

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TIMBER HOMEOWNERS' ASSOCIATION)
INC., BRIAN MORAN, and CHRISTY)
BALDWIN,)
)
Petitioners,)
)
vs.) Case No. 07-2467
)
CITY OF TALLAHASSEE and)
DEPARTMENT OF ENVIRONMENTAL)
PROTECTION,)
)
Respondents.)
_____)

RECOMMENDED ORDER

On March 19, 20, and 26, 2008, a quasi-judicial hearing was held in this case in Tallahassee, Florida, before J. Lawrence Johnston, Administrative Law Judge (ALJ), Division of Administrative Hearings (DOAH).

APPEARANCES

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For Respondent: City of Tallahassee:

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STATEMENT OF THE ISSUE

The issue in this case is whether the application filed by the Florida Department of Environmental Protection (DEP) for abandonment of a segment of Mission Road, from the Ocala Drive intersection to a point east of Yonview Drive, should be granted; and, if so, what conditions should be placed on the abandonment.

PRELIMINARY STATEMENT

On March 29, 2007, Wilson Miller Engineering filed the pending application for abandonment on behalf of DEP and the Florida Department of State, which own and operate Mission San Luis ("the Mission"), a National Historic Landmark and archeological site and park that borders the length of roadway subject to the abandonment application on both the north and south side of Mission Road.

On or about May 15, 2007, Notice of the proposed abandonment was provided. Under the version of Section 8-1, Land Development Code (LDC), in force and effect at the time, abandonment applications were subject to requests for quasi-judicial proceedings. Petitioners filed a Petition for Quasi-Judicial Proceedings with the Planning Commission on May 25, 2007.

The matter was referred to DOAH, and a final hearing was scheduled for September 20-21, 2007. After two continuances agreed to by all parties, the hearing was re-scheduled for February 26-27, 2008. On February 14, 2008, Petitioners filed an Emergency Motion for Continuance, which included a request for sanctions against DEP, on grounds that DEP intended to present evidence that had not been disclosed in discovery. Both the City and DEP opposed the Emergency Motion for Continuance, which was heard on February 15, 2008. Based on the oral arguments presented and the matters discussed during the hearing, the Emergency Motion for Continuance was granted, and the final hearing was re-scheduled for March 19-20, 2008. Ruling on the request for sanctions was reserved. When the final hearing could not be completed in the time allotted, March 26, 2008, was scheduled for completion of the final hearing.

As required by the Order of Pre-Hearing Instructions entered on July 9, 2007, and subsequently modified, the parties filed a Pre-Hearing Stipulation on March 13, 2008.

At the final hearing, the following exhibits were admitted: Joint Exhibits 1, 3, 22-28, 30-34, 37 (excerpts), 38, 39 (deposition exhibits 3, 4, 8, 10, 14 and 15 only), 41, 45 (deposition exhibits 1 and 3 only), 47 (deposition exhibits 1, 3, 6 and 8 only), 49-51, 54, 55, 57, 58, 59, 60, 61 and 64; Petitioners' Exhibit 1; and City Exhibits 1-11. DEP called: the Mission's Executive Director, Bonnie McEwan, Ph.D., and Chris

Brockmeier, an expert traffic engineer. The City called: its Fire Chief, Cynthia Dick; its City Attorney, James English; Police Department Captain Kenneth Sumpter; Wayne Tedder, its Director of Planning; and Gabriel Menendez, its Director of Public Works. The Petitioners called: Wayne Coloney, an expert traffic engineer; Richard Boutin, an expert property appraiser; Christine Baldwin; David Vaughn; and Brian Moran.

After presentation of the evidence, the parties requested and were granted 20 days from the filing of the Transcript to file proposed recommended orders. The six-volume Transcript was filed on April 9, 2008. The parties' timely-filed proposed recommended orders have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Proposed Abandonment and Vicinity

1. The eastern terminus of Mission Road is at Ocala Road. At one time, Mission Road intersected Ocala Road and extended farther east along the alignment of Tennessee Street. However, when Tennessee Street was extended farther west, the intersection of Tennessee Street and Ocala Road was moved slightly south of the juncture of Ocala Road and Mission Road. Now at the junction of those roads, Mission Road is designed to have only a right turn in from Ocala Road southbound, and a right turn out from Mission Road onto Ocala Road, headed south.

2. Mission San Luis (Mission) is bisected by Mission Road near its eastern terminus at Ocala Road. While the Mission is accessible from Mission Road, its main entrance is on Tennessee Street just west of Ocala Road. The Mission has administrative offices and an archeological laboratory on the south side of Mission Road, while the re-created Mission and Apalachee Village, along with most of the archeological remains, and visitor parking, are on the north side of Mission Road.

3. Yonview Drive joins Mission Road from the south. The juncture of those two roads marks the western terminus of the part of Mission Road that is the subject of the application for abandonment; Ocala Road marks the eastern terminus of the proposed abandonment. All of the land on either side of this part of Mission Road is owned by the State and is part of the Mission.

