

# Third District Court of Appeal

State of Florida, July Term, A.D. 2007

Opinion filed August 08, 2007.

Not final until disposition of timely filed motion for rehearing.

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No. 3D06-1799

Lower Tribunal No. 04-2754GM

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**Herbert Payne; Ann Stetser; The Durham Park Neighborhood Association, a Florida not-for-profit corporation; and The Miami River Marine Group, Inc., a Florida not-for-profit corporation,**  
Appellants,

vs.

**City of Miami, a Florida municipal corporation; and Balbino Investments, LLC,**  
Appellees.

An Appeal from the Department of Community Affairs.

Andrew W.J. Dickman (Naples), for appellants.

Greenberg Traurig and David C. Ashburn (Tallahassee); Greenberg Traurig and Elliot H. Scherker and Lucia Dougherty and Paul R. Lipton and Pamela A. DeBooth, for appellee Balbino Investments, LLC; Jorge L. Fernandez, City Attorney, and Rafael Suarez-Rivas, Assistant City Attorney, for appellee City of Miami.

Before GERSTEN, C.J., and CORTIÑAS and ROTHENBERG, JJ.

ROTHENBERG, Judge.

Balbino Investments, LLC (“Balbino”) owns a parcel of land located on the north side of the Miami River at approximately N.W. 18th Avenue and which was being used as a commercial boatyard and marina. Balbino applied for and obtained from the City of Miami (“City”) a small scale amendment to the Future Land Use Map (“FLUM Amendment”) of the Miami Comprehensive Neighborhood Plan (“Comprehensive Plan”), changing the land use designation of the property from Industrial and General Commercial to Restricted Commercial. Balbino also applied for and obtained a zoning change from SD-4.2 Waterfront Industrial to C-1 Restricted Commercial and a Major Use Special Permit (“MUSP”), thereby allowing Balbino to construct a mixed-use project on the property with a maximum density of 150 units per acre, comprising of three high-rise buildings consisting of 1,073 condominium units with a median price of \$200,000 to \$225,000 per unit.

The following parties filed a petition with the Division of Administrative Hearing (“DOAH”), challenging the ordinance that approved the FLUM Amendment: Herbert Payne (“Payne”), a boat captain who owns and operates one of the largest tugboat companies on the Miami River and who relies exclusively on commercial marine business on the Miami River for his livelihood; Ann Stetser, a

local resident; the Durham Park Neighborhood Association, Inc. (“Durham Park”), a non-profit neighborhood association comprised of approximately ninety homeowners and businesses located in the Durham Park area, which is across the Miami River and to the west of Balbino’s property; and The Miami River Marine Group, Inc. (“Marine Group”), a trade association representing marine and industrial businesses along the Miami River (collectively referred to as “the appellants”). This petition was dismissed as untimely filed. On appeal, this court reversed and remanded, finding that the petition was timely filed. Payne v. City of Miami, 913 So. 2d 1260 (Fla. 3d DCA 2005)(“Payne I”).

Meanwhile, the circuit court dismissed Marine Group from the petition, finding that it lacked standing. That decision, which will be addressed more fully in this opinion, was also reversed by this court in Payne v. City of Miami, 927 So. 2d 904 (Fla. 3d DCA 2005)(“Payne II”).

On remand, the appellants sought leave to amend the petition to include arguments regarding additional provisions contained in the Comprehensive Plan. Balbino objected, arguing that the provisions the appellants sought to include pertained to **land development** regulations, and therefore, did not apply to the challenged FLUM Amendment which pertains to **land use**. The administrative law judge (“ALJ”) agreed with Balbino, and he denied the appellants’ motion for leave to amend the petition with allegations arising from those provisions.

After a hearing conducted by the ALJ on April 4 and 5, 2006, the ALJ issued a Recommended Order, which was subsequently adopted by the Florida Department of Community Affairs (“the Department”), which is the subject of the appellants’ appeal.

Because the appellants are challenging agency action, our review is governed by section 120.68, Florida Statutes (2006), and Coastal Development of North Florida, Inc. v. City of Jacksonville Beach, 788 So. 2d 204 (Fla. 2001). The relevant provisions of section 120.68 provide:

(7) The court shall remand a case to the agency for further proceedings consistent with the court’s decision or set aside agency action, as appropriate, when it finds that:

(a) There has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts;

**(b) The agency’s action depends on any finding of fact that is not supported by competent, substantial evidence . . . ;**

(c) The fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure;

**(d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action; or**

(e) The agency’s exercise of discretion was:

1. Outside the range of discretion delegated to the agency by law;

2. Inconsistent with agency rule;

**3. Inconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency; or**

4. Otherwise in violation of a constitutional or statutory provision[.]

(Emphasis added).

Amendments to a local government's comprehensive plan are legislative in nature and, therefore, are subject to the fairly-debatable standard of review. Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997). Thus, where reasonable persons could differ as to the propriety of the planning action, it should be affirmed. Id.; see also Coastal Dev., 788 So. 2d at 206 (applying the fairly-debatable standard of review to small scale development amendments). However, because the future land use map of a comprehensive plan represents a local government's fundamental policy decisions, any proposed change to that established policy is a policy decision that requires that those policies be reexamined. Coastal Dev., 788 So. 2d at 209.

It seems to us that all comprehensive plan amendment requests necessarily involve the formulation of policy, rather than its mere application. *Regardless of the scale of the proposed development*, a comprehensive plan amendment request will require that the governmental entity determine whether it is socially desirable to reformulate the policies previously formulated for the orderly future growth of the community. This will, in turn, require that it consider the likely impact that the proposed amendment would have on traffic, utilities, other services, and future capital expenditures, among other things.

Id. at 209 (quoting with approval Jacksonville Beach v. Coastal Dev. of N. Fla., Inc., 730 So. 2d 792, 794 (Fla. 1st DCA 1999)(emphasis added)).

