

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KATHLEEN BURSON,)
)
 Petitioner,)
)
 vs.)
)
 CITY TITUSVILLE,) Case No. 08-0208GM
)
 Respondent,)
)
 and)
)
 RAVI SHAH,)
)
 Intervenor.)
 _____)

RECOMMENDED ORDER FOLLOWING REMAND

The final hearing in this case was held on March 24 and 25, and April 4, 2008, in Titusville, Florida, before Bram D.E. Canter, an Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Kathleen Burson
2950 Knox McRae Drive
Titusville, Florida 32780

For Respondent: Dwight W. Severs, Esquire
Richard C. Broome, Esquire
City of Titusville
Post Office Box 2806
Titusville, Florida 32781-2806

For Intervenor: John H. Evans, Esquire
John H. Evans, P.A.
1702 South Washington Avenue
Titusville, Florida 32780

STATEMENT OF THE ISSUE

The issue in this case is whether the small-scale amendment to the Future Land Use Map of the City of Titusville Comprehensive Plan, adopted by Ordinance 72-2007, is "in compliance" as that term is defined in Section 163.3184(1)(b), Florida Statutes (2007).¹

PRELIMINARY STATEMENT

On December 11, 2007, the City of Titusville amended its comprehensive plan through the adoption of Ordinance 72-2007, which made changes to the Future Land Use Map (FLUM). Because it was a "small-scale" amendment, involving less than 10 acres of land, the amendment was not reviewed for compliance by the Department of Community Affairs. This proceeding was initiated on January 10, 2008, when Petitioner Kathleen Burson filed a petition challenging the amendment.

Ravi Shah was granted leave to intervene in support of the amendment.

Petitioner's motion to file an amended petition was denied, but she was granted leave to file a second amended petition. Petitioner filed her 2nd Amended Petition on March 11, 2008.

At the final hearing, Petitioner testified on her own behalf and presented the testimony of Jewell Brennigan.^[2] Petitioner's Exhibits 1, 1G, 1H, 1O, 50 and 51 were admitted into evidence. The City presented the testimony of Courtney Harris, the City's planning director; James Stephens, a mapping technician for the City; William Kerr, IV, a consulting ecologist; and Bart Pair, a civil engineer. The City's Exhibits 1 through 16 were admitted into evidence. Intervenor presented no testimony. Intervenor's Exhibit 1 was admitted into evidence. Because the final hearing could not be completed in the two days for which it was scheduled, additional testimony was presented and additional exhibits were received into evidence via a telephonic hearing held on April 4, 2008.

The three-volume Transcript of the final hearing was prepared and filed with DOAH. Petitioner and Respondent filed Proposed Recommended Orders which were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. Petitioner Kathleen Burson owns property and resides at 2950 Knox McRae Drive in Titusville. Her residence is located near the land affected by the FLUM amendment. Petitioner submitted comments and objections regarding the amendment to the Titusville City Commission.

2. The City of Titusville is a municipality of the State of Florida and has adopted a comprehensive plan that it amends from time to time pursuant to Section 163.3167(1)(b), Florida Statutes.

3. Intervenor Ravi Shah was the applicant for the comprehensive plan amendment and a companion zoning change. He signed a contract to purchase the property affected by the amendment. At the time of the hearing, the contract's expiration date had passed. However, Intervenor is pursuing mediation under the terms of the contract to contest and prevent the termination of his right to purchase the property.

The Amendment

4. The amendment changes the FLUM designations for a portion of a 18.17-acre parcel of land ("the property") located at the intersection of State Road 405 (South Street) and Fox Lake Road. The amendment was formally approved by Ordinance 72-2007, issued by the City on December 11, 2007, and was designated Small Scale Amendment 15-2007.

5. The property had two FLUM designations before the amendment, Residential High Density and Conservation. The amendment changes a portion of the Residential High Density area to Conservation. It changes an area formerly designated Residential High Density and Conservation to Commercial Low Intensity. It changes an area formerly designated Conservation

to Residential Low Density. Respondent's Exhibit 10 and Petitioner's Exhibit 50, respectively, depict the "before" and "after" land use designations.

6. Concurrent with the comprehensive plan amendment, the City approved a rezoning of the property. Petitioner and the City presented evidence related to the re-zoning and to Intervenor's proposed development of a drug store and other retail shops on that portion of the property now designated Commercial Low Intensity. However, most of this evidence was irrelevant to the issue of whether the comprehensive plan amendment is "in compliance."

The Property and Surrounding Land Uses

7. The property is currently vacant. A wetland covers 3.71 acres in the southern portion of the property. The boundaries of the wetland were used to define the area designated Conservation by the amendment. It was the City's intent for the amendment to place in the Conservation designation on any part of the wetland that was not previously designated Conservation and to remove from the Conservation designation any land that was not part of the wetland.

8. The upland portion of the property is used by wildlife, but it is not known to be used by any threatened or endangered wildlife species other than the gopher tortoise, which is a

threatened species. Several gopher tortoise burrows were found and at least one burrow was "active."

9. Petitioner claims that the amendment would destroy the rural character of the area. The City disputed that the area has much rural character.