4. Proceeding west from Yonview, the Mission is on the northeast side of Mission Road, which provides access to the current parking lot for the Mission and the current visitor center, which is an adaptive use of a house built in 1938. Along that stretch of Mission Road, The Timbers condominium development is on the southwest side of Mission Road. Just west of the Mission property, San Luis Road intersects Mission Road. To the north of Mission Road, San Luis is a public road that proceeds north, past Leon County's San Luis Park (which is on the east side of the road), and residential neighborhoods to the west

side, to where San Luis Road intersects Tharpe Street. To the south of Mission Road, aligned with San Luis Road, is an entrance to The Timbers. Sometimes referred to as an extension of San Luis Road, the roadway within The Timbers actually is private and serves as access to The Timbers condominium units; it continues through The Timbers and continues between other properties to the development's other entrance on White Drive. As Mission Road proceeds west from San Luis Road, the rest of The Timbers is on its south side; on its north side, Solana Drive joins it from the residential neighborhood to the north. Solana Drive is a short street between San Luis Road and Mission Road. The northern terminus of Solana Drive is near the southern end of the County Park.

Petitioners and Their Interests

5. Petitioners are The Timbers Homeowners' Association, Inc. ("HOA"), and Brian Moran and Christy Baldwin, individually. The individual Petitioners each own one or more units within The Timbers. Ms. Baldwin has resided there for nearly ten years. The HOA is charged with representing the interests of the owners and residents of The Timbers. It owns and has responsibility for the repair, maintenance, and improvement of the common areas within the development. Mr. Moran and Ms. Baldwin are officers of the HOA.

6. The Timbers is a 223-unit condominium community that fronts, along its entire length, the south side of Mission Road

between White Drive and Yonview Drive. A portion of this frontage is located directly across Mission Road from what is now Mission San Luis. The private road within The Timbers between Mission Road and White Drive is how The Timbers connects to the public road system. As it fronts Mission Road, The Timbers is a pleasant, wooded community of multiple condominium structures, each of which fronts on a side street connected to its private "San Luis Road."

7. The Timbers is conveniently located for easy access to Florida State University, Florida A&M University, and other points to the south or east of The Timbers (including downtown Tallahassee). A significant number of residents of The Timbers use Mission Road by turning right onto Mission Road, which takes them to a right turn onto Ocala Road, with no stop sign, stop light, or significant intersection in between. From there, they can go straight south on Ocala Road or turn east or west on Tennessee Street. If the abandonment application is granted, that route would be eliminated, and there would be two remaining ways to leave The Timbers--via the White Drive exit, or by making two left turns, one onto Mission Road and the second, after a stop sign, onto White Drive. Meanwhile, drivers traveling east (toward town) on Mission Road from virtually all points west of The Timbers (and thus west of White Drive) on Mission Road, would take a right curve onto White Drive from Mission Road but they would do so with the right-of-way or, if signalized, a traffic

light timed to give them a "longer green" preference. Those Timbers residents, owners, and visitors exiting at White Drive would have to negotiate their left turn without the right-of-way and against whatever increased traffic might be introduced onto White Drive if Mission Road were closed. From there, depending on the ultimate destination, traffic could either go straight on White Drive towards Pensacola Street or turn left onto Tennessee Street to reach the Tennessee Street/Ocala Road intersection. The intersection at White Drive and Tennessee Street is signalized but is not consistent with current design standards in that it has an offset center line.

8. According to the planned unit development documents for The Timbers, the White Drive entrance was supposed to be the main entrance to the development. However, the Mission Road entrance has come to function more like the actual "main" and is more attractive aesthetically. Petitioners have spent significant effort and money in beautifying and otherwise maintaining its private extension of San Luis Road through curbing, landscaping, signage, etc. The part of the road that joins The Timbers to White Drive is not as well constructed and is not bounded by The Timbers but rather by other properties. It also is where the garbage dumpsters for the development are located. (On the other hand, the mailboxes for the development also are located off that part of the private road.)

9. The closure of Mission Road probably will shift some internal Timbers traffic from the Mission Road entrance to the White Drive entrance. It also is possible that some external traffic coming south on San Luis Road might use the private extension of the road within The Timbers as a "short-cut" to White Drive. However, the road through the Timbers may not prove to be a desirable "short-cut" because it is a lower-quality road, has potholes, and is not designed for through-traffic but rather as a feeder road for the parking areas of the development. There are three stop signs; the turns are tight; and cars sometimes are parked along the side of the road. As a result, "friction" would slow through-traffic and discourage use of the road as a cut-through.

10. The design of San Luis Road also makes it less likely that The Timbers would be used as a short-cut to White Drive. There is a hard right turn in the road signed for 15 miles per hour that people tend to avoid by turning onto right onto Solana Drive.

11. Many residents walk within The Timbers, including to the mailboxes, to the tennis courts, and to the dumpsters, or to walk their dogs (perhaps in the green space created by an abandoned railroad right-of-way in the vicinity) on the western side of The Timbers. If traffic increases on that side of the private extension of San Luis Road, both the safety and the

subjective experience of those pedestrians would be adversely affected to some extent. However, those effects are speculative.

12. A resident-controlled gate system for the Mission Road entrance to prevent cut-through traffic likely would cost The Timbers HOA in the neighborhood of \$15,000. Associated costs for telephone connections to each of the units, electrical service, and maintenance would likely range from \$75 to \$80 per residential unit per year. But such a gate is not desired by Petitioners as it would constitute a significant inconvenience for Petitioners and others who reside in or visit The Timbers. Should the Timbers elect to install sidewalks along its San Luis Road to accommodate increased or shifted traffic within The Timbers, the costs associated with that could reasonably exceed \$110,000, including engineering, permitting, utilities, and remediation. The owners of units within The Timbers would ultimately bear the costs of any needed improvements or additional maintenance that would result from a closure of Mission Road. However, it is speculative whether such measures will be needed or actually undertaken.