In applying these standards, we conclude that the ALJ erred in refusing to apply this court's findings in Payne II at the time of hearing, or in the alternative,

erred by not continuing the hearing, as requested by the appellants, until the opinion did become final. Instead, the ALJ chose to rely on the Department's definition of the term "Port of Miami River" in Monkus v. City of Miami, DOAH Case No. 04-1080 GM (Department of Community Affairs, Final Order, Oct. 28, 2004)("Monkus"), a definition rejected by this court in Payne II. Although the ALJ did recognize this court's holding in Payne II in his Recommended Order, his untimely adoption did not cure the error, as the ALJ precluded the appellants from introducing relevant evidence and from making critical arguments based upon his incorrect conclusion that the Port of Miami River Subelement of the Comprehensive Plan was not relevant. Additionally, although the ALJ ultimately recognized this court's holding in Payne II, he still declined to apply the goals, policies, and objectives of the Port of Miami River Subelement of the Comprehensive Plan. This was error.

The ALJ additionally erred in failing to examine the FLUM Amendment's impact upon, and consistency with, other fundamental policy decisions contained in the Comprehensive Plan and the Miami River Master Plan, and he made findings that are unsupported by competent, substantial evidence. We conclude that had the correct law been applied to facts which are supported by competent substantial evidence, it would compel a finding that the Balbino FLUM Amendment is inconsistent with both the Comprehensive Plan and the Miami

## STATUTORY REQUIREMENTS

Section 163.3161, Florida Statutes (2004), which is known as the Local Government Comprehensive Planning and Land Development Regulation Act, was enacted to strengthen local governments' role in the establishment and implementation of comprehensive planning to control future development. Section 163.3161 provides, in part:

(5) It is the intent of this act that adopted comprehensive plans shall have the legal status set out in this act and that **no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with this act.**

....

(7) The provisions of this act in their interpretation and application are declared to be the minimum requirements necessary to accomplish the stated intent, purposes, and objectives of this act; to protect human, environmental, social, and economic resources; and **to maintain, through orderly growth and development, the character and stability of present and future land use and development in this state.**

§163.3161(5), (7), Fla. Stat. (2004)(emphasis added). Section 163.3177(6), Florida Statutes (2004), provides that comprehensive plans shall include certain elements, including:

(a) A future land use plan element designating proposed future general distribution, location, and extent of the uses of land for residential uses, commercial uses, industry, agriculture, recreation,

conservation, education, public buildings and grounds, other public facilities, and other categories of the public and private uses of land . .

..

§ 163.3177(6)(a), Fla. Stat. (2004).

Amendments to comprehensive plans may not be made more than two times during any calendar year except: (a) in the case of an emergency, (b) when the amendment is directly related to a proposed development of regional impact, or (c) if the amendment is for a small scale development. § 163.3187(1)(a)-(c), Fla. Stat. (2004). The Balbino FLUM Amendment was sought and granted as a small scale development pursuant to section 163.3187(1)(c).

Section 163.3187(1)(c), Florida Statutes (2004), provides an exception to the time limitation for small scale amendments to comprehensive plans if:

1. The proposed amendment involves a use of 10 acres or fewer and:

....

f. If the proposed amendment involves a residential land use, the residential land use has a density of 10 units or less per acre, except that this limitation does not apply to small scale amendments described in sub-sub-subparagraph a.(1) that are designated in the local comprehensive plan for urban infill, urban redevelopment, or downtown revitalization as defined in s. 163.3164, urban infill and redevelopment areas designated under s. 163.2517, transportation concurrency exception areas approved pursuant to s. 163.3180(5), or regional activity centers and urban central business districts approved pursuant to s. 380.06(2)(e).

§ 163.3187(1)(c)(1)(f), Fla. Stat. (2004).

Thus, before a small scale FLUM Amendment may be approved without complying with the requirements normally imposed, the applicant must demonstrate that the amendment involves a use of ten acres or less **and** the proposed amendment involves a residential use with a density of ten units or less per acre or that the property is designated in the Comprehensive Plan as urban infill, urban redevelopment, or downtown revitalization.

We note that the ALJ and the City incorrectly applied the 2005 version of this statute and that there was no evidence presented demonstrating that this small scale FLUM Amendment satisfied these requirements or the requirements of the 2004 version of section 163.3187, Florida Statutes.<sup>1</sup> The density exception does not apply as the density for the proposed development is over ten units per acre, and the current Industrial classification, which pertains to nearly all of the property contained in this small scale FLUM Amendment, permits **no** residential uses. The only exception the Balbino FLUM Amendment could conceivably be relying on is that the subject property is located in an urban infill zone. However, the City, after paying for and participating in the creation of the Miami River Corridor Urban Infill Plan (“Infill Plan”), failed to adopt the Infill Plan, and takes the position that the **entire City is an urban infill site**. We find this argument hard to

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<sup>1</sup> The 2005 version of this statute provides a further exception where the future land use category allows a maximum residential density allowable under the existing land use category, an exception which does not pertain to the Balbino FLUM Amendment.

accept. We additionally note that the Infill Plan targeted certain areas for urban infill development and this particular site is not a designated urban infill target area under the Infill Plan.

The only challenge, however, made by the appellants regarding whether the FLUM Amendment complies with section 163.3187 was that the subject property is larger than ten acres. As the ALJ concluded that the FLUM Amendment involves less than ten acres, and the appellants have not raised the issue on appeal, nor have they argued that the Balbino FLUM Amendment does not fall within any of the exceptions contained in the statute, we make no finding regarding whether the requirements of section 163.3187 have been satisfied and do not base our analysis or reversal on whether the subject property fulfills the statutory requirements of a small scale amendment.

In addition to the statutes regulating land development, requiring the enactment of comprehensive planning to control future development and providing a regulatory scheme for amendments to comprehensive plans, is the City's Zoning Code. Article 6 of the City of Miami Zoning Code (2004) ("City's Zoning Code") provides for the creation of SD Special Districts to **protect** certain areas or districts within the City. Article 6, Section 600, provides, in pertinent part, as follows:

**Section 600. Intent.**

It is the intent of these regulations to permit creation of SD Special Districts:

- (a) In general areas **officially designated as having special and substantial public interest in protection of existing or proposed character**, or of principal views of, from, or through the areas;

....

It is further intended that such districts and the regulations adopted for them shall be in accord with, and promote the policies set out in, the Miami Comprehensive Neighborhood Plan and other officially adopted plans in accordance therewith.

