

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BAY POINT CLUB, INC., )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 01-4890  
 )  
 BAY COUNTY, )  
 )  
 Respondent, )  
 )  
 and )  
 )  
 K. EARL DURDEN; DAVID ALLEN )  
 SPENCER; HARRY B. SIPPLE, III; )  
 UNAL TUTAK; DAVID W. HILL; )  
 LUCY N. HILTON; WILLIAM F. )  
 FUSSELMAN; and BAY POINT )  
 COMMUNITY ASSOCIATION, INC., )  
 )  
 Intervenor. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on May 13-15 and September 11, 2002, in Panama City and Tallahassee, Florida.

APPEARANCES

For Petitioner: Kenneth D. Goldberg, Esquire  
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Tallahassee, Florida 32308-5201

For Respondent: Michael S. Burke, Esquire  
Burke & Blue  
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For Intervenors: Robert C. Apgar, Esquire  
(Durden et al.) Sherry A. Spiers, Esquire  
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For Intervenor: Richard W. Moore, Esquire  
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STATEMENT OF THE ISSUES

The issues are whether Petitioner's application for a Notice of Proposed Change to its Development of Regional Impact constitutes a substantial deviation from the criteria in Section 380.06(19)(b)1.-15., Florida Statutes, and whether the proposed change is consistent with Bay County's Comprehensive Plan.

PRELIMINARY STATEMENT

This matter began on September 11, 2001, when Respondent, Bay County, by a 2-2 tie vote, denied a Notice of Proposed Change to a previously-approved Development of Regional Impact filed by Petitioner, Bay Point Club, Inc., on the ground that the proposed change constituted a substantial deviation. On October 12, 2001, Petitioner filed a Notice of Appeal and Petition to Appeal DRI Development Order with the Florida Land and Water Adjudicatory Commission. Petitions to Intervene in

opposition to the Petition were then filed by Intervenors, K. Earl Durden, David Allen Spencer, Harry B. Sipple, III, Unal Tutak, David W. Hill, Lucy N. Hilton, William F. Fusselman, and Bay Point Community Association, Inc. In an Order of Transmittal rendered by the Florida Land and Water Adjudicatory Commission on December 19, 2001, intervention by those parties was authorized. By the same Order, the matter was referred to the Division of Administrative Hearings, with a request that an Administrative Law Judge be assigned to conduct a hearing.

By Notice of Hearing dated January 18, 2002, and by agreement of all parties, a final hearing was scheduled on May 13-15, 2002, in Panama City, Florida. A continued hearing was held on September 11, 2002, in Tallahassee, Florida. Intervenors' Joint Emergency Motion for Continuance of Final Hearing was denied on May 10, 2002.

At the final hearing, Petitioner presented the testimony of Gary Ament, Bay County planning and zoning manager; Robert F. Henry, III, its president; Dan Garlick, an environmental consultant and accepted as an expert; Gail Easley, a land planning consultant and accepted as an expert; Tom Beck, a land use planner and accepted as an expert; Steve Marshall, a real estate appraiser and accepted as an expert; Joseph F. Chapman, III, chairman of the board of the holding

company which owns Petitioner; Raymond Powell, president and chief executive officer of Peoples First Community Bank; and William F. Spann, a former owner and developer of Bay Point. Also, it offered Petitioner's Exhibits 1-18, which were received in evidence. Respondent, Bay County, offered Composite Exhibit 1, the record of the proceeding before Bay County, which was received in evidence. Intervenors presented the testimony of Edward R. "Ted" Mack, a land use planner and accepted as an expert; Harry B. Sipple, III, a realtor and accepted as an expert; Libby Sipple, a realtor and accepted as an expert; James Gardner, a realtor and accepted as an expert; Richard DeVed, a past president of the Bay Point Community Association, Inc.; and Karen G. Durden, K. Earl Durden, and William F. Fusselman, all property owners. Also, they offered Intervenors' Exhibits 1-23, 31-35, 37, 38, 42, and 43. A ruling on Exhibits 4 and 5 was reserved. All exhibits are hereby received in evidence except Exhibits 23, 31-35, and 38. Finally, at Petitioner's request, the undersigned took official recognition of a Final Judgment entered in the case of Durden et al. v. Bay Point Club, Inc., Circuit Court Case No. 00-1119 (Fla. 14th Cir. 2001), aff'd 810 So. 2d 922 (Fla. 1st DCA 2002). Although Petitioner also requested that the case of Edgewater Beach Owners Association, Inc. v. Walton County et al., 27 Fla. L. Weekly D1880 (Fla. 1st DCA,

August 22, 2002), be officially recognized, that case is not final as decisions on petitions for rehearing, rehearing en banc, and certification to the Florida Supreme Court are still pending. Therefore, official recognition is premature.

