

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES HESTON; OAK HAVEN)
PRESERVATION ASSOCIATION;)
HAROLD MOSLEY; JAMES COLEMAN;)
MICHAEL AND LAURA LANGTON;)
MARY ANN SAADEH; ROBERT AND)
VIRGINIA GARDNER; and MARIE)
SCHULLER,)
)
Petitioners,)
)
vs.) Case No. 03-4283GM
)
CITY OF JACKSONVILLE,)
)
Respondent,)
)
and)
)
BARTRAM ATLANTIC, LLP, and)
WAL-MART STORES EAST, L.P.,)
)
Intervenors.)

)

REVISED RECOMMENDED ORDER

This cause came before the undersigned after an Order of Remand was issued by the Administration Commission on June 25, 2004. (A copy of the Order of Remand was faxed to the Division of Administrative Hearings on June 30, 2004.) The issue in this case is whether a small scale development amendment adopted by Respondent, City of Jacksonville (City), on October 27, 2003, is in compliance. That amendment authorizes a change in the land use category in the Future Land Use Map (FLUM) on an 8.5-acre

parcel of property owned by Intervenor, Bartram Atlantic, LLP (Bartram), from Residential Professional Institution (RPI) to Neighborhood Commercial (NC), a more intensive commercial use. Intervenor, Wal-Mart Stores East, L.P. (Wal-Mart), has a contract to purchase the property from Bartram and intends to construct a 40,000 square-foot freestanding Wal-Mart grocery store and a 7,500 square-foot outparcel for limited retail uses. The amendment is opposed by Petitioners, who are an association of homeowners and other individual homeowners who reside adjacent to, or near, the Bartram property.

On March 5, 2004, the undersigned entered a Recommended Order determining that the amendment was not in compliance because it conflicted with Future Land Use Element (FLUE) Policies 1.1.7, 1.1.8, 3.2.1, and 3.2.5 of the City's Comprehensive Plan (Plan).

On June 25, 2004, the Administration Commission entered its Order of Remand for the purposes of:

(1) accept[ing] "additional evidence solely on the issue of whether the City of Jacksonville has amended its Highway Functional and Classification Map to change the designation of Bartram Road from a local road to a collector road[,] and "to make any additional Findings of Fact and/or Conclusions of Law as [the administrative law judge] deems appropriate in light of this additional evidence."

(2) mak[ing] any additional Findings of Fact and/or Conclusions of Law based on the existing record that [the administrative law judge] deems appropriate to clarify [an] internal inconsistency" regarding the "amendment's compliance (or lack thereof) with Policy 1.1.7 in the City's Future Land Use Element" [since it appeared that Petitioners had not raised this issue].

(Order of Remand, paragraphs 9 and 10)

The Order of Remand further required that the undersigned "file a Revised Recommended Order, consistent with the directives herein, within 30 days of the date of this Order of Remand," or by July 26, 2004.¹

On July 8, 2004, the parties filed a Stipulation of Supplemental Record Evidence (Stipulation), which contained stipulated findings that the City had amended its Highway and Functional Classification Map (Map) to change the classification of Bartram Road from a local road to a collector. Also, on July 9, 2004, Petitioners filed a Voluntary Consent to Issue Preclusion as to Policy 1.1.7 of the City of Jacksonville Comprehensive Plan, in which they voluntarily agreed that Policy 1.1.7 "is not in issue." On the same day, a telephonic conference call was conducted with all parties to discuss the parties' view as to what further findings, if any, were necessary to conform the Revised Recommended Order with the directives of the Order of Remand. On July 12, 2004,

Petitioners filed a Memorandum of Law on Remand, while on July 13, 2004, the City and Intervenors filed a Memorandum of Law on Legal Import of Supplemental Evidence on Remand. Finally, on July 13, 2004, Petitioners filed a Motion to Strike footnote 6 of the City's and Intervenors' filing. The filings of the parties have been considered in the preparation of this Revised Recommended Order.

FINDINGS OF FACT

In accordance with the Order of Remand, the following additional findings of fact are made:

1. By Ordinance No. 2003-1070-E, the City seeks to change the land use on Bartram's property from RPI to NC, a more intensive commercial use. FLUE Policy 3.2.5 imposes the following requirements for the reclassification of property to the NC category:

The City shall require neighborhood commercial uses to be located in nodes at the intersections of collector and arterial roads. Prohibit the location of neighborhood commercial uses interior to residential neighborhoods in a manner that will encourage the use of local streets for non-residential traffic. (Emphasis added)

2. Under this policy, in order for Bartram's property to be reclassified, it must be located within a node (as defined in the Definitions portion of the FLUE), and the node must be at the intersection of collector and arterial roads.

