STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. MARKS RIVER PROTECTION ASSOCIATION, Petitioner, vs. DEPARTMENT OF COMMUNITY AFFAIRS and WAKULLA COUNTY, Respondents, and N. G. WADE INVESTMENT COMPANY, Intervenor.	)	CASE NO. 94-3289GM

RECOMMENDED ORDER

Pursuant to notice, the above matter was heard before the Division of Administrative Hearings by its assigned Hearing Officer, Donald R. Alexander, on November 29, 30 and December 1, 5 and 6, 1994, in Tallahassee, Florida.

APPEARANCES

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For Respondent: (DCA) Kenneth D. Goldberg, Esquire
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For Respondent: (County) Ronald A. Mowrey, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether the Wakulla County plan amendment adopted by Ordinance No. 94-12 on March 28, 1994, is in compliance.

PRELIMINARY STATEMENT

This case began on June 3, 1994, when petitioner, St. Marks River Protection Association, filed a petition for formal administrative hearing alleging that a comprehensive plan amendment adopted by respondent, Wakulla County, was not in compliance with certain state comprehensive plan goals and regional policy plan issues, and various parts of Chapter 163, Florida Statutes, and Chapter 9J-5, Florida Administrative Code. The petition was forwarded by respondent, Department of Community Affairs, to the Division of Administrative Hearings on June 14, 1994, with a request that a Hearing Officer be assigned to conduct a hearing. On August 1, 1994, N. G. Wade Investment Company was authorized to intervene in support of the plan amendment.

By notice of hearing dated July 14, 1994, a final hearing was scheduled on August 30, 31 and September 1, 1994, in Tallahassee, Florida. Respondents' joint motion for continuance was granted, and the matter was rescheduled to November 29, 30 and December 1, 5 and 6, 1994.

On August 2, 1994, the undersigned denied intervenor's motion to dismiss petitioner on the ground it lacked the legal capacity to bring this action.

At final hearing, petitioner presented the testimony of Charles G. Pattison, director of resource planning and management for the Department of Community Affairs; George Edward Mills, IV, Wakulla County director of planning and zoning; Woodrow W. Lewis, Jr., its president; C. W. Hendry, Jr., a professional geologist and accepted as an expert in geology, hydrology and soils of Florida; Brad Hartman, a state biologist and accepted as an expert in wildlife biology and ecology; and Neil G. Sipe, a land planning consultant and accepted as an expert in urban and regional planning. Petitioner also offered petitioner's exhibits 1-9, 11, 13-17, 19 and 22. All exhibits were received in evidence. Intervenor presented the testimony of Robert Cambric, a representative of the Apalachee Regional Planning Council; William A. McArthur, its president; Robert R. Hahn, a land planner and accepted as an expert in comprehensive planning; Randall Armstrong, a biologist and accepted as an expert in ecology and environmental assessment; Gregory Prebel, an engineer and accepted as an expert in storm water engineering; Edward Waters, a professional engineer and accepted as an expert in traffic analysis and wastewater and water supply; Steven P. Stanley, an engineer; Dr. A. W. Hayes, a geologist and accepted as an expert in geohydrology; Kenneth M. Kirton, a forester and real estate broker; and George Edward Mills, IV, director of planning and zoning for Wakulla County and accepted as an expert in comprehensive planning. Also, it offered intervenor's exhibits 1, 2, 2A-2D, 3, 8-18, and 21. All exhibits were received in evidence. Finally, the parties stipulated to the admission of joint exhibit 1, which is a copy of the amended section 28 map.

The transcript of hearing (eight volumes) was filed on January 25, 1995. Proposed findings of fact and conclusions of law were filed by intervenor and the County, petitioner, and the agency on February 22, 23 and 24, 1995, respectively. A ruling on each proposed finding is set forth in the Appendix attached to this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact have been determined:

A. Background

a. The Parties

1. Respondent, Wakulla County (County), is a local governmental unit subject to the land use planning requirements of Chapter 163, Florida Statutes. That chapter is administered by respondent, Department of Community Affairs (DCA). The DCA is charged with the responsibility of reviewing comprehensive growth management plans and amendments thereto.

2. Petitioner, St. Marks River Protection Association (SMRPA), is a non-profit corporation whose basic purpose is to conserve and protect the St. Marks River. A majority of its members own property or live within the County. Many live along the St. Marks River and fish, swim, dive, and view the various life along the river system. Petitioner participated in the amendment process by appearing at hearings and submitting written comments. Therefore, it has standing to bring this action.

