

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF COMMUNITY)
AFFAIRS,)
)
Petitioner,)
)
vs.) Case No. 04-3651GM
)
CITY OF GROVELAND,)
)
Respondent,)
)
and)
)
FRANK GAMMON and BANYAN)
CONSTRUCTION AND DEVELOPMENT,)
INC.,)
)
Intervenors.)
_____)

RECOMMENDED ORDER

On October 5-7, 2005, a final administrative hearing was held in this case in Groveland, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether the City's Future Land Use Map (FLUM) Amendment for Site 7 is "in compliance," as defined in Section 163.3184(1)(b), Florida Statutes.¹

PRELIMINARY STATEMENT

In February 2004, the City of Groveland (City) transmitted to the Department of Community Affairs (DCA) a package of proposed comprehensive plan amendments, including FLUM designations for several annexed sites. DCA issued an Objections, Recommendations, and Comments Report (ORC), and on August 2, 2004, the City adopted, through enactment of its Ordinance No. 2004-02-07, a revised amendment package which addressed some but not all of the ORC issues. On October 8, 2004, DCA issued a Notice of Intent to find six FLUM amendments not "in compliance" but to find the rest of the adopted amendment package "in compliance" and filed a Statement of Intent (SOI) and Petition for Formal Administrative Hearing (Petition) as to the six adopted FLUM

amendments. While the case was in abeyance, the parties resolved their disputes as to all of the adopted FLUM amendments except "Site 7," consisting of 361 acres within the boundaries of the Green Swamp Area of Critical State Concern (the Green Swamp). The case was set for final hearing on Site 7 on October 5-7, 2005, in Groveland, Florida. Leave to intervene was granted to Frank Gammon and to Banyan Construction and Development, Inc. (Banyan).

Instead of filing a prehearing stipulation, DCA and the other parties filed separate prehearing statements reflecting some agreement but much disagreement as to the issues to be determined at the final hearing.

The disagreements were further specified in two motions in limine filed by the City and Intervenors on the two days immediately preceding the final hearing. The first argued that, contrary to the restrictions in Section 163.3184(8)(b), Florida Statutes, DCA's SOI and Petition expanded upon the issues raised in the ORC although the proposed and adopted amendments were identical with respect to Site 7. It sought to strike from DCA's Petition the issue of consistency with Rule 9J-5.006(4),² as relates to urban sprawl, and to limit the issues of consistency with the Principles for Guiding Development in the Green Swamp (Guiding Principles) based on alleged inconsistencies with Rules 9J-5.006, 9J-5.011, and 9J-

5.013 to the specific subsections cited in the ORC. In the second motion, the City and Intervenors sought to dismiss the parts of DCA's Petition that had been resolved or lacked site-specific evidence to establish a baseline for determining consistency with the Guiding Principles.

At the outset of the final hearing, the motions in limine were heard, and ruling was reserved, effectively denying them. However, it became clear during the course of the final hearing that several issues in the Petition were indeed resolved or were being dropped by DCA, leaving essentially whether the Site 7 FLUM amendment: discourages the proliferation of urban sprawl; is consistent with Plan policies designed primarily to discourage urban sprawl and promote intergovernmental coordination; is consistent with the Guiding Principles; reacts appropriately to the data and analysis on environmental site suitability; and is consistent with certain provisions of the State Comprehensive Plan on planning for new public facilities.³

At the final hearing, DCA called three witnesses: Brenda Winningham, an expert in comprehensive planning; T.M. "Mike" Gurr, an expert in geology and hydrogeology; and Rebecca Jetton, an expert in the Green Swamp and in land use and comprehensive planning. DCA also had its Exhibits 1a, 1b, 2, 3, 5-7, 9-17, 19, 26, 27, 30, 31, 36, 37, 40, 42-47, 49-51,

53-55, and 57-61 admitted in evidence. Ruling was reserved on objections to DCA Exhibits 18, 20, and 41. It is now ruled that, while the relevance objection to Exhibit 20 is sustained, the relevance objection to Exhibit 18 is overruled, and Exhibit 18 is admitted in evidence. As to Exhibit 41, the objection to policy recommendations in the document is sustained, but Exhibit 41 is admitted in evidence insofar as technical data.

The City called one witness: Teresa Greenham, an expert in land use and comprehensive planning. The City also had its Exhibits 4, 11, 14, 23, 32, and 45 admitted in evidence.

Frank Gammon testified on behalf of himself and the other Intervenor, Banyan. Intervenors also called three other witnesses: Wendy Grey, an expert in land use planning; Chyrl Ellinor, an expert in biology and resource management; and Peter Hubbell, an expert in hydrology, the Green Swamp, and water resource management. Intervenors also had their Exhibits 1, 2, 4(A-H), 5, 6, 7, 8, and 10 admitted in evidence.

After presentation of evidence, no party requested a transcript of the final hearing, and the parties were given ten days in which to file proposed recommended orders (PROs). However, DCA filed an unopposed motion to enlarge the time to

October 21, 2005, which was granted. Timely PROs were filed by DCA and jointly by the City and Intervenors.

On October 26, 2005, the City and Intervenors filed a Motion to Strike portions of DCA's PRO--namely, portions addressing the failure of the City's comprehensive plan, as amended, to discourage the proliferation of urban sprawl and to react appropriately to data and analysis demonstrating Site 7 to be unsuitable for the FLUM amendment. They argued that those issues were not sufficiently specified in the SOI and Petition. On November 11, 2005, DCA filed a Response in Opposition. Based on these filings, the Motion to Strike is denied.

DCA's Unopposed Motion to Strike, filed November 15, 2005, (to strike from the City's and Intervenors' PRO the reference to Intervenors' Exhibit 9, which was withdrawn) is granted.

FINDINGS OF FACT

1. The City of Groveland is located in Lake County, mostly north of State Road 50 and the northeastern corner of the Green Swamp. The core of the City is in the vicinity of the intersections of State Road 50 with State Road 33 (to the south) and State Road 19 (to the north). There are many lakes and wetlands within the City and surrounding the City in Lake County.

