

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.)
_____)

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 January 7 and
8, 2004, in Jacksonville, Florida.

APPEARANCES

For Petitioners: David J. Russ, Esquire
601 South Main Street, Suite 9J-5
Gainesville, Florida 32601-6719
(withdrew as counsel on February 11, 2004)

For Respondent: Cindy A. Laquidara, Esquire
City of Jacksonville
117 West Duval Street, Suite 480
Jacksonville, Florida 32202-7300

For Intervenor: Karl J. Sanders, Esquire
(Wal-Mart) Edwards, Cohen, Sanders,
Dawson & Mangu, P.A.
Six East Bay Street, Suite 500
Jacksonville, Florida 32202-5405

For Intervenor: T.R. Hainline, Esquire
(Bartram) Shannon K. Scheffer, Esquire
Rogers Towers, P.A.
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STATEMENT OF THE ISSUE

The issue is whether the City of Jacksonville's small scale development amendment adopted by Ordinance No. 2003-1070-E on October 27, 2003, is in compliance.

PRELIMINARY STATEMENT

This matter began on October 27, 2003, when Respondent, City of Jacksonville (City), adopted Ordinance No. 2003-1070-E¹ which changed the future land use designation on the City's Future Land Use Map (FLUM) on an approximate 8.5-acre parcel of property owned by Intervenor, Bartram Atlantic, LLP (Bartram), from Residential Professional Institution (RPI) to Neighborhood Commercial (NC). Intervenor, Wal-Mart Stores East, L.P. (Wal-Mart), has a contract to purchase the property from Bartram for development of a freestanding grocery store.

On November 18, 2003, Petitioners, 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), filed a Petition for Administrative Hearing (Petition) under Section 163.3187(3)(a), Florida Statutes (2003),² with the Division of Administrative Hearings for the purpose of challenging the amendment. The Petition alleged generally that the amendment was not in compliance because it was not based on adequate data and analyses and because it was internally inconsistent with other provisions of the City's Comprehensive Plan (Plan).

By Order dated December 2, 2003, Petitions for Leave to Intervene filed on behalf of the Christopher Forrest Skinner Trust (which owned the property until September 8, 2003, when it sold the property to Bartram) and Wal-Mart were granted. On December 10, 2003, the Christopher Forrest Skinner Trust was authorized to withdraw as an intervenor and Bartram's Petition for Leave to Intervene was granted.

By Notice of Hearing dated December 10, 2003, a final hearing was scheduled on January 8, 2004, in Jacksonville, Florida. On December 15, 2003, an additional day of hearing was added and the matter was rescheduled to commence on January 7, 2003, at the same location.

At the final hearing, Petitioners presented the testimony of Father John R. Eason, rector of the St. Paul Episcopal Church, which lies adjacent to Bartram's property; Isabelle Cruz, who lives near the site; Jeannie L. Fewell, director of the City's Planning and Development Department; Robert Lincoln, a planner/attorney and accepted as an expert; James W. Crosby, who lives near the property; and James F. Tullis, a former member of the City Council from 1985-1999. Also, they offered Petitioners' Exhibits 1-12; all exhibits were received in evidence except Exhibit 12, on which a ruling was reserved. That exhibit is hereby received in evidence. On February 27, 2004, however, Petitioners voluntarily withdrew Exhibits 3 and 11; in addition, because their Exhibits 1, 2, 4, 6-8, and 10 duplicated exhibits offered by the other parties, they advised that those exhibits would not be submitted.

The City and Intervenors jointly presented the testimony of Jeannie L. Fewell, director of the City's Planning and Development Department and accepted as an expert; Michael Hertzberg, chief of the City's Comprehensive Planning Division; and James A. Sellen, an urban planner and accepted as an expert. Also, they offered Respondent's Exhibits 1-33, which were received in evidence. Finally, the following members of the public, four of whom are Petitioners, and who all live near the

subject property, offered testimony in opposition to the amendment: Michael Langton; Robert P. Gardner, Jr.; Alice H. Dixon; Charles Heston; Mary Ann Saadeh; and Betty Miller.

