

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FRANCES GIBBONS, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 04-4590GM  
 )  
 DEPARTMENT OF COMMUNITY )  
 AFFAIRS and MARTIN COUNTY, )  
 )  
 Respondents, )  
 )  
 and )  
 )  
 ALDERWOODS GROUP, INC., )  
 )  
 Intervenor. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on January 26, 2005, in Stuart, Florida.

APPEARANCES

For Petitioner: Frances Gibbons, pro se  
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Port St. Lucie, Florida 34986-3559

For Respondent: Kelly A. Martinson, Esquire  
(Department) Department of Community Affairs  
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Tallahassee, Florida 32399-2100

For Respondent: David A. Acton, Esquire  
(County) Martin County Administrative Center  
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For Intervenor: Thomas E. Warner, Esquire  
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STATEMENT OF THE ISSUE

The issue is whether Plan Amendment No. 04-4 adopted by Ordinance No. 647 on October 5, 2004, is in compliance.

PRELIMINARY STATEMENT

This matter began on October 5, 2004, when Respondent, Martin County (County), by a 4-1 vote, adopted Ordinance No. 647 which, among other things, approved a request to change the land use on an approximate 31-acre parcel of land owned by Intervenor, Alderwoods Group, Inc., from Institutional, Public Conservation to General Institutional. The amendment was designated as Plan Amendment No. 04-4 and was implemented through a change on the Future Land Use Map (FLUM) of the County's Comprehensive Plan (Plan). A cemetery is now located on the southern half of the property.

On November 29, 2004, the Department of Community Affairs (Department) published its Notice of Intent to Find the Martin County Comprehensive Plan Amendment in Compliance (Notice). On December 16, 2004, Petitioner, Frances Gibbons, who resides outside the County, but alleges that she owns burial lots in

the affected cemetery, filed a Petition for Administrative Hearing (Petition) under Section 163.3184(9), Florida Statutes (2004),<sup>1</sup> challenging the plan amendment on a number of grounds.

The Petition was forwarded to the Division of Administrative Hearings on December 23, 2004, with a request that an administrative law judge conduct a hearing. By Notice of Hearing dated December 30, 2004, a final hearing was scheduled on January 26, 2005, in Stuart, Florida.

At the final hearing, Petitioner testified on her own behalf and offered Petitioner's Exhibits 1 and 2, which were received in evidence. The County presented the testimony of Clyde Dulin, a Senior Planner, and offered County Exhibits 1-4, which were received in evidence. The Department presented the testimony of Roger Wilburn, a Department Principal Planner and Acting Regional Administrator, and offered Department Exhibits 1-4, which were received in evidence. Intervenor presented the testimony of Edward Libengood, Manager of Maintenance Construction.

Proposed Findings of Fact and Conclusions of Law were filed by Petitioner and Respondents on February 7 and 9, 2005, respectively, and they have been considered in the preparation of this Recommended Order. (On February 9, 2005, Intervenor filed a Notice of Adopting and Joining in Respondents' Joint

Proposed Recommended Order.) On February 8, 2005, Intervenor filed a Motion to Strike Documents Attached to Petitioner's Post-Hearing Submittals (Motion). The Motion is ruled upon in the Conclusions of Law portion of this Recommended Order. Finally, although the parties announced at the hearing that the matter would not be transcribed, on February 13, 2005, a Transcript of the hearing was filed by the Department.

#### FINDINGS OF FACT

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

1. Intevernor owns a 31.4-acre tract of land in Martin County several miles southwest of Jupiter, east of Interstate 95 and the Florida Turnpike, and slightly more than one mile west of U.S. Highway 1. On the southern half of the property is an existing cemetery, Riverside Memorial Park, Inc. (the Cemetery), which has been in place since 1901 and is used for interments. The northern half of the land is completely undeveloped and contains native vegetation, including sand pine scrub and pine flatwoods. (If the land use change is approved, besides continuing in-ground burials and constructing mausoleum buildings on the vacant part of the land, Intervenor apparently intends to construct a funeral home. This intended use, and the possibility of others, has triggered the filing of the challenge by Petitioner.)