3. Intervenor, N. G. Wade Investment Company, owns the real property which is the subject of the amendment in this proceeding. It also submitted comments to the County during the transmittal and adoptive phases of the process.

b. The Nature of the Dispute

4. The County adopted its current comprehensive plan (plan) on September 2, 1992. On October 15, 1992, DCA issued its notice of intent to find the plan not in compliance. The matter is now pending before the Division of Administrative Hearings (DOAH) in Case No. 92-6287GM. However, the County and DCA have reached a settlement in concept in that case and are drafting language for an acceptable remedial amendment.

5. On February 24, 1993, intervenor made application for a plan amendment to change the future land use map portion of the plan on 240 acres of land in northeastern Wakulla County from agriculture-1 to industrial land use. The plan amendment was adopted by the County on March 28, 1994, and was found to be in compliance by the DCA on May 19, 1994.

6. On June 3, 1994, petitioner filed a petition challenging the plan amendment on the ground the amendment was inconsistent with other parts of the plan, regional policy plan, and state plan as they relate to water quality, protection for ground and surface waters, wildlife habitat, traffic and provision of public services. Thereafter, the matter was referred to DOAH for an evidentiary hearing and has been assigned Case No. 94-3289GM.

B. The Plan Amendment

7. The amendment implements the County's policy to develop an industrial park and to expand the County's employment base by 1995. It was transmitted to the DCA in October 1993 for a compliance review.

8. During its review process, the DCA considered comments from various entities, including the Apalachee Regional Planning Council (ARPC), the

Northwest Florida Water Management District, the Department of Environmental Protection, the Department of Transportation (DOT) and the Tallahassee-Leon County Planning Department (TLCPD).

9. The DCA raised several objections to the amendment in its Objections, Recommendations and Comments (ORC) issued on January 28, 1994. These included criticisms that (a) the amendment was not supported by appropriate data and analysis, (b) the County had not properly coordinated with other affected government jurisdictions, and (c) it was not clear that the policy structure of the plan concerning industrial land uses provided adequate assurance that the proposed future land use map amendment would be consistent with the requirements of Chapter 163, Florida Statutes, and Chapter 9J-5, Florida Administrative Code, including the need to protect natural resources.

10. After coordinating with the DOT, ARPC, and TLCPD, and in response to the ORC, the County provided more land use analysis and a new traffic analysis. In response to the criticism concerning the protection of natural resources, the County submitted a summary of data and analysis of the soils, subsurface geology, and groundwater conditions on the site to show that the site was suitable for industrial development.

11. On March 28, 1994, the County adopted the amendment and submitted the adoption ordinance and responses to the ORC to the DCA. As modified, the amendment called for a change in the land use designation from agriculture - 1 to industrial "for a proposed 240-acre light industrial planned unit development called Opportunity Park." The property is approximately one mile from State Road 363 and the Leon County line, and the land around it is presently subject to timber harvesting. The size and scope of industrial activities that could take place at Opportunity Park would be constrained by other provisions of the plan including floor area ratio, limitations on pre- and post-development ground and surface water flow rates, and requirements for wastewater reuse.

12. After reviewing this material, the DCA accepted the County's response to the ORC and determined that the additional data and analysis were adequate. In determining whether the level of the data and analysis was adequate, the DCA took into consideration the fact that the County is a small, rural county with modest planning resources and with a very modest rate of population growth. Indeed, the County had only 14,202 people according to the 1990 population census, and it projects a growth rate of only 500 persons per year through the year 2000. The DCA also recognized that the County is in dire need of economic development. This is borne out by the fact that approximately 58 percent of its land is within conservation areas managed by the federal or state governments, 33 percent of the land is in agricultural use, and only 0.32 percent is in industrial land use.

13. By letter dated April 28, 1994, the DCA received a recommendation from the ARPC to find the amendment generally consistent with the Apalachee Regional Policy Plan. Thereafter, on May 18, 1994, the DCA issued its notice of intent to find the amendment in compliance with the Act.

C. Criticisms of the Amendment

a. Generally

14. In its petition, SMRPA has raised a number of grounds regarding what it perceives to be shortcomings in the plan amendment. First, petitioner contends that the amendment lacks adequate data and analysis, it fails to

protect natural resources, and it violates the traffic element of the plan. Petitioner further contends that the amendment is inconsistent with those parts of the plan which concern the maintenance of existing hurricane evacuation times, the County failed to coordinate the amendment with adjacent local governments, and the amendment is inconsistent with certain policies of the plan's economic development element. Finally, petitioner asserts that the amendment is inconsistent with the capital improvement element of the plan concerning water supplies and fire fighting equipment, the amendment encourages urban sprawl, it fails to preserve the internal consistency of the plan, and it is contrary to the state and regional policy plans.