2. The Green Swamp was designated an Area of Critical State Concern by the Florida Legislature in 1979. It consists of approximately 500 million acres south from the City through south Lake County and into Polk County. It is bordered on the east by U.S. Highway 27 and on the west extends over the County line into Sumter County. The Green Swamp is important as a statewide resource to Florida because it is one of the last remaining intact ecosystems in Florida. It is one of Florida's largest wetland systems, second only to the Everglades. It includes the headwaters of five rivers, and provides recharge to the Floridan Aquifer, the primary source of drinking water for Florida. It is an ecologically and hydrologically significant resource. It provides habitat for many endangered species including gopher tortoise, scrub jay, and wood stork.

3. In 2003, the City annexed the parcels known in this proceeding as Sites 4, 5, 6, and 7 from Lake County into the City. All of the parcels are located east of State Road 33 and south of State Road 50 and within the boundaries of the Green Swamp. Sites 4, 5, and 6 total 171.1 acres of wetlands bordering Sumner Lake and the City's boundaries before annexation. Site 7 consists of 361 acres (264 acres of uplands and 97 acres of wetlands). (There is an approximately 70-acre County "enclave" in the middle of Site 7 which

remained in Lake County.) Site 7 currently is used to grow citrus. It is connected to the City through the other three sites and Sumner Lake.

4. At the time of annexation (and until City plan amendments are found to be "in compliance"),⁴ the future land use designation for Sites 4, 5, and 6 was Lake County Rural/Conservation. Site 7 had and still has its Lake County future land use designations. Its 97 acres of wetlands are designated Lake County Rural/Conservation, which allows one dwelling unit per 10 acres, while the 264 acres of uplands are designated as Lake County Transition, which allows one unit per 5 acres, or one unit per acre if the "timeliness" criteria under the Lake County Comprehensive Plan are met.

5. These parcels were the subject of the City's FLUM amendments adopted on August 2, 2004. The FLUM amendments changed the designation of Sites 4, 5, and 6 from County Rural/Conservation to City Conservation. These City designations have been found to be "in compliance." The FLUM amendments also changed the future land use designation of Site 7's 97 acres of wetlands to City Conservation, and its 264 acres of uplands to City of Groveland Green Swamp Single Family Rural Development (GSRD), which allows two dwelling units per acre. With a transfer of development rights from the undevelopable wetlands to the developable uplands, which

would be allowed under both the City's and the County's comprehensive plans, the maximum number of dwelling units allowed on Site 7 under the City's designation would increase to 532, up from the 57 allowed under the current County designations.

Compliance Issues

6. As indicated in the Preliminary Statement, DCA's Petition and SOI alleged that the City's Plan, as amended by the Site 7 FLUM amendment, is not "in compliance" because:

(1) it is inconsistent with Rule Chapter 9J-5 because it fails to discourage the proliferation of urban sprawl, as required by Rule 9J-5.006(5); (2) it is internally inconsistent with the City's Future Land Use Element (FLUE) Policies 1-1.10.1 (land use allocation), 1-1.10.2 (promoting orderly compact growth), and 1-1.10.3 (coordination with Lake County to reduce urban sprawl), and Intergovernmental Coordination Element (ICE) Policy 7-1.1.3 (land use planning of adjacent lands); (3) it is inconsistent with the Green Swamp Guiding Principles; (4) it is inconsistent with Section 163.3177(6)(a) and (8), Florida Statutes, and Rule 9J-5.005(2)(a), because it does not react appropriately to the data and analysis on environmental site suitability; and (5) it is inconsistent with State Comprehensive Plan Public Facilities Goal 17(a) and Policies 17(b)1.-2.

Urban Sprawl

7. It is no longer disputed that there is a demonstrated need for the additional residential development allowed by the Site 7 FLUM amendment. The real contention by DCA is that the development should not occur at Site 7.

8. DCA's urban sprawl argument focuses on five of the 13 "primary indicators that a plan or plan amendment does not discourage the proliferation of urban sprawl":

4. As a result of premature or poorly planned conversion of rural land to other uses, fails adequately to protect and conserve natural resources, such as wetlands, floodplains, native vegetation, environmentally sensitive areas, natural groundwater aquifer recharge areas, lakes, rivers, shorelines, beaches, bays, estuarine systems, and other significant natural systems.

* * *

6. Fails to maximize use of existing public facilities and services.

7. Fails to maximize use of future public facilities and services.

8. Allows for land use patterns or timing which disproportionately increase the cost in time, money and energy, of providing and maintaining facilities and services, including roads, potable water, sanitary sewer, stormwater management, law enforcement, education, health care, fire and emergency response, and general government.

9. Fails to provide a clear separation between rural and urban uses.

Fla. Admin. Code R. 9J-5.006(5)(g).

Indicator 4

9. DCA's argument as to Indicator 4 is two-fold: Site 7

is surrounded by rural land; and increasing densities will harm the natural resources of the Green Swamp.

10. Site 7 is immediately surrounded by generally rural uses. As indicated, wetlands and Sumner Lake are to the immediate northwest. Directly to the north of the northernmost portion of Site 7 is a sprayfield owned and operated by the City of Clermont. North of the sprayfield is an open water body. The east side of Site 7 adjoins a marshy area on the west side of Lake Palatlahaha. The south side of Site 7 abuts CR 565 and low wetlands areas, with Lake Wash and other rural lands and wetlands farther south.

11. While immediately surrounded by rural lands (City Conservation, County Rural/Conservation, and County Transition), Site 7 is located approximately 3,000 feet (not three miles, as DCA's primary witness on this issue believed as late as her deposition in this case) south of State Road 50, a highly traveled, major road that connects West Central Florida to East Central Florida. Site 7 is in a fast-growing area less than two miles southeast of the center of the City. Immediately to the north of Sumner Lake is the Westwood residential subdivision which lies along the southern boundary of State Road 50. Existing homes are scattered around the sprayfield.