The Transcript of the hearing (two volumes) was filed on January 20, 2004. Proposed findings of fact and conclusions of law were due on January 30, 2004, and a joint Proposed Recommended Order was filed by the City and Intervenors on that date. On February 3, 2004, Petitioners filed an Amended Motion for Extension of Time to File Proposed Recommended Order requesting that they be given until February 3, 2004, in which to make their filing. Later that same day, Petitioners filed a Motion for Additional Day to File Proposed Recommended Order, indicating that a filing would be made the following day, or on February 4, 2004. A Motion for Extension of Time to submit a proposed recommended order was then filed by Petitioners on February 10, 2004. After a substitution of counsel for Petitioners was made,³ the parties agreed that Petitioners would be given until February 13, 2004, in which to make their filing, and that the City and Intervenors would be given until February 17, 2004, in which to file an amended proposed recommended order. Petitioners' Amended Proposed Recommended Order was subsequently filed on February 14, 2004. Thereafter, the City and Intervenors' unopposed Motion for One-Day Extension

to File Amended Proposed Recommended Order was granted, and the same was filed on February 18, 2004. Both filings have been made and considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

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

a. Background

1. Bartram is a limited liability corporation which owns an 8.5-acre tract of land at 5720 Atlantic Boulevard between Bartram Road and St. Paul Avenue in Jacksonville, Florida, or less than a mile east of the Hart Bridge (which crosses into downtown Jacksonville) and around one-quarter mile south of the Arlington River.⁴ The property is now vacant; from 1939 until 1990, however, a three-story, 125,000 square-foot hospital (with three separate "out buildings") for children operated on the site. The unused buildings remained on the site until they were demolished in 1998.

2. On October 27, 2003, the City approved an application filed by Wal-Mart's counsel (originally on behalf of the property's former owner, the Christopher Forrest Skinner Trust, and then the new owner, Bartram) for a small scale plan amendment. This was formalized through the adoption of

Ordinance No. 2003-1070-E, which changed the property's land use designation on the FLUM, a component of the Future Land Use Element (FLUE) in the Plan, from RPI to NC. Both land use categories are commercial classifications.

3. If the amendment is found to be in compliance, Wal-Mart intends to construct a 40,000 square-foot free-standing grocery store with a 7,500 square-foot outparcel for other retail stores. The grocery store will be operated 24 hours per day, 7 days per week. Wal-Mart has also agreed to file a second land use application to change approximately 3.0 acres of the site to Conservation (CSV), which means that portion of the property cannot be developed in the future.

4. Ordinance No. 94-1011-568, enacted in 1994, requires that small scale plan amendments be reviewed with a companion rezoning application. This is to ensure that when examining an application for a small-scale amendment, the City's determination of "in compliance" is predicated on both the Plan and its Land Development Regulations. Pursuant to that requirement, the City also approved a change in the zoning on the property from Commercial, Residential, Office (CRO) to Planned Unit Development (PUD). Under the PUD, the City has limited development of the site to a 40,000 square-foot grocery store and a 7,500 square-foot outparcel for limited retail uses;

imposed a limitation on curb cuts; provided for setback restrictions, building orientation, and design standards; and preserved over 70 trees on the property as well as green space. These limitations and restrictions are more stringent than those set forth in the NC category. The City's rezoning decision (Ordinance No. 2003-1071-E) has been challenged in Circuit Court by one of Petitioners. (While the new zoning and site plan appear to be solidified, the City concedes that it has the authority at a later date to approve modifications to the site plan, or even change the zoning on the property to another category that is allowed under NC.)

5. On November 18, 2003, Petitioners filed their Petition challenging the plan amendment. In their unilateral Prehearing Stipulation,⁵ Petitioners contend that the amendment is not supported by adequate or professionally acceptable data and analysis, and it is inconsistent with the standards governing "the location and extent of commercial uses," "the current designation of Bartram Road as a local road," and "the protection of established residential neighborhoods." At hearing, counsel for Petitioners further stipulated that the allegations of internal inconsistencies regarding urban sprawl and roadway/traffic capacity (contained in the Petition) were

being withdrawn. A request to add affordable housing as an issue was denied as being untimely.

6. The parties have stipulated that Petitioners and Intervenors reside, own property, or own or operate a business within the City and offered comments, recommendations, or objections to the City prior to the adoption of the amendment. Accordingly, these stipulated facts establish that Petitioners and Intervenors are affected persons and have standing to participate in this action.