b. Data and Analysis

15. Updates to the data which support the County's plan indicate a need in the County for approximately 500 acres of additional industrial use. While the County did not provide the DCA with an analysis or description of the methodology that was used to arrive at the estimate of gross acreage needed in the supporting data, it offered demonstrative evidence that showed that approximately 200 acres of land that are currently designated for industrial use cannot be developed consistent with the County's plan because of existing constraints due to flooding. The evidence fails to show to the exclusion of fair debate that the County did not consider or have available sufficient data and analysis to support a need for the new industrial land use in the County.

c. Protection of Natural Resources

16. The data and analysis supporting the County's plan designates the amendment area as having a high recharge potential to the Floridan Aquifer. The plan's supporting data and analysis also shows the entire County as on the Woodville Karst Plain and as an area prone to sinkhole formation. However, these general characteristics must be tempered by the site-specific data described below.

17. An analysis of site-specific data consisting of soil boring tests and results, which data were considered by the County at the time of the adoption of the amendment, show that the area is underlain with clay confining layers which sit above the Floridan Aquifer. Therefore, the land is not in an area of high or even moderate recharge to the Floridan Aquifer because of the presence of these clay confining layers.

18. An analysis of the site-specific data revealed that, unlike most areas of the County, the amendment area is not on the Woodville Karst Plain. Rather, it is on an ancient sand dune system known as the Wakulla Sandhills, a series of relic sand dunes overlying the St. Marks limestone formation. At the same time, the more persuasive evidence shows that the amendment area is not prone to sinkhole formation. Indeed, the existing depressions on the site are most likely deflation basins caused by wind activity on the sand hills and are commonly known as "blowouts."

19. The evidence fails to show to the exclusion of fair debate that the County failed to consider or did not have available to it sufficient data and analysis to indicate how the subject amendment will protect the groundwater recharge areas to the Floridan Aquifer. The evidence also failed to show to the exclusion of fair debate that the amendment is in conflict with the relevant policies of the County's plan.

20. As to the issue concerning the protection of surface and groundwater quality, the County's soil survey performed by the United States Department of Agriculture shows the amendment area as having severe soil ratings for septic tanks. Even so, the evidence failed to show to the exclusion of fair debate that any development activity undertaken in the amendment area would be unlimited and would adversely impact natural resources. In fact, an analysis of the site-specific data indicates that the presence of the clay confining layers would severely retard the percolation of stormwater or wastewater to the Floridan groundwater acquifer. Although there is evidence of the presence of a surficial (perched) aquifer in the area that might contain pollutants, the evidence failed to show to the exclusion of fair debate that the surficial aquifer is a natural drinking water resource in need of protection.

21. There are no surface water streams in the vicinity of the amendment area. Also, there are no unusual site characteristics which would tend to cause pollution of surface or groundwater from industrial usage of the site.

22. Potential discharge from industrial activities into the groundwater at the site would not affect Wakulla Springs or the St. Marks cave systems because these features are four to five miles away and are upgradient of the site. The evidence fails to prove to the exclusion of fair debate that industrial activities at the amendment site will adversely impact the water quality in the St. Marks River.

23. As to the protection of wetlands, SMRPA provided no evidence concerning the existence, nature, extent or value of wetlands that would be impacted by use of the amendment area for industrial purposes.

24. As to the protection of endangered or threatened species, SMRPA alleged that the amendment was inconsistent with policies and objectives of the County's plan concerning habitat protection for endangered or threatened species. There were, however, no endangered or threatened species observed on the amendment site. One gopher tortoise was observed leaving the site while two gopher tortoise burrows were also seen. While it is true that the gopher tortoise is a species of special concern, the Game and Fresh Water Fish Commission has a permit program for the gopher tortoise that includes relocation of the tortoise or payment to a mitigation bank for habitat acquisition. Therefore, the evidence failed to show to the exclusion of fair debate that the amendment is in conflict with the relevant policies and objectives of the County's comprehensive plan.

25. As to the protection of forests and agricultural lands, petitioner alleged that the amendment was inconsistent with policies and objectives of the County's plan, which state that the County shall encourage continuing use of land for agriculture. The evidence failed to show to the exclusion of fair debate that the conversion of 240 acres of land from agricultural use to industrial use is in conflict with the general objective to encourage the continuing use of land for agriculture.

d. Traffic

26. Petitioner alleged that the amendment will allow development that will permit violations of the levels of service established for impacted roadways and policies 1.2 and 5.5 of the plan's traffic element.