12. Westwood is located within the City's boundaries and

in the Green Swamp. It has a future land use designation of Green Swamp Single Family Low Density Development (GSLD), which allows up to four single-family detached homes per acre. This corresponds to the Lake County Ridge designation it had at the time it was annexed into the City. Westwood currently is under construction, with many homes already occupied.

13. Along the northern side of State Road 50 north of Westwood is a parcel within the City designated on the FLUM as Commercial, which is proposed to be used for a Publix grocery store, and the Green Valley Country Club, an existing golf course community.

14. To the west of Site 7 is an existing golf course and water ski community known as the Swiss Ski School. It is located within unincorporated Lake County in the Green Swamp and has a Planned Unit Development (PUD) approval for 296 residential units. To the west of the Swiss Ski School lie Stewart Lake and Olsen Lake and their associated wetlands, which are in the Green Swamp in the unincorporated County and have County designations of Rural/Conservation and Transition. Farther west, along State Road 33 and still in the Green Swamp, lie developments having FLUM designations of GSSFLD allowing up to four units per acre. Both those developments lie within City limits.

15. To the south of Site 7, and in unincorporated Lake

County, with a County designation of Transition, lies a subdivision along Monte Vista Road which is vested for residential development partly at a density of two units per acre and partly at one unit per acre.

16. Although there will be wetlands and Sumner Lake in City Conservation designations between Site 7 and developments to the north and west in the City, leapfrog development is not a concern for Site 7 and its surrounding area. To the extent Site 7 is separated from other urban or suburban uses in the City by lakes, wetlands, and conservation lands, no urban, suburban or even rural development of those conservation lands should be expected, so that "leaping over" those undeveloped lands should not be considered an indicator of sprawl.

17. For these reasons, it is found that the Site 7 FLUM amendment is not premature. Nor is the conversion from agricultural use to residential use poorly planned. The development will be compact and orderly, and public facilities and services are available. Natural resources already receive a significant amount of protection in the plan. The development of Site 7 will promote conservation of natural resources by allowing only uplands to be developed onsite and allowing a density of up to two units per acre. A lower density would be an inefficient use of developable land. An

inefficient land use pattern encourages the premature conversion of environmentally significant lands.

Indicators 6 and 7

18. DCA's arguments as to Indicators 6 and 7 essentially are that some public facilities and services will have to be extended to Site 7, that there are places in the City capable of development using only existing public facilities and services, and that the City has planned for future public facilities and services elsewhere--namely, in the North Overlay, which is described below.

19. As for existing public facilities and services (Indicator 6), development under the site 7 FLUM amendment will receive the same public services of law enforcement, fire, emergency services, and schools as are currently available to Site 7, at a lower residential density, under the existing Lake County Transition land use. Pursuant to an interlocal agreement with Lake County, the City already provides law enforcement services not only to Site 7 and surrounding areas in the City, but also to adjacent areas in unincorporated Lake County. As the City already provides public services in the area, it will be more cost-efficient to spread those costs among more homeowners. The proposed amendment will allow more homeowners to share these costs.

DCA's only response to these facts, some of which were not known by DCA's expert witness, was that "the increased population on the site may require additional staff and facilities to serve the population." DCA's PRO, at 41.

20. As for water and sewer, as indicated, a connection to central water and sanitary sewer is available at State Road 50, approximately 3,000 feet from Site 7 (a fact also not known by DCA's expert witness until shortly before the hearing). The developer will be required to pay for the cost of the new lines to Site 7. After those lines are installed, nearby property owners can voluntarily connect to central water and sewer. A few of the nearby property owners who have septic tanks have indicated an interest in connecting to the Site 7 sewer lines. For these reasons, the proposed amendment would result in an efficient use of central water and sanitary sewer facilities.

21. As for future public facilities and services (Indicator 7), in 2003, as a result of a settlement agreement between the City and DCA on the City's 2003 plan amendment, the City proposed and adopted the "Groveland North Overlay" area and associated policies as a plan for future growth. The North Overlay was found to be "in compliance," is part of the City's FLUE, and is designated on Map 1-7 of the City's FLUM series.

22. The North Overlay is located to the north of the existing City limits and consists of several thousand acres. It is identified as an area in which future annexations are likely to take place in order to meet growth needs. The area is adjacent to parcels already annexed by the City, designated for urban densities, and planned for public facilities. It allows for a mix of uses. It shows that the City had identified a growth strategy to meet its need for the planning timeframe and beyond. It was established to ensure that, as land in the North Overlay was annexed into the City, new development would not develop as urban sprawl, but rather would be managed in a way which created a more effective land use pattern.

23. While adopting the North Overlay, the City has a policy to annex land only on a voluntary basis. It does not exercise its rights under Section 171.0413, Florida Statutes, to require contiguous, compact unincorporated territory to annex. For this reason, it is difficult for the City to foresee with certainty which lands will annex into its municipal boundaries.

24. In addition, starting in the mid-1990's, before adopting the North Overlay, the City began to annex land to the south in the Green Swamp. At that time, the City began the process of amending its comprehensive plan to include

provisions to comply with the Principles for Guiding Development in the Green Swamp.

25. In late 2000, the City embarked on a study to guide development and facilitate municipal expansion in the Green Swamp. The DCA provided funding for the study through a technical assistance grant. DCA also provided feedback for the study. The City hired a private consulting firm to do the study and produce a series of four quarterly reports. The final report is entitled "City of Groveland Small Area Study Final Report November 1, 2001." The Small Area Study considered an area of approximately 2,580 acres in the Green Swamp, which the City reasonably projected may be annexed. The geographic boundaries of the study were larger in the first three phases of the study, but were constricted for the final report at the request of DCA planner, Bob Dennis, to be closer to State Road 33. In addition, future annexations were projected to be phased, with areas closer to State Road 33 projected to occur before areas farther away from there. Site 7 is even farther away from State Road 33 and entirely outside the final boundaries of the Small Area Study. But the Small Area Study was not intended to bind the City, or restrict the City's annexation rights and powers, or change the City's policy of voluntary annexation. In other words, the projected

annexations and phasing did not preclude consideration of out-of-phase or out-of-area annexations.