The Transcript of the hearing (6 volumes) was filed on September 25, 2002. At the request of the parties, the time for filing proposed findings of fact and conclusions of law was extended to November 8, 2002. The same were filed by all parties except Bay County, and they have been considered by the undersigned in the preparation of this Recommended Order. Finally, on November 15, 2002, Petitioner filed a Motion to Strike Portions of [Intervenors'] Proposed Recommended Order. Responses in opposition to the Motion were filed by Intervenors on November 19 and 20, 2002, and a Reply to the Responses was filed by Petitioner on November 25, 2002. This dispute is ruled upon in the Conclusions of Law portion of this Recommended Order.

#### FINDINGS OF FACT

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

##### A. Background

1. Petitioner, Bay Point Club, Inc. (Petitioner), is the owner of Parcels F, 9, 10, and 12 located within the Bay Point Yacht and Country Club Resort Development of Regional Impact

(Bay Point DRI) in Panama City, Florida. The Bay Point DRI was approved by Respondent, Bay County (County), on July 22, 1986, and authorized the development of 2,161 residential units, 200 hotel units, 123 marina slips, and recreational facilities on approximately 946 acres. The County is responsible for issuing development orders for projects that are to undergo development of regional impact review, including amendments to development orders of previously determined DRIs, in conformity with the requirements of Section 380.06, Florida Statutes.

2. When the original Development Order was issued in 1986, Bay Point Yacht & Country Club was the sole developer of the Bay Point DRI. Since that time, the ownership and control of the properties within the Bay Point DRI has changed, and there are now multiple owners and developers of the 36 separate development areas or parcels included within the Bay Point DRI, including Petitioner, who owns the above four parcels.

3. The Bay Point DRI was approved by the County prior to the adoption of its Comprehensive Plan (the Plan). When the first Plan was adopted in 1991, the County recognized and incorporated the Bay Point DRI through the adoption of an overlay to the Future Land Use Map (FLUM) which delineates the boundaries of the property. As stated in Future Land Use

Element Policy 3.4.5, the overlay was adopted to ensure the consistency and compatibility of the Bay Point DRI with the County's FLUM. Parcels F and 12 were designated as "Seasonal/Resort" and Parcels 9 and 10 were designated as "Residential" on the FLUM. These designations remain in effect as of the date of the final hearing. A Seasonal/Resort classification allows a broad range of uses such as beach houses, multifamily housing, condominiums, hotels, lodges, restaurants, and other similar uses, while a Residential classification permits those land uses typically associated with residential occupancy.

4. The Bay Point DRI has been amended 15 times, which amendments cumulatively reduced by 145 the total number of residential units. None of these amendments constituted a substantial deviation from the approval given in the original Development Order, and the County has never required a corresponding amendment to its Plan, FLUM, or DRI overlay as a condition for approval for any of these changes to the DRI.

5. In July 1993, PFP One, Inc., Petitioner's parent company, entered into a Purchase and Sale Agreement with the Federal Deposit Insurance Corporation, as manager of the FSLIC Resolution Trust Fund, to purchase Parcels F (a waterfront lot adjacent to the Bay Point Marina), 10, and 9 for \$235,000. At that time, Parcels 9 and 10 were vacant, and they remain

vacant today. A private membership tennis facility was operating on Parcel F through a lease agreement Petitioner inherited as a part of the purchase. These tennis facilities were closed on April 1, 2000, due to a lack of membership support. Parcel 12 was purchased by PFP One, Inc. in 1994. It contained a private clubhouse facility which had once been operational prior to the approval of the DRI, but was closed at the time of the sale. The clubhouse was remodeled by Petitioner shortly after the Parcel was purchased and reopened the same year. Due to a lack of membership support, however, the clubhouse was closed in 1996. The single-family residential portion of Bay Point begins within a few hundred feet west of the above Parcels.