27. Petitioner failed to present any evidence showing that the levels of service established for impacted roadways and traffic circulation would be

violated by the amendment. Therefore, petitioner failed to show that the amendment was in conflict with the cited policies.

e. Hurricane Evacuation Times

28. Petitioner alleged that the amendment is inconsistent with objective 2(c) and policy 2.11 of the plan's coastal management element concerning the maintenance of existing hurricane evacuation times.

29. The evidence failed to prove to the exclusion of fair debate that the amendment would result in an increase of the existing hurricane evacuation times.

f. Intergovernmental Coordination

30. Petitioner alleged that the amendment was inconsistent with objective 1.1 and policies 1.1.1 and 1.1.4 of the plan's intergovernmental coordination element. Those provisions relate to the need to coordinate the County's land use map amendments and review the relationship of any proposed development to the existing comprehensive plans of adjacent local governments.

31. The evidence failed to show a lack of intergovernmental coordination of the impact of the plan amendment on the comprehensive plans of adjacent local governments. In fact, the evidence showed that the County coordinated with adjacent local governments, including the City of Tallahassee and Leon County.

g. Economic Development

32. Petitioner alleged that the amendment is inconsistent with policies of the plan's economic development element. Specifically, it cites policies 2.1, 2.4, 2.5, and 2.6, which concern the County's objective to expand the employment base by 1995 by indentifying which businesses and industry jobs can be increased.

33. The evidence failed to prove to the exclusion of fair debate that the amendment would not expand the County's employment base by 1995. In fact, the evidence showed that the amendment will assist the County in achieving economic stability and will expand the employment base of the county by providing more job opportunities. Indeed, the eastern part of the County is now experiencing a trend towards industrial and commercial development, and a prison is being constructed adjacent to the site. At the same time, however, a decline in the County's seafood industry and layoffs at Olin Corporation, a major employer, reflect a need for new jobs. Finally, the amendment implements policy 6.1 of the economic development element which provides that "the County shall cooperate with the private and public sector to develop an industrial park with required facilities and services to attract businesses and industries."

h. Water Supplies and Fire Fighting Equipment

34. Petitioner alleged that the amendment is inconsistent with the capital improvement element of the plan because there are inadequate water supplies and fire fighting equipment in the area to support fire protection for industrial uses at the site.

35. The evidence failed to show to the exclusion of fair debate that there would be inadequate water supplies and fire fight equipment to support fire protection for industrial uses at the site.

i. Failure to Discourage the Proliferation of Urban Sprawl

36. Petitioner alleged that by placing an industrial site at the subject location, the amendment would encourage urban sprawl and inhibit advantageous growth in the area.

37. The evidence failed to show to the exclusion of fair debate that the amendment will encourage urban sprawl and inhibit advantageous growth in the area of the amendment.

j. Failure to Preserve the Internal Consistency of the Plan

38. Petitioner alleged that the amendment fails to preserve the internal consistency of the County's plan as required by the Act, in that it is in direct conflict with numerous plan provisions.

39. Based on the findings of fact above, it is clear that the amendment is not in direct conflict with numerous plan provisions. Therefore, the evidence failed to show to the exclusion of fair debate that the amendment fails to preserve the internal consistency of the County's plan, as required by the Act.

k. The State Comprehensive Plan

40. The State Comprehensive Plan is contained in Chapter 187, Florida Statutes. Goals and Policies of the State Comprehensive Plan are contained in Section 187.201, Florida Statutes.

41. The evidence failed to prove to the exclusion of fair debate that the amendment is inconsistent with the State Comprehensive Plan, as a whole.

l. The Regional Policy Plan

42. The Apalachee Regional Planning Council has adopted the Apalachee Regional Policy Plan (Regional Plan). The Regional Plan was adopted pursuant to Chapter 186, Florida Statutes, to provide regional planning objectives to the counties in that region, which includes Wakulla County.

43. The evidence failed to show to the exclusion of fair debate that the amendment is inconsistent with the Regional Plan.

D. Standing

44. On November 15, 1993, and March 26, 1994, or during the adoptive stage of the amendment, SMRPA filed comments and objections in form of letters with the County. On June 3, 1994, SMRPA filed its petition for formal administrative hearing with the DCA challenging the plan amendment.

45. Throughout the course of this proceeding, intervenor has challenged the standing of petitioner on the theory that the corporation was dissolved prior to filing its petition, and even though the corporation was later reinstated, it was not the same corporation that filed comments and objections during the adoptive stage of the amendment. The facts underlying this claim are as follows.

46. On April 27, 1989, petitioner filed articles of incorporation with the Department of State. On August 13, 1993, the corporation was administratively

dissolved. On June 1, 1994, Virginia P. Brock, an officer of SMRPA, released the corporate name and stated that the officers and directors did not have any intention of reinstatement of the corporation.