26. The DCA grant required the Small Area Study to evaluate the area south of Groveland using several criteria, including upland area, utility availability and expansion, road/transportation network, Lake County land use designation, current land use activities, environmental assessment impacts, and the Green Swamp rules.

27. The Small Area Study recommended that the City adopt two land use categories to apply to residential development in the Green Swamp: a land use category allowing a maximum of four units per acre, and another land use category allowing a maximum of two units per acre. A requirement of 60 percent open space and limitations on impervious surface for residential development also were recommended. For the protection of the Green Swamp and the Floridian Aquifer, the study also recommended that clustered development be encouraged and that central water and sewer be provided. The Small Area Study also recommended that wetlands be designated a Conservation land use. The Small Area Study also recommended that the plan require an upland buffer of 50 feet from the edge of the wetland line and that all development be prohibited in wetlands and floodplains. The City adopted

those recommendations, as well as others. All of those plan amendments were found to be in compliance with DCA to be "in compliance."

28. One of those amendments, FLUE Policy 1.3.11, prohibits any structure in the Green Swamp to be located within fifty feet of a wetland line. This requirement exceeds the St. Johns River Water Management District (SJRWMD) performance standards for wetland buffers, which require an average uplands buffer of 25 feet, with a minimum buffer of 15 feet, as well as the standard included in the plan's Conservation Policy 7.3.5, which applies only to development located outside of the Green Swamp, and requires an average buffer of 50 feet, with a minimum buffer of 25 feet.

29. FLUE Policy 1.3.3 and Conservation Policy 7.13.1 prohibit all development in the wetlands and floodplains for land located within the Green Swamp. This policy is more stringent than the Guiding Principles and Rule 9J-5. Rule 28-28.008(1) provides performance criteria for development in flood-prone areas, which may be adopted in land development regulations applying in Lake County portions of the Green Swamp. Rule 9J-5.013(3)(b) requires that land uses be distributed to allow wetland impacts to be minimized and mitigated.

30. The City also implemented the recommendations of the Small Area Study for the two residential land use categories.

As already indicated, the City adopted the GSLD land use category, allowing a density of up to four units per acre. FLUE Policy 1.1.17. It also adopted the GSRD land use category in FLUE Policy 1.1.18, allowing a density of up to two single family detached homes per acre. Both categories require that at least 60 percent of the property remain in open space and that development be clustered on the least environmentally sensitive portions of the site.

31. The amendments adopting the GSLD and GSRD land use categories were found by DCA to be "in compliance" and consistent with the Principles of Guiding Development in the Green Swamp. However, those categories were not yet assigned to all land considered in the Small Area Study, much less land outside its final boundaries. The appropriateness of GSRD for Site 7 is the issue in this case.

Indicator 8

32. DCA's arguments as to Indicator 8 essentially focus on the timeliness provision in Lake County's Transition designation and the requirement to provide some new public facilities and services as a result of the City's Site 7 FLUM amendment. See Finding 4, supra.

33. Development of Site 7 under Lake County's Transition designation would be limited to one unit per five acres. Site 7 would not qualify for development at one unit per acre under

the timeliness provision, which requires more than 40 percent of the surrounding area within a mile radius, and 60 percent of the surrounding area within a two-mile radius, to be developed at a density of one unit per acre or greater.⁵ In addition, development of Site 7 under the City's FLUM amendment would make one unit per acre development of the 70-acre County "enclave" within Site 7 timely, which in turn may make one unit per acre development of other County land in the vicinity timely under Lake County's Transition designation.

34. In effect, DCA fears that the City's Site 7 FLUM amendment will have a "domino effect" that will trigger rapid, wholesale conversion of rural County Transition land that can be developed at one unit per five acres to Transition land "timely" for development at one unit per acre. But DCA did not prove that its fear is reasonable. DCA also fears that the City's Site 7 FLUM amendment ultimately will result in too much residential development in the Green Swamp. But future County land use designation changes that will harm the Green Swamp will be subject to challenge by DCA. In any event, whether the City's FLUM change at issue in this case is timely depends on a number of factors besides just the timeliness provision of Lake County's Transition designation.

35. Indicator 8 addresses allowing "land use patterns or timing which disproportionately increase the cost in time,

money and energy, of providing and maintaining facilities and services," not just patterns or timing that increases those costs. (Emphasis added). DCA did not prove that extending water and sewer lines will be a disproportionately high cost for the developer to pay and pass on to homeowners. The water and sewer lines will be placed along an existing right-of-way and will be required to be extended approximately 3,000 feet to reach Site 7. Longer lines have been installed within City limits. Also, as discussed above relating to Indicators 6 and 7, the Site 7 FLUM amendment will allow a greater sharing of expenses of facilities and services.

Indicator 9

36. As to Indicator 9, there is some merit to DCA's argument that the Site 7 FLUM amendment fails to provide a clear separation between rural and urban uses. But this is partly because of the lakes and wetlands between Site 7 and those urban uses. In addition, there are some urban-like uses between Site 7 and other urban uses in the City. See Finding 14, supra.

Internal Consistency

37. DCA's Petition and SOI alleged that the Site 7 FLUM amendment is internally inconsistent with other parts of the City's comprehensive plan addressing urban sprawl considerations: FLUE Policies 1-1.10.1, 1-1.10.2, and 1-

1.10.3; and ICE Policy 7-1.1.3. After the Site 7 FLUM amendment was adopted, the City further amended its comprehensive plan. FLUE Policies 1-1.10.1, 1-1.10.2, and 1-1.10.3 became, respectively: Policy 1.1.2; Objective 1.6 and Policy 1.6.1; and Policy 1.6.2. ICE Policy 7-1.1.3 was replaced by ICE Policy 11.1.1, and there was no objection to substituting the new, equivalent policy for purposes of this proceeding.