7. Because the City's action involves a small scale (as opposed to a large scale) development plan amendment, the Department of Community Affairs did not formally review the plan amendment for compliance. See § 163.3187(3)(a), Fla. Stat.

b. The Existing and Proposed Land Use on the Site

8. The City's Plan, which was adopted in 1990, includes five types of commercially denominated land use categories, two of which are RPI and NC. The RPI category (in which category the Bartram property has been assigned since 1990) is a mixed-use category "primarily intended to accommodate office, limited commercial retail and service establishments, institutional and medium density residential uses." Among others, this category also authorizes large institutional uses, office-professional uses, veterinarians, filling stations, off street parking,

nursing homes, residential treatment facilities, day care centers, and other institutional uses "when sited in compliance with [the FLUE] and other elements of the 2010 Comprehensive Plan."

9. According to the Plan Category Description in the FLUE (pages 50-51, Respondent's Exhibit 13), "RPI developments are frequently appropriate transitional uses between residential and non-residential areas." While the existing RPI designation on the property allows Commercial Neighborhood zoning, which may include a grocery store like Wal-Mart proposes, because of some uncertainty over this, and its desire to have a PUD on the property, the City has required that Bartram seek a land use change to NC with PUD zoning, which serves to limit the range of allowable uses and imposes other development restrictions.

10. The Plan Category Description in the FLUE (pages 51-52, Respondent's Exhibit 13) provides that NC designated lands "serve the needs of contiguous neighborhoods"; they "will generally be located within a ten minute drive time of the service population"; they allow uses which "serve the daily needs of contiguous neighborhoods"; and they must not "penetrate into residential neighborhoods." They may include "convenience goods, personal services, veterinarians, filling stations and other low intensity retail and office-professional commercial

uses developed in freestanding or shopping center configurations," and "[n]ormally, such centers will be anchored by a food or drug store and will contain four to ten other supporting retail and office uses." Finally, NC sites "should abut a roadway classified as a collector or higher facility on the [City's] adopted functional classification system map."

c. The Property and Surrounding Area

11. As noted above, the property has been vacant since 1990, when an existing hospital was closed; demolition of the buildings was completed some eight years later. On its northern boundary (which measures approximately 400 feet), the property abuts Atlantic Boulevard, an extremely busy, six-lane roadway classified on the City's Highway Functional Classification Map (Map) as a principal arterial road. The eastern boundary of the property (which runs around 480 feet deep) abuts Bartram Road, a two-laned paved road with an 80-foot right-of way which runs south from Atlantic Boulevard for around one-half mile and then curves east where it meets University Boulevard (a north-south arterial road) a few hundred feet away. When the hearing was conducted in January 2004, or after the amendment was adopted, Bartram Road was still classified as a local road on the City's Map. Whether it is still classified as a local road at this time is not of record.⁶ On its western side, the property abuts

St. Paul Avenue, a local road which dead ends just south of Bartram's property on Heston Road (another local road), while nine single-family lots are located adjacent to the southern boundary of the property (and on the northern side of Heston Road).

12. The property is around one-quarter mile west of a highly developed major intersection at Atlantic and University Boulevards. The property (on both sides of the roadway) lying between the eastern side of Bartram's property and the major intersection is currently classified as Community/General Commercial (CGC), which authorizes a wide range of slightly more intense commercial uses than are authorized in NC. That land use category is "generally developed in nodal patterns and [is intended to] serve large areas of the City."

13. Directly across Bartram Road to the east (and in the southeastern quadrant of Bartram Road and Atlantic Boulevard) is an older shopping center anchored by a 50,000 square-foot Publix grocery store. The shopping center also has a sandwich shop, florist, pizza parlor, and beauty salon, and sits on a tract of land approximately the same size as Bartram's property. That parcel has approximately the same depth as the Bartram property (480 feet), and the rear of the stores come as close as 35 feet

to the single-family homes which lie directly behind the shopping center.

14. Since 1887, the St. Paul Episcopal Church has occupied the 5-acre tract of property directly across St. Paul Avenue to the west. Besides the church itself, a library, office building, educational wing, parish fellowship hall, and a small house (all owned by the church) sit on the property. From the church property to the Little Pottsburg Creek, or around a quarter of a mile to the west, a large, single parcel of land fronts on the southern side of Atlantic Boulevard and is classified as RPI. While aerial photographs appear to show that the property west of the church is either undeveloped or largely undeveloped, under its present RPI classification it may be used for commercial, institutional, or medium density residential purposes at some time in the future. The distance from the intersection of Atlantic and University Boulevards to the Little Pottsburg Creek appears to be six-tenths of a mile or so.