47. On May 30, 1994, new articles of incorporation for SMRPA were filed with the Department of State. This corporation had common officers and directors with the dissolved corporation. The articles of incorporation were rejected by the Department of State on June 10, 1994, on the ground all outstanding fees and taxes owed by SMRPA had not been paid. After such outstanding taxes and fees were paid through 1994, the Department of State deemed the status of SMRPA to be "active" as of June 14, 1994. Such reinstatement related back and took effect as of the effective date of the dissolution of the corporation on August 13, 1993, and the corporation was carry on its affairs as if no dissolution occurred.

CONCLUSIONS OF LAW

48. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Subsections 120.57(1) and 163.3184(9), Florida Statutes.

49. The broad issue in this case is whether the plan amendment is "in compliance" with Part II of Chapter 163, Florida Statutes, and Chapter 9J-5, Florida Administrative Code. "In compliance," as defined in Subsection 163.3184(1)(b), Florida Administrative Code, means the plan is consistent with applicable provisions of Chapter 163, Florida Statutes, the regional policy plan, and Chapter 9J-5, Florida Administrative Code. At the same time, consideration must be given to Subsection 163.3177(10)(i), Florida Statutes, and Rule 9J-5.002(2), Florida Administrative Code, which require the DCA to provide more flexible compliance review "with regard to the detail of the data and analysis required" for small, rural counties.

50. This case arose under Subsection 163.3184(9)(a), Florida Statutes, following the DCA's notice of intent to find the plan amendment in compliance. Under that statute, the plan amendment shall be determined to be "in compliance" if the local government's determination of compliance is fairly debatable. Therefore, the action of the City (and DCA) must be approved "if reasonable persons could differ as to its propriety." B & H Travel Corporation v. Department of Community Affairs, 602 So.2d 1362, 1365 (Fla. 1st DCA 1992). In other words, petitioner bears a heavy burden in proving the legitimacy of its claims.

51. As a threshold matter, petitioner contends that the DCA lacks authority to determine the consistency of the plan amendment when the plan as a whole has not yet been determined to be in compliance. It cites no specific authority or precedent for this proposition.

52. From the standpoint of judicial economy, it would, of course, be more efficient to consolidate all cases involving contested plan amendments with the case involving the overall plan and issue a single order resolving all issues. However, nothing in Chapter 163, Florida Statutes, or Chapter 9J-5, Florida Administrative Code, specifically prohibits the DCA from conducting a compliance review as to a plan amendment, including a formal hearing, before the overall plan has been found to be in compliance. Further, Subsection 163.3184(11)(d), Florida Statutes, which authorizes the Administration Commission to impose sanctions against local governments for non-compliant plans and amendments,

clearly contemplates that such a procedure is permissible. That paragraph reads in pertinent part as follows:

> (d) The sanctions provided by paragraphs (a) and (b) shall not apply to a local government regarding any plan amendment, except for plan amendments that amend plans that have not been finally determined to be in compliance with this part . . . (Emphasis added)

This language suggests rather clearly that the DCA is expected to conduct compliance reviews of amendments for plans not yet found to be in compliance. A part of this review process necessarily includes a formal hearing if requested by a party. It follows that if the County's overall plan cannot pass muster, to the extent this amendment is grounded upon parts of the plan which are contrary to the law, the amendment must likewise fail. Conversely, if the overall plan is ultimately found to be in compliance, the plan amendment determination made in this proceeding is valid. Therefore, the undersigned concludes that the DCA has authority to determine the consistency of the challenged plan amendment even though the plan as a whole has not yet been determined to be in compliance.

53. Petitioner first contends that the data and analysis relied upon by the County was insufficient to support a finding of need for a new industrial land use. The more persuasive evidence, however, supports a conclusion that the county relied upon adequate data and analysis when adopting the amendment, that such data and analysis were further permissibly explained and refined at hearing, Zemel v. Lee County and Dept. of Community Affairs, 15 F. A. L. R. 2735 (DCA, June 22, 1992), and that all requirements of the law were satisfied. This is especially true in this case after giving consideration to Rule 9J-5.002(2), Florida Administrative Code, which provides for a more flexible compliance review of small, rural counties.

54. Petitioner next argues that the plan amendment is inconsistent with the goals, objectives and policies of the overall plan. There is, of course, no requirement that a plan amendment "further" the goals, objectives and policies of the plan being amended. However, the plan, as amended, cannot contain goals, objectives and policies that are in conflict with each other. In this case, the evidence failed to prove to the exclusion of fair debate that the amendment is inconsistent with the goals, objectives and policies of the overall plan.

