STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GREGORY L. STRAND,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 03-4415GM
	)	
DEPARTMENT OF COMMUNITY AFFAIRS and ESCAMBIA COUNTY,	)	
	)	
Respondents.	)	
_____	)	

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 March 2, 2004, in Pensacola, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether the plan amendment adopted by

Ordinance No. 2003-45 on September 4, 2003, is in compliance.

PRELIMINARY STATEMENT

This matter began on September 4, 2003, when Respondent, Escambia County (County), adopted Ordinance No. 2003-45, which changed the land use designation on the Future Land Use Map (FLUM) on five parcels of land totaling 43.76 acres from Low Density Residential (LDR) to Commercial.

On October 24, 2003, the Department of Community Affairs (Department) issued a Notice of Intent To Find the Escambia County Comprehensive Plan Amendment In Compliance. On November 17, 2003, Petitioner, Gregory L. Strand, who resides within the County, filed a Petition under Section 163.3184(9), Florida Statutes (2003),[1] challenging the plan amendment on the ground that the amendment conflicted with four policies of the County's Comprehensive Plan (Plan). The Petition was forwarded to the Division of Administrative Hearings on November 21, 2003, with a request that an administrative law judge conduct a hearing.

By Notice of Hearing dated December 5, 2003, a final hearing was scheduled on January 27, 2004, in Pensacola, Florida. Thereafter, the parties' joint Motion for Continuance was granted, and the matter was rescheduled to March 2, 2004, at the same location.

At the final hearing, Petitioner presented the testimony

of Vikki R. Garrett, former County Transportation Planner; Doyle Butler, Chief of the County's Environmental Quality Division; Doris Ruth Smith, a County Senior Planner; and Jeffrey E. Beilling, a Department Principal Planner. Also, he offered Petitioner's Exhibits 1-6, which were received in evidence. The Department presented the testimony of Jeffrey E. Beilling, a Principal Planner, and offered Department Exhibits 1, 2, and 4-7, which were received in evidence. The County presented the testimony of Keith Wilkins, Director of the County's Neighborhood Environmental Services Department. Also, it offered County Exhibits 1-3, which were received in evidence.

The Transcript of the hearing was filed on March 26, 2004. Proposed Findings of Fact and Conclusions of Law were filed by Respondents and Petitioner on April 12 and 13, 2004, respectively, and they have been considered 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. E. K. Edwards (Edwards) and Richard J. Clark (Clark), who are non-parties, own two tracts of land totaling 43.76 acres approximately four or five miles west-northwest of the

City of Pensacola in unincorporated Escambia County. The larger tract (known as the Northern Parcel and owned by Edwards) consists of one parcel totaling 26.76 acres and is located at 2700 Blue Angel Parkway, also known as State Road 173. The second tract (known as the Southern Parcel and owned by Clark) consists of four contiguous parcels totaling around 17 acres and is located approximately 560 feet south of the Northern Parcel at the northeastern quadrant of the intersection of Blue Angel Parkway and Sorrento Road (intersection). The two tracts are separated by two large privately-owned lots that currently have residential uses. (However, the land use on one of those parcels, totaling almost 9 acres, was recently changed to a Commercial land use designation. See Finding of Fact 15, infra.)

2. On July 10, 2002, a realtor (acting as agent on behalf of the two owners) filed an application with the County seeking to change the land use on the FLUM for both the Northern and Southern Parcels from LDR to Commercial. The LDR category allows residential densities ranging from one dwelling unit per five acres to 18 dwelling units per acre, as well as neighborhood commercial uses. The Commercial category would allow the owners to place a broad range of commercial uses on their property, such as shopping centers, professional offices, medical facilities, convenience retail, or other

similar uses.

3. On November 20, 2002, the County Planning Board (on which Petitioner was then a member) considered the application and voted unanimously to change the land use classification on the Southern Parcel to Commercial. It also voted to change the non-wetlands portion of the Northern Parcel to Commercial. However, the request to change the land use on the wetlands portion of the Northern Parcel was denied. This recommendation was forwarded to the Board of County Commissioners (Board), which modified the Planning Board's recommendation and approved the application as originally submitted. The amendment was then sent to the Department for an in compliance determination.

