

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES OSBORNE, BERNARD)
KNIGHT, AND MARY JO KNIGHT,)
)
 Petitioners,)
)
 vs.) Case No. 03-4758GM
)
 TOWN OF BEVERLY BEACH AND)
 DEPARTMENT OF COMMUNITY)
 AFFAIRS,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, this matter was heard on July 12 and 13, 2005, in Bunnell, Florida by Bram D. E. Canter, the duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Robert J. Rigio, Esquire
Rigio & Mitchell, P.A.
400 South Palmetto Avenue
Daytona Beach, Florida 32114

For Respondent: Shaw Stiller, Esquire
(Department) Kelly A. Martinson, Esquire
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

For Respondent: Sidney F. Ansbacher, Esquire
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STATEMENT OF THE ISSUE

The issue in the case is whether the Town of Beverly Beach's Comprehensive Plan Amendment 03-1, initially adopted by Ordinance 2003-ORD-6 and amended by Ordinance 2004-ORD-6, is "in compliance," as required by Section 163.3184, Florida Statutes (2004).

PRELIMINARY STATEMENT

This matter began in June 2002, when the Town of Beverly Beach (Town) proposed an amendment to the Future Land Use Map of the Beverly Beach Comprehensive Plan. Pursuant to the statutory scheme created by the Local Government Comprehensive Planning and Land Development Regulation Act (the Act), Chapter 163, Part II, Florida Statutes (2004), the Town transmitted the proposed amendment to the Department to review for compliance with the Act.

On July 11, 2003, the Department issued its Objections, Recommendations and Comments (ORC) Report, setting forth four objections to the proposed amendment. The Town made changes to the proposed amendment to address the objections in the ORC Report and adopted the amendment on October 6, 2003.

The adopted amendment was originally designated as Comprehensive Plan Amendment (CPA) 02-1. The amendment was later designated CPA 03-1. Throughout this Recommended Order, it will be referred to as Plan Amendment 03-1. Plan Amendment

03-1 changed 14.5 acres in the Town from "Conservation/Spoil Area" (no development allowed) to "Low Density Residential" (up to five dwelling units per acre allowed).

On November 28, 2003, the Department published a Notice of Intent to Find the Comprehensive Plan Amendment Not in Compliance. Shortly thereafter, the Department initiated these proceedings against the Town. Three residents of the Town, Charles Osbourne, Bernard Knight, and Mary Jo Knight, intervened.

In September 2004, the Department and the Town entered into a settlement agreement ("compliance agreement"), wherein the Department agreed that if specified remedial actions were taken by the Town, including making changes to Plan Amendment 03-1 and other policies within the Beverly Beach Comprehensive Plan, the Plan Amendment would be deemed in compliance. On December 6, 2004, the Town adopted the changes specified by the compliance agreement through Ordinance 2004-ORD-6 (hereafter referred to as the "Remedial Amendment").

On February 28, 2005, the Department published a Cumulative Notice of Intent to Find the Beverly Beach Comprehensive Plan Amendment and Remedial Comprehensive Plan Amendment in Compliance. Thereafter, the Intervenors filed an Amended Petition to Intervene. Because there was a compliance agreement between the Town and the Department, the procedures set forth in

Subsection 163.3184(16), Florida Statutes (2004), became applicable and the parties were realigned with the Intervenors becoming the Petitioners and the Department and the Town becoming the Respondents.

At the final hearing, the Petitioners presented the testimony of Charles Osbourne, a resident of the Town and the former Mayor; Charles Gautier, Chief of the Department's Office of Comprehensive Planning; James Stansbury, a planner employed by the Department; Gail Duggins, a bird-watcher with knowledge about scrub jays; Lindsay Haga, formerly a senior regional planner with the Northeast Florida Regional Planning Council; and Edward Lehman, a planning supervisor with the Northeast Florida Regional Planning Council. Petitioners' Exhibits 1-3, 5, 6A-D, 11-12, 14-17, 19, 22-24, 28, 30, and 31 were received into evidence. At the hearing, the undersigned rescinded the admission into evidence of Petitioners' Exhibit 30 as irrelevant. The Town presented the testimony of Lindsay Haga; Lorraine Capasse, Town Clerk for Beverly Beach; and Stephen Emmett, the current Mayor of Beverly Beach. The Town's Exhibits A, C-E, G, H, and 6B were received into evidence. The Department presented the testimony of Sergey Kireyev, a planner with the Department. The Department's Exhibits 1-5 and 8-10 were received into evidence.