55. It is further contended that the plan amendment is inconsistent with the Apalachee Regional Policy Plan and the state comprehensive plan found in Chapter 187, Florida Statutes. To be considered consistent with those plans, the County's plan, as amended, must be "compatible with" and "further" those plans. The evidence fails to show to the exclusion of fair debate that the amendment is inconsistent with any goal of either plan.

56. As to the issue of urban sprawl, Subsection 163.3177(6)(a), Florida Statutes, requires that plans discourage the proliferation of urban sprawl. The evidence fails to prove to the exclusion of fair debate that the amendment does not meet this statutory goal.

57. Finally, intervenor has renewed its motion to dismiss petitioner on the ground petitioner lacks standing to bring this action. The undersigned previously ruled on that motion by order dated August 2, 1994. For the reasons set forth in that order, the motion is again denied.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Department of Community Affairs enter a final order determining the Wakulla County comprehensive plan amendment to be in compliance.

DONE AND ENTERED this 27th day of March, 1995, in Tallahassee, Florida.

DONALD R. ALEXANDER
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of March, 1995.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 94-3289GM

Petitioner:

1. Partially accepted in finding of fact 2.
2-4. Partially accepted in finding of fact 1.
5. Partially accepted in finding of fact 3.
6-8. Rejected as being unnecesary.
9-11. Partially accepted in finding of fact 4.
12. Partially accepted in finding of fact 5.
13. Partially accepted in finding of fact 6.
14. Partially accepted in finding of fact 5.
15-19. Partially accepted in finding of fact 4.
20. Partially accepted in finding of fact 11.
21. Partially accepted in finding of fact 5 and 11.
22. Partially accepted in finding of fact 11.
23-26. Rejected as being unnecessary.
27-74. Partially accepted in findings of fact 16-25.
75-76. Partially accepted in findings of fact 26-29.
77-82. Partially accepted in findings of fact 36 and 37.
83-88. Partially accepted in finding of fact 15.
89. Partially accepted in findings of fact 40 and 41.
90. Partially accepted in findings of fact 42 and 43.
92-93. Partially accepted in findings of fact 38 and 39.
94. Partially accepted in finding of fact 15.
95. Rejected as being contrary to the evidence.

Respondent DCA

1-5. Partially accepted in findings of fact 1-3.
6-8. Partially accepted in finding of fact 12.
9-10. Partially accepted in finding of fact 4.
11-13. Rejected as being unnecessary.

14. Partially accepted in finding of fact 5.
15-24. Partially accepted in findings of fact 7-13.
25-26. Partially accepted in finding of fact 15.
27-41. Partially accepted in findings of fact 16-25.
42-43. Partially accepted in findings of fact 26 and 27.
44-45. Partially accepted in findings of fact 28 and 29.
46-47. Partially accepted in findings of fact 30 and 31.
48-49. Partially accepted in findings of fact 32 and 33.
50-51. Partially accepted in findings of fact 34 and 35.
52-53. Partially accepted in findings of fact 36 and 37.
54-55. Partially accepted in findings of fact 38 and 39.
56-57. Partially accepted in findings of fact 40 and 41.
58-60. Partially accepted in findings of fact 42 and 43.

Intervenor and County:

1. Partially accepted in findings of fact 1-6.
2-4. Rejected as being unnecessary.
5-7. Partially accepted in findings of fact 7-13.
8-19. Partially accepted in findings of fact 16-25.
20. Partially accepted in findings of fact 26 and 27.
21. Partially accepted in findings of fact 28 and 29.
22. Partially accepted in findings of fact 30 and 31.
23-25. Partially accepted in findings of fact 32 and 33.
26-27. Partially accepted in findings of fact 34 and 35.
28-33. Partially accepted in findings of fact 42-47.
34. Partially accepted in finding of fact 3.
35. Partially accepted in findings of fact 42-47.

Note: Where a proposed finding has been partially accepted, the remainder has been rejected as being unnecessary for a resolution of the issues, irrelevant, not supported by the more credible, persuasive evidence, subordinate, or a conclusion of law.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit to the agency written exceptions to this Recommended Order. All agencies allow each party at least ten days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the Final Order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

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AGENCY FINAL ORDER

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STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

ST. MARKS RIVER PROTECTION
ASSOCIATION,

Petitioner,

vs. DOAH CASE NO. 94-3289GM

DEPARTMENT OF COMMUNITY AFFAIRS
and WAKULLA COUNTY,

Respondents,
and

N.G. WADE INVESTMENT COMPANY,

Intervenor.
_____/

FINAL ORDER

A Hearing Officer of the Division of Administrative Hearings ("DOAH") has entered his Recommended Order in this proceeding. A copy of the Recommended Order is attached to this Final Order as Exhibit A.