13. It is possible that the owners of units in The Timbers might suffer some diminution in property value as a result of the proposed abandonment. According to a property appraiser, Richard Boutin, there will be diminution in value of approximately one percent of the value of units, which ranges between \$120,000 and \$150,000, that would materialize over time, taking two-to-five

years to occur. Whether such a diminution in value actually will occur is uncertain.

14. As described above, due to the location of The Timbers, the proposed abandonment will adversely affect Petitioners more than it will adversely affect most of the rest of the general public. Most of the greater adverse effects on Petitioners will be similar in kind to the adverse effects on most of the general public. At least one of the greater effects on Petitioners also is different in kind -- namely, some drivers probably will use Petitioners' private road as a cut-through. See Findings 9-10, supra.

Standards for Abandonment Applications

15. A guiding principle for all City Commission action is to act in the public interest. The City Commission must act in the public interest, whether stated in a regulation or not, including when acting on an application for abandonment of right-of-way.

16. City Commission Policy 410 has been used as a guide for reviewing abandonment applications. Policy 410 provides:

1. The City of Tallahassee will not consider any application for right-of-way abandonment, if the subject right-of-way is currently being used by the City, or if the City has any plans to use the right-of-way at some point in the future.

2. Abandonment of a right-of-way must be demonstrated to be in the best interest of the general public. Neither abandonment of a right-of-way solely for the purpose of placing it on the tax rolls in its current

state, nor abandonment of a right-of-way solely to benefit an abutting property owner, is considered to be sufficient to meet the test of "in the public's best interest".

3. Abandonment of right-of-way automatically reverts only to abutting property owners with one-half of the right-of-way going to each owner by operation of law upon adoption of a City ordinance.

4. Provide applicant with a Quit [sic] Deed for recording, if the right-of-way is abandoned.

Unlike ordinances, policies can be waived. Notwithstanding paragraph 1 of the Policy, the evidence was clear that the City abandons right-of-way that is in use, either explicitly or implicitly waiving paragraph 1. Over 90 percent of the abandonment applications processed by the City have been for rights-of-way that are currently being used, including some that were being used heavily. The actual standards for determining whether to abandon a road have been found in the other parts of Policy 410, especially in paragraph 2. Although Policy 410 had a sunset date of March 25, 1997, it has not been replaced, and the Planning Department continued to use it as a guide for review of abandonment applications.

17. On February 23, 2005, the City Commission reviewed proposals from the Planning Department for modifications to the City's abandonment policies, procedures, and fee requirements. The proposed modifications included revised procedures, added definitions, and added the following specific review criteria:

(a) The approval of the application shall not create any safety or public health

hazard, including any environmental health hazard;

(b) The approval of the application shall not result in the preclusion of right-of-way or fee simple access to any existing parcel/lot of record;

(c) The approval of the application shall not result in the preclusion of access to any publicly-maintained facility or infrastructure;

(d) The approval of the application shall not create any condition inconsistent with the Tallahassee-Leon County Comprehensive Plan, including the Long Range Transportation Plan included therein;

(e) The approval of the application would not eliminate or preclude a street or bicycle/pedestrian interconnection that the City Commission intends to retain;

(f) The approval should not adversely affect service access required for any official public safety, utility service, waste collection service provider; the United States Postal Service; Leon County Schools (school buses); or TalTran.

On February 23, 2005, the City Commission approved the modifications and approved the Planning Department's recommendation to repeal Policy 410 since the modification would be more definitive. The City Commission approved the Planning Department's recommendations, and directed staff to draft an ordinance incorporating the proposed modifications to the abandonment policies, procedures, and fee requirements and to bring the ordinance back before the Commission for adoption. As of this date, due to staffing constraints, the Planning

Department has not taken an ordinance back to the City Commission for review and action.

Conditions of Abandonment

18. The City's Planning Department has placed several conditions on the proposed abandonment to address issues raised by the reviewing departments during the processing of abandonment applications. Placing conditions on abandonment of right-of-way is authorized and common.

19. A standard condition for abandonment is that easements be retained by the City for any utilities. It also is standard to require the maintenance of adequate emergency access for the fire and police departments. Also standard, a vehicular turn-around will have to be constructed at the new eastern terminus of Mission Road.

20. To connect with other bicycle-pedestrian trails in the area and enhance these modes of transportation and the City's Bicycle-Pedestrian Master Plan, the Planning Department recommends that a bicycle/pedestrian easement around the perimeter of the Mission be dedicated to the public as a condition of the abandonment.

21. Finally, the Planning Department recommends that the proposed abandonment be conditioned on payment by the State for signalization at the Mission Road and White Drive intersection if, within 12 months of the abandonment, traffic increases to a point where signalization there is warranted.

22. In testimony, the Executive Director of the Mission, Dr. Bonnie McEwan, supported the idea of a bicycle/pedestrian easement for the City, and DEP did not oppose either the standard or recommended conditions of abandonment.

Effects of New Mission Visitor Center on Pedestrian Safety

23. The building that currently functions as a Visitor Center for the Mission is an adaptive use of a 1938 house. Limited restrooms are in a separate building next to the house. Currently, due to the lack of accommodations, frequent requests to hold major events, weddings, receptions, and special functions must be denied.

