STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM B. HUNT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 94-7071GM
	)	
DEPARTMENT OF COMMUNITY AFFAIRS and MARION COUNTY,	)	
	)	
Respondents.	)	
_____	)	

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 May 10 and 11, 1995, in Ocala, Florida.

APPEARANCES

For Petitioner: William B. Hunt, pro se
3531 Southeast 30th Terrace
Ocala, Florida 34471

For Respondent: (County) Gordon B. Johnston, Esquire
601 Southeast 25th Avenue
Ocala, Florida 34471-2690

For Respondent: (DCA) Brigette A. Ffolkes, Esquire
2740 Centerview Drive
Tallahassee, Florida 32399-2100

STATEMENT OF THE ISSUE

The issue in this case is whether the Marion County comprehensive plan, as amended by Ordinance No. 94-12 on April 7, 1994, is in compliance.

PRELIMINARY STATEMENT

This case began on December 13, 1994, when petitioner, William B. Hunt, filed a petition for an administrative hearing alleging that the Marion County comprehensive plan, as amended by remedial amendments, was not in compliance in a number of respects with 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 December 19, 1994, with a request that a Hearing Officer be assigned to conduct a hearing.

By notice of hearing dated January 10, 1995, a final hearing was scheduled for May 10-12, 1995, in Ocala, Florida. At final hearing, petitioner presented the testimony of Teresa M. Manning, a land use planning manager with the

Department of Community Affairs, and Gus Gianikis, acting planning director for Marion County. Also, he offered petitioner's exhibits 1-7. All exhibits were received in evidence. Respondent, Marion County, offered County exhibits 1-14 while respondent, Department of Community Affairs, offered DCA exhibits 1-4. All exhibits were received in evidence.

There is no transcript of hearing. Proposed findings of fact and conclusions of law were filed by respondents and petitioner on May 26 and 30, 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, Marion County (County), is a local government subject to the comprehensive land use planning requirements of Chapter 163, Florida Statutes. That chapter is administered and enforced by respondent, Department of Community Affairs (DCA). The DCA is charged with the responsibility of reviewing comprehensive land use plans and amendments made thereto.

2. Petitioner, William B. Hunt, owns property and resides within the County. Petitioner also submitted written comments to the County during the public hearing held on April 7, 1994, concerning the adoption of an amendment to the County's comprehensive plan. Therefore, he is an affected person within the meaning of the law and has standing to bring this action.

b. The nature of the dispute

3. In July 1991, the County initially transmitted its proposed comprehensive land use plan to the DCA. The DCA issued an Objections, Recommendations, and Comments (ORC) report for the County's plan on October 18, 1991. The County issued a response to the DCA's ORC report and adopted its comprehensive plan in January 1992. In April 1992, the DCA issued a notice of intent to find the comprehensive plan not in compliance.

4. In an attempt to bring the County's plan into compliance, the DCA and County entered into a settlement agreement in March 1993. Pursuant to the agreement, the County was supposed to adopt certain remedial amendments to its comprehensive plan.

5. In August 1993, the County adopted remedial amendments to its comprehensive plan. In October 1993, the DCA issued a notice of intent to find the remedial amendments not in compliance.

6. In another attempt to bring the County's plan into compliance, the DCA and County entered into another settlement agreement in February 1994, and into an addendum thereto in April 1994. Pursuant to this agreement, the County adopted the agreed-upon remedial amendments to its comprehensive plan by Ordinance No. 94-12 on April 7, 1994. On May 30, 1994, the DCA issued a cumulative notice of intent to find the County's comprehensive plan and remedial amendments in compliance.

7. On June 18, 1994, petitioner filed a petition to intervene with the Division of Administrative Hearings seeking to challenge the newly amended plan. After being advised that the petition was filed in the wrong forum, and that he incorrectly sought to intervene rather than to initiate a new proceeding, on December 13, 1994, petitioner filed a petition for an administrative hearing with the DCA. In his lengthy petition, which contains allegations running some fifty-four pages in length, petitioner has challenged the County's plan, as amended, in numerous respects. In his proposed order, however, petitioner has summarized his complaints into the following categories: (a) "many" of the plan objectives are not "specific or measurable," (b) "many" policies in the plan are not "adequate," (c) "many" of the required objectives and policies are not found within a particular element, (d) "many" policies in the plan defer implementation to the land development regulations, or to other kinds of regulations, that are to be adopted after the plan is adopted, (e) "publications" adopted by reference in the plan "have not been adequately cited," (f) "the plan does not control growth," and it "designates an over-allocation of land that can be developed at non-rural densities and intensities," (g) the plan violates the concurrency provision on State Road 200, and (h) the plan fails to include an analysis of projected mass transit level of service and system needs.