The Town's motion for official recognition of the Petition for Writ of Certiorari, Amended Order Granting Petition for Certiorari, and Judgment Taxing Attorneys Fees and Costs Under Section 57.105, Florida Statutes, from the case of Raymond Gustafson and AIA Realty and Development, Inc. v. Town of Beverly Beach, Case No. 99-143-CA, Seventh Judicial Circuit Court, Flagler County, Florida, was granted.

A two-volume Transcript of the hearing was filed with the Division. Proposed recommended orders were filed by the parties on August 16, 2005, and were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state land planning agency and has authority to administer and enforce the Local Government Comprehensive Planning and Land Development Regulation Act, Chapter 163, Part II, Florida Statutes (2004).

2. One of the Department's duties under the Act is to review proposed amendments to local government comprehensive plans to determine whether the amendments are in compliance with the Act.

3. The Town of Beverly Beach is a small municipality in Flagler County, Florida, and has the duty and authority to adopt a local government comprehensive plan pursuant to Chapter 163,

Florida Statutes (2004), and to amend the plan from time to time.

4. In June 2002, the Town proposed to amend its Future Land Use Map (FLUM) to change some of the land uses within the 37-acre Shelter Cove Planned Unit Development (PUD). The Shelter Cove PUD was the subject of an earlier lawsuit in the circuit court for Flagler County brought by the owners and developers of the property after the Town denied their PUD application. In 2002, the court entered judgment against the Town and ordered the Town to approve the PUD application. In its order, the court included a statement that the Shelter Cove PUD was consistent with the Beverly Beach Comprehensive Plan.

5. The purpose of the plan amendment proposed in June 2002 was to re-designate 14.25 acres from Conservation/Spoil Area to Low Density Residential, 0.75 acres of Conservation/Spoil Area to Medium Density Residential, and 8.25 acres of Low Density Residential to Medium Density Residential. The proposed amendment was transmitted to the Department for compliance review.

6. In its July 2003 ORC Report, the Department set forth four objections to the proposed amendment: 1) increased density in a Coastal High Hazard Area; 2) no traffic impact analysis regarding emergency evacuation; 3) inadequate potable water and sanitary sewer services; and 4) unsuitability for development

because of saltwater marsh and potential use by threatened and endangered animal species.

7. The Town made changes to the proposed amendment to address the Department's objections and adopted Plan Amendment 03-1 on October 6, 2003. One significant change made by the Town was to reduce the size of the land affected by the amendment from 23.25 acres to 14.5 acres. The stated purpose of the revised amendment was to deal exclusively with the spoil areas within the Shelter Cove PUD; to convert them from Conservation to Low Density Residential.

8. The Department was not satisfied with the changes made by the Town and on November 17, 2003, it issued a Statement of Intent To Find The Comprehensive Plan Amendment Not In Compliance. This statement did not reassert the four objections of the ORC Report, but identified only two reasons for its determination that Plan Amendment 03-1 was not in compliance: 1) increased density in a Coastal High Hazard Area that would increase evacuation clearance times and 2) inadequate sanitary sewer facilities based on the denial of the utility's permit renewal by the Department of Environmental Protection (DEP). The Department recommended remedial actions that would bring Plan Amendment 03-1 into compliance.

9. Thereafter, the Department and Town entered into a compliance agreement to identify remedial actions by the Town

that would bring the plan amendment into compliance. Pursuant to the agreement, the Town adopted remedial measures in Ordinance 2004-ORD-6 (the Remedial Ordinance) that caused the Department to determine that the plan amendment was in compliance. The Remedial Ordinance (with additions and deletions as indicated in the ordinance) states in pertinent part:

1. *Limiting Density on the 14.5-acre amendment site & Hurricane Evacuation Plan*

Future Land Use Element: contains policies controlling the density and intensity of development (both residential and non-residential) in the Town of Beverly Beach.

Policy A.1.1.9

The Low Density Residential (LDR) land use (up to 5 dwelling units/acre) shall be applied to 14.5 acres of upland spoil sites in the Shelter Cove development as shown in Exhibit A, not to exceed a total gross density of 28 residential units. In addition to the provisions described in Policy 1.1.4, the following provisions shall apply to the Shelter Cove Development:

1. Residential land use for the Shelter Cove Planned Unit Development (PUD) shall be limited to a maximum of 115 dwelling units.
2. The Town of Beverly Beach shall not issue a permit or certificate of occupancy until the Building Official certifies the required public facilities and services will be provided consistent with Chapter 9J-5, Florida Administrative Code (see Policy A.1.1.1).

* * *

Policy A.1.1.10

No later than December 2005, Beverly Beach shall revise its comprehensive plan to update the goals, objectives and policies and future land use map series and transmit such revisions to the Department of Community Affairs. The updated plan shall reflect changes to Chapter 163, Florida Statutes, and Rule 9J-5, Florida Administrative Code, since the plan went into effect in 1991. This revision shall be based on a planning period through Year 2015, with current and forecasted conditions and satisfy data and analysis requirements.

