STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| ST. GEORGE PLANTATION OWNERS' ASSOCIATION, INC., | ) | |
| Petitioner, | ) | |
| vs. | ) | CASE NO. 96-5124GM |
| FRANKLIN COUNTY, | ) | |
| Respondent, | ) | |
| and | ) | |
| BEN JOHNSON and COASTAL DEVELOPMENT CONSULTANTS, INC. | ) | |
| Intervenors. | ) | |

RECOMMENDED ORDER

Pursuant to notice, the above matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on December 19, 1996, in Apalachicola, Florida.

APPEARANCES

For Petitioner: Richard W. Moore, Esquire
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For Respondent: Alfred O. Shuler, Esquire
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For Intervenors: L. Lee Williams, Esquire
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STATEMENT OF THE ISSUE

Whether the small scale development amendment adopted by Ordinance No. 96-22 on October 3, 1996, is in compliance.

PRELIMINARY STATEMENT

This matter began on October 3, 1996, when respondent, Franklin County, adopted Ordinance No. 96-22 changing the permitted land use on 9.6 acres of land located on St. George Island from residential to commercial. The ordinance was adopted pursuant to Section 163.3187(1)(c), Florida Statutes. On November 1,

1996, petitioner, St. George Plantation Owners' Association, Inc., filed a petition for formal administrative hearing alleging the amendment was not in compliance. More specifically, petitioner contended that the amendment did not include "all the land for the essential infrastructure," and if such land was included, the total acreage involved would exceed the amount permitted by law. On December 5, 1996, intervenors, Ben Johnson and Coastal Development Consultants, Inc., were authorized to intervene in this proceeding.

By notice of hearing dated November 19, 1996, a final hearing was scheduled on December 19 and 20, 1996, in Apalachicola, Florida.

At final hearing, petitioner presented the testimony of Gail Easley, a land use planner and accepted as an expert in land use planning. Also, it offered petitioner's exhibits 1-23 and 25-27. All exhibits were received in evidence. Exhibit 14 is the deposition testimony of Ella Medley Brown, a Department of Environmental Protection registered professional engineer and accepted as an expert in the design and operation of wastewater treatment facilities. Respondent presented the testimony of Alan C. Pierce, county planning director, who was accepted as an expert in land use use planning. Intervenors presented the testimony of Ben Johnson, an economist and accepted as an expert in public utility economics and regulation. Also, they offered intervenors' exhibits 1-5 and 7. All exhibits were received in evidence.

The transcript of hearing (two volumes) was filed on January 7, 1997. Proposed findings of fact and conclusions of law were filed by the parties on January 22, 1997, and have been considered by the undersigned in the preparation of this Recommended Order.

## FINDINGS OF FACT

Based upon all of the evidence, including the stipulation of counsel, the following findings of fact are determined:

A. Background

a. The parties

1. Respondent, Franklin County (County), is a local governmental unit subject to the land use planning requirements of Chapter 163, Florida Statutes. That chapter authorizes the County, under certain conditions, to adopt what is known as a small scale development amendment to its comprehensive plan. At issue in this case is a small scale development amendment adopted by the County on October 3, 1996.

2. Petitioner, St. George Plantation Owners Association, Inc. (petitioner), is a not-for-profit corporation organized for the protection and management of the Plantation Area of St. George Island. The island lies just south of Apalachicola, Florida in the Gulf of Mexico. The parties have stipulated that petitioner is an affected person within the meaning of the law and thus it has standing to bring this action.

3. Intervenors, Ben Johnson and Coastal Development Consultants, Inc., are the owners of approximately 58 acres on St. George Island known as the Resort Village Property. The property is adjacent to the St. George Island Airport. A portion of intervenors' property, 9.6 acres, is the subject of the plan amendment being challenged.

b. The nature of the dispute

4. Intervenors' property is subject to a 1977 Development of Regional Impact (DRI) order adopted by the County in 1977. The order has been amended from time to time. Among other things, the order provides conceptual approval for the development of "one or more high quality resort hotels or motels, together with such affiliated uses as may be appropriate or desirable, such as gift and tourist shops, restaurants, recreational activities and similar activities."

5. Intervenors desire to develop the Resort Property Village consistent with the 1977 DRI order. The first part of the project consists of approximately 9.6 acres which they have designated as Phase I. The land is located within the Plantation Area of St. George Island and has a land use designation of residential.

6. In June 1995, intervenors submitted detailed site plans for Phase I to the County. On August 1, 1995, the County conducted a public hearing to review the proposed site plans and specifications for Phase I. It adopted a motion which directed its staff "to review and perfect the plans presented, so that the Board can consider the final approval of the plan." It also directed its staff to provide advice concerning the procedure to be followed.

7. After consulting with the Department of Community Affairs (DCA), which recommended that the comprehensive plan be amended to change the land use to accommodate the commercial uses, the staff recommended that the County adopt a small scale development amendment by changing the designation on its Future Land Use Map (FLUM) for 9.6 acres from residential to commercial.

