FINAL ORDER NO. AC-06-006

FILED

2006 NOV 20 P 1:38

DIVISION OF ADMINISTRATIVE HEARINGS

**STATE OF FLORIDA**
**ADMINISTRATION COMMISSION**

DEPARTMENT OF COMMUNITY AFFAIRS,

Petitioner,

vs.

LEE COUNTY,

AC CASE NO. ACC-06-012
DOAH CASE NO. 06-0049GM

Respondent,

and

LEEWARD YACHT CLUB, LLC,

Intervenor.
_____/

## FINAL ORDER

This cause came before the Governor and Cabinet, sitting as the Administration Commission ("Commission), on November 14, 2006, on the Recommended Order entered pursuant to section 163.3184(10)(b), Florida Statutes (2005), in the Division of Administrative Hearings ("DOAH"), Case No. 06-0049GM.

## BACKGROUND

This is a proceeding to determine whether an amendment to the Lee County Comprehensive Plan, which would change the future land use designation for 41.28 acres in the northeast quadrant of the Interstate 75 and State Road 80 (SR80) interchange from General Commercial Interchange to Urban Community, is not "in compliance," as defined in section

163.3184 (1)(b), Florida Statutes.[1]

At a public hearing on June 1, 2005, the Lee County Board of County Commissioners voted to adopt the amendment. The County submitted the proposed amendment to the Department of Community Affairs ("Department"), the state land planning agency statutorily charged with the duty of reviewing comprehensive plans and amendments thereto and determining whether the plan or amendment is "in compliance." On August 19, 2005, the Department issued its ORC (Objections, Recommendations, and Comments) Report and objected to the proposed amendment based upon inappropriate residential densities in the costal high hazard area (CHHA) and floodplain.

On October 15, 2005, Lee County ("County") amended its comprehensive plan through the adoption of Ordinance No. 05-20, which made changes to the Future Land Use Map (FLUM). After reviewing the amendment, the Department determined that it was "not in compliance" and issued a Notice of Intent and Statement of Intent ("NOI") on December 19, 2005. The Department identified three reasons for its determination: (1) inconsistency with state law regarding development in the CHHA and flood prone areas; (2) internal inconsistency with provisions of the County Plan requiring the consideration of residential density reductions in undeveloped areas within the CHHA, and (3) inconsistency with the State Comprehensive Plan regarding subsidizing development in the CHHA and regulating areas subject to seasonal or periodic flooding. Pursuant to 163.3184(10)(a), the Department forwarded its NOI to DOAH. Leeward Yacht Club, LLC (Leeward) was granted leave to intervene.

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[1] "In compliance" means consistent 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.

The Administrative Law Judge (ALJ) conducted a final hearing on April 25 and 26th, 2006, in Ft. Myers, Florida. On August 25, 2006, he forwarded a Recommended Order (RO) to the Commission, recommending the issuance of a final order determining that the County's adopted amendment is "in compliance."

## COMPLIANCE DETERMINATION

The Commission is authorized to take final agency action regarding whether comprehensive plan amendments are not "in compliance." *See* § 163.3184(9), (10), and (11), Fla. Stat. Upon our review of the record, the Commission adopts findings of fact in the RO and modifies certain conclusions of law. The Commission hereby determines that the amendment adopted by Lee County in Ordinance No. 05-20 is "in compliance."

## RULINGS ON EXCEPTIONS

### DEPARTMENT OF COMMUNITY AFFAIRS' EXCEPTIONS

1. Exception One to RO (p. 1), Appearances

The Department points out that the RO fails to include Assistant General Counsel, Kelly A. Martinson, under the "Appearances" section. Leeward stipulates that the Department's requested revision should be made. Accordingly, Exception One is GRANTED, and the RO is modified accordingly.

2. Exception Two to RO (p. 2), Statement of the Issue

The Department argues that the RO incorrectly states that the issue is whether the amendment is "in compliance for the reasons set forth in the Department's Petition and Statement of Intent." The Department's Petition and Statement of Intent allege that the amendment is not "in compliance." Leeward stipulates that the Department's requested revision

should be made. Accordingly, Exception Two is GRANTED, and the Statement of Issue in the RO is modified accordingly.

3. Exception Three to RO (p. 4), Preliminary Statement

The Department argues that the RO fails to note that Leeward Exhibit 16, an aerial photograph of the amendment site and the immediate surrounding area, was admitted into evidence. Leeward stipulates that the Department's requested revision should be made. Accordingly, Exception Three is GRANTED, and the listing of Leeward's Exhibits in the RO is modified accordingly.

4. Exception Four to RO (pp. 7-8). Finding of Fact 13

Leeward maintained that rights-of-way external to a development should not be included in calculating allowable units. The definition of "density" in the County Plan provides:

> For the purpose of calculating gross residential density, the total acreage of a development includes those lands to be used for residential uses, and includes lands within the development proposed to be used for streets and street rights of way, utility rights of way, public and private parks...and existing man-made waterbodies within the residential development.