24. Currently, Mission staff must cross Mission Road between their offices and the public northern section. Staff crossings are a cause for concern because of the limited sight-line distance around the curve in Mission Road to the west. They are warned regularly to use caution, but no other measures to protect staff have been implemented or requested to date. Currently, visitors to the Mission drive to the public parking area on the northern portion of the site. Visitors then remain on the north side of Mission Road until they return to their vehicles to leave.

25. In 2006, the Florida legislature appropriated funds to build a new Visitor Center at the Mission. This Center will be in excess of 20,000 square feet and will include public classrooms, a place to show orientation films, exhibits, 20

public toilets, and a meeting room accommodating 250 people. The new Visitor Center will be a vast improvement over the current facility.

26. The evidence was that the best location for the new Visitor Center is on the western portion of the Mission property south of Mission Road. The site was selected because it is relatively flat and because the relatively few archaeological remains there have been mitigated. The plans are to have people enter the Mission using the driveway entrance on Tennessee Street, park around the new Visitor Center, proceed through the Visitor Center for their orientation, and then walk to the main area of the park, where the re-created Fort, Mission, Apalachee Village, and rich archeological sites are located. If Mission Road is not abandoned, the visitors would be crossing just east and quite close to a sharp curve in the relatively narrow, canopy-like road, which has deep-cut banks.

27. Petitioners suggest that the new Visitor Center could be put on the northern part of the site. Indeed, before the State acquired the land on the south side of Mission Road where it now intends to build the new Visitor Center, the State was planning to build it on the north side of the road. However, the evidence was that the recently acquired site on the south side of the road is better suited and would be a much greater benefit to the general public. In any event, the evidence was that the State is going forward with its plans for the new Visitor Center

and already has proceeded with obtaining environmental and building permits for construction on the preferred site.

28. A conservative count of on-site visitation at the Mission last year was 30,239. There are activities year-round, including costume interpretation, a living history program, special events, and camps, including every teacher planning day and break. Most of the Mission programming is geared towards children, and approximately ninety percent of the visitors are children.

29. The State hopes and expects that visitors to the Mission will increase dramatically with construction of the new Visitor Center. The State continues to expect that a high percentage of these visitors will be children. The application for abandonment is based on the reasonable prospect of increased future use of the facility. The application for abandonment seeks to protect the expected increased number of visitors, including many groups of children, and staff from the danger of having to cross back and forth across Mission Road. Pedestrian safety in connection with the use of the planned Mission facilities is a clear benefit to the general public. The abandonment application also would enable the State to optimize the functioning of the Mission, which also benefits the general public.

Negative Effects of Abandonment

30. At the same time, granting the application for abandonment would cost the general public in other ways, which the Petitioners point out.

31. The segment of Mission Road proposed to be abandoned has a "canopy-road-like feel" (although it is not officially designated as a canopy road). The public no longer would be able to experience driving on it.

32. A traffic study done by Wilson Miller on behalf of the State confirmed that traffic on the segment of Mission Road in question is relatively light. Traffic count data from 2008 showed that the annual average daily traffic ("AADT") was 1,500 vehicles a day, including both directions. Approximately 57 percent of the 1,500 cars move in an easterly direction. By comparison, the AADT for other area roads in the vicinity is significantly higher: 9,000 vehicles for White Drive; 34,000 for Ocala Road; and 42,500 for Tennessee Street.

33. Mission Road is classified as a minor collector road. The capacity of a minor collector is between 13,000 and 14,000 AADT. The AADT established by the Wilson Miller study is only about 10% of the road's capacity, which is very light for a minor collector road.

34. If the application for abandonment is granted, traffic will shift to other roads. However, the Wilson Miller study was not an origin and destination study and was not sufficient to

determine with any precision how the traffic would shift. For that reason, Petitioners' attempt to use the traffic study to identify and quantify the costs associated with such travel shifts was not convincing. Some increase in traffic on other area roads will occur, but it is speculative based on this record where the increases might occur, how large they will be, and whether they will result in the need for taxpayer-funded road and traffic construction.

35. Petitioners contend that the proposed abandonment will shift some eastbound traffic on Mission Road to White Drive. If it does, White Drive is a major collector with recent improvements and excess capacity. Any additional traffic on White Drive would not be significant from a traffic planning standpoint. It might make the road network more efficient overall (even though certain trips may become less efficient).

36. It is possible that the re-routing of traffic from the Mission Road and Ocala Road intersection may be significant enough to warrant a traffic signal at White Drive and Mission Road. For this reason, the City staff recommends, as a condition for abandonment, that the State pay for signalization at that intersection if the need arises within a 12-month period after the abandonment. Based on the evidence, it should not be anticipated that other road and traffic improvements will be necessary as a result of the abandonment, except perhaps reversal

of the stop condition at Mission Road and San Luis Road and possibly a turn lane on Solana Drive at its Mission Road junction.

37. Petitioners also contend that the value of the 1.34 acres of road right-of-way to be abandoned is a cost to the general public that should be considered. The appraised value of the 1.34 acres was \$240,000, using an "across the fence" appraisal methodology and assuming high-density residential property "across the fence" even though the property on either side of the proposed abandonment would be park land, and the transfer of use from road to park would be from one public purpose to another public purpose. In any event, the City cannot legally "charge" for abandoning right-of-way, and the value of abandoned right-of-way is never a consideration in the City's review of an abandonment application. See Conclusion 77, *infra*.