2. The Cemetery is bordered on the east by a developed residential neighborhood, Tropic Vista; on the north by a platted but largely undeveloped residential area, Hyland Terrace, and the Jonathan Dickinson State Park (State Park); and on the south by Southeast County Road, which runs along the Martin County-Palm Beach County boundary line. Another residential neighborhood lies just south of that road in Palm Beach County.

3. The County's existing Plan was adopted in 1990. Since that time, the Cemetery has been designated on the FLUM as Institutional, Public Conservation, which is defined in Section 4.4.M.1.h.(2) of the Future Land Use Element (FLUE) of the Plan as follows:

The Public Conservation category recognizes those publicly owned areas designed for conservation uses. Only development compatible with conservation and passive recreation uses shall be permitted in the Public Conservation category. This may include access, parking, and other facilities which make possible the management of the resource and the public's enjoyment of the resources. Conservation areas include, but are not limited to, the DuPuis Preserve in south Martin County and the Savannas in north Martin County. Environmentally sensitive lands acquired by the County shall be reclassified to the Institutional-Conservation land use designation during the next plan amendment cycle.

4. The State Park and most of the platted residential

property to the north of the Cemetery (e.g., Hyland Terrace) are currently designated Public Conservation on the FLUM. The remainder of the property to the north and the neighborhoods to the east and west of the property are designated Low Density Residential on the FLUM, which allows a maximum of five dwelling units per acre. The residential property to the south in Palm Beach County is also designated Low Density Residential under that County's future land use map.

5. By application filed with the County in September 2003, Intervenor, who purchased the Cemetery in 1997, requested that the FLUM designation on the property be changed to General Institutional. That land use category is defined in Section 4.4.M.1.h.(3) of the FLUE as follows:

The General Institutional category accommodates public and not-for-public facilities such as, but not limited to, schools, government buildings, civic centers, prisons, major stormwater facilities, fire and emergency operation center facilities, public cemeteries, hospitals, publicly owned public water and sewer systems, dredge spoil management sites, and airports. Investor owned regional public water and sewer systems and private cemeteries may be allowed in General Institutional. Lands acquired by the County for General Institutional uses shall be reclassified to the Institutional-General land use designation during the next plan amendment cycle. Lands or property rights acquired by the Florida Inland Navigation District as future dredge spoil management sites shall be reclassified to the Institutional-General

land use designation during the next plan amendment cycle.

(Emphasis added) Concurrently with this change, Intervenor also requested a zoning change on the parcel from Public Service to Public Service-2 (PS-2). However, the County denied that requested change in zoning.

6. On February 19, 2004, the Local Planning Agency (LPA) voted 5-0 to recommend approval of Intervenor's request. On April 4, 2004, the County voted to accept the LPA's recommendation. On May 7, 2004, a transmittal package consisting of 13 amendments, including Plan Amendment No. 04-4, was transmitted to the Department for its review.

7. In an Objections, Recommendation, and Comments Report (ORC) issued on July 9, 2004, the Department had no objections to, or recommendations for, Plan Amendment No. 04-4 and made only the following brief comments regarding that amendment:

The change would correct an inappropriate designation given the site previously and would allow the continued use of the site for cemetery use. Adjacent properties will be protected through buffering, landscaping, and screening requirements. The proposed change is being made to correct an inappropriate land use designation on a well-established existing land use.

8. After receiving the ORC, and making changes to certain amendments (but not Plan Amendment No. 04-4) to satisfy the Department's concerns, in a report dated August

10, 2004, the County staff recommended to the County that the modified package of amendments be approved. As to Plan Amendment No. 04-4, the County staff noted that "[t]he requested land use amendment meets the criteria to correct an inappropriate land use designation."