6. The Development Order currently provides the following descriptions for Parcels F, 12, 10, and 9:

Parcel F:

Located adjacent to the Bay Point Clubhouse, this 4.8 acre site currently supports the Bay Point Tennis Center. As a part of Bay Point's long term plan, the Tennis Center is scheduled to be moved to Area 9 in 1986. In 1987, a 70-unit condominium project designated as Port Towers is planned to be built on this waterfront site. [A] total of 97,000-sq. ft. of heated and cooled space are planned. Included will be a pool and recreation center. Building height would be restricted to not more than five stories with a majority of the project being of the two and three story height.



Four, 2100 sq. ft. penthouse units, eight (8) 1,800 sq. ft. three-bedroom units, forty (40), 1400 sq. ft. two-bedroom units and eighteen (18), 1000 sq. ft. one-bedroom units are planned. There would be no restrictions of resort rental use, although it is assumed that, like Marina Club Village, the vast majority of these units will be primary and secondary homes because of pricing. Restrictive covenants for this project would be developed similar to those currently in force at Bay Point.

Parcel 12:

A 4-acre main clubhouse site, which is adjacent to the swimming pool, snack bar, health club and real estate facilities, is in the vested area and was substantially completed prior to July 1, 1973.

Parcel 10:

This one acre site is the planned location of the new Sport Center Clubhouse which will serve Bay Point's member golf facilities and the resort's tennis and health facilities. Included in the 14,000 square ft. Clubhouse will be a 90-seat restaurant and snack bar area, a health club, exercise and massage rooms, men and women's locker rooms, offices for the Director of Tennis and Golf Professional and a classroom. Additional space will house the club's sports retail center which sells both hard and soft goods associated with golf, tennis and physical exercise.

Parcel 9:

This 6 acre site has been set aside as the future location of the Bay Point Tennis Center. When completed, it will consist of up to 14 tennis courts, one of which will be the center court with stadium stands.

7. The original description of Parcels F and 12 reflects that the acreage of the two sites combined is 8.83 acres. A survey completed just before the NOPC was submitted determined that the combined acreage of the two parcels was actually 9.67 acres. Petitioner has stipulated that in the event the smaller acreage number is correct, the density that will be developed on the property will be in conformity with the limitations imposed by the smaller acreage.

8. On May 14, 2001, Petitioner filed with the County a Notification of Proposed Change to a Previously-Approved Development of Regional Impact (NOPC) under Section 380.06(19), Florida Statutes. Copies were also provided to the Department of Community Affairs (DCA) and the West Florida Regional Planning Council (Council). Under the NOPC, Petitioner proposes to change the Development Order as to Parcels F and 12 as follows:

The proposed project will be a 136-unit condominium project with approximately 58 units on Parcel F and 78 units on Parcel 12. The number of units on both parcels will increase from the current 70 units authorized on Parcel F to 136 units on Parcels F and 12 combined, a cumulative increase of 66 units. Three concrete structures are planned. The center building, which is the farthest from any existing development, is 11 stories in height with a step increase to 12 stories. The two exterior buildings are six stories in height with step increases to ten stories. All improvements to the project will be built by year end 2004, which is

the current build-out date for the Bay Point DRI, as amended. The existing tennis courts located on Parcel F will be reduced to four hard surface courts with separate restroom facilities. The residential units will consist of 1, 2, 3 and 4 bedroom condominiums, approximately 900 to 2,400 sq. ft. in size.

Thus, the proposed change in Parcels F and 12 will increase the number of condominium units from 70 to 136, change the height limitation from 5 stories to 12 stories, and eliminate the existing tennis facility. In addition, Petitioner proposes to eliminate the swimming pool and clubhouse now located on Parcel 12 and replace them with condominiums.

9. The NOPC also proposes to change the Development Order as to Parcels 9 and 10 in the following manner:

The designations for Parcels 9 and 10 will be changed from "Tennis Complex" and "Sports Center/Clubhouse," respectively, to Recreation. These changes are sought because of the historical absence of community or public support for the existing private tennis and clubhouse facilities presently located on Parcels F and 12. Funded through annual memberships by residents of Bay Point and the public, support for these facilities has been insufficient to economically sustain them and justify their continued operation. Consequently, due to lack of membership support, the Clubhouse on Parcel 12 was closed in 1996. For the same reason, the tennis courts on Parcel F were closed April 1, 2000. Changing the designation on Parcels 9 and 10, from Tennis Complex and Clubhouse to Recreation[,] will afford the Applicant with the flexibility needed to develop new or expanded active and/or passive recreational opportunities which

the residents of Bay Point are willing and able to support, and which are economically feasible. In no event, however, will the Applicant develop, or allow others to develop, recreational facilities on Parcel 9 or Parcel 10 which exceed the intensity standards authorized for the development of these properties by the original Bay Point DRI.