38. Petitioners also contend that the proposed abandonment will have the negative effect of hampering emergency response in the area. Any road closure could result in a longer emergency response time by a matter of minutes in a particular circumstance and, depending on the emergency, it is possible that a delay of mere minutes could be significant and even mean the difference between life and death. But the evidence was clear that, from any reasonable planning perspective, the proposed abandonment would not present significant difficulties to fire, hazardous material, or police responders, assuming that maintaining

adequate emergency access into the Mission itself is made a condition of the abandonment.

39. Geographic areas are assigned to Fire Department stations for primary response. The response routes of drivers are not assigned, but are instead discretionary on the part of the driver based on the time of day, traffic patterns, nature of the road, and possible school zones. The primary station is called as the First Due, with the secondary being Second Due, and so forth. Station 4, located at the corner of Pensacola Street and Appleyard Drive, is the First Due Station, or engine company, for the area of the proposed abandonment, including The Timbers. The typical route for Station 4 would be to travel from its location at Appleyard Drive and proceed to Tennessee Street, turn right and proceed east to White Drive, then turn left and proceed north to Mission Road. This route would not be affected by the proposed abandonment.

40. The Second Due Station for this area is the Main Fire Station located at 327 North Adams Street. The probable emergency response route for a fire truck coming from this Station would be to travel west on Tennessee Street, go through the Ocala Road intersection with Tennessee Street, turn right and proceed north on White Drive, and turn right and proceed east on Mission Road. The alternative route of proceeding north on Ocala Road at the Tennessee Street intersection and turning left onto Mission Road would be extremely difficult to navigate for a large

fire truck, particularly in light of traffic, and typically would not be the preferred route. The typical route from the Second Due station is not affected by the proposed abandonment.

41. The Third Due station for this area is Station 8, which is located on Hartsfield Road. This Station is situated to the west of the Timbers and the Mission. A typical route from this Station to the Timbers would be to drive east on Hartsfield Drive and take one of several southerly connections to Mission Road, and then drive east on Mission Road to access The Timbers or the Mission.

42. Another consideration for Fire Department emergency access is the specialized functions of certain stations in two areas--Urban Search and Rescue, and the Hazardous Material Response. The Urban Search and Rescue team provides specialized services including searching through collapsed buildings and piles of debris. The primary station response for Urban Search and Rescue is Station 4, and its access is unaffected by the abandonment.

43. The primary Hazardous Material Response team is Station 2, located on Sharer Road. There is a secondary specialized station for hazardous materials response, Station 3, which is located on South Monroe Street at Paul Russell Road. In addition, all of the stations have some ability to provide hazardous materials response. Currently, a possible route from Station 2 to the Timbers eventually would take Ocala Road to

Mission Road. However, this route is only available for single engine fire trucks. Due to the nature of the equipment it uses, the hazardous materials team may instead proceed along Interstate 10 to Capital Circle and head back east to the area. During a response to an incident, this specialized team would be driving en route, meaning with traffic and not in emergency mode, and the First Due station would already have sent a truck to the site along a route unaffected by the proposed abandonment.

44. As for the Police Department, the main type of call from The Timbers has been for public disturbances, which are frequently related to parties and generally not emergencies. In the three years of calls, only one call received could be considered an emergency response, which was for a young lady who had erratic breathing after passing out from drinking too much alcohol.

45. In contrast to the Fire Department, police patrol cars have no fixed locations but rather are constantly on patrol. Dispatch for police prioritizes current needs and locations of vehicles. The Police Department has a number of methods it can use to access an area in case of an emergency. In addition to the standard method of reaching an area by car, potential options to reach an area include by foot, bike, and helicopter. Even deployment of an armored car/tank type vehicle would be possible if the situation warranted it.

46. If the abandonment occurs, there will be three main routes to access the area, including San Luis Road, White Drive, and Mission Road from the west. With the two entrances to The Timbers, these routes provide at least five different ways to access The Timbers. Some locations in the City, such as cul-de-sacs, have only one access route. The various approaches to the area in question provide more than sufficient access.

47. The proposed abandonment would result in the elimination of a less-than-ideal intersection at Mission Road and Ocala Road. Resulting from the extension of Tennessee Street to the west of Ocala Road, the intersection at Mission Road and Ocala Road does not meet current design standards because it is too close to Tennessee Street. It is not unusual for cars turning right from Mission Road onto Ocala Road to cross two or three lanes within a very short distance in order to turn left onto Tennessee Street. This maneuver is dangerous and illegal. Of six accidents at the intersection over four years, five involved oncoming traffic striking a vehicle turning onto Ocala Road from Mission Road. In a three-month period in 2006 alone, there were three such collisions. One reason there are not more similar accidents appears to be that the danger is so obvious that most drivers--both those attempting the maneuver and those driving south on Ocala Road--use caution. In addition, many of the local residents have become quite skilled at negotiating the intersection. Another illegal maneuver at this less-than-ideal

intersection is sometimes used by cars heading north on Ocala Road and crossing Tennessee Street. Since it is not possible to make a legal turn left onto Mission Road, some turn left into a business parking lot on the northwest corner of Tennessee Street and Ocala Road, drive through the business parking lot, and then turn left onto Mission Road.