10. The property is bounded on the west by South Street, which is an arterial road. The land across South Street to the west includes commercial and industrial uses.

11. The land on the northwest corner of the intersection of South Street and Fox Lake Road is designated Commercial Low Intensity and the City has approved a gas station/convenience store for the site.

12. The property is bounded on the north partly by Fox Lake Road, a collector road, and partly by a small parcel which is designated Residential High Density. This small parcel has existing dwellings and has non-conforming density.

13. Across Fox Lake Road to the north is land which is designated Residential High Density.

14. To the east of the property, between the property and the neighborhood where Petitioner resides, is land which is designated Residential Low Density and is zoned for single-family homes on lots of at least one acre.

15. Petitioner's neighborhood comprises 14 homes on lots that generally range in size from one acre to 4.5 acres, with

one 10-acre lot. No other homeowners in Petitioner's neighborhood challenged the amendment, even those persons who live closer to the property than Petitioner.

16. The southern border of the property is bounded by Commercial High Intensity, Conservation, and Educational land uses. The Education designation covers the site of Apollo Elementary School.

17. The property has access to urban services, including public utilities.

18. The land uses designations created by the amendment are compatible with the surrounding land uses. More specifically, the Commercial Low Intensity designation is compatible with Petitioner's neighborhood because the neighborhood is separated from the commercial use by almost 300 feet, with other residential land uses between.

The Conservation Designation

19. Petitioner's challenge to the amendment focuses primarily on the change in the area previously designated Conservation. She contends that the area should remain Conservation because she relied on the designation, and the former Conservation designation protects upland wildlife.

20. When it adopted its first comprehensive plan in 1988, the City designated Conservation areas on the FLUM to correspond with wetlands as depicted on a 1988 National Wetland Inventory

map prepared for the U.S. Fish and Wildlife Service. From time to time since 1988, the City has modified the boundaries of Conservation areas depicted on the FLUM when, in the process of reviewing land development proposals, the City has received more current and detailed information about the boundaries of particular wetlands.

21. Petitioner claims that it is wrong for the City to use wetlands, alone, as a basis for designating Conservation areas. She cites statements made by the City in 1988 as evidence that the City intended for the Conservation designation to cover some upland areas as well as wetlands.

22. Goal 1, Objective 6, Policy 3 in the Conservation Element states that "at a minimum," the 1988 Wetland Inventory Map will be used to define Conservation areas. Policy 3 allows the City to designate Conservation areas to correspond only with wetlands, and that has been the City's consistent practice. It is reasonable for the City to continue that practice in the adoption of the amendment at issue in this case. The amendment is consistent with this policy.

Protection of the Wetland's Functional Values

23. Petitioner contends that the amendment is inconsistent with comprehensive plan policies and with Florida Administrative Code 9J-5.013(3), related to protecting the functional values of wetlands. Petitioner did not present competent evidence that

any functional values of the wetland on the property would be adversely affected by the amendment, but she does not think an adequate functional value assessment was done for the wetland.

24. Goal 1, Objective 6 of the Conservation Element is to "encourage preservation/protection of wetlands according to their function." Policy 1, Strategy 1 states that "The protection of wetlands shall be determined by the functional value of the wetland." Other related policies and strategies in the Conservation Element indicate that this objective is to be accomplished in part through land development regulations. For example, Policy 3, Strategy 6 states that "Mitigation for unavoidable impacts to wetlands which possess significant functional value, as determined by a functional value assessment, will be addressed in the land development regulations."

25. Florida Administrative Code 9J-5.013(3)(a) states:

Wetlands and the natural functions of wetlands shall be protected and conserved. The adequate and appropriate protection and conservation of wetlands shall be accomplished through a comprehensive planning process which includes consideration of the types, values, functions, sizes, conditions and locations of wetlands, and which is based on supporting data and analysis.

26. The City interprets its comprehensive plan policies as satisfied if wetland impacts are avoided. The wetland analysis

conducted for the amendment at issue in this case was adequate because the entire wetland is included in the Conservation designation and, therefore, appropriate planning level protection is provided for the wetland. The adjacent Commercial Low Intensity designation, standing alone, does not mean that adverse impacts to the wetland will occur. Intervenor's proposed development, for example, provides a buffer from the wetland and does not propose to have an impact to the wetland.

27. The City's interpretation and application of the comprehensive plan objectives and policies related to protecting wetland functional values was not shown to be unreasonable. The amendment was not shown to be inconsistent with the comprehensive plan nor with Florida Administrative Code Rule 9J-5.013(3)(a).

Compatibility

28. Petitioner contends that the amendment also violates Florida Administrative Code Rule 9J-5.013(3)(b) because it directs incompatible land uses into wetlands. The amendment places all of the wetlands on the property under the Conservation land use designation. Neither the Residential Low Density designation nor the Commercial Low Intensity designation is placed in the wetlands. The amendment eliminates an incompatible Residential High Density designation that was

formerly in the wetlands. Petitioner failed to show that the amendment directs incompatible uses into the wetlands.