* * *

3. Revise policies under Objective D.2.1, Beverly Beach Comprehensive Plan regarding the provision of potable water and sanitary sewer

Public Infrastructure/Facilities Element:
refers to the protection of water quality by specific policies that require deficiencies in wastewater treatment facilities be corrected in accordance with DEP requirements.

Objective D.2.1

By ~~December 31, 1992~~ December 31, 2005, the Town shall require that existing deficiencies in the wastewater treatment ~~package plants owned by Surfside Utilities~~ operated by Ocean City Utilities be corrected in accordance with ~~FDER~~ Department of Environmental Protection [DEP] requirements.

Policy D.2.1.1

As the Town does not own the wastewater treatment plants nor has operational control over the same, the Town shall formalize a coordination committee to include the owner/operator of ~~Surfside Utilities~~ Ocean City Utilities, the members of the Town Commission, members of

the Flagler County Board of County Commissioners or their appointee, members of the City of Flagler Beach Commission or their appointee, and ~~FDER~~ the Department of Environmental Protection [DEP] and any other identified stakeholder in the Town.

Policy D.2.1.2

The Town shall use the coordination committee to address the deficiencies in the wastewater plants, to set priorities for upgrading and replacing components of the plants, and to request ~~FDER~~ the Department of Environmental Protection [DEP] to increase and enforce their regulations requiring periodic monitoring and maintenance of package treatment plants.

Policy D.1.2.3

The Town shall use the coordination committee to investigate the feasibility of assuming operational responsibility of the wastewater treatment system by another entity.

10. Applying the five dwelling units per acre density allowed in the Low Density Residential category to 14.5 acres would generate 72.5 units. However, as indicated above, the Remedial Ordinance also restricted the total allowable dwelling units in the 14.5 acres to 28 units. The 28 units coincide with the site plan for the Shelter Cove PUD that was the subject of the circuit court judgment. The site plan called for 28 single-family lots in the former spoil areas.

11. Charles Osbourne, Bernard Knight, and Mary Jo Knight were residents of the Town of Beverly Beach when the Town adopted Plan Amendment 03-1. They intervened against the Town

in the original proceedings initiated by the Department. Following the Department's determination that the plan amendment had been brought into compliance by the Remedial Ordinance, they filed an Amended Petition to Intervene and were realigned as the Petitioners.

12. On some date between the filing of their original petition in this case and the date of the final hearing, Petitioners Bernard Knight and Mary Jo Knight moved out of Beverly Beach. They are no longer residents of the Town.

13. In their Amended Petition to Intervene, the Petitioners assert that the Remedial Ordinance did not resolve all the problems originally identified by the Department's ORC Report, and Plan Amendment 03-1 is still not in compliance. The Petitioners' objections to the amendment fall into three categories: insufficient and inaccurate data and analysis, insufficient legal description for the lands affected by the plan amendment, and inadequate wastewater services available for the increased density resulting from the amendment. These three categories will be used to organize the findings of fact that follow.

Data and Analysis/Maps

14. The Petitioners assert that the maps used for Plan Amendment 03-1 and the Remedial Amendment are not the official maps currently contained in the Beverly Beach Comprehensive

Plan. They contend the unofficial maps contained errors that caused some of the area designated as Conservation/Saltwater Marsh to be included in the 14.5 acres re-designated Low Density Residential.

15. At the hearing, the Petitioners also attempted to show that maps used by the Town with Plan Amendment 03-1 were not consistent with the Beverly Beach FLUM with regard to the depiction of saltwater marsh areas outside the 14.5 acres affected by the plan amendment. Whether such discrepancies exist is not a relevant inquiry for determining whether Plan Amendment 03-1 is in compliance.

16. A 1997 report regarding threatened and endangered animal species, prepared by Lotspeich and Associates for the developer of the Shelter Cove PUD, includes a statement that there are 10.3 acres of spoil on the 37-acre PUD site. That figure is inconsistent with the Town's claim that the lands affected by Plan Amendment 03-1 consist of 14.5 acres of spoil.

17. Lindsay Haga, a regional planner with the Northeast Florida Regional Planning Council (Council), made the determination that there are 14.5 acres of spoil area. Because the Town does not have a professional planning staff, the Council was providing planning services to the Town under contract. Ms. Haga worked on Plan Amendment 03-1 on behalf of the Town.