B. Is the Plan, as Amended, in Compliance?

a. Generally

8. In attempting to prove the allegations in his petition, petitioner offered only the testimony of a DCA land use planning manager and the County's acting planning director, both of whom concluded that the plan, as amended, was in compliance. Because both witnesses generally refuted all allegations raised in the petition, and they disagreed with the theories advanced by petitioner through his direct examination, the record in this case clearly supports a finding that the plan, as amended, is in compliance. Notwithstanding this state of the record, the undersigned will address in general terms the broad issues raised in the petition, namely, the adequacy of the plan's supporting data and analysis, the adequacy of the goals, objectives and policies, the plan's internal consistency, and the plan's consistency with the state comprehensive plan. In addition, the undersigned will address the more specific objections raised by petitioner in his proposed recommended order.

b. Adequate data and analyses

9. Petitioner has alleged that the County's plan, as amended, is not in compliance because ten elements were not supported by adequate data and analyses, as required by Chapter 9J-5, Florida Administrative Code. However, petitioner either abandoned these allegations or failed to prove them to the exclusion of fair debate.

b. Goals, objectives and policies

10. Petitioner further alleged that the County's plan, as amended, is not in compliance because a number of the goals, objectives and policies (GOPs) contained in the various elements were inadequate in that they did not meet some of the requirements for GOPs in Chapter 9J-5, Florida Administrative Code. However, petitioner either abandoned these allegations or failed to prove them to the exclusion of fair debate.

c. Internal consistency of plan

11. Petitioner next alleged that the County's plan, as amended, is not in compliance because the internal consistency requirements in Chapter 9J-5, Florida Administrative Code, had not been met. Based on the findings of fact above, however, it is clear that the evidence failed to show to the exclusion of fair debate that the County's plan contained GOPs that were in conflict with each other, thereby rendering the plan internally inconsistent.

d. Consistency with state comprehensive plan

12. Petitioner has also alleged that the County's plan, as amended, is not in compliance because it is not compatible with, and does not further, a number of goals and policies of the State Comprehensive Plan, which are contained in Section 187.201, Florida Statutes.

13. Petitioner failed to present any evidence showing that the County's plan, as amended, is not compatible with, and does not further, the State Comprehensive Plan.

e. Other objections

14. Petitioner has alleged in his proposed recommended order that some of the objectives and policies used by the County do not conform to the definition of those terms in Rule 9J-5.003, Florida Administrative Code. However, the evidence established that those definitions are not mandatory, they merely provide clarification for the local government, and the local government is free to use other definitions in its plan so long as they generally conform with the codified definition. Since the challenged objectives and policies generally conform with the above rule, and they provide the means for their achievement, they are found to be in compliance.

15. Petitioner also alleges that some elements in the plan lack certain policies and objectives required by chapter 9J-5 and thus are deficient. The more persuasive evidence shows, however, that each of the challenged elements was adequate in terms of containing the necessary policies and objectives, and thus the requirements of chapter 9J-5 have been satisfied.

16. Petitioner next alleges that many of the policies in the plan defer implementation to the land development regulations (LDRs) or other regulations that will not be adopted until after this plan becomes effective. Contrary to petitioner's assertion, however, some of the policies do not defer to the LDRs. In cases where they do, the LDRs must still be adopted in accordance with strict time limitations established by Chapter 163, Florida Statutes, and thus the necessary guidance in the plan is not lacking.

17. Petitioner further contends that "publications" adopted by reference in the plan "have not been adequately cited." He specifically refers to policy 1.5 of the Traffic Circulation Element which adopts by reference, and without specific citation to a page number, a manual entitled Institute of Traffic Engineers Trip Generation. Through testimony of witness Manning, however, it was established that it is impractical and unnecessary for the local government to cite specific page numbers of the manual in the plan itself. Indeed, reference to the title of the manual is sufficient. Therefore, those provisions of the plan which incorporate by reference other publications without detailed citations are found to be in compliance.