38. FLUE Policy 1.1.2 states:

The City shall designate land use on the [FLUM] to accommodate needs identified within the Comprehensive Plan supporting document (i.e., Data Inventory & Analysis). The City shall allocate a reasonable amount of land above identified needs to avoid economic impacts which a controlled supply of land places on land values and market potential.

As found, it is undisputed that the Site 7 FLUM amendment is internally consistent with this policy. In its response to the ORC, the City adequately demonstrated that it had a need for additional residential land to accommodate its future population. Moreover, the ratio between the City's future land use needs and population growth is only slightly more than 1:1. The Site 7 FLUM amendment does not create an over-allocation of land uses in relation to its estimated population growth. Again, DCA's challenge is to the location of Site 7.

39. FLUE Objective 1.6 states: "Discourage urban sprawl through a future land use pattern which promotes orderly, compact development." FLUE Policy 1.6.1 states:

Land use patterns delineated on the [FLUM] shall promote orderly, compact growth. The City shall encourage growth and development in existing developed areas where public facilities and services are presently in place and in those areas where public facilities can provide the most efficient service. Land shall not be designated for growth and development if abundant undeveloped land is already present within developed areas served by facilities and services."

Based on the findings as to the urban sprawl indicators, supra, DCA did not prove that the Site 7 FLUM amendment is internally inconsistent with FLUE Objective 1.6 and Policy 1.6.1, much less that internal consistency is beyond fair debate.

40. FLUE Policy 1.6.2 states: "The City of Groveland shall coordinate with Lake County through a Joint Planning Agreement to develop an areawide [sic] planning approach by 2010, taking into account environmental suitability, functional relationships and areas where public facilities and services are available or proposed to be available by year 2020." ICE Policy 11.1.1 states: "The City of Groveland shall continue to work closely with Lake County, Lake County School Board, other municipalities and affected regional, state and national government agencies to coordinate the

comprehensive planning effort of the City with those agencies affected, through the provision of information and participation on committees and working parties."

41. DCA did not prove that the Site 7 FLUM amendment is internally inconsistent with FLUE Policy 1.6.2 or ICE Policy 11.1.1, much less that internal consistency is beyond fair debate.

42. To the extent that internal consistency requires that the local government to comply with the intergovernmental coordination provisions in its comprehensive plan when it proposes and adopts plan amendments, DCA also did not prove that the City failed to do so, much less that its failure to comply is beyond fair debate.

43. The City regularly coordinates its plan amendments with Lake County. The City provided a copy of its 2004-02 amendment package to Lake County when the amendment was transmitted to DCA, as was indicated to DCA in the transmittal amendment cover letter to DCA. A local government's submittal to an adjacent local government of a copy of an amendment under review is a common way for a local government to coordinate amendments with other local governments. The City also regularly coordinates planning issues with Lake County and other Lake County municipalities by attending meetings of their planning departments. Obviously, the Site 7 FLUM

amendment was adopted long before FLUE Policy 1.6.2's 2010 target for a joint planning agreement. At this time, there is no voluntary joint planning strategy with which it can be argued that this amendment is inconsistent.

44. At the hearing, DCA was permitted to also argue internal inconsistency with new plan provisions adopted in July 2005, and found to be "in compliance" in September 2005 (but not provisions adopted in September 2005 and under DCA challenge at the time of the hearing).⁶

45. Newly adopted Sanitary Sewer Objective 5.3 reads:

MAXIMIZE EXISTING FACILITIES AND DISCOURAGE URBAN SPRAWL. The City shall maximize existing sanitary sewer facilities within its service area and promote compact efficient growth patterns.

This objective must be read in conjunction with related Sanitary Sewer Policy 5.3.1, which requires all new development in the City to connect to the central sanitary sewer system, as well as with FLUE Policy 1.1.18, which requires all development in land designated GSRD to connect to central water and sanitary sewer utilities. Density is related to the ability to provide central sewer and water services. If a developer runs new water and sewer lines, which he must do at his own cost in the City, compact density will make development more economical for those services and will encourage an efficient land use pattern.

46. A density of two units per acre is financially feasible for providing central water and sewer to Site 7, whereas the evidence was that a density of one unit per five acres, as urged by DCA, is not cost-effective for Site 7, at least given the developer's \$6.5 million land acquisition cost. As the use of septic tanks is not an option in the City for any new development, a contiguous and compact form of development is essential not only for the property in question, but also for future development sites.

47. Development of Site 7 will be connected to an existing City-owned and operated wastewater treatment plant, which has adequate capacity for the maximum of 532 homes allowed by the amendment.

48. As the amendment will allow a compact development pattern of two units per acre and will maximize the use of an existing sewer facility, it is not internally inconsistent with ICE Objective 5.3.

49. Newly-adopted ICE Objective 11.2 requires the City to implement a strategy to ensure the efficient provision of urban services, sound urban development, and accommodation of growth. The objective identifies negotiating interlocal agreements with Lake County and other local governments for joint planning areas and for providing public services.

50. ICE Objective 11.2 requires future intergovernmental

coordination and is not self-implementing. The Site 7 FLUM amendment is not internally inconsistent with ICE Objective 11.2.

Guiding Principles

51. The Guiding Principles were adopted by rule by the Administration Commission in 1974 and subsequently were approved by reference by the Legislature. See Rule 28-26.003; Ch. 79-73, § 5, Laws of Florida (1979). Preceding Rule Chapter 9J-5 and modern Florida statutory requirements for local comprehensive plans, the Guiding Principles actually were adopted to provide guidelines for the adoption of land development regulations. See Rule 28-26.004 and Rule Chapter 28-28, Land Planning-Part VII Boundary and Regulations for the Green Swamp Area of Critical State Concern-Lake County; § 380.0551(2), Fla. Stat.