15. An apartment complex (the Villa Apartments) sits on the northeastern quadrant of Bartram Road and Atlantic Boulevard on a fairly narrow sliver of land classified as Medium Density which extends north-northwest some 1,200 feet or so to the Arlington River, a tributary of the St. Johns River.

16. Immediately west of the apartment complex along the northern side of Atlantic Boulevard (and across the street beginning at the eastern part of Bartram's property and extending west) the land uses along the roadway include a relatively small CGC parcel containing a dry cleaning establishment and an upholstery shop; an approximate 350 to 400-foot strip of Low Density Residential (LDR) property (which faces more than half of the Bartram site) with two single-family homes located directly on Atlantic Boulevard, as well as two grandfathered non-conforming uses (a plumbing establishment and a coin shop); then an RPI parcel (which faces the western edge of Bartram's property and extends perhaps 150 feet along the road) with a small office development consisting of 8-10 offices; and finally more LDR parcels until the road crosses the Little Pottsburg Creek. Two local roads which dead end on Atlantic Boulevard and provide access into the residential areas north of Atlantic Boulevard are Oak Haven Street, which terminates directly across the street from the Bartram property, and Campbell Street, which terminates in front of the St. Paul Episcopal Church.

17. Except for the limited commercial uses which front on the northern side of Atlantic Boulevard, and the apartment complex which lies in the northeastern quadrant of Atlantic

Boulevard and Bartram Road, virtually all of the property directly across the street to the north and west of Bartram's property running 1,200-1,500 feet or so to the Arlington River is made up of an old, established residential neighborhood (known by some as the Oak Haven neighborhood) consisting of single-family homes, some of which (closest to the Arlington River) are on larger multi-acre tracts and have historical significance. Indeed, the oldest home in the City of Jacksonville, built around 1848, is located in this area. The area directly south of the property and to the west of Bartram Road is classified as Low Density Residential and contains single-family homes for perhaps one-half mile or so. As noted above, some of these homes back up to the rear of the Bartram property.

d. The Amendment and Review by Staff

18. Under the process for reviewing small scale amendments, the application is first reviewed by the City's Planning and Development Department for completeness and accuracy. After the staff reviews the data and performs an analysis of the data, the application is assigned an ordinance number. A staff report is then prepared, and the application is set for hearing before the City's Planning Commission (Commission), an advisory board which makes a recommendation on

the application. The Commission's decision (which in this case was a recommendation to deny both applications) is then reviewed by the Land Use and Zoning Committee of the City Council, which consists of 7 members (and voted 5-1 in this case to approve the applications), and the matter is finally considered by the full 19-member City Council (which in this case approved the applications by a 13-2 vote, with 4 members abstaining or absent).

19. After the application was filed, among other things, the City staff reviewed various maps, the FLUM, a zoning atlas, other relevant portions of the Plan, and data provided by other governmental agencies. It also made an inspection of the site and other potentially affected properties in the neighborhood. In preparing its report, the staff analyzed the roadway system, the neighborhood character, the site characteristics, the commercial node, compatibility with the Plan and existing uses, and compatibility with the Strategic Regional Policy Plan and State Comprehensive Plan. A more detailed account of the data relied upon by the staff and its analysis of that data is found in Respondent's Exhibit 19. Besides the staff report, there are underlying work papers (not attached to the report) used by the staff to support its findings (Respondent's Exhibit 33).

20. As a part of its review and analyses, the City considered and applied the locational criteria found in the Operative Provisions of the FLUE, which describe the factors to be used in determining appropriate locations for primary use plan categories (such as NC) in plan amendment requests. Those factors include street classification, public facilities and services, land use compatibility, development and redevelopment potential, structural orientation and other site design factors, ownership patterns, and environmental impacts. The analysis included an evaluation by staff of the impact of development based upon the most intensive uses permitted on NC property.