City of Miami Zoning Code, Art. 6, § 600 (emphasis added). “The regulations shall be designed to promote the special purposes of the district, as set out in the statement of intent.” Id. at § 600.4.3. Article 6, section 604 of the City’s Zoning Code specifically provides for the creation of a waterfront industrial district to regulate the waterfront property along the Miami River, and states, in pertinent part, as follows:

**Sec. 604. SD-4 Waterfront Industrial District.**

**Sec. 604.1. Intent.**

**This district designation is intended for application in areas appropriately located for marine activities, including industrial operations and major movements of passengers and commodities. In view of the importance of such activities to local economy and the limited area suitable and available for such activities, it is intended to limit principal and accessory uses to those reasonably requiring location within such districts, and not to permit residential, general commercial, service, office or manufacturing uses not primarily related to waterfront activities except for office uses in existing office structures. For the purposes of**

**section 3(mm) of the City of Miami Charter, this district shall be construed as an industrial district.**

**Sec. 604.4. Principal uses and structures.**

*604.4.1. Permitted principal uses and structures.*

1. Piers, wharves, docks, and railroad service to related loading, storage or distribution facilities.
2. Freight terminals; facilities for warehousing and storage, packing, packaging and crating of materials from or for marine shipment; assembly and distribution facilities for marine shipments, except as provided under permitted uses and structures in section 604.4.2 below.
3. Passenger terminals, including related facilities for handling baggage or freight ground transportation, parking, and establishments to serve needs of passengers and visitors including retail shops, eating and drinking establishments, ticket agencies, currency exchanges and the like.
4. Facilities for construction, maintenance, service, repair, supply or storage of vessels, including shipyards, dry docks, marine railways, shops for marine woodworking, electrical, communication and instrument installation and repair, welding, sail making, engine and motor repair and maintenance; ship chandlers; fuel supply establishments. Manufacture, maintenance, service, repair and/or sales of supply of parts, accessories and equipment for marine needs.
5. Bases for marine dredging, salvage, towing; marine construction offices and yards, piloting headquarters.
6. Sales, charter or rental of vessels, marine supplies and equipment, marine sporting goods and supplies.
7. Establishments for collection, processing and/or

distribution or sales of marine food products and byproducts, including eating and drinking establishments related to such operations.

8. Hiring halls for seamen and dock workers.

9. Telecommunication transmission and relay stations; radar installation.

10. Structures and uses other than as listed above for performance of governmental functions (including private facilities supplementing or substituting for governmental functions such as fire protection or provision of security), or relating to operation of public utilities.

11. Commercial marinas, including permanent occupancy of private pleasure craft as living quarters and for temporary occupancy for transients (maximum stay: thirty (30) days) as shall be required for work or security purposes, or for repair work within the district.

12. Cellular communications site provided that where a transmission tower is used the transmission tower shall be by Special Exception only. The transmission tower and anchoring devices, if directly-abutting a residential district, must: (1) be located in the interior side or rear yard of the property; (2) meet minimum setback requirements; (3) be securely anchored, installed and maintained in accordance with all applicable codes; (4) not exceed a maximum height of one hundred and fifty (150) feet; and (5) be separated from adjacent properties by a landscape buffer.

Despite section 163.3161(5), which prohibits development unless it is in conformity with the City's Comprehensive Plan; section 163.3161(7), which specifies that the purpose of the Act is to protect certain resources and to maintain the character and stability of development in this state through orderly growth and

development; section 163.3187, which limits amendments to the Comprehensive Plan; and Article 6 of the City’s Zoning Code, **which designates key areas on the Miami River as a protected district** due to its importance to the City’s economy, **a designation that specifically prohibits residential use or other uses not primarily related to waterfront activities**, the City granted Balbino a small scale FLUM Amendment for its property located within this specially protected district, to permit the construction of residential units that are **not** primarily related to waterfront activities. As will be addressed in depth herein, Balbino’s FLUM Amendment is contrary to these provisions and is inconsistent with the Miami Comprehensive Neighborhood Plan and the Miami River Master Plan.

**THE MIAMI COMPREHENSIVE NEIGHBORHOOD PLAN**  
 (“Comprehensive Plan”)

The ALJ found that the FLUM Amendment was consistent with the goals, objectives, and policies of the Comprehensive Plan. The ALJ’s evaluation of the evidence is, however, flawed because he failed to consider critical sections found in the “Port of Miami River Subelement,” and portions of the “Coastal Management” and the “Future Land Use” sections of the Comprehensive Plan in reaching this conclusion.

**The Port of Miami River Subelement**

The Comprehensive Plan was adopted by the City Commission in 1989 and

amended through August of 2004. Within the Comprehensive Plan is a section devoted to “Ports, Aviation and Related Facilities,” specifying the City’s goals, objectives, and policies regarding development within these critical areas. Within this section there is a subelement titled the “Port of Miami River.” The appellants claim that the Balbino FLUM Amendment is inconsistent with this subelement. Although the appellants claim that the Balbino FLUM Amendment is inconsistent with the Port of Miami River Subelement of the Comprehensive Plan, the ALJ precluded the appellants from introducing evidence regarding this subelement because he incorrectly concluded that it was not relevant. The ALJ based his conclusion, in part, on the Monkus definition of the Port of Miami River, despite our contrary conclusion in Payne II. At the time of the hearing, the ALJ’s justification for failing to apply this court’s findings in Payne II was that Payne II was still under consideration for rehearing and rehearing en banc. The appellants’ motion for a continuance pending the issuance of a mandate by this court in Payne II was denied. The ALJ’s failure to permit the appellants to introduce evidence or to present argument that the Balbino FLUM Amendment is inconsistent with the Comprehensive Plan, was error.

Balbino and the City claim that the Port of Miami River Subelement found in the Comprehensive Plan only relates to the fourteen commercial shipping companies that were located along the Miami River in 1989. They premise their

arguments on a footnote in the Port of Miami River Subelement of the Comprehensive Plan, which states:

The “Port of Miami River” is simply a legal name used to identify some 14 independent, privately-owned small shipping companies located along the Miami River, and is not a “Port Facility” within the usual meaning of the term. The identification of these shipping concerns as the “Port of Miami River” was made in 1986 for the sole purpose of satisfying a U.S. Coast Guard regulation governing bilge pump outs.