The Department argues that the interpretation given to this definition, excluding external rights-of-way, is based on inadmissible evidence because it came into existence after the amendment was considered and adopted by the Board of County Commissioners. The Department further argues that the subsequent interpretation violates Rule 9J-5.005(2)(a).

The rights-of-way in dispute are for Interstate 75 and State Road 80, which cannot be developed by a private owner and are external to the development. A plain reading of the definition supports Leeward's interpretation. Rule 9J-5.005(2)(a) is inapplicable here because the definition of "density" is not "data;" it is part of the County's plan. Finding of Fact 13 is

supported by competent, substantial evidence (T. 340), and Exception Four is therefore REJECTED.

5. Exception Five to RO (p. 8). Finding of Fact 15

The ALJ determined that the amendment would create the potential for 290 residences in the northeast quadrant of the interchange, using 29 acres as the appropriate acreage affected by the amendment and with the exclusion of the rights-of-way. The Department argues that this finding suffers from the same error as Finding of Fact 13. Exception Five is REJECTED for the same reasons stated in Exception Four.

6. Exception Six to RO (pp. 11-12), Findings of Fact 25 & 26

The County Plan contains a map depicting the CHHA and the instant parcel as being entirely within it. The definition of CHHA in the County Plan is "[t]he category 1 evacuation zone as delineated by the Southwest Florida Regional Planning Council." The SFRPC uses the storm surge level for a category one hurricane in setting the coastal high hazard line, which for the proposed amendment is 5.3 feet. Thus, contrary to the depiction in the County Plan map, not all of the amendment site lies in the CHHA.

The Department argues that the RO finding of conflict between the two depictions of the CHHA is not supported by the record. Even if the Department's argument is correct, it is immaterial because the ALJ correctly used the 5.3 feet contour line on the amendment site.

The location of the CHHA on Map 5 is generalized, and therefore, depicted by reference to roads. It is clear from the record that the controlling location of the CHHA boundary is that of the SFRPC. See also Rule 9J-5.003(17). Moreover, the SFRPC's delineation of the CHHA is scientifically established by the Sea, Lake, and Overland Surges from Hurricanes (SLOSH)

computerized storm surge model, and comports with legislative intent as evidenced by the enactment of 163.3178(2)(h), Fla. Stat. (2006). The finding that the SWRPC's 5.3 feet contour line delineating the Category 1 storm surge line precisely depicts the CHHA is supported by competent, substantial evidence. (T. 188-195). Accordingly, Exception Six is REJECTED.

7. Exception Seven to RO (p. 16), Finding of Fact 38

The Department argues that there is no competent, substantial evidence for the ALJ's findings that: (1) "[t]he reduction in dwelling units in the CHHA over the past several years may be as high as 10,000 units;" or (2) "[t]he Department did not present evidence to dispute that there had been an overall reduction in dwelling units in the CHHAs of Lee County."

Mr. Roeder gave expert testimony that the County's cumulative plan amendments had resulted in a net reduction in densities. He stated that River Run and Pine Island together would amount to a major reduction, "at least 10,000 units" conservatively. (T. 385). During the Department's cross-examine, Mr. Roeder admitted the number "was a pretty rough guess." (T. 402), He noted, however, that "reductions have been large and increases have been small."

Because the testimony pertaining to reduction of 10,000 units was admittedly no more than a "pretty rough guess," Exception Seven is GRANTED, in part, and Finding of Fact 38 is modified accordingly. However, the Department failed to present evidence disputing the County's overall reduction of dwelling units in the CHHAs. Accordingly, Exception Seven is REJECTED, in part.

8. Exception Eight to RO (p. 20), Finding of Fact 46

The Department argues that the ALJ's finding that the County Plan must be interpreted in light of the Department's practice of allowing offsets is a conclusion of law and should be

rejected. Leeward agrees that the finding is a mislabeled conclusion of law. To that extent, Exception Eight is GRANTED, in part.

The Department also argues that the ALJ's conclusion that Objective 105.1 and Policy 105-1.4 must be interpreted in light of the Department's practice of allowing offsets is erroneous. The ALJ actually concluded that Objective 105.1 and Policy 105-1.4, which require consideration of density reductions in the CHHA, can be harmonized with the County planning director's testimony and with the County's adoption of the amendment by construing the provisions with the Department's own offset practice. Exception Eight is REJECTED, in part.

9. Exception Nine to RO (p. 30-31), Conclusions of Law 67-70

The Department argues that these conclusions of law stand for the basic premise that the provisions of Chapter 163, Florida Statutes, and Rule 9J-5, Florida Administrative Code, are not applicable to future land use amendments. The Department correctly concludes that such an interpretation is not reasonable or supported by current law.

