that zoning ordinances . . . must be predicated upon legislative standards which can be applied to all cases, rather than to the theory of granting an administrative board or even a legislative body the power to arbitrarily decide each

case entirely within the discretion of the members of the administrative board of legislative body." See id. at 543; see also Delta Truck Brokers, Inc. v. King, 142 So. 2d 273, 275 (Fla. 1962) (noting that a zoning code, like other legislation, "cannot delegate to an administrative agency, even one clothed with certain quasi-judicial powers, the unbridled discretion to adjudicate private rights").

Rather, for regulations which provide decisional authority to pass constitutional muster, they must have objective criteria that the governmental entity must follow when making a decision. See N. Bay Village v. Blackwell, 88 So. 2d 524, 526 (Fla. 1956) ("An ordinance whereby the city council delegates to itself the arbitrary and unfettered authority to decide where and how a particular structure shall be built or where located without at the same time setting up reasonable standards which would be applicable alike to all property owners similarly conditioned, cannot be permitted to stand as a valid municipal enactment."); City of Miami v. Save Brickell Ave., Inc., 426 So.2d 1100, 1104 (Fla. 3d DCA 1983) ("[I]f definite standards are not included in the ordinance, it must be deemed unconstitutional as an invalid delegation of legislative power to an administrative board."). Consistent with the above-cited authority, Florida courts have steadfastly held that "[a]ny standards, criteria or requirements which are subject to whimsical or capricious application or unbridled discretion will not meet the test of constitutionality." See ABC Liquors, Inc. v. City of Ocala, 366 So. 2d 146, 149 (Fla. 1st DCA 1979).

Here, it is indisputable that Resolution No. 7158 contains no objective criteria or standards to govern when the Sunnyside Task Force Study Report would or would not apply to a particular parcel of land. Rather, the decision of whether the Sunnyside Task Force Study Report will or will not apply to a particular parcel of land is left entirely to the unfettered discretion of the City Commission. Pursuant to Florida law, however, "[t]he granting or withholding of a permit . . . should not depend on the whim or caprice of the permitting authority." See Effie, Inc. v. City of

Ocala, 438 So. 2d 506, 508 (Fla. 5th DCA 1983); see also Kash N' Karry Food Stores, Inc. v. City of Temple Terrace, 19 Fla. L. Weekly Supp. 425, 428 (Fla. 13th Cir. Ct. 2012) ("A case by case decision based on the various council members' view of what constitutes a best use" violates the essential requirements of law and "subjects the application to a whimsical or capricious review which 'will not meet the test of constitutionality.'").

To the extent Resolution No. 7158 grants the City Commission unbridled discretion to decide on a case-by-case without any objective criteria whether or not to apply the recommendations of the Sunnyside Task Force Study Report to a particular parcel, the Resolution is contrary to established law and ineffectual. See Effie, Inc., 438 So. 2d at 510 ("Clearly, the opportunity for the exercise of unbridled discretion is present here, and whether so exercised or not, renders the ordinance unconstitutional."). Simply put, an applicant "has a right to know what the requirements are that he must comply with in order to implement the permitted use," otherwise "councilmen can act upon whim, caprice or in response to pressures which do not permit of ascertainment or correction." See id. at 509.

Finally, the Special Magistrate also considers the Petitioners' reasonable expectation when they acquired the Parent Tract to be able to develop the property in accordance with its assigned future land use designation which allows "up to four (4) units per acre." (Pet. Ex. 3 at I-34). As previously discussed, the unrefuted evidence introduced during the evidentiary hearing establishes that the City did not apply the Sunnyside Task Force Study Report to the Parent Tract when it approved the 2005 PUD or the 2006 PSP. Additionally, the record is devoid of any credible evidence that the 2005 PUD and the 2006 PSP were ever lawfully rescinded or that the City ever provided notice to the Petitioners' predecessor that such development approvals were deemed "expired." Moreover, PUDs are not static approvals and are frequently amended based upon

changes in market preferences, new ownership, or increases in the costs of construction. (T. 82-83). Given the significant increase in the costs of construction in recent years and the fact that the developer of the Sunnyside PUD would be required to extend central water and sewer lines to service the Parent Tract as a condition of the PUD, it is not surprising that the Petitioners would seek to modify the prior development approvals to increase the number of units to help offset this cost and make the project more financially viable.[4]