18. Ms. Haga obtained a mapping of the land uses within the Shelter Cove PUD from information maintained by the St. Johns River Water Management District (District). The land use categories are based on the Future Land Use Classification Categorization System, and were applied by the District using aerial photography. Using professional software called "ArcView," Ms. Haga derived the size of the various land uses mapped within the Shelter Cove PUD by the District. The software calculated the size of the spoil areas as 14.5 acres. According to Ms. Haga, planners use this method "100 percent" of the time to delineate land uses on future land use maps.

19. Ms. Haga was called as a witness by the Petitioners and by Beverly Beach and testified at length on direct and cross-examination on how she determined the size of the spoil areas. Nevertheless, some ambiguity remains as to whether the size and position of the spoil areas designated in the official Town FLUM are the same as their size and position as delineated by Ms. Haga for Plan Amendment 03-1 using information from the St Johns River Water Management District.

20. The Town and the Department seem to suggest in their joint post-hearing submittal that the size and position of the spoil areas on the FLUM can be "cleaned up" or re-drawn using more site-specific information presented at the final hearing. The implication is that, if the Town's FLUM delineated less than

14.5 acres as Conservation/Spoil Area, but better data is presented at the hearing to show that the spoil areas actually cover 14.5 acres, the FLUM delineation can be ignored or treated as if did cover 14.5 acres. The redrawing of land uses as they are depicted on an adopted FLUM is arguably beyond the authority granted to the Department in Chapter 163. That issue need not be decided on this record, however, because the more credible and persuasive evidence shows there were no material changes to the size and position of the spoil areas in Plan Amendment 03-1, and no saltwater marsh was re-designated as Low Density Residential.

Data and Analysis/Topographic Information

21. The Petitioners assert that topographic data used by the Town was flawed and did not accurately reflect that much of the Shelter Cove PUD is within the 100-year floodplain. For example, the June 2002 Transmittal Packet sent to the Department included a statement that, "According to FEMA the 100 year floodplain is confined to the saltwater marsh areas located adjacent to the Intracoastal Waterway."

22. At the hearing, the Town admitted that some of topographic information was inaccurate and described it as a "scrivener's error." The parties stipulated to the introduction into evidence of topographic information that indicates a

portion of the 14.5 acres affected by Plan Amendment 03-1 lies within the 100-year floodplain.

23. The Petitioners have not shown how the inclusion of inaccurate topographic in the data and analysis causes Plan Amendment 03-1 to be not in compliance; or, put another way, the Petitioners have not shown how the accurate topographic information proves Plan Amendment 03-1 will be inconsistent with the Beverly Beach Comprehensive Plan or applicable state laws and regulations. The Beverly Beach Comprehensive Plan does not prohibit Low Density Residential uses in the 100-year floodplain.

Data and Analysis/Clustering

24. The Petitioners contend that the data and analysis was flawed because it included a reference to the possibility of clustering dwelling units to avoid adverse impacts to areas unsuitable for development, but the Town has no regulations that allow for or address clustering.

25. Neither the Amended Petition to Intervene nor the evidence presented by the Petitioners makes clear how this alleged error causes Plan Amendment 03-1 to be not in compliance. Any alleged error must relate to the 14.5 acres affected by the amendment. The Petitioners did not show that clustering of dwelling units is planned or necessary on the 14.5 acres.

Data and Analysis/Scrub Jays

26. The Petitioners contend that the data and analysis is insufficient because it fails to describe and account for the current use of the site by the Florida scrub jay, a bird listed as threatened by the Florida Fish and Wildlife Conservation Commission and the United States Fish and Wildlife Service. The Town and Department stipulated that scrub jays have been seen on the property.

27. Charles Osbourne and Gail Duggins, a birdwatcher, testified that they have seen scrub jays in the Shelter Cove PUD area on several occasions. They marked Petitioners' Exhibit 15 to indicate eight specific sites within the PUD where they had observed scrub jays. None of the marked sites are located on the 14.5 acres affected by Plan Amendment 03-1.

28. Lotspeich and Associates conducted a scrub jay survey on the 37-acre Shelter Cove PUD in 1997. They observed no scrub jays on the 14.5 acres that will be affected by Plan Amendment 03-1. In the written report of the survey, Lotspeich and Associates concluded that, "no jays reside on-site nor did any birds react as though they were defending territory which extended onto the property." Following a second survey in 2002, Lotspeich and Associates reached the same conclusion that the property "is unlikely to support a resident Florida scrub jay population."

29. The observations of scrub jays made by Mr. Osbourne and Ms. Duggins do not contradict the conclusions of the Lotspeich and Associates reports. Mr. Osbourne and Ms. Duggins did not offer an opinion (and no foundation was laid for their competence to offer such an opinion) that scrub jays reside on the 14.5 acres affected by Plan Amendment 03-1.