48. Petitioners contend that the proposed abandonment will shift traffic from the Mission Road/Ocala Road intersection to the White Drive/Tennessee Street intersection, which also is inconsistent with design standards due the centerline offset, making the left turn onto Tennessee Street from White Drive potentially dangerous. However, whether and how much traffic would be shifted to that intersection was not proven. In addition, most of the traffic experts who testified were more concerned about the dangers inherent in the Mission Road/Ocala Road intersection and thought elimination of the Mission Road/Ocala Road intersection would make the Ocala Road/Tennessee Street intersection more efficient.

Comprehensive Plan

49. The evidence was that, with the conditions recommended by the City's Planning Department, the proposed abandonment does not create any condition that is inconsistent with the Tallahassee-Leon County Comprehensive Plan, including the Long-Range Transportation Plan.

50. Goal 2 of the Historic Preservation Element of the Comprehensive Plan is to "[e]nsure that all municipal and county actions encourage and promote the preservation of this community's historic resources." Closing the proposed portion of Mission Road will serve Goal 2 by supporting and satisfying Policy 2.1.3 (mitigate the impact of development on historic resources), Policy 2.1.5 (property listed in the Florida Master Site File), and Objective 2.4 (develop a land conservation program to protect historic resources).

51. The proposed abandonment also is consistent with other parts of Goal 2, namely: Objective 2.5 (establish a program to protect significant archaeological resources); Policy 2.5.1 (mitigation of adverse impacts to significant sites); Policy 2.5.2 (archaeological sites to be filed with Florida Master Site File and Archaeological Sensitivity Zone Maps of Leon County); Objective 3.2 (provide for the interpretation of local government-owned historic resources in parks and other public lands); Policy 3.2.1 (support and encourage local projects involving walking, bicycling and driving tours through historic areas); and Policy 3.2.2 (include the existence of historic resources as a criterion in the acquisition of public parks).

52. The recommended bicycle/pedestrian path easement condition is consistent with Goal 6 of the Conservation Element of the Comprehensive Plan, which encourages the City/County to "implement a county-wide greenways network . . . to provide for

. . . educational and historical interpretive opportunities and increased opportunities for alternative modes of transportation."

53. Goal 6 of the Conservation Element of the Plan and supporting Policies 6.1.1 through 6.1.4 were the origin of the Tallahassee-Leon County Greenways Master Plan. The intent was to link historic and natural resources throughout the community, linking them to residential, work, and business areas. The bicycle/pedestrian easement link San Luis City Park trails with an existing trail at the intersection of Tennessee and Ocala.

54. The proposed abandonment is consistent with the Parks and Recreation Element of the Comprehensive Plan in that state facilities may be included to meet state-required levels of service. Parks are essential to a sustainable community.

55. The Land Use Element of the Comprehensive Plan has the general goal of protecting natural and aesthetic environments and residential areas. One way to protect residential areas is not to route collector roadways through them. Everything adjoining the western boundary of the Mission is classified as Residential Preservation. Closing Mission Road will force traffic away from this area and protect 18 homes on San Luis Road from cut-through traffic. The Planning Department would downgrade area street classifications to "local streets" to reflect their true use and provide better neighborhood protection.

56. Studies performed by the Planning Department resulted in a multi-modal transportation district and a greenways master

plan. The City operates under the Tallahassee/Leon County Multimodal Transportation District Plan. That Plan focuses on bike paths, mass transit, and sidewalks to facilitate greater mobility with fewer roads. Service levels for bicycle paths in the San Luis area are close to critical. The bicycle/pedestrian easement will provide greater connectivity, thereby improving service levels.

57. Many students reside in the vicinity of the proposed road closure and provision of a bike path connecting the areas north of Mission Road with the Ocala Trail south of Tennessee Street would attract more bicycle traffic in the hopes of changing the mode of transportation for college students.

58. The City has a Tallahassee-Leon County Greenways Master Plan (Greenways Plan). The abandonment application provides an opportunity under the Greenways Plan. The bicycle/pedestrian easement will connect an existing trail at the intersection of Tennessee Street and Ocala Road to San Luis City Park. This is consistent with the Greenways Plan.

59. The City has adopted the Bicycle and Pedestrian Master Plan (Bike/ped Plan). The purpose of the Bike/ped Plan is to facilitate greater awareness of bike and pedestrian facilities and to promote construction of new facilities. The bicycle/pedestrian easement would provide greater accessibility to existing amenities and infrastructure and meet the intent of the Bike/ped Plan.

60. Petitioners argued that there already exists a better connection between the existing trail at the intersection of Tennessee Street and Ocala Road to San Luis City Park via Ocala Road and Continental Avenue. However, the evidence did not prove that the existing route would be safer or better than the connection that would become available as a result of the bicycle/pedestrian easement condition on the proposed abandonment. Even if it would be, an additional route and connection still would serve a public benefit.

61. Petitioners also pointed out that State could dedicate an easement through its property for purposes of a bicycle/pedestrian connection without applying for abandonment of right-of-way and that the City never asked for such a dedication before the State applied for application of the right-of-way. But it is typical to consider such matters in the context of an application for abandonment.

Alternatives to Abandonment

62. Petitioners concede that pedestrian safety at the Mission San Luis "would be rendered perfect if the road were abandoned, closed, and eliminated." However, they contend that other steps could be taken to protect the pedestrians as well or better without abandoning the road.