Section 163.3184 (1)(b), Florida Statutes, includes Rule 9J-5 within the requirements necessary for a finding of "in compliance." The definition does not except a FLUM.

An agency's interpretation of its own rule is entitled to great weight. The ALJ noted that "when an agency's construction contradicts unambiguous language of the rule, the construction is clearly erroneous and cannot stand." *Citing Woodly v. Dept. of Health and Rehab. Serv.*, 505 So.2 d 676, 678 (Fla. 1987). Here, the Department's interpretation is not only reasonable, but supported by the clear and unambiguous language of the statute defining "in compliance." Therefore, Exception Nine is GRANTED, and conclusions of law 67-70 are hereby rejected.

10. Exception Ten (p. 33), Conclusion of Law 74

The Department takes exception with the first sentence of Conclusion of Law 74 for the same reasons set forth in Exceptions 7 and 8. For the same reasons that the Department's exceptions to Findings of Fact 38 and 46 were rejected, Exception Ten is REJECTED.

11. Exception Eleven (p. 33), Conclusion of Law 75

The Department takes exception with Conclusion of Law 75 for the same reasons set forth in Exceptions 7 and 8. Exception Eleven is REJECTED, because the proposed amendment is consistent with the County Plan and with the State Comprehensive Plan.

12. Exception Twelve (p. 34), Conclusion of Law 76

The Department argues that it overcame the County's presumption of correctness in determining that the amendment is "in compliance." For the reasons previously stated in these exceptions, Exception Twelve is REJECTED.

13. Exception Thirteen (p. 34), Recommendation

The Department takes exception to the recommendation that the amendment be found "in compliance." For the reasons previously stated in these exceptions, Exception Thirteen is REJECTED.

**LEEWARD YACHT CLUB'S EXCEPTIONS**

14. Exception One, Findings of Fact 32 and 37

Leeward argues that Finding of Fact 32 is a mislabeled conclusion of law. Leeward further argues that the ALJ mistakenly rejected Leeward's "comparative approach," which compares the density for the proposed future land use with the densities of the future land uses designated for the surrounding properties.

The Department agrees that the last sentence of Finding of Fact 32 is a mislabeled conclusion of law. Exception One as to Finding of Fact 32, therefore, is GRANTED, in part. Exception One is REJECTED, in part, because the ALJ's rejection of Leeward's "comparative approach" was proper.

Leeward takes exception to Findings of Fact 32 and 37, arguing that the term "population concentration" suggests a density comparison, which the ALJ refused to perform. The Legislature enacted the coastal management statute, section 163.3178, Florida Statutes, with the intent that local government comprehensive plans restrict development activities where such activities would destroy coastal resources and that such plans protect human life and limit public expenditures in areas that are subject to natural disaster. § 163.3178(1), Fla. Stat. Protection of human life includes the capability to safely evacuate the density of coastal population proposed in the future land use plan in the event of a pending disaster. § 163.3178(2)(d), Fla. Stat. Therefore, the ALJ correctly rejected Leeward's approach, opting for a "straightforward consideration of the number of lives placed in harm's way," an analysis that comports with legislative intent.

15. Exception Two, Conclusion of Law 74

Leeward takes exception to the ALJ's determination that the amendment is consistent with Policy 61.3.2 (floodplains), because it was not raised in DCA's ORC Report. This contention is unsupported; in its report, the Department objected to the amendment based upon the location of the site being within the 100-year floodplain. Exception Two is, therefore, REJECTED.

## CONCLUSION

Upon review of the entire record and the RO, and after considering the parties' exceptions thereto, the Commission finds that the FLUM amendment adopted by the County in Ordinance No. 05-20[2] is "in compliance" with all applicable provisions of Chapter 163, Florida Statutes, and Rule 9J-5, Florida Administrative Code.

## NOTICE OF RIGHTS

Any party to this Order has the right to seek Judicial review of the Final Order pursuant to section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Commission, Office of Policy and Budget, Executive Office of the Governor, The Capitol, Room 1801, Tallahassee, Florida 32399-0001; and by filing a copy of the Notice of Appeal, accompanied by the applicable filing fees, with the appropriate District Court of Appeal. Notice of Appeal must be filed within 30 days of the day this Order is filed with the Clerk of the Commission.

DONE AND ENTERED this 15th day of November, 2006.

Teresa B. Tinker
for MICHAEL P. HANSEN, Secretary
Administration Commission

FILED with the Clerk of the Administration Commission this 15th day of November, 2006.

Barbara Leighty
Clerk, Administration Commission

[2] The Recommendation portion of the DOAH ALJ's RO contains an erroneous reference to "Ordinance No. 05-10." The reference should read "Ordinance No. 05-20."

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to the following persons by United States Mail or hand delivery this 15th day of November, 2006.

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