Based upon this footnote, they argue that the policies and objectives regarding the Port of Miami River in the Comprehensive Plan only apply to those fourteen companies. Not only is this argument illogical, it was rejected by this court in

Payne II:

**We find that the “Port of Miami River” subsection is not limited to 14 unidentified companies.** Rather, the footnote explains that the “Port of Miami River” is not a port in the traditional sense of the word. Accordingly, appellants did not have to allege that they were one of the 14 shipping companies referenced in the footnote.

Payne, 927 So. 2d at 908 (footnote omitted)(emphasis added).

Some of the objectives and policies found in the “Port of Miami River” Subelement of the Comprehensive Plan, which the ALJ failed to consider when he found that the FLUM Amendment was consistent with the Comprehensive Plan, are:

**Objective PA-3.1:** The City of Miami, through its Land development regulations, shall help protect the Port of Miami River from encroachment by non water-dependent or water-related land uses, and shall regulate its expansion and redevelopment in coordination with

the City's applicable coastal management and conservation plans and policies.

**Policy PA-3.1.1:** The City shall use its land development regulations to encourage the establishment and maintenance of water-dependent and water-related uses along the banks of the Miami River, and to discourage encroachment by incompatible uses.

**Policy PA-3.1.2:** The City shall, through its land development regulations, encourage the development and expansion of the Port of Miami River consistent with the coastal management and conservation elements of the City's Comprehensive Plan.

**Policy PA-3.1.3:** The City shall, through its land development regulations, encourage development of compatible land uses in the vicinity of the Port of Miami River so as to mitigate potential adverse impacts arising from the Port of Miami River upon adjacent natural resources and land uses.

**Policy PA-3.3.1:** The City of Miami, through its Intergovernmental Coordination Policies, shall support the functions of the Port of Miami River consistent with future goals and objectives of the Comprehensive Plan, particularly with respect to the unique characteristics of the Port of Miami River's location and its economic position and functioning within the local maritime industry, and the necessity for coordination of these characteristics and needs with maritime industry that complements, and often competes with, the Port of Miami River.

The City and Balbino's argument, that these objectives and policies do not apply to the Balbino property because it is not located on one of the original shipping company sites, is illogical. It is undisputed that many of the fourteen shipping companies that were located at various sites along the Miami River in 1986 have moved, changed hands, and no longer exist, and that instead of fourteen shipping companies along the Miami River, there are now at least twenty-eight.

Since the Comprehensive Plan's enactment in 1989, the City adopted The Miami River Master Plan, which will be addressed more fully herein, and the City has amended and readopted the Comprehensive Plan. It is also undisputed that the marine industry along the Miami River has grown substantially and has become an important economic asset to the City. The Miami River generates over \$800 million in input, \$427 million in income, \$45 million in tax revenue per year, and provides employment to 7,500 people. The shipping industry along the Miami River is not only growing, further expansion is all but certain when the U.S. Army Corps of Engineers completes its dredging of the Miami River. It is, therefore, illogical to conclude that the City meant only to protect the original fourteen shipping companies along the Miami River when it drafted, enacted, amended and readopted the Comprehensive Plan. Thus, we reaffirm our position in Payne II, that the Port of Miami River referred to in the Comprehensive Plan, and as amended and adopted in 2004, is **not** limited to the fourteen shipping companies that existed in 1989.

Our conclusion is supported by the findings contained in the Miami River Master Plan, prepared by the City of Miami Department of Planning, Building and Zoning, and adopted by the City on January 23, 1992, by Resolution #92-61. In this document, the City recognized that, although the Miami River is a navigable waterway used extensively for commercial shipping, it is not officially regulated as

a port by state or local government; these commercial shipping operations are 100% owned and operated by private enterprise and, therefore, do not enjoy the structure, authority, and advantages normally associated with ports; that the name Port of Miami River was simply coined in 1986 to satisfy a U.S. Coast Guard regulation governing bilge pumpouts; and that there are currently between twenty-five and thirty independent shipping companies operating on the Miami River as opposed to the fourteen companies operating in 1989. Miami River Master Plan, River Management, Port of Miami River, 2.12 (Jan. 1992). Indeed, based upon this rather unusual structure, or lack thereof, the Miami River Master Plan stresses the need for a formal organization to manage the use of these facilities, providing, in part, as follows:

## RECOMMENDATIONS

### **Policy:**

**2.4.9** Create an official “port” organization with responsibility to assist with enforcement of rules and regulations applicable to commercial shipping activity.

(a) Support the private sector efforts to fulfill the role of a port through a cooperative organization.

(b) If the private port cooperative fails to effectively manage shipping activity, establish a public port agency with legal authority to enforce regulations.

Id. at 2.13.

Additionally, the Infill Plan contains a summary specifically addressing the

Port of Miami River Subelement. It reads as follows:

In 1988 The Port of Miami River consisted of approximately 14 independent shipping terminals, along the Miami River as shown in Figure IV-16, that were joined together in 1986 in order to comply with U.S. Coast Guard regulations regarding pumpout of bilge water.

The Infill Plan lists the fourteen original shipping terminals; discusses the services provided and the tonnage of cargo shipped; notes the estimated \$1.7 billion value; and then addresses the Port of Miami River Subelement as it existed in 1995:

As shown in Figure IV-19, in 1995 the Port of Miami River consists of about 28 independent shipping terminals located along navigable 5.5 miles of the Miami River that stretch from the salinity dam to the Biscayne Bay.

The Infill Plan names the twenty-eight shipping terminals that existed in 1995 and which were considered the Port of Miami River at that time. While the Infill Plan does not provide a more current list of the Port of Miami River entities, its drafters make it clear that the term clearly includes the shipping terminals along the river wherever they are located and regardless of the name or ownership.