4. On June 13, 2003, the Department issued its Objections, Recommendations, and Comments (ORC) Report. In the ORC, the Department expressed concerns that there were insufficient "adequate data and analyses to demonstrate the suitability of the [Northern Parcel] for the proposed Future Land Use designation" because of the presence of on-site wetlands. The ORC went on to say that the County had failed to demonstrate how the proposed amendment would be consistent with four other Plan provisions that prohibit the location of commercial and industrial land uses in certain types of wetlands. The ORC recommended that the County "provide a more

detailed characterization of the site and the surrounding area relative to the natural resources [wetlands] on the amendment site and the general area."

5. After the issuance of the ORC, Mr. Edwards retained an ecological consultant, Dr. Joe A. Edmisten, to address the Department's concerns. On July 16, 2003, Dr. Edmisten submitted a 14-page Report in which he essentially concluded that while there were wetlands on the site, there were no endangered, threatened, rare, or listed plant or animal species. That Report has been received in evidence as Petitioner's Exhibit 4.

6. In light of this new information, the Planning Board again considered the matter on August 20, 2003, and by a four-to-one-vote recommended that the application, as originally filed, be approved. The matter was then forwarded to the Board.

7. In response to an inquiry by a Board member at the Board's meeting on September 4, 2003, Dr. Edmisten stated that he found a "few pitcher plants in the wetlands [on Mr. Edwards' property]," including Sarracenia leucophylla, which is on the State (but not federal) Endangered Plant List. See Fla. Admin. Code R. 5B-40.0055(1)(a)334. Even though this information had not been disclosed in the Report, by a three-to-two vote, the Board adopted Ordinance No. 2003-45, which

approved the change to the FLUM for both the Northern and Southern Parcels. On October 24, 2003, the Department issued its Notice of Intent to Find the Escambia County Comprehensive Plan Amendment in Compliance.

8. On November 17, 2003, Petitioner, who resides, owns property, and operates a business within the County, and submitted written or oral comments, objections, or recommendations to the County before the amendment was adopted, filed his Petition alleging that the plan amendment was not in compliance. Petitioner is an affected person within the meaning of the law and has standing to file his Petition.

9. In the parties' Pre-Hearing Stipulation, Petitioner contends that there is inadequate data and analyses relative to the natural environment (wetlands), traffic concurrency, and urban sprawl to support the amendment. As further clarified by Petitioner, he does not challenge the change in the FLUM for the Southern Parcel, but only contests that portion of the amendment which changes the land use on the Northern Parcel, on which wetlands are sited. In view of this, only the Northern Parcel will be considered in this Recommended Order.

B. The Property

10. The Northern Parcel fronts on the eastern side of Blue Angel Parkway approximately 1,400 feet north of the intersection. In broader geographic terms, the property is in western Escambia County and appears to be several miles west-northwest of the Pensacola Naval Air Station (which lies west-southwest of the City of Pensacola) and several miles south of U.S. Highway 98, which runs east-west through the southern part of the County. Blue Angel Parkway is a minor arterial roadway (at least where it runs in front of the Northern Parcel) and begins at the Pensacola Naval Air Station (to the south) and runs north to at least U.S. Highway 98. From the Naval Air Station to the intersection, Blue Angel Parkway appears to have four lanes, and from that point continuing past the Northern Parcel to U.S. Highway 98, it narrows to two undivided lanes.

11. At the present time, an old borrow pit sits on the eastern side of the land, for which the property was given a special exception by the County's Zoning Board of Adjustments in March 1995. Also, there are at least three other ponds (or old borrow pits) formerly used by the owner for catfish farming; two large, unused metal buildings (apparently hangars) moved from the Naval Air Station to the property as military surplus; and numerous stored empty tanks in the southeastern corner of the property. The remainder of the

property is vacant. When Dr. Edmisten's Report was submitted in July 2003, all of the ponds were filled with water due to recent heavy rains.

12. Because of existing development at all corners of the intersection except the southwest corner, the intersection has been designated by the County as a commercial node, and the County considers the node to extend from the intersection northward along the eastern side of Blue Angel Parkway to the Northern Parcel. (However, on the western side of the road, the County has determined that the node terminates at the end of a parcel on which a Wal-Mart Super Center sits, and that further commercial development beyond that point would be inappropriate.) This determination is consistent with the Commercial land use classification found on the western portion of the Northern Parcel. See Finding of Fact 13, infra.

13. The property presently carries a split future land use: an approximate 150-foot deep sliver of land which fronts on Blue Angel Parkway is classified as Commercial, while the remainder of the parcel is LDR. This dichotomy in land uses stems from a decision by the County in 1993 (when the Plan was adopted) to designate a narrow commercial strip on both sides of Blue Angel Parkway from just south of the intersection to Dog Track Road, which lies north of the Northern Parcel.