9. The County scheduled the package of amendments for consideration at a meeting in September 2004. Due to Hurricanes Frances and Jeanne, however, the matter was rescheduled to the following month. On October 5, 2004, by a 4-1 vote, the County enacted Ordinance No. 647, which adopted, among others, Plan Amendment No. 04-4. The revised package was then forwarded to the Department for its compliance review.

10. The data and analyses presented by the County in support of the Plan Amendment included aerial photographs and detailed site maps; a review of past changes in future land use designations in the surrounding area; information about, and analysis of, environmental considerations including soils, wetlands, overall hydrology, plant and animal species, and impact on the adjoining State Park; a capital facilities impact analysis; a transportation analysis; a concurrency analysis, including impacts on public utilities, parks and recreation facilities, and fire and public safety facilities; an evaluation of the potential for contribution to urban



sprawl; and an extensive review of compatibility with numerous goals, objectives, and policies of the Plan. Although Petitioner asserted at hearing that "the documentation of the applicant . . . [does not] support the purpose to correct an inappropriate land use designation," none of this data and analyses was factually contradicted by Petitioner.

11. On November 29, 2004, the Department published its Notice in the Stuart News, a local newspaper of general circulation.

12. On December 16, 2004, Petitioner, who resides in St. Lucie County and says she owns four plots within the Cemetery, filed her 19-page Petition raising a number of procedural and substantive allegations.<sup>2</sup> At hearing, however, her testimony focused on the issues of whether Intervenor was required to secure the consent of all of the individual burial plot owners before it could file the application for a land use change; whether the plan amendment actually corrects an inappropriate land use designation, rather than being "a complex change from an actual passive land use of the historical cemetery"; whether the amendment comports with the requirements in Chapter 497, Florida Statutes, which governs funeral and cemetery services; and whether the proposed land use is compatible with the "passive" nature of the cemetery.

13. Prior to the hearing, Petitioner did not assert that

Intervenor was required to obtain the consent of all plot owners before filing its application with the County.

Therefore, the issue has not been timely raised. Even it was, the issue is irrelevant to an in compliance determination, as defined in Section 163.3184(1)(b), Florida Statutes. That is to say, while ownership may bear on the issue of standing, it is not a consideration in determining whether a land use change is in compliance. Thus, the County (or even Intervenor for that matter) can initiate a change in land use, regardless of the ownership of the affected property.

14. Likewise, issues regarding compliance with the requirements of Chapter 487, Florida Statutes, are not relevant here. Those matters should be raised with the agency responsible for administering funeral home and cemetery regulations.

15. In the same vein, Petitioner's concern that the undeveloped portion of Intervenor's land may be used for a funeral home or another use allowed in the General Institutional category is not relevant to the issue of whether the amendment is in compliance. Compatibility concerns such as these can be addressed through relevant zoning and building code requirements and land development regulations.

16. Finally, Petitioner has contended that the existing land use category, Institutional, Public Conservation, is

appropriate for the Cemetery and that it is unnecessary to change that designation. To place this issue in proper perspective, it is necessary to go back to 1982, when the first County FLUM was adopted. At that time, there was only one institutional designation, which was assigned to all institutional property, both publicly and privately owned, including the Cemetery. When the 1990 Plan was adopted, however, the Department required that the County establish three categories of institutional property: Institutional General, Institutional Recreational, and Institutional, Public Conservation. Probably because the State Park, a County fire station, a missile tracking station, a mental health facility, and the Cemetery were all in the same area, through "oversight" the Public Conservation designation was inadvertently assigned to all of those parcels at that time, even though that designation was inappropriate for the privately-owned Cemetery.

17. The existing designation, Institutional, Public Conservation, recognizes those "publicly owned areas designed for conservation uses." (Emphasis added) See § 4.4.M.1.h.(2). The category is specifically limited to "development compatible with conservation and passive recreation uses," such as "[e]nvironmentally sensitive lands."

Id. One of its purposes is to protect natural areas, natural flora, and fauna.