30. The Department's ORC Report stated that the originally-proposed amendment was not consistent with Policy E 1.4.3 of the Town's comprehensive plan which calls for the Town to obtain information from appropriate agencies concerning the known locations of listed plant and animal species. The Department recommended in the ORC Report that the Town conduct a survey for gopher tortoises and other listed species. The Department's objection about listed species, however, was not included in its subsequent Statement of Intent to Find The Comprehensive Plan Amendment Not in Compliance.

31. The Town had available to it, as part of the data and analysis to support Plan Amendment 03-1 and the Remedial Amendment, the Lotspeich and Associates reports prepared for the United States Fish and Wildlife Service. The reports convey the results of Lotspeich and Associates' surveys of the Shelter Cove PUD property for gopher tortoises, scrub jays and other listed species. It is likely to be the best information available since it is a site-specific, scientific study. The Petitioners

did not show that better data were available or that the Lotspeich and Associates reports are flawed. In fact, the Lotspeich and Associates reports were exhibits offered by the Petitioners.

32. Policy E.1.4.3 of the Beverly Beach Comprehensive Plan directs the Town to adopt land development regulations that provide protections for known listed species. Land development regulations are the usual and appropriate tools for applying specific protective measures to specific development proposals. No regulations have yet been adopted by the Town to protect listed species. Listed species are not left unprotected from development activities in the Town, however, since there are both state and federal laws to protect listed species and their habitats.

Data and Analysis/Beach Access

33. The Petitioners contend that the data and analysis was insufficient because it indicated that there are five locations in the Town where the public can gain access to the beach, but the Petitioners allege there are only two public beach walkovers that qualify under the Beverly Beach Comprehensive Plan.

34. The beach access issue relates to the Town's recreational level of service standard adopted in the Recreation and Open Space Element of the Beverly Beach Comprehensive Plan.

Policy F.1.1.1 specifies that the adopted level of service standard is "Five publicly-owned beach access facilities."

35. The Petitioners apparently believe that the easements acquired by the Town that provide for public beach access across private property do not qualify as publicly-owned beach access facilities as contemplated by the Beverly Beach Comprehensive Plan. The term "publicly-owned beach access facilities" is not defined in the Recreation and Open Space Element, but one can find a statement at page F-2 that, "Access points and parking areas are support facilities for public owned beaches." Therefore, the Town considers an access point, without any man-made structures, to be a "facility."

36. Furthermore, the comprehensive plan, itself, includes a map that depicts the location of the five public beach access points. It must be assumed that these access points met the Town's intent and meaning. By raising the issue of whether the data and analysis for Plan Amendment 03-1 is accurate in referring to the existence of five public beach access points, the Petitioners are collaterally attacking the existing comprehensive plan.

37. Stephen Emmett, the mayor of Beverly Beach, stated that the five public beach access points depicted in the Beverly Beach Comprehensive Plan, as well as a new sixth beach access point, are currently maintained by the Town.

Description of the Land Affected

38. The Petitioners alleged in their Amended Petition to Intervene that the Town did not have an adequate legal description for the lands affected by the plan amendment. The issue was not raised in the Petitioners' Pre-Hearing Statement. When the Department objected to the Petitioners' presentation of evidence on this issue because it was not raised in their Pre-Hearing Statement, the Petitioners voluntarily withdrew the issue.

Sanitary Sewer Services

39. The Petitioners contend that sanitary sewer services are not adequate for the increased residential density that would result from Plan Amendment 03-1. The Beverly Beach Wastewater Treatment Facility is operated by Ocean City Utilities. Ocean City's application to renew the permit for the facility was denied by DEP in September 2003 because the facility was not in compliance with several DEP regulations.

40. As a result of the denial of Ocean City's permit renewal application, DEP would not allow new customers to connect to the Beverly Beach Wastewater Treatment Facility, including the Shelter Cove PUD. DEP subsequently approved the connection of the Shelter Cove PUD wastewater collection system to the Beverly Beach Wastewater Treatment Facility.

41. Permitting problems associated with the treatment plant was one reason for the Department's objection to the originally proposed plan amendment and the Department's subsequent determination that Plan Amendment 03-1 was not in compliance. No evidence was presented to show that Ocean City Utilities has corrected the deficiencies in the wastewater treatment plant or has obtained a renewal permit from DEP.

42. Nevertheless, the Department determined that Plan Amendment 03-1 is in compliance based on the changes to the Beverly Beach Comprehensive Plan called for in the compliance agreement and adopted in the Remedial Ordinance. Objective D.2.1 of the Beverly Beach Comprehensive Plan was amended to require that existing deficiencies in the wastewater treatment plant be corrected by December 31, 2005. Policies D.2.1.1, D.2.1.2, D.2.1.3 were amended to re-constitute and re-energize a coordination committee to address the deficiencies in the wastewater plant and the feasibility of giving operational responsibility to another entity (such as Flagler County).