Jack Luft, who testified for the appellants and who was accepted by the ALJ as an expert in the field of comprehensive land planning, was a land planner with the City for twenty-eight years; participated in the rewrite of the Comprehensive Plan in 1978; was the senior project manager for several components of the Comprehensive Plan in the 1980's; wrote master plans for various cities and areas, including Virginia Key, Dinner Key, Coconut Grove, downtown, Watson Island,

Bicentennial Park, and for a number of neighborhood revitalization parks; planned the Design District in the 1990's; was a consultant for Sunny Isles Beach's Comprehensive Master Plan in 2000; and is considered an expert for last year's Comprehensive Plan. Additionally, Mr. Luft served as the Director for the Department of Development for the City and was involved in revitalization strategies for Little Havana and Little River, where he analyzed census information, income data, and housing costs and conditions to determine how to approach the revitalization of these communities.

Mr. Luft testified that the Port of Miami River is not specifically defined in the Comprehensive Plan, but rather, it is only "vaguely referred to as a collection of marine industries and nonspecific locations of an unspecified number." It is Mr. Luft's expert opinion that the Port of Miami River comprises the marine industrial uses and properties along the Miami River, which include the shipping terminals, shipping operations, and an array of services including freight forwarders, port construction companies, repair facilities, equipment suppliers, and other entities that operate and service the vessels on the Miami River.

Dr. Francis Bohnsack, the Executive Director of the Miami River Marine Group and who serves as the Miami River Port Director for the United States Coast Guard as a liaison for the marine industry on the Miami River with local, state, and federal agencies, agrees with Mr. Luft's definition of the Port of Miami

River. Dr. Bohnsack explained that the Miami River Marine Group was established because of the Port of Miami River's unconventional structure. While conventional ports have an operational infrastructure owned by the government, the Port of Miami River is comprised of privately owned companies that compete with each other. The Miami River Marine Group was established as an independent entity to serve its interests and the interests of the marine industry. She further explained that the Port of Miami River is a "riverine port" with many terminal addresses running along the entire length of the Miami River in designated marine industrial sites. It is, therefore, the position of both Mr. Lutz and Dr. Bohnsack that the Port of Miami River includes the port facilities that are water-dependent, zoned SD-4, and regulated by the Coast Guard, customs, and the various federal, state and local agencies.

The evidence supports Mr. Luft's and Dr. Bohnsack's definition of the Port of Miami River. We, therefore, conclude that the Port of Miami River encompasses the water-dependent marine activity on the river, which includes the shipping companies and terminals and the associated supporting marine industries zoned SD-4 on the Miami River.

This conclusion, however, is not dispositive. Whether we view the Port of Miami River as the ever-changing shipping terminals along the river or as the SD-4 water-dependent and water-related marine industries on the river, the ALJ erred

in refusing to permit the appellants to introduce evidence or to argue that this FLUM Amendment is inconsistent with the objectives and policies of the Port of Miami River Subelement. Additionally, while the ALJ ultimately recognized this court's holding in Payne II, in his Recommended Order, he failed to consider the objectives and policies of the Port of Miami River Subelement previously listed in this opinion.

This error is material, as Balbino's proposed land use is clearly inconsistent with the Port of Miami River Subelement of the Comprehensive Plan. Objective PA-3.1 requires the City to "**protect the Port of Miami River from encroachment by nonwater-dependent or water-related land uses**" (emphasis added). This Subelement also provides clear policy which requires the City through its land development regulations to encourage the maintenance of water-dependent and water-related uses along the banks of the Miami River and to encourage expansion of the Port of Miami River. Contrary to these objectives and policies, the City approved Balbino's small scale FLUM Amendment to the Comprehensive Plan, changing the land use designation which is mostly Industrial to Restricted Commercial; and also permitted this parcel of land, located directly on the Miami River, to be rezoned from SD4-2 Waterfront Industrial to Restricted Commercial, thereby allowing the construction of a mixed-use project, which is neither water-dependent nor water-related and will limit future expansion of the

Port of Miami River.

Balbino and the City additionally argue that the Port of Miami River Subelement applies to land development regulations (zoning), not to land use, which is what the FLUM Amendment addresses. Balbino and the City, therefore, argue that regardless of how we define the Port of Miami River, the ALJ did not err in refusing to consider whether Balbino's FLUM Amendment was consistent with the objectives and policies of the Port of Miami River Subelement. We disagree.

The Balbino property was, for the most part, zoned SD-4.2 Waterfront Industrial. Therefore, its land use designation was, by necessity, identified as Industrial. The SD-4.2 classification precludes **any** residential uses. The SD-4.2 land development regulation was placed on this property to reserve and preserve it as a water-dependent or water-related industrial use that could **not** be used for residential purposes. The Port of Miami River Subelement was enacted to specifically protect the Miami River from encroachment by non-water-dependent or non-water-related uses that have no relevance to and do not support the shipping industry. By changing the land use designation from Industrial to Restricted Commercial, the only water-related or water-dependent use permitted in that classification would be for a marina. Additionally, the FLUM Amendment will permit residential use, a land use specifically precluded by the SD-4.2 land

development classification. Thus, by changing the land use, the FLUM Amendment dramatically changes the permitted land development uses.

We are also unwilling to pretend ignorance or to engage in willful blindness. The City agreed to amend the land use designation from Industrial and General Commercial to Restricted Commercial, granted Balbino's petition to change the land development classification from SD-4.2 Waterfront Industrial to Restricted Commercial, and granted Balbino's MUSP, thus granting Balbino permission to build three mixed-use high-rise buildings, which are in no way related to the shipping industry and which are completely inconsistent with the Comprehensive Plan.

This parcel of land has always been used for marine industrial purposes. When the City approved the FLUM Amendment, zoning change, and MUSP, the property was being used as a water-dependent commercial marina and "self-help" boat repair facility. Therefore, the land use change is clearly tied into the zoning change and MUSP.

We, therefore, conclude that the ALJ erred in refusing to allow the appellants to offer evidence; to consider that evidence; and to evaluate whether Balbino's FLUM Amendment was consistent with the goal, objectives, and policies of the Port of Miami River Subelement. We find that had the ALJ done so, the inescapable conclusion would have been that the FLUM Amendment is

inconsistent with the Comprehensive Plan.