14. The property also carries an Industrial zoning classification (presumably related to the mining activities), even though the land use on most of the parcel is residential. By his application, Edwards is seeking to "unify" the back or eastern portion of his property, which is now LDR, with the western portion fronting on Blue Angel Parkway, which is classified as Commercial.

15. To the east of the Northern Parcel is Coral Creek, a fairly large residential subdivision platted in the 1990s. Some of the single-family lots in that subdivision back up to the eastern boundary of the property. The property to the north is vacant, is populated with some pitcher plants, and is classified as residential. Across the street and to the southwest is a new Wal-Mart Super Center which opened in the last year or so at the northwestern quadrant of the intersection. (The northern boundary of the Wal-Mart Super Center parcel is directly across the street from the southern boundary of the Northern Parcel.) The property directly across the street and extending to the north is vacant and classified as Residential. That parcel also contains pitcher plants and is informally designated as "pitcher plant prairie." The property which separates the Northern and Southern Parcels is classified as Residential, except for 8.98 acres which were recently changed from LDR to Commercial

through a small-scale development amendment approved by the Department. See Gregory L. Strand v. Escambia County, DOAH Case No. 03-2980GM (DOAH Recommended Order Dec. 23, 2003; DCA Final Order Jan. 28, 2004). The Final Order in that case, however, has been appealed by Petitioner.

16. While the precise amount of wetlands on the site is unknown, the record does indicate that wetlands exist on "approximately" one-half of the Northern Parcel, or around thirteen or so acres, leaving a like amount of uplands. (Therefore, even if the property is reclassified, the amount of development on the property will be restricted in some measure through the application of the County's Wetlands Ordinance found in the Land Development Code.) A small area of wetlands exists on the western side of the property near Blue Angel Parkway while a larger wetland system lies on the eastern side of the property and acts as a buffer with the Coral Creek subdivision. The wetlands are under the permitting jurisdiction of the United States Corps of Engineers, the Department of Environmental Protection, and the County.

C. Petitioner's Objections

17. Petitioner contends that the amendment is not in compliance because there is inadequate data and analyses relative to conservation (wetlands), traffic, and urban sprawl

to support the change in the land use.[2] These issues will be addressed separately below.

a. Wetlands

18. As to this objection, Petitioner's principal concern is that if the land use change is approved, there will be much more intense development on the property which will result in a loss of wetlands, even with mitigation. Citing Policy 11.A.2.6.d of the Coastal Management Element of the Plan, he contends that there is insufficient data and analyses to support the plan amendment's distribution of land uses in such a way as to minimize the effect and impact on wetlands. The cited policy contains provisions which govern the development of lands within wetland areas, including one provision which states that "commercial and industrial land uses will not be located in wetlands that have a high degree of hydrological or biological significance, including the following types of wetlands: . . . Wetlands that have a high degree of biodiversity or habitat value, based on maps prepared by the Florida Fish and Wildlife Commission or Florida National Areas Inventory, unless a site survey demonstrates that there are no listed plant or animal species on the site."

19. In Case No. 03-2980GM, supra, which involved a change in the FLUM on a parcel of property which separates the Northern and Southern Parcels, Petitioner contended, among

other things, that the terms of Policy 11.A.2.6.d should apply whenever the FLUM is being amended, and that because there were wetlands on the parcel, along with two types of endangered plants, the policy prohibited a change from a residential to a commercial land use. In rejecting that contention, however, the Department approved and adopted language by the Administrative Law Judge which concluded, for several reasons, that "the County intended Policy 11.A.2.6.a through e to apply to decisions of the County regarding development applications and not to changes in future land use designations or categories in a FLUM." (Recommended Order, page 19). Therefore, the policy applies to development applications, and not to FLUM amendments, and does not have to be considered at this juncture. (That policy, and the County's Wetlands Ordinance, will obviously come into play at the time a site plan is filed and the owner seeks to develop the property.) As such, there is no need for data and analyses at this time to demonstrate that the policy has been satisfied.

20. As noted above, after the Department issued its ORC, Mr. Edwards engaged the services of Dr. Edmisten, who performed a study and prepared a Report that evaluated the wetlands on the Northern Parcel. That Report constitutes much of the data and analyses which support the amendment.