43. In addition, the Remedial Ordinance amended Policy A.1.19 of the Beverly Beach Comprehensive Plan to prohibit the Town from issuing a permit or certificate of occupancy for the Shelter Cove PUD "until the Building Official certifies the required public facilities and services will be provided consistent with Chapter 9J-5, Florida Administrative Code."

44. No dispute was raised about the available capacity of the Beverly Beach Wastewater Treatment Facility to serve the Shelter Cove PUD.

CONCLUSIONS OF LAW

45. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties pursuant to Sections 120.569, 120.57(1), and 163.3184(9), Florida Statutes (2004).

46. Under the comprehensive planning scheme established in Chapter 163, Part II, Florida Statutes (2004), the Department has the duty to review proposed and adopted local government comprehensive plan amendments. The Department's role is not to opine as to whether a local government's amendment is the "best" of the alternative approaches available to the local government for addressing a subject, but to determine whether the amendment is "in compliance," as defined in Subsection 163.3184(1)(b), Florida Statutes (2004).

47. "In compliance" means consistent with the requirements of Sections 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 Florida Administrative Code Chapter 9J-5. § 163.3184(1)(b), Fla. Stat. (2004).

48. The Petitioners have not alleged that Plan Amendment 03-1 and the Remedial Ordinance are inconsistent with Sections 163.31776, 163.3178, 163.3180, 163.3191, and 163.3245, Florida Statutes, or the strategic regional policy plan. The Petitioners' challenge is confined to alleged inconsistency with Sections 163.3177, Florida Statutes (2004), the State Comprehensive Plan, and Florida Administrative Code Chapter 9J-5.

Standing

49. In order to have standing to challenge a plan amendment, the challenger must be an "affected person," which is defined as a person who resides, owns property, or owns or operates a business within the local government whose comprehensive plan amendment is challenged. § 163.3184(1)(a), Fla. Stat. (2004). As residents of the Town when Plan Amendment 03-1 was adopted, the three Petitioners had standing to challenge the amendment. However, Bernard Knight and Mary Jo Knight no longer reside in the Town and will not be affected by the amendment. The claims raised on their behalf in the Amended Motion to Intervene are now moot.

50. Because Charles Osbourne is an affected person and has standing in this proceeding, the question of whether the Knights have standing need not be addressed. See Coalition for Adequacy

and Fairness in School Funding, Inc. v. Chiles, 680 So. 2d 400 n. 4 (Fla. 1996).

Burden of Proof

51. The Town determined that Plan Amendment 03-1 is in compliance. Because the Department also determined that Plan Amendment 03-1 is in compliance, Subsection 163.3184(9), Florida Statutes (2004), provides that the amendment "shall be determined to be in compliance if the local government's determination of compliance is fairly debatable."

52. The term "fairly debatable" is not defined in Chapter 163, Florida Statutes, or Florida Administrative Code Chapter 9J-5. The Supreme Court of Florida has suggested, however, that the fairly debatable standard under Chapter 163, Florida Statutes, is the same as the common law "fairly debatable" standard applicable to decisions of local governments acting in a legislative capacity. In Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997), the Court said, "The fairly debatable standard of review is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety." (citation omitted). Quoting from City of Miami Beach v. Lachman, 71 So. 2d 148, 152 (Fla. 1953), the Court stated further, "[A]n ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical

deduction that in no way involves its constitutional validity." Martin County v. Yusem, 690 So. 2d at 1295.

Data and Analysis

53. The Petitioners contend that Plan Amendment 03-1 and the Remedial Ordinance are not based upon appropriate data and analysis as required by Subsections 163.3177(6), (8), and (10), Florida Statutes, and Florida Administrative Code Rule 9J-5.005(2)(a). Each amendment to a comprehensive plan must be based upon appropriate data. Florida Administrative Code Rule 9J-5.005(2) requires that, in order for a plan provision to be "based" upon relevant and appropriate "data," the local government must "react to it in an appropriate way and to the extent necessary indicated by the data available on that particular subject at the time of adoption of the plan or plan amendment at issue." The data must also be the "best available existing data" "collected and applied in a professionally acceptable manner." Fla. Admin. Code R. 9J-5.005(2)(a)-(c); § 163.3177(10)(e), Fla. Stat. (2004).