52. The City's plan contains goals, objectives, and policies that are consistent with the Guiding Principles. Nonetheless, DCA contends that the Site 7 FLUM amendment is inconsistent with the following objectives to be achieved under the Green Swamp Guiding Principles, Rule 28-26.003(1):

- (a) Minimize the adverse impacts of development on resources of the Floridan Aquifer, wetlands, and flood-detention areas.
- (b) Protect the normal quantity, quality and flow of ground water and surface water which are necessary for the protection of resources of state and regional concern.

(c) Protect the water available for
aquifer recharge.

* * *

(j) Protect the natural flow regime of
drainage basins.⁷

53. One of the primary reasons for designating the Green Swamp as an area of Critical State Concern is its relatively high aquifer recharge capabilities. This results from the relative proximity of the surficial aquifer to the ground surface, together with relatively high rate at which water percolates through the soils overlying the surficial aquifer. The relatively high aquifer recharge rate results in a relatively high potentiometric surface in the underlying Floridan aquifer (Central Florida's primary drinking water source) and drives the groundwater system throughout Central and Southwest Florida.

54. Florida contains many areas of no recharge, but low-to-moderate recharge characteristics are common throughout Florida. Within the Green Swamp, there are areas of low, moderate, and high aquifer recharge, depending primarily on the proximity of the surficial aquifer to the ground surface and the characteristics of the overlying soils. In the area of Site 7, the surficial aquifer is approximately 150 feet below ground surface. Site 7 has both Type A (sandy, upland) soils, which have a high infiltration rate, and Type B (wetlands) soils. The area has been regionally mapped by

SJRWMD as having a net recharge rate of 0-4 inches (low) on the western side of the site, and 4-8 inches (moderate) on the eastern part of the site. As such, these recharge characteristics of Site 7 can be said to be "common" for the Green Swamp.

55. As for groundwater contamination, a map of the Floridan Aquifer Groundwater Vulnerability admitted into evidence by DCA showed that the groundwater for Site 7 and the surrounding area are "more vulnerable" to contamination. However, DCA did not present a map for other parts of the Green Swamp or the rest of Florida for comparison purposes, and its expert witness on the subject was unable to quantify vulnerability or directly compare Site 7 to other parts of the Green Swamp and the rest of Florida. However, he did testify that areas of "high vulnerability" extend all the way to the west of Tallahassee and that the western part of the Green Swamp generally is more vulnerable to groundwater contamination than the eastern part, where Site 7 is, because the surficial aquifer is at or near the ground surface in the western part of the Green Swamp.

56. As to the natural flow regime of drainage basins, Site 7 lies in the Oklawaha River Drainage Basin. The natural local drainage of Site 7 is into the Palatlahaha River via several smaller drainage sub-basins: Sumner Lake Outlet,

Palatlakaha Reach, Lake Wash Outlet, and Pine Island Outlets. The Palatlakaha is a major tributary to the Oklawaha River. DCA did not prove that the Site 7 FLUM amendment will adversely impact the natural flow regime of the drainage basin Site 7 is in.

57. DCA did not prove that Site 7 has any hydrologic or environmental characteristics that would require more protection than other parts of the Green Swamp. It follows that DCA did not prove a need for Site 7 to have a lower density than is allowed under the GSRD land use category already approved by DCA for the Green Swamp. Similar residential densities also have been approved in other parts of the Green Swamp.

58. A plan's goals, objectives and policies must be considered when evaluating the impacts of development allowed by a land use category. The FLUM, the goals, objectives, and policies are interrelated. See § 163.3177(6)(a), Fla. Stat. The hydrologic features and functions addressed in the Guiding Principles are protected in the plan, and those protections have been found by DCA to be consistent with the Guiding Principles. Those plan provisions will guide development to ensure that the aquifer, wetlands, flood detention areas, groundwater, surface water, Lake Sumner, and the natural flow of the drainage basin will be appropriately protected.

59. The essence of DCA's argument that the Site 7 FLUM amendment is inconsistent with the Guiding Principles is that, regardless of how much protection the plan's provisions afford, the Site 7 FLUM will allow approximately ten times the various impacts of development--e.g., impacts on wetlands, reduction of aquifer recharge due to increased impervious surfaces, water quality impacts, and water quantity impacts-- at one unit to five acres under the current Lake County Transition designation, so that adverse impacts are not minimized, and resources are not protected, as envisioned in the Guiding Principles. There are several flaws in DCA's argument, even assuming the impact factor of ten.

60. First, the logical extension of DCA's argument would be that minimization and protection require no additional adverse impacts. If so, development at one unit per acre under Lake County Transition's timeliness provisions--a fivefold increase in impacts, under DCA's rationale--also would be inconsistent with the Guiding Principles.

61. Second, planning should be based on reality,⁸ and DCA did not prove that residential development would occur on Site 7 at one unit to five acres. To the contrary, while continued development of small parcels in areas designated Lake County Transition is plausible, the evidence was that it is financially infeasible to develop Site 7 as a whole

residentially at that density.⁹ For that reason, while ordinarily it is appropriate only to compare potential impacts from different possible land use designations, in this case it is appropriate to consider the impacts of the current use of Site 7 as an orange grove when deciding whether the Site 7 FLUM amendment is consistent with the Guiding Principles. The evidence was clear that, under all the criteria in the Guiding Principles cited by DCA, residential development under the Site 7 FLUM amendment is far preferable to the continued use of the property as an orange grove¹⁰--the likely if not absolutely clear result of maintaining Lake County's Transition designation.¹¹

62. Third, as mentioned in Finding 57, supra, it was clear from the evidence that DCA has found residential land use designations of two units per acre and greater not only elsewhere in the Green Swamp, both in the City and elsewhere, to be consistent with the Guiding Principles, and DCA failed to explain why those densities would be consistent with the Guiding Principles elsewhere but not at Site 7.