8. By a 3-2 vote, on October 3, 1996, the County adopted Ordinance No. 96-22 which changed the designation for the 9.6 acres on the FLUM from residential to commercial. Because the amendment affected ten or fewer acres, the County opted to make the change with a small scale development amendment under Section 163.3187(1)(c), Florida Statutes.

9. According to the site plan which accompanied a Notification of Proposed Change filed with the County on May 26, 1996, the Phase I development includes four hotels, 10,250 square feet of commercial space, 300 square feet of retail space, a beach club, a 325 seat conference center, various support and recreational facilities, and a wastewater treatment plant.

10. The Phase I site plan, however, does not include the three subsurface absorption beds which are required to service the effluent from the wastewater treatment plant. If the absorption beds were included, they would increase the size of Phase I from 9.6 to approximately 14.6 acres.

11. In a petition challenging the adoption of the small scale amendment, petitioner contends that, if the absorption beds are properly included in the land use amendment, the land use area would exceed ten acres and thus would require a full-scale land use amendment subject to DCA review. In response, the County and intervenors have contended that, under the current plan, there is no need to change the land use where the wastewater treatment facility will be located since such facilities are allowed in any land use category. As such, they contend there is no requirement to include such property in Ordinance 96-22.

B. The Wastewater Treatment Facility

12. The proposed development will be served by a wastewater treatment facility. The Department of Environmental Protection (DEP) has issued a permit to Resort Village Utility, Inc., a utility certified by the Florida Public Service Commission to serve the entire 58-acre Resort Village property. The permit provides that the plant can accommodate up to, but not exceeding, 90,000 gallons of treated effluent per day.

13. The facility consists of the wastewater treatment plant, lines to the plant from the development which carry the untreated wastewater to the plant, and lines from the plant to three sub-surface absorption beds where the treated effluent is disbursed.

14. The absorption beds required for the Phase I project wastewater treatment facility will not serve any residential customers. Rather, they will only serve Phase I and any other subsequent phases of Resort Village development, which is a commercial development.

15. Construction must begin on the wastewater treatment plant once the flow of waste effluent reaches 7,500 gallons per day, or if the wastewater from restaurants reaches 5,000 gallons per day. The Phase I project is required to use this facility once the rate of flow of waste effluent exceeds 10,000 gallons per day. Until these thresholds are met, the project will rely temporarily on aerobic systems to handle and treat waste effluent.

16. Under the permit issued by the DEP, the wastewater treatment facility required for Phase I consists of both a wastewater treatment plant and three absorption beds. Through expert testimony of a DEP professional engineer, it was established that the absorption beds were integral to the design and successful operation of the facility. The County and intervenors acknowledge this fact. Therefore, the "use" that is the subject of the amendment is the entire wastewater treatment facility, including the absorption beds, and "involves" some 14.6 acres. Since the plan amendment does not involve "10 or fewer acres," as required by statute, the amendment cannot qualify as a small scale development amendment and is thus not in compliance.

17. In making these findings, the undersigned has considered a contention by the County that Policy 2.3 of the comprehensive plan sanctions its action. That policy reads as follows:

> Public utilities needed to provide essential service to existing and future land uses in Franklin County shall be permitted in all the land use classifications established by this plan. Public utilities includes all utilities (gas, water, sewer, electrical, telephone, etc.) whether publicly or privately owned.

At hearing, the County planner construed the term "public utilities" as being "minor (utility) infrastructure," including wastewater treatment plants not exceeding 100,000 gallons per day. Relying on this provision, the County reasons that the proposed facility is "minor" infrastructure, since it will only have 90,000 gallons per day capacity, and thus it can be placed in a residential land use category. They go on to argue that, since no change in land use classification is needed to permit the facility, it is unnecessary to include the facility in the plan amendment. According to the County, however, the plant (but not the beds) was included only because it was easier to draw a map for the

entire 9.6 acres rather than excise that portion of the land where the plant will be located.

18. Under the same theory, the County has placed at least two existing wastewater treatment facilities in the residential land use category. Those facilities, however, predate the adoption of the comprehensive plan in April 1991, and both serve residential, as opposed to commercial, developments. Moreover, the County admitted that it lacks any "clear" policy about the meaning of "public utilities," and it has never adopted a land development regulation to implement the interpretation given at hearing.

19. The County's position is contrary to conventional land use planning practices which define "utilities" as infrastructure such as water or electrical lines that transport a service and would, by their very nature, be required to cross different land uses. Conversely, conventional land use planning practices define "facilities" as infrastructure that performs a service, such as power plants or pumping stations. This infrastructure does not cross different land use categories.

20. In this case, the absorption beds perform a service by further processing and treating waste effluent from Phase I. Therefore, conventional land use planning practices would logically call for the plant and related absorption beds to be classified as "public facilities" under Policy 2.2(i) of the County's comprehensive plan. That policy defines the term as including "water and sewer facilities." The classification would also be compatible with the definition of "public facilities" found in DCA Rule 9J-5.003(105), Florida Administrative Code.