54. However, the data and analysis that can support a plan amendment are not limited to those identified or actually relied upon by a local government. All data in existence and available to a local government at the time of the adoption of the plan amendment may be relied upon to support an amendment in a de novo proceeding. Zemel v. Lee County, et al., 15 F.A.L.R. 2735

(DCA June 22, 1993), aff'd, 642 So. 2d 1367 (Fla. 1st DCA 1994). See also The Sierra Club, et al. v. St. Johns County, et al., Case Nos. 01-1851GM and 01-1852GM, 2002 WL 1592234 (DOAH May 20, 2002; DCA July 30, 2002) ("The ALJ need not determine whether the [local government] or the Department were aware of the data, or performed the analysis, at any prior point in time.").

55. Analysis, as opposed to data, need not be in existence at the time of the adoption of a plan amendment. See Zemel, supra. Data that existed at the time of the adoption of a plan amendment may be subjected to different or even first-time analysis at the time of an administrative hearing held to hear a challenge to a plan amendment. Id.

56. A challenger who claims the data and analysis for a comprehensive plan amendment is insufficient must do more than show that some of the data was inaccurate. The data and analysis can include hundreds, even thousands, of individual "facts," with wide variation in their importance or contribution to the local government's decision to adopt a particular plan amendment. Only errors in the data and analysis that are shown to undermine the action taken by the local government will serve to meet the challenger's burden of proving an amendment is not in compliance. In this case, certain map and topographic discrepancies found by the Petitioners did not cause the data

and analysis to be insufficient to support the Town's plan amendments.

57. The Petitioners did not demonstrate that Plan Amendment 03-1 and the Remedial Ordinance are unsupported by appropriate data and analysis. The Petitioners did not prove that the data relied on by the Town was not the best available data, or that the Town did not "react to it in an appropriate way and to the extent necessary," as required by Florida Administrative Code Rules 9J-5.005(2)(a)-(c) and Subsection 163.3177(10)(e), Florida Statutes (2004).

Internal Consistency

58. The Petitioners contend that the Plan Amendment 03-1 and the Remedial Ordinance are inconsistent with existing provisions of the Beverly Beach Comprehensive Plan. Subsection 163.3177(2), Florida Statutes (2004), and Florida Administrative Code Rule 9J-5.005(5)(a) require the elements of a comprehensive plan to be internally consistent. A plan amendment creates an internal inconsistency when it has the effect of conflicting with an existing provision of the comprehensive plan.

59. The Petitioners contend that the Plan Amendment 03-1 and the Remedial Ordinance are inconsistent with Objective A.3.1 of the Beverly Beach Comprehensive Plan, which provides that the Town will protect its natural resources from destruction or encroachment by development, because the plan amendments will

cause adverse impacts on scrub jays and wetlands. The Petitioners did not demonstrate, however, that adverse impacts to wetlands and scrub jays will result from the challenged plan amendments. Therefore, no inconsistency with Objective A.3.1 was established.

60. The Petitioners also contend that the Plan Amendment 03-1 and the Remedial Ordinance are inconsistent with Policy D.1.2.4 of the Beverly Beach Comprehensive Plan. Policy D.1.2.4 states, "The Town shall prohibit any development that adversely affects the economic availability of potable water or sanitary sewer."

61. The Petitioners have not demonstrated a conflict between Policy D.1.2.4 and the Plan Amendment 03-1, as amended by the Remedial Ordinance. Plan Amendment 03-1 and the Remedial Amendment support and further the intent of Policy D.1.2.4 by addressing the problems associated with the Beverly Beach Wastewater Treatment Facility. In addition, the prohibition created in new Policy A.1.1.9 against the issuance of any permit or certificate of occupancy for the Shelter Cove PUD until the wastewater treatment facility has obtained a permit renewal from DEP matches the prohibition in Policy D.1.2.4 against development that adversely affects the availability of sanitary sewer.

Consistency with Section 163.3177

62. One part of the statutory definition of "in compliance" is consistency with Section 163.3177, Florida Statutes. This statute identifies and describes the required and optional elements of a local government comprehensive plan. The Petitioners assert that Plan Amendment 03-1 and the Remedial Ordinance are inconsistent with several requirements of Section 163.3177.

63. The Petitioners contend that the plan amendments are inconsistent with Subsection 163.3177(6)(a), Florida Statutes (2004), which requires a local government to have a comprehensive plan element that addresses future land uses and includes standards for the control and distribution of population densities. The Beverly Beach Comprehensive Plan has a Future Land use Element and the Petitioners have not demonstrated that Plan Amendment 03-1 and the Remedial Ordinance conflict with any particular policy or objective of the Future Land Use Element.

64. The Petitioners contend that the plan amendments are inconsistent with Subsection 163.3177(6)(c), Florida Statutes (2004), which requires a local government to have a comprehensive plan element that addresses, among other related subjects, the provision of adequate sanitary sewer services. The Beverly Beach Comprehensive Plan has a Public Facilities

Element and, as explained above, Plan Amendment 03-1 and the Remedial Ordinance are consistent with Policy D.1.2.4 of that element pertaining to the prohibition of development that adversely affects the availability of sanitary sewer services.