### **Coastal Management**

The Comprehensive Plan also contains a section, titled “Coastal Management,” which addresses the coastal areas located within the City. One of the goals specified in this section is to “[p]rovide an adequate supply of land for water dependent uses.” Goal CM-3. In order to accomplish this goal, Objective CM-3.1 provides: “**Allow no net loss of acreage devoted to water dependent uses in the coastal area of the City of Miami**” (emphasis added). Moreover, Policy CM-3.1.1 states: “Future land use and development regulations will encourage water dependent uses along the shoreline.”

The ALJ concluded that because the change to a Restricted Commercial land use designation will still **permit** a commercial marina to operate at that location, the FLUM Amendment will result in no loss of acreage devoted to water-dependent use. This conclusion ignores the intent of Coastal Management Goal CM-3. The ALJ ignored the fact that (1) **the property is currently a commercial marina**; (2) the FLUM Amendment, zoning change, and MUSP approval were all tied together and approved together: the City’s approval allows Balbino to construct over 1,000 residential units on property where residential units were previously precluded; and (3) **eliminates** the commercial marina currently operating at that location, as well as twenty-seven of the ninety-three dry boat slips

on the Miami River.

The Balbino FLUM Amendment to the Comprehensive Plan, changing the land use designation, which is primarily Industrial to Restricted Commercial, and the zoning change from SD4-2 Waterfront Industrial to Restricted Commercial, **will** result in a net loss of acreage devoted to water-dependent use, thereby conflicting with Coastal Management Goal CM-3. Instead of “[p]rovid[ing] an adequate supply of land for water dependent uses[,] . . . [a]llow[ing] no net loss of acreage devoted to water dependent uses in the coastal area of the City of Miami,” and using its land use regulations to “encourage water dependent uses along the shoreline,” these changes to this property’s land use and zoning will deplete land specifically reserved by the City for waterfront industrial use in its Comprehensive Plan.

The Comprehensive Plan’s goals, objectives, and policy considerations regarding coastal areas, and specifically those coastal areas along the Miami River, are in recognition of how important the shipping industry and other water-dependent uses are to the City’s economy.

In view of the importance to the local economy, the limited available areas suitable for high intensity water dependent uses, and strong population pressures of the 1960’s, the City created in the mid 1960’s a zoning classification entitled Waterfront Industrial. **This zoning classification strictly prohibits uses that are not directly related to waterfront activities.**

.....

Since any new water dependent or related facilities would involve redevelopment of existing waterfront properties, **these zoning ordinances are considered sufficient to insure that adequate land area for water-dependent or related uses is protected.**

....

Along the Miami River, an economic study in 1986 reported that the firms located in the study area . . . **have a significant impact on the Miami economy.** They employ an estimated 7,000 workers on a full time basis and over 600 part time. Total sales are estimated at \$613 million, or about \$87,000 for a full time worker. An additional indirect impact of \$1.2 billion of business activity in the Miami area is created by firms in the study area. Many of the firms located in the study area are marine related businesses in part composed of water dependent and water related activities.

Miami Comprehensive Neighborhood Plan 1989-2000, Volume II, Data and Analysis, Coastal Management Element (emphasis added).

The ALJ, however, failed to consider the importance of the marine industry to the City's economy or to appreciate that the Industrial land use designation and Waterfront Industrial SD-4 zoning classification were created to **protect** those uses and to **ensure** that there will be adequate land area for water-dependent and related uses.

### **Future Land Use**

The Future Land Use section of the Comprehensive Plan also provides that a future land use goal is to “[m]aintain a land use pattern that (1) protects and

**enhances the quality of life in the city’s residential neighborhoods; (2) fosters redevelopment and revitalization of blighted or declining areas; (3) promotes and facilitates economic development and the growth of job opportunities in the City . . . and (6) protects and conserves the city’s significant natural and coastal resources.”** Goal LU-1.

The ALJ found that the FLUM Amendment is consistent with Goal LU-1. He concluded that because the “FLUM Amendment will eliminate the potential for development of industrial uses that may generate ‘excessive amounts of noise, smoke, fumes, illumination, traffic, hazardous wastes, or negative visual impact[,]’” it will improve the quality of life of the surrounding neighborhoods, and it is, therefore, consistent with subpart (1). He additionally found that because the Balbino property is located in Allapattah, a declining area, the FLUM Amendment will provide redevelopment and revitalization of the area, and is, therefore, consistent with subpart (2). These findings, however, are unsupported by the record.

Ms. Stetser, a resident near the Balbino property, testified that rather than “enhancing the quality of life” in the neighborhood, the addition of over 2000 additional cars to the already congested two-lane North River Drive and to the 17th Avenue bridge, which already backs up, will cause further delays and frustration to the neighborhood’s drivers.

We also note that in 1997, the Florida Legislature created the Miami River Study Commission to assess the main issues along the Miami River and to make recommendations for improving its management; in 1998, the Legislature established the Miami River Commission to coordinate state, regional, and local activities impacting the Miami River; and in 1999, the Legislature adopted the Urban Infill and Redevelopment Act to assist local governments in implementing their local comprehensive plans. In 2000, in recognition of the importance of the Miami River and the need for a single, multi-jurisdictional plan for the entire Miami River Corridor, the City, Miami-Dade County, and the Miami River Commission executed a joint planning agreement to create an urban infill plan for the Miami River Corridor. After two years of collaborative effort, the Infill Plan was adopted by the Miami River Commission and Miami-Dade County as their Strategic Plan. While the City has not yet adopted the Infill Plan it helped create, it does periodically refer to data contained in the Infill Plan, and it has been relied upon, in part, by the City, the ALJ, and Balbino during the proceedings.

The Infill Plan identifies the Allapattah area as a neighborhood stretching from N.W. 17th Avenue to N.W. 27th Avenue on the north bank of the Miami River. The Balbino property is located at approximately N.W. 18th Avenue directly on the Miami River. The Infill Plan notes that Allapattah is the home to thriving marinas, two of the largest yacht basins on the Miami River, numerous

produce and flower markets, and a thriving wholesale and retail clothing district on N.W. 20th Street. In addressing the waterfront properties along the Miami River, the Infill Plan states that both high density and lower density residential development may not be the most appropriate use of the neighborhood's river frontage and that **“Allapattah's waterfront industrial zoning should be maintained.”** Thus, while it may be beneficial to develop certain areas in the Allapattah area, the waterfront in areas zoned Waterfront Industrial is not one of them.