63. First, Petitioners suggest the alternative of a pedestrian crossing with a pedestrian-controlled stop light and advance warning flashers. This suggestion was supported by the

testimony of Petitioners' traffic expert, Wayne Coloney. But he assumed there would be 360 feet between the pedestrian crossing and the curve in Mission Road. Actually, the pedestrian crossing would be only approximately 210 feet from the curve, which is less than the 330 feet that Mr. Coloney considered to be safe. The other traffic experts also believed that it would be unsafe to design a pedestrian-crossing that close to the curve, even with advance warning flashers--a design that works best on straight roads with long sight-line distances, such as Meridian Road.

64. Next, Petitioners suggest the construction of an overpass. This would be a more expensive proposition. It would require the construction of ramps, stairs, and elevators to comply with the Americans with Disabilities Act. In addition, to be effective in protecting pedestrians, fencing would have to be installed for a considerable distance on both sides of the road to discourage pedestrians from crossing the road instead of using the overpass. According to Mr. Coloney, all of this would cost between \$300,000 and \$390,000 to install and between \$20,000 and \$30,000 to maintain. Both the overpass and the fencing would be at odds with the environment the State would be trying to re-create and maintain on the Mission property.

65. Petitioners also suggest digging a tunnel under the road, which would be less obvious than an overpass. However, this also would require fencing to be effective and would be the

most expensive of the suggested alternatives--costing between \$450,000 and \$690,000 to install. In addition, it would require digging a tunnel through artifact-rich earth, which would be contrary to the a primary purpose of Mission San Luis.

Application of Findings to Standards

66. Paragraph 2 of Policy 410 requires a demonstration that an abandonment of right-of-way is "in the best interests of the general public." It is clear that the proposed abandonment is not in any private interest since the abandonment is to the State for incorporation in its Mission San Luis, a public facility. The abandonment is not for the sole purpose of placing property on the tax rolls, or for the benefit an abutting private property owner. It is to benefit the public. It also is primarily to protect the safety of pedestrians working at and visiting the facility, including many school children. For these reasons, the abandonment clearly is in the public interest, as opposed to any private interest. Whether it is in the best interest of the general public is a more difficult judgment to make. But, on balance, the abandonment application, with the standard and recommended conditions, probably is in the best interest of the general public.

67. The proposed abandonment also meets the new policy criteria for abandonment of right-of-way. It does not create any safety or public health hazard, including environmental health hazard. It does not preclude access to any existing parcel or

lot of record. It does not preclude access to any publicly-maintained facility or infrastructure. It does not create any condition inconsistent with the Comprehensive Plan, including the Long-Range Transportation Plan. It does not eliminate or preclude a street or bicycle/pedestrian interconnection that the City Commission intends to retain. It does not adversely affect any required service access for any official service provider.

CONCLUSIONS OF LAW

Jurisdiction

68. At the time the Petition for Quasi-Judicial Proceedings was filed in this case, Section 8-1 of the LDC provided:

No street dedicated to public use shall be closed, abandoned or vacated until the application therefor has been considered by the city-county planning commission. Filing fees, advertisements, written notices and hearings shall be as is provided for amendments to the zoning map in chapter 10 to provide opportunities for public participation in the abandonment process.

69. LDC Section 10-51, which governs zoning map amendments, provides in pertinent part:

(e) *Preliminary decisions for amendments to the official zoning map.* The planning commission shall review the application and the planning department staff report on the application at a scheduled public hearing, and render a preliminary decision which shall include the planning commission's findings and recommendations to the city commission. The preliminary decision shall be rendered when the written decision is filed with the planning commission clerk, who shall promptly notify the applicant in writing.

(f) *Quasi-judicial proceedings.* The planning commission's preliminary decision on its recommendation to the city commission shall become final 15 calendar days after it is rendered unless a person who qualifies as a party as defined in this Code files a petition for quasi-judicial proceedings in accordance with chapter 2, article III, division 2, subdivision II, of this Code and the bylaws of the planning commission.

LDC Section 2-138 provides for referral of petitions for quasi-judicial proceedings to DOAH.

70. Effective March 25, 2008, Section 8-1 was amended to add the sentence: "Notwithstanding the foregoing, abandonments are legislative decisions, and shall not be eligible for quasi-judicial proceedings under this Code." (Emphasis added.) There was no argument by the parties as to whether this new version of the Code applies to this case, so as to result in its dismissal for lack of jurisdiction. However, if for no other reason than that the State could withdraw and re-file its application and avoid a quasi-judicial proceeding, it appears that those "new legal consequences were clearly intended." See Lakeland Regional Medical Center, Inc. v. State, Agency for Health Care Admin., et al., 917 So. 2d 1024, 1030 (Fla. 1st DCA 2006). Nonetheless, in the event that was not the result intended by the City Commission, this Recommended Order is being submitted to the Planning Commission as provided for a quasi-judicial proceeding under LDC Section 10-51.