21. Despite the presence of one endangered plant species, the Report indicates that the wetlands do not have a high degree of hydrological or biological significance; that the change in the FLUM is consistent with all relevant policies in the Plan, including those cited in the ORC; that a mitigation plan will be offered prior to any development; and that all wetlands issues will be addressed during the development stage. The Report also indicates that among other things, Dr. Edmisten utilized the National Wetlands Inventory Map in reaching his conclusions.

22. The Department reviewed the document and found that it constituted the best available data and analyses, that the data were analyzed in a professional manner, and that the County reacted to the data in an appropriate manner when it adopted the amendment. This is especially true since the County has provisions in its Plan for wetlands avoidance and fully considers these issues through the site-review process. Given these considerations, it is at least fairly debatable that there exist adequate data and analyses regarding wetlands to support the change in the land use on the property.

b. Traffic

23. Petitioner also contends that there is a lack of adequate data and analyses to demonstrate that the proposed change in land use will not adversely impact traffic in the

area. More specifically, he contends that the County failed to perform an analysis of infrastructure capacity, and that it also failed to include information that Blue Angel Parkway is not in its five-year plan for improvements.

24. Data and analyses were provided in the form of a spreadsheet dated November 6, 2002, and entitled Traffic Volume and Level of Service Report (Traffic Report). The Traffic Report contained several categories of information regarding traffic volume, Level of Service (LOS), and other transportation information. (See Petitioner's Exhibit 1) The data were far more detailed than data previously used by the County on other amendments of this size and character, and they were based on Florida Department of Transportation (DOT) accepted standards of traffic calculations. The data and analyses were the best available at the time the plan amendment was adopted.

25. The data shows that the section of Blue Angel Parkway on which the Northern Parcel fronts has an adopted LOS of "D." At the time the amendment was adopted, the service volume on that portion of the road was 74 percent, which means that the roadway was operating at 74 percent of its capacity. Therefore, when the amendment was adopted, the roadway was not failing, and it could handle additional traffic, including any

that might be associated with the future development of the land.

26. Petitioner also contends that the County's study was flawed because the County used so-called "Art Tab" software, which became outdated after September 1, 2002. (Art-Tab software has now been updated and is called Free Plan software.) He further suggests that the County should have performed a new study using updated software. Under DOT requirements set forth in its Quality/Level of Service Handbook, however, the County was not required to redo its analysis; rather, it was required to use the new software only in the event further studies were required. Because Blue Angel Parkway was not failing at the time the study was performed, it was not necessary for the County to undertake a new study.

27. During the interagency review process, the DOT did not issue any objections, recommendations, or comments to the Department concerning the amendment.

28. Finally, Petitioner contends that because the County did not have Blue Angel Parkway on any road improvement list at the time the amendment was adopted, its analysis of infrastructure capacity was flawed. See Section 163.3177(3)(a), Florida Statutes, which requires that each local government's comprehensive plan contain a capital

improvements element with a component which outlines the principles for correcting public facility deficiencies covering at least a five-year period. Whether the County's Plan contains such a component is not of record. In any event, even if the County failed to consider the fact that Blue Angel Parkway was not scheduled for upgrading when the amendment was adopted, given the other data and analyses available at that time (the traffic spreadsheet), which reflected that the roadway was operating below capacity, the County had sufficient information regarding infrastructure capacity to support the amendment.

29. Based on the foregoing, it is at least fairly debatable that the amendment has adequate data and analyses relative to traffic impacts to support the land use change.

c. Urban sprawl

30. Finally, Petitioner asserts that no data were gathered and no analyses were performed to demonstrate that the change in land use will discourage urban sprawl.

31. In this case, the Department did not require that the County perform an urban sprawl analysis, given the type of surrounding land uses; the relative small size of the Northern Parcel; the absence of any land use allocation problems; the ability of the owner to now place up to 18 units per acre

and/or neighborhood commercial development on the property under the current LDR classification; and the fact that the Northern Parcel is located on the edge of a rapidly urbanizing area of the County. At the same time, Petitioner presented no evidence which supported the need for such a study.

32. The Northern (and Southern) Parcel is located in a rapidly urbanizing area of the County and is close to several other urban uses. Indeed, as noted earlier, there is a Wal-Mart Super Center across the street at the northwestern quadrant of the intersection, and a mix of commercial and residential uses abut the intersection to the southeast.

33. All four corners of the intersection have been designated as a commercial node in the County's draft Southwest Sector Plan, and the County has determined that the node continues northward on the eastern side of the road to and including the Northern Parcel. As a general rule, the Department considers the size and shape of nodes to be a local government decision, and it found no reason here to question that determination. The Plan encourages commercial development at intersectional nodes.