Rather than promoting economic development and the growth of job opportunities as required in LU-1(3), the evidence establishes that it will do just the opposite. Jack Luft testified that the Miami River Master Plan; the Urban Infill Plan; the City of Miami, Miami River Market Analysis; and the 2004 Economic Impact Analysis, all reflect that the Miami River and its marine industrial base is a significant source of jobs and economic enhancement to the City. This includes not only the shipping industry, but a variety of marine industrial support services that reinforce and directly serve the industry. He noted that from 1991 to 2001, the marine industries on the river doubled in ports serving the Caribbean and in the cargo handled along the river. Jobs have tripled. The Miami River marine industry is an important economic asset to the City which provided over \$4 billion in trade during the ten-year period from 1991 to 2001. Mr. Luft testified that “this

amendment eliminates irreplaceable marine industrial land from the river. There is not another place to recapture it, and it completely violates the promotion and facilitation of economic development of one of the most important industries in the city. It's clear.” Mr. Luft additionally stated that the FLUM Amendment not only eliminates this particular marine use on the river, it threatens the viability and the very existence of the surrounding marine industrial uses and that it is the Miami River maritime industry itself which provides jobs in the region.

The ALJ also failed to address LU-1(6), which requires the City to protect and conserve its “significant natural and coastal resources.” **Since 2000, fifty percent of the properties designated for marine industrial water-related and water-dependent uses along the banks of the Miami River have been lost due to the multiple small scale land use amendments to make way for residential high-rises.** These small scale amendments do not require the scrutiny that is normally required to amend the Comprehensive Plan. Therefore, developers, with City approval, have been compromising the marine industry and in effect, changing the Comprehensive Plan piecemeal, rather than performing a comprehensive review with appropriate public and governmental input and oversight. The Balbino FLUM Amendment is an example of this piecemeal alteration of the City's coastal resources, and when viewed in conjunction with the other small scale amendments, dramatically affects the stated goals and objectives

to preserve the Miami River as a working river, which are to protect the marine industries along the river and to reserve a sufficient amount of waterfront industrial land for expansion of water-dependent and water-related uses.

Despite the FLUM Amendment's conflict with the overall goals, objectives, and policies specified in the Comprehensive Plan and the River Master Plan, the ALJ upheld Balbino's FLUM Amendment because he found that it was consistent with Policy LU-1.3.6, which encourages "diversification in the mix of industrial and commercial activities and tenants" in certain areas of the City, including the "River Corridor." The ALJ, however, failed to consider that while diversification and mixed-use classifications may be desirable in certain locations along the River Corridor, **the Comprehensive Plan and the River Master Plan make it clear that these goals only apply to appropriately zoned areas, not to land reserved for waterfront industrial purposes:**

**Goal CM-3: Provide an adequate supply of land for water dependent uses.**

**Objective CM-3.1: Allow no net loss of acreage devoted to water dependent uses in the coastal area of the City of Miami.**

Miami Comprehensive Neighborhood Plan 1989-2000, Volume II, Data and Analysis, Coastal Management Element: **In view of the importance to the local economy, the limited available areas suitable for high intensity water dependent uses, and strong population pressures of the 1960's, the City created in the mid 1960's a zoning classification entitled Waterfront Industrial. This zoning classification strictly prohibits uses that are not directly related to waterfront activities.**

River Master Plan, 0.2: **The function of the Miami River as a “working waterfront” should be preserved. Scarce waterfront land should be reserved, wherever possible, for use by businesses that are dependent on a waterfront location or are essentially related to the maritime economy of the area.**

River Master Plan, Urban Design 4.20: **New housing construction should be encouraged, except on lands reserved for water-dependent uses.**

River Master Plan, Urban Design 4.20, Objective 4.8: **Encourage residential development on appropriately zoned lands in the Mid-River area.**

Additionally, there was no evidence presented to support the ALJ’s findings that the Balbino project will “fulfill a need for housing for persons who work in the Civic Center area” and will promote job creation. No evidence was presented that there is a need for such housing. In fact, the evidence presented paints a very different picture. Jack Luft testified that Miami and Florida have initiated an aggressive marketing campaign to strengthen its ports. The Caribbean Basin Initiative and the recent Central American Free Trade Agreement (CAFTA) are two of those initiatives. He additionally noted that Rule 9J-5 of the State Administrative Code requires the City to do an assessment of need. In compliance with Rule 9J-5, **the studies performed demonstrate an enormous need to preserve waterfront industrial sites along the Miami River.** The Port of Miami River handles one-third of the tonnage that serves the Caribbean basin and is one of the major ports serving the shallow draft ports of the Caribbean. Mr. Luft

testified that the existing need, while great, **is continuing to grow with no other location to fulfill the need.** He astutely pointed out that while there are many suitable upland locations for the residential buildings planned by this developer, the marine industry has no such latitude.

### **MIAMI RIVER MASTER PLAN** (“River Master Plan”)

The River Master Plan is as a result of a planning study undertaken by the City of Miami Department of Planning, Building and Zoning, to provide a long-range and a short-range vision of the Miami River as a “working waterfront.” It specifically provides that:

**The function of the Miami River as a “working waterfront” should be preserved. Scarce waterfront land should be reserved, wherever possible, for use by businesses that are dependent on a waterfront location or are essentially related to the maritime economy of the area.**

**The river should grow as a shallow draft seaport – a lifeline to the Caribbean Basin – providing good-paying jobs for city residents. New shipping terminals should be located where they will not be detrimental to residential neighborhoods.**

**The river’s role in the regional market for repair, sales and service of boats and marine equipment should be maintained and strengthened.**

**The marine character embodied by the fishing industry on the river should be preserved.**

River Master Plan, 0.2 (emphasis added).

The River Master Plan addresses the limited availability of land suitable to development and expansion of water-dependent marine businesses, stating in pertinent part:

Within Dade County, there is estimated to be only 13.7 acres of undeveloped land<sup>[2]</sup> with suitable water access and zoning to permit expansion of water-dependent marine businesses. Of that total, 8 acres are located on the Miami River. **Given the economic significance of the marine industry, particularly in terms of the type and number of jobs created, it is important to prevent encroachment upon the limited amount of land available for growth of marine activities in the Miami River area.**

....