21. Besides the locational criteria, the FLUE contains a number of policies directed at combating the expansion of strip commercial uses that have historically developed along the City's arterial and collector roadways, including Atlantic Boulevard. These are found in FLUE Policies 3.2.2, 3.2.5, 3.2.7, 3.2.8, and 3.2.16. In reviewing the application, the staff considered these policies and concluded that the amendment would be consistent with those provisions.

e. Objections by Petitioners

22. As noted earlier, Petitioners generally contend that the amendment is not supported by adequate data and analyses. They further contend that the amendment is inconsistent with

standards governing the location and extent of commercial uses, the current designation of Bartram Road as a local road, and the protection of established residential neighborhoods. While the various papers filed by Petitioners did not identify the specific provisions of the Plan allegedly being violated, they were disclosed through their expert at the final hearing.

23. Petitioners first contend that the City's data and analyses were predicated on the uses and restrictions contained in the PUD rezoning proposal, and not on alternative development scenarios that are possible under the NC land use designation. They also contend that the City failed to develop data and analyses regarding the impact on FLUE Objective 3.1 or FLUE Policies 1.1.19 and 3.1.7. The latter FLUE policy and the cited objective pertain to affordable housing, an issue not timely raised by Petitioners, while the remaining policy requires that FLUM amendments be based on the amount of land required to accommodate anticipated growth and the projected population of the area.

24. The evidence shows that, prior to the adoption of the amendment, the City reviewed appropriate data from a number of different sources, and it evaluated the plan amendment based upon the most intensive uses that could be permitted under the NC land use designation. In every instance where Petitioners'

expert testified that there was insufficient data and analyses, the testimony and exhibits credibly countered that testimony. Therefore, it is found that the plan amendment is supported by adequate and acceptable data, and that the data were collected and applied in a professionally acceptable manner.

25. Petitioners' main contention regarding consistency is that the amendment conflicts with FLUE Policies 1.1.8, 3.2.1, and 3.2.5 in several respects. The first policy requires in relevant part:

that all new non-residential projects [including commercial projects on NC lands] be developed in either nodal areas, in appropriate commercial infill areas, or as part of mixed or multi-use developments such as Planned Unit Developments (PUDs), . . .

Policy 3.2.1 requires that the City

promote, through the use of development incentives and other regulatory measures, development of commercial and light/service industrial uses in the form of nodes, centers or parks, while discouraging strip commercial development patterns, in order to limit the number of curb cuts and reduce conflicts in land uses, particularly along collectors and arterials.

Finally, Policy 3.2.5 provides that 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.

26. Petitioners first contend that Bartram's property does not lie within a "node," as that term is defined in the Definitions portion of the FLUE, and that by siting the NC land outside of a nodal area, the amendment is encouraging strip development in contravention of all three policies. They also contend that the amendment conflicts with Policy 3.2.5 because the Bartram property is not located at the corner of an arterial or collector road. Finally, they assert that the amendment is at odds with Policy 1.1.8 because the Bartram parcel is not an "appropriate commercial infill location."

27. In resolving these contentions, it is first necessary to determine whether Bartram Road is a collector or a local street. By virtue of its high traffic volume (an Average Daily Traffic count of more than 1,600), the road actually functions as a collector road, that is, it collects traffic from the local roadway network in the neighborhood, two elementary schools, and a church campus (all south of Atlantic Boulevard) and distributes that traffic to both Atlantic and University Boulevards on each end, both of which intersections are signalized. Indeed, one of Petitioners' witnesses described Bartram Road as a heavily-used, cut-through street for persons traveling between Atlantic and University Boulevards.

28. When the amendment was adopted, however, and even as late as the final hearing in January 2004, the road was still classified on the City's Map as a local road. For purposes of making a land use change, the actual classification on the City's Map should be used, rather than basing the decision on a future change on the Map that may or may not occur. Therefore, the property does not lie at the intersection of a collector or arterial roadway.

29. A "node" is defined in the Definitions portion of the FLUE (page 74, Respondent's Exhibit 13) 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.

30. Petitioners contend that a fair reading of the definition is that a node (or focal point of concentrated activity) exists only at the intersection of University and Atlantic Boulevards, and does not extend outward to include the vacant Bartram site. In other words, Petitioners contend that the node is limited to the individual parcels at the intersection itself.

31. On the other hand, the City and Intervenors take the position that a commercial node extends from its center (the intersection) outward in a lineal direction along a roadway until it ends at a natural physical boundary; if no physical boundary exists, then the node extends only to the end of the existing development along the roadway. Using this rule of thumb, they argue that the node begins at the intersection of Atlantic and University Boulevards and extends westward, presumably on both sides of the road,⁷ in a lineal direction along Atlantic Boulevard until it ends at a natural physical boundary, the Little Pottsburg Creek, approximately six-tenths of a mile away.