BACKGROUND

This is a proceeding to determine whether a comprehensive plan amendment adopted by Wakulla County is in compliance with the local Government Comprehensive Planning and Development Regulation Act, Ch. 163, Part II, Fla. Stat. (Sup. 1994) (the "Act"). The Department issued a Notice of Intent to find the amendment in compliance with the Act. The Petitioner filed a petition pursuant to 163.3184(9), Fla. Stat. (Supp 1994), which alleged that the amendment is not in compliance. The Department forwarded the petition to the Division of Administrative Hearings, which conducted a final hearing on August 30, 31 and September 1, 1994.

The Hearing Officer made detailed findings of fact and conclusions of law in his Recommended Order. He determined that the plan amendment is in compliance with the Act, and recommended that the Department enter a final order finding the amendment in compliance. The Petitioner and the Department filed exceptions to the Recommended Order. The Intervenor filed a Response to the Petitioner's Exceptions, and Wakulla County joined in that response.

RULINGS ON EXCEPTIONS

PETITIONER'S EXCEPTION 1 and DEPARTMENT'S EXCEPTION TO CONCLUSION OF LAW

In 1992, the Department issued a Notice of Intent to find the overall Wakulla County comprehensive plan not in compliance with the Act, and that case is still pending before DOAH. Both the petitioner and the Department object to the Hearing Officer's conclusion of law 52 concerning the effect of the pending comprehensive plan compliance case on the instant plan amendment.

The Petitioner contends that a plan amendment cannot be in compliance with the Act if the overall comprehensive plan has not been found in compliance. As the Hearing Officer stated in conclusion of law 52, there is nothing in Ch. 163 or Rule 9J-5 which prevents the Department form conducting a compliance review of the amendment. Indeed, the Petitioner goes further and concedes in its Exceptions that the law requires that the Department review such an amendment. And, as the Hearing Officer pointed out in conclusion of law 52, 162.3184(11)(d) clearly contemplates that such a procedure is permissible. Nonetheless, the Petitioner asserts that the Department must "automatically" find the amendment not in compliance. The Department accepts the reasoning expressed in the Recommended Order, and rejects the Petitioner's theory.

Acceptance of the Petitioner's theory would convert the Department's compliance review into a useless act. The transmittal of the adopted amendment (163.3184(7)), the issuance of the Department's Notice of Intent (163.3184(8)), the formal administrative proceeding required by 163.3184(9) and (10), and the consideration of the amendment by the Administration Commission under 163.3184.(20), all of which the Petitioner concedes are "required," would be wasted efforts since the outcome would be pre-determined.

A logical consequence of the Petitioner's theory is that a local government which litigates the compliance determination for its comprehensive plan could not amend the plan without subjecting itself to sanctions under 163.3184 (11). As Petitioner would have it, any amendment adopted by Wakulla County must be found not in compliance by the Administration Commission, whereupon the Commission must consider the imposition of sanctions. This would be so even

though no final determination has been made that the Wakulla County comprehensive plan is not in compliance with the Act.

Petitioner's Exception 1 is DENIED.

The Department also filed an Exception to conclusion of law 52. The Department objected to the implication in conclusion of law 32 that the determination of compliance for the plan amendment is contingent upon the determination that the original plan is in compliance. Despite this possible implication in conclusion of law 52, the Hearing Officer ultimately recommended that the plan amendment be found in compliance, and did not recommend a reservation of jurisdiction to change that determination if the overall Wakulla County comprehensive plan is determined to not be in compliance.

The Act does not authorize the Department or the Administration Commission to invalidate or reverse a final compliance determination for any reason, or to reserve jurisdiction for that purpose. Therefore, the Department's Exception to conclusion of law 52 is GRANTED.

PETITIONER'S EXCEPTION 2.

The Petitioner contends that the Hearing Officer improperly gave Wakulla County special consideration as a "less populated region of the state" pursuant to 163.3177(11)(a) and (b).

However, it appears that any special consideration given to the County did not affect the Hearing Officer's recommendation, since he determined in conclusion of law 53 that "all requirements of the law were satisfied". Although the Hearing Officer went on to state that "[t]his is especially true in this case after giving consideration to Rule 9J-5.002(2), Florida Administrative Code, which provides for a more flexible compliance review of small, rural counties," it is clear that he concluded that the amendment satisfied even the standards which would be applied to large urban counties.