34. Under Florida Administrative Code Rule 9J-5.003(134), urban sprawl is defined in part as "urban development or uses which are located in predominately rural areas." Indicators of urban sprawl include "[t]he premature

or poorly planned conversion of rural land to other uses," and the "creation of areas of urban development or uses which are not functionally related to land uses which predominate the adjacent area." The evidence does not support a finding that the amendment will result in the poorly planned conversion of rural lands, or the creation of a land use that is not functionally related to land uses that predominate the adjacent area.

35. Given these considerations, Petitioner has not proven beyond fair debate that the plan amendment will result in urban sprawl, or that the County lacked adequate data and analyses related to urban sprawl to support the change in the land use.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569, 120.57(1), and 163.3184(9), Florida Statutes.

37. Petitioner resides, owns property, and operates a business in the County, and he submitted oral or written comments, objections, or recommendations to the County prior to the adoption of the amendment. As such, he is an affected person and has standing to file this challenge. See §

163.3184(1)(a), Fla. Stat.

38. Under the statutory scheme in place, if a large-scale plan amendment has been found to be in compliance by the Department, as it was here, an affected person has the somewhat onerous task of proving beyond fair debate that the plan amendment is not in compliance. § 163.3184(9), Fla. Stat. This means that "if reasonable persons could differ as to its propriety," a plan amendment must be upheld. Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997). See also Martin County v. Section 28 Partnership, Ltd., 772 So. 2d 616, 621 (Fla. 4th DCA 2000)(where there is "evidence in support of both sides of a comprehensive plan amendment, it is difficult to determine that the County's decision is anything but 'fairly debatable'").

39. "'In compliance' means consistent with the requirements of ss. 163.3177, 163.31776, . . . 163.3178, 163.3180, 163.3191, and 163.3245, with the state comprehensive plan, with the appropriate strategic regional policy plan, and with chapter 9J-5, Florida Administrative Code . . . ." § 163.3184(1)(b), Fla. Stat.

40. The more persuasive evidence supports a conclusion that Petitioner has failed to prove beyond fair debate that the plan amendment is not in compliance. Accordingly, because

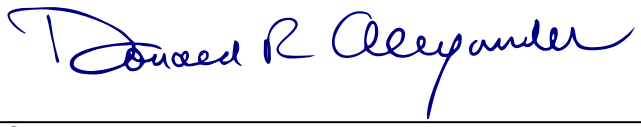
the County's determination of compliance is fairly debatable, the plan amendment is in compliance. § 163.3184(9)(a), Fla. Stat.

RECOMMENDATION

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

RECOMMENDED that the Department of Community Affairs enter a final order determining that the plan amendment adopted by Ordinance No. 2003-45 on September 4, 2003, is in compliance.

DONE AND ENTERED this 6th day of May, 2004, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 6th day of May, 2004.

ENDNOTES

1/ Unless otherwise noted, all future references will be to Florida Statutes (2003).

2/ The papers filed in this action create some confusion as to what are the actual concerns of Petitioner. This confusion arises because in his Petition, he argued that the plan amendment was "inconsistent" with Sections 7.A.4.1, 8.A.2.1, 11.A.2.6, and 14.A.3.1 of the Plan (which happen to be the same four sections cited by the Department in its ORC). In the parties' Pre-Hearing Stipulation, however, Petitioner describes the nature of the controversy as being an alleged lack of "adequate data and analysis to demonstrate concurrency and the suitability of this site for the proposed Future Land Use Designation as to the natural environment, traffic, and urban sprawl." At the same time, he also contended that the amendment "conflicts with Sections 7, 8, 11, and 14 of the Comprehensive Plan, as well as Chapter 163, Florida Statutes," and that "the Amendment is not in compliance based on concurrency issues related to the environment (wetlands), traffic, and urban sprawl." In yet another portion of the Pre-Hearing Stipulation, the parties identify the facts requiring litigation as relating principally to an alleged lack of data and analyses and the amendment's failure to discourage urban sprawl. Finally, in his Proposed Recommended Order, Petitioner seeks relief only on the ground that the plan amendment is not supported by adequate data and analyses. Based on the latter paper, and his counsel's remarks at hearing that Petitioner is "focusing on data and analysis" (Transcript, page 10), the undersigned has assumed that there are no consistency issues, but only a contention that the plan amendment lacks adequate data and analyses.

COPIES FURNISHED:

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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.