In sum, for the reasons detailed above, the Sunnyside Task Force Study Report does not govern the development of the Parent Tract or otherwise reduce the maximum allowable density on such property. Accordingly, to the extent the City Commission's denial of the Sunnyside PUD was premised upon the Sunnyside Task Force Study Report, such denial is "unreasonable" or "unfairly burdens" the Petitioners' use of the Parent Tract pursuant to the Dispute Resolution Act.

CONCLUSION & RECOMMENDATION

A. Standard For Recommendation

A special magistrate is charged by Section 70.51(19)(b), Florida Statutes (2023) with making a recommendation to the Petitioners and the City. As in the matters to consider, a special magistrate is given broad authority to craft that recommendation:

> If the special magistrate finds that the development order or enforcement action, or the development order or enforcement action in combination with the actions or regulations of other governmental entities, is unreasonable or unfairly burdens use of the owner's property, the special magistrate, with the owner's consent to proceed, may recommend one or more alternatives that protect the

[4] Even the Sunnyside Task Force Study Report acknowledges that, "once density levels drop to less than three (3) units per acre, the cost of extending water and wastewater lines becomes a financial burden." (Pet. Ex. 21A at 7).

public interest served by the development order or enforcement action and regulations at issue but allow for reduced restraints on the use of the owner's real property, including, but not limited to:

1. An adjustment of land development or permit standards or other provisions controlling the development or use of land.

2. Increases or modifications in the density, intensity, or use of areas of development.

3. The transfer of development rights.

4. Land swaps or exchanges.

5. Mitigation, including payments in lieu of onsite mitigation.

6. Location on the least sensitive portion of the property.

7. Conditioning the amount of development or use permitted.

8. A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development.

9. Issuance of the development order, a variance, special exception, or other extraordinary relief, including withdrawal of the enforcement action.

10. Purchase of the real property, or an interest therein, by an appropriate governmental entity.

§ 70.51(19)(b), Fla. Stat. (2023) (emphasis supplied).

B. **Recommendation**

1. Based on the totality of the facts and law applicable to this special magistrate proceeding as discussed in this SM Recommendation, the Special Magistrate respectfully recommends that:

A. The City approve the Sunnyside PUD consistent with the Revised Sunnyside PUD Concept Plan that the Petitioners introduced during the evidentiary hearing and subject to all conditions in the prior Staff Report for the Sunnyside PUD. The Revised Sunnyside PUD Concept Plan, which reduces the number of lots to 150, removes the Additional Tract, increases the size of certain open space areas or buffers adjacent to the nearest properties with existing residential

homes, and increases the distances of homes within the Sunnyside PUD from the nearest existing residential homes in the area, is compatible with the surrounding area land uses and complies with the City's Comprehensive Plan and the City's LDC.

B. The City implement, as has Lake County, the portions of the Sunnyside Task Force Study Report that it wants to have applied to future developments by adopting comprehensive plan amendments and land development regulations, as appropriate.

I want to thank the attorneys in this matter as well as City staff for their presentations and cooperation throughout this special magistrate proceeding and the mediation that preceded it. Both sides presented their case in a professional and ethical manner and given the totality of this case, especially the undisputed facts, both sides presented the best possible case for their respective sides.

This Special Magistrate Recommendation was entered and provided to the attorneys for Petitioners and the City by electronic mail on this 15th day of January 2024.

Carlos Alvarez

CARLOS ALVAREZ, ESQUIRE
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