63. Again under this issue, DCA in effect fears that the City's Site 7 FLUM amendment will have a "domino effect" that will ultimately result in the entire Green Swamp being designated for two-unit per acre residential densities. But the entire Green Swamp is not like Site 7. Future County land

use designation changes that actually will harm the Green Swamp will be subject to challenge by DCA, and it is unreasonable to assume that DCA will allow densities of two units per acre throughout the Green Swamp if it is allowed at Site 7.

Environmental Suitability

64. For essentially the same reasons DCA argues inconsistency with urban sprawl rules and plan provisions and with the Guiding Principles, DCA also contends that the City did not react appropriately to data and analysis indicating Site 7's alleged environmental unsuitability for residential development at two units per acre. Based on the previous findings, DCA did not prove that allegation.¹²

State Comprehensive Plan

65. DCA alleges that the Site 7 FLUM amendment is inconsistent with the State Comprehensive Plan's Public Facilities goal and two related policies. Public Facilities Goal (a) addresses the need to protect substantial investments in existing public facilities. Related Policy (17)(b)1. provides incentives for developing land in a way that maximizes the uses of existing public facilities. Public Facilities Policy 17(b)2. promotes the "rehabilitation and reuse of existing facilities, structures, and buildings as an alternative to new construction."

66. As discussed above in the urban sprawl findings, the Site 7 FLUM amendment encourages the efficient use of existing public facilities. The increase in density, which the amendment allows, may be viewed as a land use incentive that encourages the maximization of existing public facilities both as to Site 7 and as to surrounding properties that may later connect to City utilities. The amendment furthers Public Facilities Goal (a) and Policy (b)(1).

67. The Site 7 FLUM amendment also does not undermine or conflict with Policy (b)(2). The City's plans to rehabilitate a downtown community redevelopment area (CRA) will not be adversely affected by development allowed by the proposed amendment. Also, there is insufficient land within the CRA to accommodate the City's projected housing and land use needs. The amendment is not inconsistent with this policy.

CONCLUSIONS OF LAW

Standard of Review/Standard of Proof

68. Except for certain "amendments directly related to proposed small scale development activities" and described in Section 163.3187(1)(c), DCA reviews all local government comprehensive plans and plan amendments for "compliance"-- i.e., for consistency "with the requirements of ss. 163.3177, 163.31776, when a local government adopts an educational facilities element, 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, where such rule is not inconsistent with this part and with the principles for guiding development in designated areas of critical state concern and with part III of chapter 369, where applicable." § 163.3184(1)(b), Fla. Stat.

69. When DCA determines that a local government's plan or plan amendment is not "in compliance," administrative proceedings under Section 163.3184(10) take place. These proceedings are conducted under Sections 120.569 and 120.57. Most administrative proceedings initiated after preliminary agency review and notice of the agency's intent to take final action, and conducted under Sections 120.569 and 120.57 are de novo proceedings designed to "formulate final agency action, not to review action taken earlier and preliminarily." McDonald v Florida Department of Banking and Finance, 346 So. 2d 81 (Fla. 1st DCA 1977). But the Legislature has chosen to treat administrative review of comprehensive plan and plan amendment cases differently. In proceedings under Section 163.3184(10), a different standard of review is established: "In the proceeding, the local government's determination that the comprehensive plan or plan 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 comprehensive plan or plan amendment is not in compliance. The local government's determination that elements of its plans are related to and consistent with each other shall be sustained if the determination is fairly debatable." § 163.3184(10)(a), Fla. Stat.

Compliance Criteria

70. Whether the Plan Amendments are consistent with relevant provisions of the State Comprehensive Plan, regional policy plan, Chapter 163, Part II, Florida Statutes, and Rule Chapter 9J-5 regarding discouraging urban sprawl is determined by application of Rule 9J-5.006(5).¹³

71. Of the 13 urban sprawl indicators in Rule 9J-5.006(5)(g), DCA only alleged the existence of indicators 4, 6, 7, 8, and 9. As found, DCA did not prove, by a preponderance of the evidence, that the City's Site 7 FLUM amendment fails to discourage the proliferation of urban sprawl. As a result, DCA's evidence was not sufficient to overcome the statutory presumption under Section 163.3184(10)(a) that the City's determination to the contrary was correct.

72. As found, it was even clearer that DCA did not prove beyond fair debate that the City's Site 7 FLUM amendment is internally inconsistent with provisions in the City's plan

designed to discourage the proliferation of urban sprawl and promote intergovernmental coordination. As a result, DCA's evidence clearly was not sufficient to overcome, beyond fair debate, the statutory presumption under Section 163.3184(10)(a) that the City's determination to the contrary was correct.

73. As found, DCA did not prove, by a preponderance of the evidence, that the City's Site 7 amendment is inconsistent with the Guiding Principles. As a result, DCA's evidence was not sufficient to overcome the statutory presumption under Section 163.3184(10)(a) that the City's determination to the contrary was correct.

74. As found, DCA did not prove, by a preponderance of the evidence, that the City's Site 7 amendment failed to react appropriately to the data and analysis on the environmental suitability of Site 7. As a result, DCA's evidence was not sufficient to overcome the statutory presumption under Section 163.3184(10)(a) that the City's determination to the contrary was correct.¹⁴

75. Section 163.3177(10)(a), Florida Statutes, defines "consistency" for the purpose of determining whether the plan is consistent with the State Comprehensive Plan. For these consistency determinations, the plan is consistent if it is "not in conflict with" the relevant plan and "take [s] action

in the direction of realizing goals or policies" of the relevant plan. In making these determinations, the State Comprehensive Plan "shall be construed as a whole and no specific goal and policy shall be construed or applied in isolation from the other goals and policies in the plan. . . ."
." Id.