65. The Petitioners failed to prove beyond fair debate that Plan Amendment CPA 03-1 and the Remedial Amendment are inconsistent with Section 163.3177, Florida Statutes (2004).

Consistency With the State Comprehensive Plan

66. The Petitioners contend that the plan amendments are inconsistent with the State Comprehensive Plan that is set forth in Section 187.201, Florida Statutes (2004). Subsection 163.3177(10)(a), Florida Statutes (2004), explains that the term "consistency" with regard to the State Comprehensive Plan means the local plan (or plan amendment) is "compatible with" and "furthers" the State Comprehensive Plan. The term "compatible with" is defined to mean that the local plan is not in conflict with the State Comprehensive Plan. The term "furthers" is defined to mean that the local plan "takes action in the direction of realizing goals or policies" of the State Comprehensive Plan.

67. The Petitioners contend that Plan Amendment 03-1 and the Remedial Amendment are inconsistent with the policy in Subsection 187.201(9)(b)3., Florida Statutes (2004), which prohibits the destruction of endangered species and their

habitat. The Florida scrub jay is listed by Florida and the Federal Government as a threatened species, not an endangered species. In addition, the Petitioners' evidence regarding scrub jay sightings in the Shelter Cove PUD did not constitute proof that Plan Amendment 03-1 and the Remedial Amendment will adversely affect the Florida scrub jay.

68. The Petitioners contend that Plan Amendment 03-1 and the Remedial Amendment are inconsistent with the goal in Subsection 187.201(15)(a), Florida Statutes (2004), which calls for development in areas where service capacity can accommodate growth in an environmentally acceptable manner. Because the Remedial Amendment prohibits the issuance of a permit or certificate of occupancy by the Town until the Beverly Beach Wastewater Treatment Facility has been permitted by DEP, the Petitioners have failed to demonstrate that the amendment would violate this particular policy of the State Comprehensive Plan.

69. The Petitioners contend that Plan Amendment 03-1 and the Remedial Amendment are inconsistent with the policy in Subsection 187.201(15)(b), Florida Statutes (2004), which is also aimed at ensuring that there is adequate service capacity to accommodate growth. For the same reason just stated above, the Petitioners have failed to show that the Town's plan amendments are inconsistent with this policy.

70. The Petitioners contend that Plan Amendment 03-1 and the Remedial Amendment are inconsistent with the policy in Subsection 187.201(9)(b)6, Florida Statutes (2004), which requires a local government, in land use planning and regulation, to consider the availability of natural resources to meet demands and the potential for flooding. The Petitioners have not adequately articulated, much less proven, that the Town's plan amendments are inconsistent with this state policy.

71. The Petitioners failed to prove beyond fair debate that Plan Amendment CPA 03-1 and the Remedial Amendment are inconsistent with the State Comprehensive Plan.

Consistency With Chapter 9J-5

72. One part of the statutory definition of "in compliance" is consistency with Florida Administrative Code Chapter 9J-5. Chapter 9J-5 contains minimum criteria the Department uses in reviewing local government comprehensive plans and plan amendments. The Petitioners assert that Plan Amendment 03-1 and the Remedial Ordinance are inconsistent with several of the minimum criteria in Chapter 9J-5.

73. The Petitioners contend that Plan Amendment 03-1 and the Remedial Amendment are inconsistent with Rule 9J-5.005(2) which describes the data and analysis that is necessary to support a plan amendment. For the reasons stated above in the section on data and analysis, the Petitioners have failed to

demonstrate that the Town's plan amendments are inconsistent with this particular rule.

74. The Petitioners contend that Plan Amendment 03-1 and the Remedial Amendment are inconsistent with Rule 9J-11.007 (sanitary sewer services), Rule 9J-5.006(3)(b)4. (protection of natural resources), Rule 9J-5.006(2)(e) (flood prone areas), Rule 9J-5.006(3)(c)(availability of services), and Rule 9J-5(6)(5)(h)7. (suitability of land uses). The Petitioners' failure of proof on each of these subjects is set forth in the findings of fact.

75. The Petitioners failed to prove beyond fair debate that Plan Amendment CPA 03-1 and the Remedial Amendment are inconsistent with Florida Administrative Code Chapter 9J-5.

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 Town of Beverly Beach Plan Amendment 03-1, and Remedial Ordinance 2004-ORD-6, are "in compliance" as defined in Chapter 163, Part II, Florida Statutes (2004).

DONE AND ENTERED this 29th day of August, 2005, in
Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
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Filed with the Clerk of the
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this 29th day of August, 2005.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.