32. The purpose of a node is, of course, to concentrate commercial uses near an intersection and reduce the potential for strip development along arterial roads, such as Atlantic Boulevard (which now has strip development extending eastward from the intersection for more than a mile to the Regency Square Shopping Mall). All parties agree that the existing development along Atlantic Boulevard west of the intersection up to the Bartram site is strip or ribbon development, as defined in the Plan, that is, development which "is generally characterized by one or two story commercial/office uses that are located immediately adjacent to one another, or in close proximity,

extending out in a development pattern, typically along arterial roadways and usually each individual structure has one or more driveway accesses to an arterial." (Respondent's Exhibit 13, page 76.)

33. The more persuasive evidence supports a finding that the node, that is, the area of concentrated commercial activity or the developed or developable lands at the confluence of University and Atlantic Boulevards, logically extends from the intersection 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, where virtually all commercial uses on both sides of the roadway end. (On the northern side of the road, the node would terminate just east of the Villa Apartments, where the CGC uses end). This collection of parcels (up to the eastern side of the Bartram site) includes all of 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." (If the contrary evidence was accepted, that is, the node extends to the Little Pottsburg Creek, the City could arguably change the land use on the property west of the church to a more intensive commercial use, and in doing so encourage more strip

development.) Therefore, the Bartram property is not located within a nodal area and is not a developable land area suitable for "medium to high densities and intensities" of use. By changing its classification to NC and encouraging further strip development beyond the node, the amendment conflicts with Policies 1.1.8, 3.2.1, and 3.2.5.

34. "Commercial infill" is defined in the FLUE as "[c]ommercial development of the same type and scale as adjacent commercial uses that is sited between those uses in existing strip commercial areas." (Respondent's Exhibit 13, page 68.) To qualify as commercial infill under this definition, the adjacent commercial uses must be "of the same type and scale" as those being sited on the vacant property.

35. In the staff report, the City describes the property as "a true infill site," since the land on both sides of the parcel is developed, and the Bartram property is now vacant. However, while the Bartram property has a similar type and scale of development on its eastern side (an older Publix grocery store with 4 connected small retail shops), the property on its western side is a church campus and therefore a completely dissimilar use. (In addition, the property on its southern side is single-family residential). Because the surrounding uses are not of the same type and scale as the proposed infill, the

change in land use is not an appropriate commercial infill area. Therefore, the amendment conflicts with Policy 1.1.8, which requires that "all non-residential projects be developed in either nodal areas, [or] in appropriate commercial infill areas."

36. In their Amended Proposed Recommended Order, the City and Intervenors contend that the development nonetheless qualifies as "urban infill," which is defined in part at pages 77-78 of the FLUE as "[t]he development of vacant parcels in otherwise built-up areas where public facilities . . . are already in place." While this catch-all definition would appear to authorize the type of infill being proposed by Bartram (as well as virtually any other type of infill since the Bartram site is a vacant parcel in an otherwise built-up area), other FLUE provisions refer to commercial infill and nodal areas as the primary considerations for siting NC property.

37. Finally, the City and Intervenors suggest that the plan amendment provides an appropriate transition from the busy intersection uses to residential neighborhoods, that is, from intense commercial uses to the east and residential uses to the south and west. The change, if approved, will result in two fairly large grocery stores, one in a shopping center configuration, and both with attendant retail stores, sitting

side by side, with a church campus immediately to the west, existing residential uses to the south, and primarily residential uses directly to the north. This pattern of development is at odds with Policy 1.1.7, which requires a "[g]radual transition of densities and intensities between land uses in conformance with the [FLUE]."

38. The other contentions of Petitioners have been considered and found to be unpersuasive.

CONCLUSIONS OF LAW

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

40. Section 163.3187(3)(a), Florida Statutes, imposes the burden of proof on the affected persons challenging the small scale amendment. That subsection also provides in part:

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.

41. Under the statute, the City's determination must be accepted as being correct unless the preponderance of the evidence establishes otherwise. In other words, the test is

whether the evidence supports or contradicts the determination of the City. Denig v. Town of Pomona Park, Case No. 01-4845GM, 2001 WL 1592220 (DOAH June 18, 2002; Admin. Comm. Oct. 23, 2002).⁸ Therefore, the specific statutory burden of proof has been applied in this proceeding.