76. As compared to Rule Chapter 9J-5, the State Comprehensive Plan sets out general planning goals and policies. Unlike Rule Chapter 9J-5, they do not establish "minimum criteria"; rather, if a local comprehensive plan provision would appear to violate a provision of the State Comprehensive Plan, a balanced consideration must be given to all other provisions of both the State Comprehensive Plan and the local comprehensive plan to determine whether a local comprehensive plan is consistent with the State Comprehensive Plan. In addition, many of the provisions of the State Comprehensive Plan apply to the State of Florida and its agencies in planning on the state level, as opposed to local governments. Rarely, if ever, will a local plan violate the State Comprehensive Plan if it does not also violate the applicable Rule Chapter 9J-5 "minimum criteria."

77. As found, DCA did not prove, by a preponderance of the evidence, that the City's Site 7 amendment is inconsistent with the State Comprehensive Plan. As a result, DCA's

evidence was not sufficient to overcome the statutory presumption under Section 163.3184(10)(a) that the City's determination to the contrary was correct.

RECOMMENDATION

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

RECOMMENDED that the Administration Commission enter a final order finding the City's Site 7 FLUM amendment to be "in compliance."

DONE AND ENTERED this 28th day of November, 2005, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of November, 2005.

ENDNOTES

1/ Statutory citations are to the 2004 codification of the Florida Statutes.

2/ Rule references are to the current codification of the Florida Administrative Code.

3/ The City and Intervenors continued to object to the urban sprawl issue on grounds raised in their first motion in limine. They also objected to internal consistency issues based on provisions adopted by the City after the Site 7 FLUM amendment at issue in this case. However, they declined a continuance to give them more time to prepare to address those issues, and their objections were overruled except as to provisions adopted in September 2005, still under DCA challenge at the time of the final hearing, and not yet found "in compliance."

4/ See § 171.062(2), Fla. Stat. (2004)(an area that is annexed to a municipality continues to be subject to the county land use plan and land development regulations until the municipality adopts a comprehensive plan amendment that includes the annexed area); § 163.3189(2)(a), Fla. Stat. (2004); Fla. Admin. Code R. Rule 9J-11.011(9); Moehle v. City of Cocoa Beach, 20 FALR 3314 (DCA 1998) (challenged amendments do not become effective until the DCA or Administration Commission issues a final order determining the amendments to be "in compliance").

5/ Other timeliness provisions appear to be met.

6/ See endnote 3, supra.

7/ DCA's PRO, at 140, cites to paragraph (d), "Protect the functions of the Green Swamp Potentiometric High of the Floridan Aquifer," instead of (j). But that appears to be a typographical error. Elsewhere in the PRO, DCA refers to paragraph (j), not (d). Likewise, DCA's Petition and SOI refer to paragraph (j), not paragraph (d), which also is not referenced in DCA's prehearing statement.

8/ See, e.g., § 163.3177(2) ("the comprehensive plan shall be financially feasible"); see also Dept. of Community Affairs, et al., v. Hillsborough County, DOAH Cases 89-5157GM and 90-6639GM, 1992 WL 880113, at *110 (DOAH RO Dec. 8, 1992; Admin. Comm. FO Dec. 16, 1993) ("economic reality may limit retrofitting [of stormwater systems] to redevelopment").

9/ All parties agree that it would be inappropriate to locate more intense commercial uses or even mixed use there.

10/ Conversion of Site 7 from citrus to residential use at two units per acre would result in an annual savings to the Floridan aquifer of approximately 90 million gallons--three inches of the Floridan aquifer's water level--due to the

significant reduction in water needed by approximately 530 units compared with the citrus grove's permitted water use. In addition, the current unregulated (grandfathered) agricultural practice of applying chemicals to the site without stormwater diversion into a stormwater management facility has an extremely negative impact on the quality of groundwater and Lake Sumner. In the face of these facts, DCA's only remaining argument for preferring the current use of Site 7 was the theory that an orange grove could revert to natural conditions. But the evidence did not prove that such a theory would be based on reality. See endnote 8, supra.

11/ The Intervenors' evidence on this subject was not entirely convincing. It assumed that Banyan would continue orange grove operations indefinitely unless the Site 7 FLUM amendment became effective. But the evidence called into question whether net revenue from those operations would pay the debt service on Banyan's purchase of the land for approximately \$6.5 million. In addition, the Intervenors presented evidence on the feasibility of development only at two units per acre and at one unit per five acres. Their evidence did not address directly the possible financial feasibility of development at one unit per acre, if and when development at that density might become timely under Lake County's Transition designation.

12/ DCA's Petition and SOI also allege under "Environmental Suitability" that the Site 7 FLUM amendment is internally inconsistent with several provisions in the City's plan. Policy 7.13.14, former Policy 5-1.13.4, requires that development in the Green Swamp "not alter the quantity, quality, and natural flow regime of surface water, nor the quantity or quality of groundwater recharge." Policy 7.13.5, former Policy 5-13.5, requires that the natural flow of wetland systems "be maintained by the use of upland buffers, the City complying with the conditions of its consumptive use permits regarding limitations on groundwater withdrawals and controls on stormwater runoff." Policy 1.3.10, former Policy 1-3.6.10, requires that impervious surfaces in the Green Swamp "be kept to a minimum by limiting paved areas and encouraging alternatives to impervious paving surfaces." All of these policies apply to all development in the Green Swamp, including development at Site 7. DCA's PRO does not address these allegations. DCA did not prove that the Site 7 FLUM amendment is inconsistent with any of the policies, much less that internal inconsistency is beyond fair debate.

13/ Rule 9J-5.003 (134) also defines "urban sprawl."

14/ It was even clearer that DCA did not prove beyond fair debate that the City's Site 7 FLUM amendment is internally inconsistent with environmental protection provisions in the City's plan which were cited in DCA's Petition and SOI but not in its PRO. As a result, DCA's evidence clearly was not sufficient to overcome, beyond fair debate, the statutory presumption under Section 163.3184(10)(a) that the City's determination to the contrary was correct.

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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.