Under these proposed changes, Parcels 9 and 10, which are predominately wetlands, will remain undeveloped and constitute a passive recreation area.

10. The changes proposed in the NOPC will require corresponding changes to the uses originally approved for Parcels F, 12, 10, and 9 in the Bay Point DRI Development Order, including changes to Map H, the Master Development Plan Map.

11. The changes proposed by the NOPC for the DRI Development Order, including the changes to Map H, will not require a corresponding amendment to the underlying land use designations for Parcels F and 12 (Seasonal/Resort) and Parcels 9 and 10 (Residential).

12. The NOPC was reviewed by the Council for conformity with the requirements of Section 380.06(19)(f)4., Florida Statutes. On June 11, 2001, the Council advised the County that the changes proposed for Parcels F, 9, 10, and 12 did not appear to constitute a substantial change from the previously-

approved Bay Point DRI. The DCA did not submit a written objection to the proposed NOPC.

13. On August 7 and September 7, 2001, the County held quasi-judicial public hearings on the NOPC. At the latter meeting, the County denied the NOPC on the basis of a 2-2 tie vote regarding the question of whether the proposal constituted a substantial deviation. The County did not make any determination with respect to the question of whether the NOPC was consistent with its Comprehensive Plan. This finding was confirmed in a letter from the County Attorney's Office dated September 7, 2001, and transmitted to Petitioner on September 11, 2001.

14. On October 11, 2001, Petitioner filed its Petition to Appeal DRI Development Order with the Florida Land and Water Adjudicatory Commission (Commission). On November 7, 2001, Intervenors, K. Earl Durden, David Allen Spencer, Harry B. Sipple, III, Unal Tutak, David W. Hill, Lucy N. Hilton, and William F. Fusselman, who all own property within the Bay Point DRI and have standing to participate, filed a Petition to Intervene. On November 8, 2001, Intervenor, Bay Point Community Association, Inc., which is the homeowners' association for the approximately 1,300 residences within the Bay Point DRI and likewise has standing to participate, filed its Petition to Intervene. These Petitions were granted by

the Commission on December 19, 2001. Although the Petitions to Intervene contended that the NOPC constituted a substantial deviation requiring further DRI review by the County, that issue has been abandoned. Remaining at issue is the contention that the NOPC is inconsistent with the County's Comprehensive Plan (Plan) by generally failing to protect residential property values, promote viable neighborhoods, and maintain the community character in residential areas, as required by various Plan Objectives and Policies. Intervenors also contend that the NOPC lacks a needed stormwater plan. In more simple terms, however, Intervenors object to any high-rise development in an area surrounded by single-family residential homes and in a community (Bay Point) where no other buildings exceed seven stories in height.

b. The characteristics of the community

15. Bay Point is a unique, residential resort development on St. Andrews Bay in Panama City, Florida. A large portion of the land lying north of Bay Point is owned by the United States Navy; thus, Bay Point is somewhat isolated from the unplanned developments which occur in other inland areas, as well as along the Gulf of Mexico.

16. Residential and commercial development commenced in Bay Point in 1971. To date, no high-rise buildings have been constructed in the community. Most structures are one or two

stories in height, and only four buildings in Bay Point exceed two stories: the Bay Town commercial and condominium development (three stories); the Lagoon Towers condominium with sixty-three units (seven stories), which is the tallest building in Bay Point; the Marriott Legends Edge timeshare with twenty-eight units (six stories); and the Marriott Hotel (five stories). The three tallest buildings are in the extreme southeast portion of Bay Point a minimum of 1,600 feet and as far as 3,000 feet from the site of Petitioner's proposed high rise condominium buildings. When viewed from a distance, the four buildings which exceed two stories in height can barely be seen above the tree line.

17. Bay Point is a mixed use development because it includes residential and nonresidential uses, as well as some community facilities. However, it is fair to state that Bay Point is a low-rise, low-density residential development, and it was planned as a predominately residential community under the 1986 DRI Development Order. Access to the residential part of the community is controlled through gates and a security force.

18. Although there are some resort rental activities and tourist accommodations (a Marriott hotel), Bay Point is comprised of predominately permanent residents. There are 681 single-family homes on individual lots in the western portion

of Bay Point, which are one and two-story structures comprising 79.9 percent of the development in Bay Point. The two-story single-family homes tend to be clustered along the bay or along the canals running through the development.