## RECOMMENDATIONS

Objective:

**1.1 Reserve the limited amount of waterfront land available for expansion of marine industries.**

Policies:

**1.1.1 Retain and enforce the requirement for water-dependent and water-related uses within areas currently designated SD-4 in the City of Miami.**

River Master Plan, The Working Waterfront 1.4 – 1.5 (emphasis added).

The River Master Plan also specifically addresses the SD-4 zoning designation for coastal areas along the Miami River to provide protection from intrusion by non-water-dependent or related uses.

In the City of Miami, marine industries along the Miami River and its

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<sup>2</sup> The River Master Plan was adopted in 1992. Thus, the data is reflective of available water-dependent land at that time.

tributaries are protected by a special zoning designation from intrusion by other uses that are not dependent on a waterfront location. This special zoning is called “SD-4, Waterfront Industrial Special District.” **It is intended for application in areas appropriately located for marine activities, to limit principal and accessory uses to those reasonably requiring waterfront locations, and to exclude residential, general commercial, service, office or manufacturing uses not primarily related to waterfront activities.**

River Master Plan, The Working Waterfront, Waterfront Industrial Zoning 1.12 (emphasis added). The River Master Plan divides the SD-4 zoning classification into SD-4.1, Waterfront Commercial, and SD-4.2, Waterfront Industrial categories. Waterfront Commercial SD-4.1 includes marinas, boatyards, fisheries, boat sales and service, mixed use, and limited restaurant or residential with water dependent use. Waterfront Industrial SD-4.2 includes shipping terminals, marine contractors, commercial shipyards, towing, and salvage, and all SD-4.1 uses, **except residential.**

This waterfront zoning classification was recommended by City planners in 1956, was adopted by the City in 1961, and generally remained intact until recent years when the City began approving small scale amendments to the Comprehensive Plan and the concurrent zoning changes. Most of Balbino’s property is zoned SD-4.2 Waterfront Industrial property, and therefore, is reserved for waterfront industrial purposes and specifically excludes any residential uses.

The City, Balbino, and the ALJ all contend that, because the subject property is located in the “Mid-River” section where most of the existing housing

is located along the Miami River, a change from an Industrial land use, and SD-4.2 Waterfront Industrial zoning, to a mixed-use residential Restricted Commercial designation is consistent with the area's land use. We disagree, as the River Master Plan, which recognizes the importance of housing opportunities in the Mid-River area, specifically limits its application to land **not reserved for water-dependent uses.**

#### Residential Development

A number of opportunities remain for development of new housing by building on vacant lots or by increasing the density of existing developed lots. **New housing construction should be encouraged, except on lands reserved for water-dependent uses.** In the proposed SD-4.1 Waterfront Commercial zoning district (see page 1.14) residential development could be permitted as an **accessory** use to a marina.

....

#### **Objective:**

**4.8 Encourage residential development on appropriately zoned lands in the Mid-River area.**

River Master Plan, Mid-River, Urban Design, 4.20 (emphasis added). Balbino's property, which is zoned SD-4.2 Waterfront Industrial, therefore, is specifically excluded from the City's stated residential development goals along the Mid-River. Even SD-4.1 Waterfront Commercial zoned land may only include residential development as an **accessory use to a marina.**

Lastly, the River Master Plan recognizes that higher land values and the

concomitant increase in property taxes results in the displacement of marine businesses and that the SD-4 Waterfront zoning was created, in part, to protect the maritime industry along the Miami River from being priced out of the location. It, therefore, provides for specific objectives and policies to protect these marine businesses from displacement by higher land values.

### **Land Values**

One issue which directly affects the continued viability of marinas and small boatyards, as well as other businesses along the Miami River, is that of increasing land values and the concomitant increase in property taxes. Clearly this has been the case in the Downtown portion of the river and has resulted in the displacement of marine businesses with office buildings. . . .

. . . .

### **RECOMMENDATIONS**

#### **Objective:**

**1.3** Preserve the marine repair, service, equipment and related industries along the Miami River that are vital to the shipping industry or the recreational boating industry.

#### **Policies:**

**1.3.1** Protect boatyards and related marine businesses from displacement by higher land values uses by adopting separate “marine industrial” and “marine commercial” zoning district classifications.

River Master Plan, Marinas and Boatyards, Land Values 1.9. Balbino’s FLUM Amendment, changing the land use designation from Industrial to Restricted

Commercial, is clearly inconsistent with the objectives and policy considerations relating to property values. Balbino's 1,073-unit residential towers will most likely raise the property values and taxes, not protect them, thereby creating a financial strain on smaller marine businesses critical to the working waterfront. The ALJ erred in failing to consider this issue in finding that the FLUM Amendment was consistent with the River Master Plan.

### **CONCLUSION**

While we recognize that agency action enjoys great deference, findings of fact must be supported by competent, substantial evidence. Furthermore, when the agency incorrectly interprets the law or fails to apply the law, the decision rendered is subject to reversal. Because we conclude that the ALJ erred in precluding the appellants from introducing evidence and in making argument regarding the FLUM Amendment's inconsistency with the Port of Miami River Subelement of the Comprehensive Plan; failed to consider the Port of Miami River Subelement and critical areas of the Coastal Management and Future Land Use sections of the Comprehensive Plan; failed to consider critical sections of the River Master Plan; and made findings that were unsupported by the evidence, we reverse. We find that had the ALJ considered these areas of the Comprehensive Plan and the River Master Plan, he could not have concluded that Balbino's FLUM Amendment was consistent with either.

We further note that these “small scale” amendments, when viewed together as a whole, are changing the character of the Miami River waterfront without proper long range planning or input from appropriate agencies, departments, and citizen groups. Because the Miami River is such an important asset to the City, County, and State, such piecemeal, haphazard changes are not only ill-advised, they are contrary to the goals and objectives of those who worked together, debated, and determined how the Miami River waterfront should be developed. If the City’s vision for the Miami River has changed, then that change should be clearly reflected in its Comprehensive Plan to provide industries and land owners along the Miami River with fair notice.

Reversed.