3. In the Recommended Order dated March 5, 2004, a determination was made that the plan amendment was inconsistent with Policy 3.2.5 based on the testimony of the City's Director of Planning and Development, who testified that at the time of the hearing in January 2004, Bartram Road (which sits on the eastern side of Bartram's property and forms an intersection with Atlantic Boulevard) was still classified as a local road on the City's Map. See Transcript Volume 1, page 100, and Finding of Fact 28. Therefore, when the amendment was adopted, and even at the time of the final hearing, the property was not located at the intersection of a collector and arterial road.

4. The parties' Stipulation indicates that on November 12, 2003, or after the amendment being challenged here was adopted, the City adopted Ordinance No. 2003-1244-E, which made certain revisions and modifications to Map T-2 and related text of the Plan's Transportation Element. (According to the Stipulation, the preliminary steps for making this change began in May 2003, when legislation was filed with the City Council asking that the City Council consider certain revisions and modifications to the Map.) Among the revisions approved by Ordinance No. 2003-1244-E was the reclassification of Bartram Road from a local road to a collector. The amendment was then transmitted to the Department of Community Affairs (Department) for its compliance review.

5. On January 19, 2004, the Department found Ordinance No. 2003-1244-E to be in compliance and on the same date published a Notice of Intent to Find the Duval/Jacksonville Comprehensive Plan in Compliance (Notice of Intent). The Notice of Intent became final agency action on February 9, 2004, when no petition was filed to challenge the Department's action. Thus, the change in the classification of Bartram Road became effective on February 9, 2004, or approximately three and one-half months after the small scale amendment was adopted.

6. Based on this post-adoption hearing change, Bartram's property is now located at the intersection of a collector road (Bartram Road) and an arterial road (Atlantic Boulevard). As such, the plan amendment no longer conflicts with that portion of Policy 3.2.5 which requires that NC property be located only at the intersections of collector and arterial roads.²

7. However, as noted above, FLUE Policy 3.2.5 also requires that NC property be located "in nodes." A node is defined in the Definitions portion of the FLUE as follows:

A focal point within the context of a larger, contiguous area surrounding it. It is an area of concentrated activity that attracts people from outside its boundaries for purposes of interaction within that area. The developed or developable land areas at the confluence of collector or higher classified roadways, which are suitable for medium to high densities and

intensities of use for either single, multiple or mixed use developments.

8. Under this policy, then, a node exists if the developable land area (the vacant Bartram property) is at the confluence of a collector or higher classified roadway (the intersection of Bartram Road and Atlantic Boulevard), and the land is "suitable for medium to high densities and intensities of use for either single, multiple or mixed use developments."

9. This issue was resolved against the City and Intervenor in Findings of Fact 29-33 of the Recommended Order dated March 5, 2004. More specifically, the evidence supported a finding that a node does not exist at the southwest corner of the intersection of Bartram Road and Atlantic Boulevard, where Bartram's property is located. See Finding of Fact 33 ("[T]he node . . . extends from the intersection [of University and Atlantic Boulevards] westward in a lineal fashion along the southern side of Atlantic Boulevard until the end of the existing development, that is, the Publix shopping center [or the southeast quadrant of the intersection of Bartram Road and Atlantic Boulevard], where virtually all commercial uses on both sides of the roadway end."). Therefore, the node ends on the eastern side of the intersection of Bartram Road and Atlantic Boulevard and does not extend across Bartram Road to the Bartram

property. The reclassification of Bartram Road to a collector does not affect this finding.³

10. In addition, the Bartram parcel is currently classified as RPI, consistent with its historical institutional use and the character of the neighborhood. As noted in Findings of Fact 11-17, 35, and 37 of the Recommended Order dated March 5, 2004, the adjacent use to the west of the Bartram property remains a historic church, which abuts the mainly undeveloped lands to the west of the church; the lands to the south and southwest remain decades-old single family residences; and the lands to the north likewise remain largely decades-old residences. Given this character of the neighborhood, the Bartram property is not suitable for medium or high densities or intensities of the type authorized under the NC land use category. Therefore, even though Bartram Road has been reclassified as a collector, the plan amendment still conflicts with Policy 3.2.5 since the Bartram property is not within a node, as that term is defined in the Plan.

11. As noted in Findings of Fact 29 through 36 of the Recommended Order dated March 5, 2004, the plan amendment also conflicts with FLUE Policies 1.1.8 and 3.2.1. The reclassification of Bartram Road does not affect these findings,

and they are reaffirmed. Therefore, the plan amendment continues to be inconsistent with FLUE Policies 1.1.8 and 3.2.1.