19. As originally developed, commercial development made up only 10.4 percent of the land area of Bay Point. Of that total, 6.6 percent is retail and office development (such as offices, restaurants, retail shops, and a post office); 1.5 percent is commercial recreation (pro shops and golf and tennis club); and 1.7 percent is a Marriott Hotel. In addition, community facilities (including a playground for children) comprise 1.5 percent of the land area. There is also a 201-slip marina and a semi-private golf club on the premises.

20. The "resort core" area of Bay Point refers to certain development in the Seasonal/Resort land use category containing a mixture of mainly seasonal and tourist residential, commercial, and noncommercial uses. Of the almost 1,000 acres in the Bay Point DRI, only about 24 acres were planned and approved for "resort core," or less than 15 percent of the 200 acres designated as Seasonal/Resort. The remaining 85 percent of the Seasonal/Resort area has a predominately residential character. Petitioner's project on Parcels F and 12 is far from any development that could be



characterized as "resort core," and all of the development in the immediate vicinity of and surrounding Parcels F and 12 is residential development with structures not exceeding two stories in height. Thus, Petitioner cannot rely on any perceived proximity of Parcels F and 12 to the "resort core" as a basis for justifying the high-rise structures.

c. Consistency with the Plan

21. Intervenors contend that the NOPC is inconsistent with Future Land Use Element (FLUE) Policy 3.4.5 (which allegation is subject to an objection by Petitioner); Housing Element Objective 8.5; Housing Element Policy 8.5.1; Housing Objective 8.9 (which allegation is subject to a Motion to Strike); Stormwater Management Objectives 5E.9 and 5E.12; Stormwater Management Policies 5E.9.1, 5E.10.1, and 5E.12.1; and FLUE Policy 3.3.1. Each of these items will be addressed separately below.

22. As a part of its 1999 Plan (which amended and updated the 1991 Plan), the County adopted special treatment zones (STZs) to be designated on the FLUM in addition to the future land use categories. The specific STZs are established pursuant to FLUE Objective 3.4, which provides that the zones are created "for purposes of dealing with unique or desirable circumstances." The unique circumstance in this case is the DRI.

23. In the Plan, the County has either adopted or expressed its intent to adopt distinct land development regulations or land use controls for each STZ. FLUE Policy 3.4.5 establishes the Bay Point DRI STZ. This policy provides that:

[t]he Bay Point Development of Regional Impact (DRI) Special Treatment Zone shall be established in order to ensure compatibility and consistency between the Bay Point DRI Development Order and the FLUM. Development in this area shall be governed by the DRI Development Order.

(Emphasis supplied) The last sentence of Policy 3.4.5 was added by comprehensive plan amendment adopted on July 10, 2001.

24. By virtue of the underscored language, the conditions and restrictions on the use and development of Parcels F, 9, 10, and 12 in the DRI Development Order in effect on July 10, 2001, are incorporated into the County's Plan. This was confirmed at hearing by the County's Planning and Zoning Manager. Thus, the maximum five-story height limitation on Parcel 12 contained in the DRI Development Order is incorporated into the Plan by reference through Policy 3.4.5.

25. Because all three of Petitioner's proposed high-rise condominium buildings exceed the five-story height limitation

for Parcel F found in the DRI Development Order in effect on July 10, 2001, the NOPC is inconsistent with Policy 3.4.5.

26. Objective 8.5 of the Housing Element provides that all projects in the County will "preserve and protect the character, compatibility, and aesthetics of residential areas and neighborhoods through the enforcement of land use regulations." Petitioner contends that this Objective cannot apply to the development on Parcels F and 12 because these parcels are in a mixed land use category under the FLUM and therefore are not in "residential areas or neighborhood" as contemplated by the Objective. However, the Objective refers to "residential areas and neighborhoods," and not to future land use categories. Thus, the Objective is directed towards existing residential and multi-family development in Bay Point, including Intervenors' property, and must be taken into account when judging the merits of Petitioner's application.

27. "Character" and "aesthetics" are not defined in the Plan. Rather, they are terms of art in the planning profession and are commonly understood by planning professionals. These terms refer to development as it exists, not development that could occur based on a land use category. This is because one cannot protect the character and aesthetics of a land use designation.