18. Petitioner has also complained that the plan does not control growth, and it over allocates land to non-rural purposes. In this regard, the County's future allocation of land use was made through the use of a multiplier, which is a planning technique for assessing future land use needs. This technique, and the accompanying calculations, were not shown to be unreasonable or to produce inappropriate results. It was further established that, in making its projections, the County exceeded the requirements of chapter 163. Indeed, in the words of a DCA planner, the County made one of the "most honest assessments of development of any plan in the state."

19. Petitioner next asserts that policy 2.1 of the Traffic Circulation Element allows a 20 percent degradation to the existing level of service for two segments on State Road 200, and thus it "violates the concurrency provision of the act and Rule 9J-5." While the level of service for roads must be consistent with Department of Transportation standards to the maximum extent possible, if it cannot meet them, the local government may show justification for deviation from those standards. In this case, the County presented justification for deviating from those standards by 20 percent on State Road 200 as authorized by Rules 9J-5.0055(1)(d) and 9J-5.007(2)(b), Florida Administrative Code. Therefore, the questioned policy is deemed to be in compliance.

20. Finally, petitioner alleges that the plan fails to include an analysis of projected mass transit level of service and system needs. Admittedly, such an analysis is not found in the plan. However, this is because the County does not operate a public mass transit system. In circumstances such as these, the County is required by chapter 163 to have a mass transit element in its plan, but it is not required to adopt an objective on this subject. Therefore, the absence of such an analysis does not render the plan not in compliance.

CONCLUSIONS OF LAW

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

22. The broad issue in this case is whether the plan, as amended, is "in compliance" with Part II of Chapter 163, Florida Statutes, and Chapter 9J-5, Florida Administrative Code. "In compliance," as defined in Section 163.3184(1)(b), Florida Statutes, means the plan is consistent with the applicable provisions of Part II of Chapter 163, Florida Statutes, the state comprehensive plan, the regional policy plan, and Chapter 9J-5, Florida Administrative Code.

23. This case arose under Section 163.3184(9)(a), Florida Statutes, following DCA's notice of intent to find the County's plan and remedial amendments in compliance. Under that statute, the plan or amendment must be determined to be "in compliance" if the local government's determination of compliance is fairly debatable. Therefore, the action of the County 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 his claims.

24. Based upon all of the evidence, it is concluded that petitioner has failed to prove to the exclusion of fair debate that the County's plan, as amended, is not supported by adequate data and analyses, or that some of the GOPs are inadequate or in conflict with each other.

25. Based upon all of the evidence, it is concluded that petitioner has failed to prove to the exclusion of fair debate that the County's plan, as amended, is inconsistent with the State Comprehensive Plan.

26. Therefore, it is concluded that petitioner has failed to prove that the County's determination of compliance is not fairly debatable.

27. Finally, at hearing petitioner moved to "disqualify" his own witness, Teresa M. Manning, then a DCA employee, on the ground she had applied for the position of County planning director. The request was denied. In his proposed order, he again requests that she be disqualified on the ground that, after the hearing, she was hired for that position. Because this is not a ground for disqualifying a witness under Section 90.603, Florida Statutes, but rather is a factor to be considered in assessing the witness' credibility, the request to disqualify witness Manning 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 that Marion County's comprehensive plan, as amended by Ordinance No. 94-12, is in compliance.

DONE AND ENTERED this 29th day of June, 1995, in Tallahassee, Florida.

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

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of June, 1995.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 94-7071GM

Petitioner:

1.	Partially accepted in finding of fact 2.
2-3.	Partially accepted in finding of fact 1.
4a.-4c.	Partially accepted in finding of fact 14.
4d.	Partially accepted in finding of fact 15.
4e.	Partially accepted in finding of fact 16.
4f.	Partially accepted in finding of fact 17.
4g.	Partially accepted in finding of fact 18.
5.	Partially accepted in finding of fact 19.
6.	Partially accepted in finding of fact 20.
7-9.	Covered in conclusions of law.

Respondents:

1. Partially accepted in finding of fact 1.
2. Partially accepted in finding of fact 2.
3. Partially accepted in finding of fact 3.
4. Partially accepted in finding of fact 4.
5. Partially accepted in finding of fact 5.
6. Partially accepted in finding of fact 6.
7. Partially accepted in finding of fact 7.
8. Partially accepted in finding of fact 9.
9. Partially accepted in finding of fact 10.
10. Partially accepted in finding of fact 11.
11. Partially accepted in finding of fact 12.
12. Rejected as being unnecessary.
13. Partially accepted in finding of fact 13.

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.