12. Because Policy 1.1.7 was not specifically raised by Petitioners in their pleadings, and they have consented to the exclusion of that issue, any finding that the plan amendment is inconsistent with that policy is not relevant and need not be considered in the disposition of this matter.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Section 163.3187(3), Florida Statutes (2003).

14. Section 163.3187(3)(a), Florida Statutes (2003), provides as follows:

In the proceeding, the local government's determination that the small scale development amendment is in compliance is presumed to be correct. The local government's determination shall be sustained unless it is shown by a preponderance of the evidence that the amendment is not in compliance with the requirements of this act.

15. Under this statute, the City's determination that the plan amendment is in compliance must be accepted as being correct unless the preponderance of the evidence establishes otherwise. Therefore, the test is whether the evidence supports or contradicts the City's determination. Denig v. Town of

Pomona Park, Case No. 01-4845GM, 2001 WL 1592220 (DOAH June 18, 2002; Admin. Comm. Oct. 23, 2002).

16. By a preponderance of the evidence, Petitioners have shown that the plan amendment conflicts with Policies 1.1.8, 3.2.1, and 3.2.5. Therefore, in these respects, the evidence contradicts the City's determination, and it is concluded that the plan amendment is internally inconsistent with the Plan. Because the FLUM will not be consistent with other elements of the Plan, the plan amendment is not in compliance. Coastal Development of North Fla., Inc. et al. v. City of Jacksonville, 788 So. 2d 204, 208 (Fla. 2001)("the FLUM must be internally consistent with the other elements of the comprehensive plan").

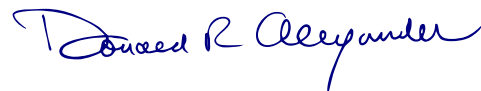
17. Petitioners' Motion to Strike footnote 6 of the City's and Intervenors' Memorandum of Law on Legal Import of Supplemental Evidence on Remand is granted.⁴

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law contained in the Recommended Order dated March 5, 2004, as revised by the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Administration Commission enter a final order determining that the small scale development amendment adopted by the City of Jacksonville in Ordinance No. 2003-1070-E is not in compliance.

DONE AND ENTERED this 22nd day of July, 2004, in Tallahassee, Leon County, Florida.



DONALD R. ALEXANDER
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of July, 2004.

ENDNOTES

1/ Because the thirtieth day falls on Sunday, July 25, 2004, the due date for submitting this Revised Recommended Order is Monday, July 26, 2004.

2/ Because the change in the reclassification of the road is an amendment to the Transportation Element of the Plan, it constitutes a legislative decision by the City. Martin County v. Yusem, 690 So. 2d 1288, 1294 (Fla. 1997). Therefore, it is not a piece of information or datum that is subject to the rule that only data in existence at the time the amendment is adopted can be considered. See Zemel et al. v. Lee County et al., Case No. 90-7793GM, 15 F.A.L.R. 2735 (DCA June 22, 1993), aff'd, 642 So. 2d 1367 (Fla. 1st DCA 1994). Absent an exception, which has not been shown here, the comprehensive plan in effect at the time of

the FLUM change should govern future development in the City. Compare Dept. of Comm. Affrs. v. Young and Monroe County, Case No. 88-3451, 1988 WL 617631 at page 15 (DOAH, Recommended Order Feb. 1 1995, FLWAC Final Order April 13, 1995)("the [comprehensive plan and land development regulations] to be applied [are] the [plan and LDRs] in effect when the permits were issued").

3/ The undersigned has rejected a contention that deference should be accorded the City's interpretation (enunciated at the final hearing) that the node extends west from the intersection of Atlantic and University Boulevards through the Bartram property and continues all the way to the Little Pottsburg Creek. See, e.g., Dixon v. City of Jacksonville, 774 So. 2d 763, 765 (Fla. 1st DCA 2000)("We reject . . . the City's argument that deference should be given to the City's interpretation of [the comprehensive land use plan] which it administers, thereby requiring its approval so long as its construction falls within the range of possible interpretations."). The City's interpretation of where the node exists has been previously rejected. See Finding of Fact 33.

4/ In footnote 6 of the City's and Intervenors' joint filing dated July 12, 2004, Intervenors, but not the City, contend for the first time that Policies 1.1.8 and 3.2.1 have no application here since they are to be considered only when the property is actually developed. Besides being untimely, and outside the scope of the remand, this contention is not supported by the record.

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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.