21. Finally, the County and intervenors point out that the facility may not be constructed for many years, depending on the rate and amount of development that occurs in Phase I. Thus, they contend that there is no immediate requirement for the County to change the future land use designation of the property where the absorption beds will be located. But given the fact that the beds and plant are a single, interrelated system, the County cannot choose to change the land use designation for a portion of the facility while ignoring the remainder.

## CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.57(1) and 163.3187(1)(c), Florida Statutes.

23. Section 163.3187(1), Florida Statutes (Supp. 1996), governs this controversy. Although a number of conditions must be met by a local government when adopting a small scale amendment, only the following condition found in subparagraph (1)(c)1. is in issue:

> (c) Any local government comprehensive plan amendments directly related to proposed small scale development activities may be approved without regard to statutory limits on the frequency of consideration of amendments to the local comprehensive plan. A small scale development amendment may be adopted only under the following conditions:
>
> 1. The proposed amendment involves a use

> of 10 acres or fewer . . . :
>
> * * *

24. Under the foregoing condition, the test is not simply to examine the face of the ordinance and determine if the amount of land which is the subject of the amendment is "10 acres or fewer;" if it was, there would be no need for an evidentiary hearing to perform this simple task. Rather, the statute contemplates a broader inquiry to see if the "use" that is the subject of the amendment "involves" ten acres or less. If it does not, as petitioner alleges here, the land use change must be accomplished through a regular plan amendment requiring DCA review and approval.

25. Section 163.3187(2), Florida Statutes, contains a further requirement which reads as follows:

> (2) Comprehensive plans may only be amended in such a way as to preserve the internal consistency of the plan pursuant to s. 163.3177(2).

Although subsection (2) allows "consistency" arguments to be raised in a section 163.3187(1)(c) proceeding, petitioner did not allege these arguments in its initial complaint (petition), and thus the untimely argument (made for the first time at hearing) that Ordinance No. 96-22 lacks internal consistency has been disregarded.

26. The more persuasive and credible evidence shows that the absorption beds are integral to the design and operation of the wastewater treatment plant. Therefore, when crafting a land use classification change, the County must consider the entire facility, including the absorption beds, as a single system in the same land use classification. Because the proposed "use" which is the subject of the amendment "involves" 14.6 acres, or more than the ten acres permitted by law, the amendment cannot qualify as a small scale development amendment under section 163.3187(1)(c). This being so, Ordinance No. 96-22 is not in compliance.

27. In reaching this conclusion, the undersigned has considered the contention by the County and intervenors that, under Policy 2.3 of the comprehensive plan, "minor" public utilities, including wastewater treatment plants having less than 100,000 gallons per day capacity, may be located in any land use classification. They then conclude that the entire facility could have remained in a residential land use category without being a part of the small scale amendment. But this interpretation conflicts with conventional land use planning practices. Even if it did not, by choosing to place the plant facility in a commercial land use category, the County was also obliged to include the absorption beds in the amendment since the beds are an integral part of the facility.

28. At hearing, intervenors also proffered an argument that the project is vested and therefore not subject to the requirements of the comprehensive plan or section 163.3197(1)(c). It is unclear as to what extent, if any, intervenors formally raised this issue with the County, once it decided on August 6, 1996, to utilize a small scale development amendment. In any event, the vesting issue was previously litigated by intervenors before the Florida Land and Water Adjudicatory Commission (FLWAC) in Ben Johnson and Coastal Development Consultants, Inc. v. Bd. of County Comm. of Franklin County, 95 ER FALR 39 (FLWAC, April 12, 1995). In its final order, FLWAC determined that any

development of the property must comply with the requirements of Chapters 163 and 380, Florida Statutes. This order was affirmed in Johnson v. Bd. of County Comm. of Franklin County, 670 So.2d 944 (Fla. 1st DCA 1996). Intervenors are accordingly bound by the terms of that order. The undersigned interprets that final order as meaning intervenors are subject to the requirements of chapter 163, including section 163.3187(1)(c).

29. In summary, the "use" of the facility that is the subject of the amendment "involves" more than ten acres. Therefore, the change in land use classification for Phase I cannot qualify as a small scale development amendment under Section 163.3187(1)(c), Florida Statutes. This being so, Ordinance No. 96-22 is not in compliance.

## RECOMMENDATION

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

RECOMMENDED that the Administration Commission enter a Final Order determining Ordinance No. 96-22 adopted by Franklin County on October 3, 1996, as not in compliance for failing to meet the criteria of Section 163.3187(1)(c), Florida Statutes.

DONE AND ENTERED this 13th day of February, 1997, in Tallahassee, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
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this 13th day of February, 1997.

COPIES FURNISHED:

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## NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written 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.