28. The evidence shows that "character" consists of those attributes that lend a sense of place to an area, which people in the area can identify with that is distinguishable from other such areas. It includes such factors as type of buildings, building height and mass, the relationship of one building to another, the types of activities that go on in the area or neighborhood, the presence or absence of vegetation, the presence or absence of underground utilities, street design, architectural design, and the preservation of the long-standing stable nature of a neighborhood. "Aesthetics" are those attributes that determine whether an area is visually pleasing.

29. The character of the Bay Point community is that of a stable, low-rise, low density, residential resort community. The buildings in Bay Point consist of individual homes and small villa or townhouse-type buildings clustered on parcels. There are no high-rise buildings in the community or beachfront property. The evidence clearly supports a finding that Bay Point is a predominately neighborhood residential community.

30. Petitioner proposes to construct on Parcels F and 12 three separate high-rise buildings. The outer buildings are six stories at their exteriors, with step increases to ten stories at the interiors. The center building will be eleven

stories at the outer edges, with a step up to twelve stories at the peak. The construction of these high-rise condominiums will be in stark contrast to, and out of harmony with, the existing low-rise, low-bulk structures which surround the proposed project and will dramatically change the low-rise, neighborhood character of Bay Point. Thus, the proposed condominiums are not consistent with Objective 8.5 in that they do not preserve the character of the existing residential development within Bay Point.

31. Policy 8.5.1 of the Housing Element requires compatibility between types of residential structures. The Policy also requires that specific criteria be included in the County's Land Use Code "for the preservation and protection of residential areas." It further provides that these standards should ensure that "compatibility between types of residential buildings" will be maintained, and that "residential areas will be used primarily for residential purposes." As of the date of hearing, however, no standards had been adopted, although the County is now in the process of developing such criteria.

32. Until specific criteria are adopted and included in the Land Use Code, Petitioner contends that the Policy cannot be relied upon by Intervenors. If this proposition were true, however, no existing project could be measured for

compatibility, and the Policy would be meaningless. The more persuasive evidence supports a finding that in the absence of specific standards in the Land Use Code, it is appropriate to rely upon standards used by land use professionals for determining compatibility between types of residential buildings. Indeed, every land planning expert who testified at hearing agreed that a consistency determination should be made based on the guidance provided in the Objectives and Policies of the Plan.

33. The County has addressed the subject of compatibility in Objective 3.9 and Policy 3.9.1 of the Future Land Use Element. The former provision provides that "[a]ll proposed land uses shall be compatible with adjacent conforming land uses," while the latter provision defines "compatibility" to mean "a condition in which land uses or conditions can coexist in relative proximity to each other in a stable fashion over time such that no use or condition is unduly negatively impacted directly or indirectly by another use or condition."

34. The evidence establishes that land use planners view compatibility as meaning the relationship between buildings, uses, and activities to one another. Factors to be used in making this determination are density, building height, scale and mass, lot configuration, and building orientation. Other

factors used in this determination include established development patterns, expectations that arise from established development patterns, character of the neighborhood, and stability of the neighborhood.

35. The evidence supports a finding that the development pattern in Bay Point, the expectations of Intervenors and the community based on that development pattern, and the atypical height and mass of Petitioner's project render the proposed project incompatible with Bay Point and thus inconsistent with Objective 8.5.1 of the Plan. In making this finding, the undersigned has found that Petitioner's compatibility analysis is too narrow in scope and ignores the reality that Petitioner proposes to develop three high-rise buildings, grouped together in one location, in an established, predominately low-rise residential community.

36. Objective 8.9 of the Housing Element requires that any project in the County "[p]rotect residential property values and ensure that each homeowner has the opportunity for quiet use and enjoyment of their residence." Thus, in order to be consistent with the Plan, Petitioner must demonstrate that its project will not impact the residential property values in Bay Point in a negative manner.

37. To demonstrate consistency with the foregoing Objective, Petitioner's expert opined that the proposed

project would infuse new capital and value into the Bay Point area thereby increasing property values. However, Petitioner's market study (Petitioner's Exhibit 12) is flawed in several respects. For example, it incorrectly defines the Bay Point neighborhood as including an intensely developed Gulf front tourist district along Thomas Drive and the east end of Highway 98 in Panama City, within a three to six mile southern radius of Bay Point, and which includes high-rise condominiums, motels, and commercial uses that are dependent on the tourist industry. The study also concludes, erroneously, that most of the condominium units in Bay Point are utilized as second homes and rental properties by absentee owners. Finally, the study uses two "comparable" projects on which to base a market analysis, one in Destin and the other in Seascapes. Neither property is really comparable since both are located on the Gulf of Mexico in neighboring Walton County.