Further, special consideration would not have been unwarranted, since rule 9J-5.002(2), F.A.C., states:

> Due to the varying complexities, sizes, growth rates and other factors associated with local governments in Florida, the Department shall consider the following factors as it provides assistance to local governments and applies this chapter in specific situations with regard to the detail of the data, analyses, and the content of the goals, objectives, policies, and other graphic or textual standards required:
> (a) The local government's existing and projected population and rate of population growth.

Petitioner's Exception 2 is DENIED.

PETITIONER'S EXCEPTION 3.

The Petitioner contends that the Department failed to consider the impact of the amendment on urban sprawl, and that the failure of the Department to undertake such a review invalidates the finding of in compliance made for the amendment.

However, the purpose of the formal administrative hearing in this case was to determine whether the amendment actually encourages urban sprawl, not whether the Department's initial review of the amendment was adequate. The Petitioner had the opportunity to present evidence to demonstrate that the plan amendment encourages urban sprawl, and the Petitioner had the burden of proof on that issue. 163.3184(9), Fla. Stat. (Supp. 1994). The Hearing Officer determined that the Petitioner's "evidence fail[ed] to prove to the exclusion of fair debate that the amendment does not meet this statutory goal." Finding of fact 37 and Conclusion of law 56.

Petitioner's Exception 3 is DENIED.

DEPARTMENT'S FIRST EXCEPTION TO FINDING OF FACT

The Department objects to an inference in finding of fact 20 that, in order to successfully challenge a plan amendment as failing to protect surface and groundwater quality in areas having severe soil ratings for septic tanks, a challenger would have to prove that any development activity would be unlimited.

Finding of fact 20 as a whole determines that development activity in the amendment area would not adversely impact natural resources because of the hydrology of the area, not because of the amount of development. The Hearing Officer found that the Floridan aquifer is protected by a clay confining layer, and that the surficial aquifer in the area is not a natural drinking water resource in need of protection.

Any implication that a challenger must demonstrate that development will be "unlimited" in order to have an adverse effect on natural resources is rejected.

Department First Exception to Finding of Fact is GRANTED.

DEPARTMENT'S SECOND EXCEPTION TO FINDING OF FACT

The Department objects to an inference in finding of fact 24 that a local government can defer to existing permitting programs in order to avoid comprehensive planning. Finding of fact 24 includes the following sentence:

> While it is true that the gopher tortoise is a species of special concern, the Game and Fresh Water Fish Commission has a permit program for the gopher tortoise that includes relocation of the tortoise or payment to a mitigation bank for habitat acquisition.

The fact that the Game and Fresh Water Fish Commission has such a program was properly found by the Hearing Officer, and will not be disturbed by this final order. However, any inference that the existence of such a regulatory program allows a local government to abdicate its duty to address natural resource issues in its comprehensive plan is rejected. Such an inference would ignore the clear distinction between regulatory permitting and land use

planning, and the Department's role and expertise in land use planning as opposed to regulatory permitting. See, Department of Community Affairs v. Sarasota County, 15 FALR 830 (Admin. Comm., 1992).

The Department's Second Exception to Findings of Fact is GRANTED.

WHEREFORE, the Department of Community Affairs adopts the Hearing Officer's Recommended Order, with the following amendment, and issues this Final Order determining that the Plan Amendment is in compliance.

Conclusion of law 52 is modified by deletion of the following two sentences:

> It follows that if the County's overall plan cannot pass muster, to the extent this amendment is grounded upon parts of the plan which are contrary to the law, the amendment must likewise fail. Conversely, if the overall plan is ultimately found to be in compliance, the plan amendment determination made in this proceeding is valid.

DONE AND ORDERED in Tallahassee, Florida, this 28th day of April, 1995.

_____

LINDA LOOMIS SHELLEY, Secretary
Department of Community Affairs
240 Centerview Drive
Tallahassee, Florida 32399-2100

ANY PARTY TO THIS ORDER HAS THE RIGHT TO SEEK JUDICIAL REVIEW OF THE ORDER PURSUANT TO SECTION 120.68, FLORIDA STATUTES, BY THE FILING OF A NOTICE OF APPEAL PURSUANT TO RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE WITH THE AGENCY CLERK, 2740 CENTERVIEW DRIVE, TALLAHASSEE, FLORIDA 32399-2100, AND BY FILING A COPY OF THE NOTICE OF APPEAL, ACCOMPANIED BY THE APPLICABLE FILING FEES, WITH THE APPROPRIATE DISTRICT COURT OF APPEAL NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE DAY THIS ORDER IS FILED WITH THE AGENCY CLERK.

COPIES FURNISHED:

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FILING AND ACKNOWLEDGEMENT

FILED, on this date with the designated Department Clerk, receipt of which is hereby acknowledged.

_____

Jane R. Bass Date
Department Clerk