Standing

71. The City and DEP argue that Petitioners do not have standing because the Florida Supreme Court has held that: "This court is committed to the rule that an action by an individual to enforce his right to use a public street must be based on a special and particular injury, differing not only in degree but also in kind, from that sustained by the community at large." Brooks-Garrison Hotel Corp. v. Sara Inv. Co., 61 So. 2d 913 (Fla. 1952), cited in Lining v. Bd. of Co. Commissioners, Duval Co., 176 So. 2d 350, 352 (Fla. 1st DCA 1965). See also Henry L. Doherty & Co. v. Joachim, 200 So. 238 (Fla. 1941)(no standing to challenge abandonment of footpath, which required guests and tenants at a resort to travel a much greater distance, did not demonstrate an injury different in kind from that sustained by general public, even though greater than that of many others in the community, and did not give the resort owner standing); Halpert v. Udall, 231 Fed. Supp. 574 (S.D. Fla. 1964), aff'd, 379 U.S. 645 (1965)("[A] property owner cannot challenge the closing of a road where the injury to him is not materially different than that sustained by the public. . . . [T]his is particularly true where there is another means of ingress and egress even though the other route is substantially longer."). However, the issue in this proceeding is not Petitioners' standing to challenge the abandonment of right-of-way in court; rather, it is Petitioners' rights to a quasi-judicial proceeding. Petitioners'

standing in this case is determined by reference to LDC Section 2-134, which states in pertinent part:

Quasi-judicial proceedings may be initiated by . . . persons who will suffer an adverse effect to an interest protected or furthered by the comprehensive plan or this Code, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or service, or environmental or natural resources. The alleged adverse effects to an interest may be shared in common with other members of the community at large, but shall exceed in degree the general interest in community good shared by all persons.

As a result, it would not be necessary for Petitioners to prove an adverse effect differing not only in degree but also in kind from adverse effects on the general public to have standing.

72. In any event, Petitioners proved an adverse effect different in kind from the effect on the general public. They proved that there probably would be some use of their private San Luis Road as a cut-through if the abandonment application is granted (even if it was not proven that the use will be extensive or significant).

Burden and Standard of Proof

73. The parties agreed in their Pre-Hearing Stipulation that evidence would be first presented at the hearing by DEP as the applicant, followed by the presentation of City staff in support of the abandonment, and ending with the Petitioners' case.

74. The City asserts that Section 5, Article IX, Planning Commission Bylaws, addresses the burden of proof as follows: "[T]he initial burden of proof shall be on the applicant. Once the applicant establishes his or her entitlement to approval by submittal of competent, substantial evidence supporting the approval (referred to by the courts of this state as a 'prima facie case') the burden of proof will shift to the petitioner(s) to rebut the evidence submitted by the applicant." These Bylaws are not in evidence. However, the Bylaws quoted by the City reflect a shifting of the burden of presenting evidence, not a shift in the ultimate burden of persuasion away from the applicant. Cf. Fla. Dept. of Transp. v. J.W.C. Co., Inc., et al., 396 So. 2d 778, 788 (Fla. 1st DCA 1981). The standard of proof required to persuade the finder of fact is a preponderance of the evidence.

75. The City and DEP cite case law that the courts defer to the decision of the local government in legislative matters such as the abandonment of right-of-way. See Roney Inv. Co. v. City of Miami, 174 So. 26, 29 (Fla. 1937); Sun Oil Company v. Gerstein, 206 So. 2d 439, 440-441 (Fla. 3d DCA 1968), cert. den., 211 So. 2d 212 (Fla. 1968). In other words, the courts will not second-guess the local government's ultimate legislative decision. But those cases do not stand for the proposition that similar deference should be given to City staff in a quasi-judicial proceeding, which is a stage in the decision-making

process that is preliminary to the City's ultimate decision. The issue in this quasi-judicial proceeding is what the City's decision should be (specifically, what the Planning Commission should recommend that the City Commission's decision should be).

Guidance for Review of Abandonment Applications

76. The guidance for reviewing abandonment of right-of-way is found in City Policy 410, especially paragraph 2, and the modifications to the policy. See Findings 16-17, supra.

77. According to Attorney General Opinion 78-125, 1978 Fla. AG LEXIS 45, at *13:

[T]he several property interests of abutting landowners are subject to constitutional protection. Clearly the attempt by a municipality to usurp private property rights or property interests or to barter or sell such property rights as conditions to or in exchange for the exercise of its legislative power to vacate streets no longer required for public use, does not constitute a municipal purpose and is outside the scope of municipal home rule powers.

For that reason, the City cannot sell the property to be abandoned to the State, or charge the State for granting its application for abandonment, and the appraised value of the property to be abandoned should not be a factor in the deciding whether to grant the application.

78. On the other hand, the City has the legal authority to impose conditions upon the abandonment of a right-of-way to serve the public interest. City of Temple Terrace v. Tozier, 903 So. 2d 970 (Fla. 2d DCA 2005). The standard conditions and

conditions recommended by the City's Planning Department in this case are appropriate and should be imposed to serve the public interest. See Findings 18-22, supra.

79. As stated in City of Miami v. Girtman, 104 So. 2d 62, 66 (Fla. 3d DCA 1958), which involved an application for a driveway connection: "In the present case there was involved the question of public safety, which is a proper field for the exercise of police power . . . [N]ot only is the governing body entitled to exercise police power for those purposes, but it is bound to do so"

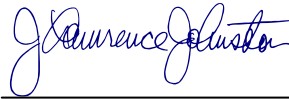
80. Considering the factors under the available guidance, DEP's application for abandonment should be granted, with the standard and recommended conditions. With those conditions, the application clearly meets the new policy criteria for abandonment of right-of-way, and it probably is in the best interest of the general public.

RECOMMENDATION

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

RECOMMENDED that the Planning Commission recommend to the City Commission that DEP's application for abandonment of right-of-way be granted, with the standard and recommended conditions.

DONE AND ENTERED this 2nd day of June, 2008, in Tallahassee,
Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.