38. The more credible evidence establishes that the threat of development of high-rise buildings on Parcels F and 12 has caused a decline in residential property values in Bay Point. Further, if the NOPC is approved, the property values will continue to decline. This decline has been exacerbated by the loss of the Bay Point community center and tennis courts, which were previously located on the lots in question.



39. Given these considerations, it is found that the NOPC is inconsistent with Housing Element Objective 8.9, in that the NOPC does not protect property values within the community.

40. Intervenors further contend that the NOPC is inconsistent with various Objectives and Policies in the Stormwater Management Element since the NOPC does not contain a detailed stormwater plan for the proposed project. These Objectives and Policies are designed to reduce and eliminate flooding, protect surface waters from contamination and sedimentation caused by the stormwater, and prevent future problems by regulating development. This contention has been rejected since the specific requirements for the stormwater system necessary to serve Parcels F and 12 are not properly addressed in the DRI process, but rather will be considered by the County at the time the actual construction documents for these parcels are submitted for review and permitting.

41. Finally, Intervenors assert that the NOPC is inconsistent with Future Land Use Element Policy 3.3.1, which designates criteria for designating land use categories on the FLUM and attendant standards for development. No credible evidence was presented on this issue, and therefore the contention has been rejected. All other matters raised by Intervenors have likewise been considered and rejected.

## CONCLUSIONS OF LAW

42. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

43. Intervenors have standing to participate as parties because they are substantially affected persons whose interests will be decided in this matter.

44. As the party challenging the development order, Petitioner bears "both the ultimate burden of persuasion and the burden of going forward." Young v. Dep't of Comm. Affairs, 625 So. 2d 831, 835 (Fla. 1993).

45. Intervenors initially contended that Petitioner's NOPC for Parcels F, 9, 10, and 12 constitutes a substantial deviation within the meaning of Section 380.06(19), Florida Statutes, and that the amendment is inconsistent with the County's Comprehensive Plan. In their Proposed Recommended Order, however, Intervenors have conceded that the NOPC does not constitute a substantial deviation. Accordingly, only the second contention need be considered.

46. Under Section 163.3194(1)(a), Florida Statutes, "all actions taken in regard to development orders by governmental agencies in regard to land covered by such plan or element shall be consistent with such plan or element as adopted." This means that all local government development orders,

including those related to developments of regional impact and amendments thereto, such as Petitioner's NOPC, must be consistent with a local government's comprehensive plan. Thus, the County is empowered to disapprove an application for development approval if it is inconsistent with any of the objectives in the Plan. Franklin County v. S.G.I., Ltd., 728 So. 2d 1210, 1211 (Fla. 1st DCA 1999).

47. For the reasons stated in the Findings of Fact, it is concluded that the NOPC is inconsistent with FLUE Policy 3.4.5, Housing Element Objective 8.5, Housing Element Policy 8.5.1, and Housing Element Objective 8.9 of the County's Plan. All other contentions raised by Intervenors have been considered and rejected. Because of this demonstrated inconsistency with the Plan, the application for a NOPC should be denied.

48. Petitioner's Motion to Strike Portions of [Intervenors'] Proposed Recommended Order pertaining to Housing Element Objective 8.9 is denied. This issue was specifically raised by Intervenors in paragraphs 36 and 39 of the parties' Joint Prehearing Stipulation, the pleadings gave Petitioner reasonable notice regarding the issue, and the matter was the subject of extensive evidence and testimony at the hearing.

49. Likewise, the issue regarding FLUE Policy 3.4.5 was raised by Intervenors in paragraph 12 of the parties' Joint Prehearing Stipulation, and there was extensive testimony and evidence on this matter. Therefore, Petitioner's objection to the consideration of this issue is overruled.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Land and Water Adjudicatory Commission enter a final order denying Petitioner's application for a NOPC on the ground that it is inconsistent with FLUE Policy 3.4.5, Housing Element Objective 8.5, Housing Element Policy 8.5.1, and Housing Element Objective 8.9 of the Bay County Comprehensive Plan.

DONE AND ENTERED this 11th day of December, 2002, in Tallahassee, Leon County, Florida.

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DONALD R. ALEXANDER  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.