18. The new land use designation, General Institution, accommodates public and not-for-profit facilities, such as schools, government buildings, and civic centers. It also specifically includes private cemeteries. See § 4.4.M.1.h.(3).

19. The Cemetery is not owned by any government or other public entity, but is entirely privately-owned, either by Intervenor, by a subsidiary corporate entity, or by the heirs to the deceased owners of individual cemetery plots. (Apparently, warranty deeds were given to purchasers of burial plots prior to 1985, and since that time, certificates of perpetual interment have been issued.) As such, the Cemetery appropriately falls within the General Institutional land use category.

20. It is beyond fair debate that the land use Public Conservation land use is an inappropriate one for the Cemetery because the land use designation, by definition in the Plan, is intended only for "publicly owned areas designed for conservation uses." The Cemetery is neither publicly owned nor a conservation use of the land.

21. It is beyond fair debate that the land use General Institutional is the only appropriate one for the Cemetery

because that land use designation, by definition in the Plan, expressly provides that "private cemeteries may be allowed" in that category.

#### CONCLUSIONS OF LAW

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

23. In order to have standing to contest Plan Amendment 04-4, Petitioner must either reside, own property, or own a business within the County. She must also have submitted oral or written comments, objections, or recommendations to the County prior to the adoption of the amendment. See § 163.3184(1)(a), Fla. Stat. Because it can be reasonably inferred that Petitioner owns burial plots in the cemetery, and she submitted oral or written comments, objections, or recommendations to the County prior to the adoption of the amendment, she is an affected person and has standing to file this challenge.

24. Under the statutory scheme in place, if a large-scale plan amendment has been found to be in compliance by the Department, as it was here, an affected person has the burden of proving beyond fair debate that the plan amendment is not in compliance. § 163.3184(9), Fla. Stat. This means that "if

reasonable persons could differ as to its propriety," a plan amendment must be upheld. Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997). See also Martin County v. Section 28 Partnership, Ltd., 772 So. 2d 616, 621 (Fla. 4th DCA 2000)(where there is "evidence in support of both sides of a comprehensive plan amendment, it is difficult to determine that the County's decision is anything but 'fairly debatable'").

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

26. The more persuasive evidence supports a conclusion that Petitioner has failed to prove beyond fair debate that Plan Amendment No. 04-4 is not in compliance. Accordingly, because the County's determination of compliance is fairly debatable, the plan amendment is in compliance. § 163.3184(9)(a), Fla. Stat.

27. Finally, in her filing styled "Chapter 28-106.215 Post Hearing Submittals," Petitioner has attached some forty pages of documents which are not a part of this record. (They include copies of warranty deeds, a Florida Master Site File

for the Cemetery, two published articles, a County resolution, and two papers from a lawsuit between the Cemetery and the County.) Because the record was closed on January 26, 2005, Intervenor's Motion to Strike Documents Attached to Petitioner's Post-Hearing Submittals is granted, and the attached documents have not been considered in the disposition of this matter.

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 Plan Amendment No. 04-4 adopted by Ordinance No. 647 on October 5, 2004, is in compliance.

DONE AND ENTERED this 23rd day of February, 2005, in Tallahassee, Leon County, Florida.



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DONALD R. ALEXANDER  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 23rd day of February, 2005.

ENDNOTES

- 1/ All future references are to Florida Statutes (2004).
- 2/ Although Petitioner's standing was raised as an issue in Intervenor's Petition to Intervene, no party pursued that allegation at hearing. (Petitioner resides in St. Lucie County, but alleged that she owns four burial lots within the Cemetery.) In addition, the Department and County (and joined by Intervenor) have conceded in their Joint Proposed Recommended Order that she has standing. Given this concession, her testimony from which it may be inferred that she is an owner of burial plots, and the fact that she submitted written objections to the County prior to the adoption of Ordinance No. 647, Petitioner is an affected person and has standing to bring this action.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.