42. Petitioners have raised two broad contentions in support of their challenge: (1) that the plan amendment is not supported by data and analyses in violation of Section 163.3177(6)(a), Florida Statutes, and Florida Administrative Code Rule 9J-5.006(2)(c); and (2) that the plan amendment conflicts with various provisions within the FLUE, and is therefore internally inconsistent with the Plan. Internal consistency is, of course, required by Section 163.3187(2), Florida Statutes, while Section 163.3177(6)(a), Florida Statutes, and Florida Administrative Code Rule 9J-5.005(2) require that an amendment be based on relevant and appropriate data. See also Coastal Development of North Fla., Inc. et al. v. City of Jacksonville, 788 So. 2d 204, 208 (Fla. 2001)("[t]he FLUM must be internally consistent with the other elements of the comprehensive plan").

43. As previously found, Petitioners have failed to establish by a preponderance of the evidence that the plan amendment is not supported by adequate data and analyses. By a

preponderance of the evidence, however, Petitioners have established that the plan amendment conflicts with FLUE Policies 1.1.7, 1.1.8, 3.2.1, and 3.2.5, and thus the amendment is internally inconsistent with the Plan in those respects. All other consistency arguments have been considered and rejected.

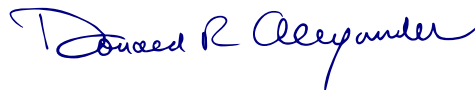
44. Because the FLUM will not be consistent with other elements of the Plan, the plan amendment is not in compliance.

RECOMMENDATION

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

RECOMMENDED that the Administration Commission enter a final order determining 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 5th day of March, 2004, in Tallahassee, Leon County, Florida.



DONALD R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of March, 2004.

ENDNOTES

- 1/ The letter "E" indicates that the Ordinance was enacted.
- 2/ Unless otherwise indicated, all statutory references are to Florida Statutes (2003).
- 3/ On February 11, 2004, or after the hearing was concluded, Robert P. Gardner, Jr., Esquire (one of the Petitioners who is also an attorney), was substituted as counsel for Petitioners.
- 4/ All distances used in this Recommended Order are rough approximations drawn from zoning and land use maps submitted into evidence.
- 5/ Although the Prehearing Stipulation is styled "Oak Haven's Prehearing Stipulation," it is assumed that it represents the position of all Petitioners.
- 6/ In their Amended Proposed Recommended Order, and citing Respondent's Exhibit 19 as authority, the City and Intervenors suggest that Bartram Road is now classified as a collector road. On page 3 of that exhibit, which is a staff report prepared for the Planning Commission meeting on September 25, 2003, the staff noted that in view of Bartram Road actually functioning as a collector road, it was proposing that the Functional Highway Classification Map be updated by changing the status of Bartram Road "from local to collector." This change was supposed to be considered at a City Council meeting to be held in November 2003. However, at the final hearing held in January 2004, the City Planning Director indicated that Bartram Road was still classified as a local road.
- 7/ The City's expert made no distinction between the north and south sides of the road when he opined that the node extended from the major intersection westward to the Little Pottsburg Creek. However, in another recent case involving a proposed land use change on a small parcel directly across the street from the church, the staff took the position that the length of the node is greater on the south side than the north. See Petitioners' Exhibit 12.

8/ The City and Intervenors contend that the "fairly debatable" standard applies, citing the case of Coastal Development of North Florida, Inc. v. City of Jacksonville Beach, 788 So. 2d 204 (Fla. 2001), which held that "small-scale development amendment decisions made pursuant to section 163.3187(1)(c), Florida Statutes (Supp. 1996), which are legislative in nature and subject to the "fairly debatable" standard of review." However, that case dealt with the review by the court of a circuit court decision (which was reviewing a decision by a local government to deny an application for a small scale amendment), and not an administrative action, and the Legislature has established a specific statutory burden of proof in administrative proceedings. This view is consistent with Denig, where the Administration Commission held that Section 163.3187(3)(a), Florida Statutes, selects the "preponderance of the evidence" standard for small scale amendment proceedings, not the "fairly debatable" standard proposed by the City and Intervenors.

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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.