29. Petitioner contends the amendment is inconsistent with Objective 1.13 and Policy 1.13.1 of the Future Land Use Element (FLUE), which require compatibility with "environmentally sensitive areas;" and Policy 1.6.1 which requires elimination or minimization of negative impacts to environmentally sensitive areas caused by commercial land uses. "Environmentally sensitive areas" are not defined in the comprehensive plan, but discussed in the Conservation Element are (1) habitat for threatened and endangered species, (2) important natural resources, (3) critical habitat, and (4) streams, lakes, rivers, estuaries, and wetlands.

30. The types of "environmentally sensitive areas" on the property are wetlands and habitat for a threatened species, the gopher tortoise. As found above, the amendment does not direct commercial uses into the wetlands. Petitioner did not show where the gopher tortoise habitat is located on the property but claims that Intervenor's proposed commercial project fails to protect that habitat.

31. The property has not been designated as critical habitat for the gopher tortoise. In fact, no critical habitat has been designated in Florida for the gopher tortoise because

there are many areas in the state that provide suitable habitat for this species.

32. In Florida, it is common for land developers to seek and obtain approval from state and federal regulatory agencies to remove and relocate gopher tortoises to other areas which have suitable gopher tortoise habitat. Developers also have the option to build near the burrows as long as they are not disturbed.

33. Goal 1, Objectives 1 and 2, Policy 3 of the Conservation Element states that "any public or private use of land greater than three (3) acres in area shall require a management plan designed to minimize harm to the species and its habitat." Such a management plan, however, would be submitted as part of a re-zoning or development proposal and, therefore, the adequacy of any management plan submitted by the Intervenor in this case is not a relevant inquiry.

34. Petitioner argues that the relocation of the gopher tortoises to other suitable habitat would not be consistent with the comprehensive plan's policy to protect habitat. For threatened and endangered species ("listed species") other than the gopher tortoise, relocation might be impracticable or inappropriate, and, therefore, inconsistent with the comprehensive plan. However, for gopher tortoises, their relocation is often determined to be practicable and

appropriate, and it has been the practice of the City and of the state and federal regulatory agencies to allow their relocation.

35. There is no policy in the comprehensive plan that clearly requires gopher tortoises and their habitat to be managed differently in Titusville than in other areas of the state. A local government's future land use designation has no effect on the regulation and protection of listed species, including gopher tortoises, afforded under state and federal law.

36. Any land use, including a single-family residence, has the potential to disturb the habitat of gopher tortoises. Although Petitioner is correct in her view that the Conservation designation is more likely to avoid habitat disturbances and the need to re-locate gopher tortoises on the property than the Commercial Low Intensity designation, that factor, standing alone, does not require a finding that the amendment is not in compliance.

Restricting Development

37. Petitioner contends that the amendment is inconsistent with FLUE Policy 1.6.1 E because the City did not impose conditions regarding hours of operation, visual impacts, and privacy factors on the Intervenor's proposed development in the Commercial Low Intensity area. This policy only requires that such matters be considered.

38. The City approved the concurrent re-zoning of property with a condition that a six-foot wooden fence be placed along the boundary between the commercial project and the adjacent residential area. The City also required Intervenor to place the wetland under a conservation easement, to provide a buffer zone around the wetland, and to prepare and submit a gopher tortoise management plan prior to development of the property. Petitioner failed to show that controls were not considered by the City or that the amendment is incompatible due to the lack of adequate controls.

Road Access

39. Petitioner contends the amendment is inconsistent with FLUE Policy 1.6.1 A, which states that sites for commercial development at collector/arterial intersections are appropriate "provided minimal access is necessary on the collector street."

The site plan for the proposed commercial development shows a primary entrance on South Street, an arterial road. A secondary, side entrance is on the collector street, Fox Lake Road. Petitioner failed to show how the amendment was inconsistent with Policy 1.6.1 A.

Open Space and Recreation Zoning

40. Petitioner contends the amendment violates the City's land development regulations (LDRs) because the LDRs place an Open Space and Recreation (OR) zoning classification on all

Conservation lands on the FLUM, and describe OR as a "permanent" classification. This argument is not persuasive, because the characterization of the OR zoning classification as "permanent" in the LDRs is merely to distinguish OR from certain other classifications which are used as "holding" or temporary classifications.

41. The word "permanent" in this context merely means that the OR classification is treated the same way as normal zoning classifications, which are "permanent" unless there is a re-zoning by the City. The City has modified or eliminated OR districts many times in conjunction with updated wetland delineations.

Market Analysis

42. Petitioner contends the amendment is inconsistent with FLUE Policy 1.6.1 I because a market analysis was not conducted.

The policy states:

Commercial land use shall be limited to those areas designated as commercial or mixed use on the Future Land Use Map except as may be permitted by the Planned Development Regulations. Requests to increase and/or convey commercial land rights to an alternate site must be accompanied by adequate analysis to prove necessity for such request.

The applicability of this policy was not shown. The first sentence of the policy appears to be self-evident: limiting commercial uses to land designated for commercial uses. The

meaning of "Planned Development Regulations" was not explained. Perhaps it is a typographical error and was intended to refer to "Land Development Regulations." The meaning intended for the term "commercial land rights" was not explained, nor was it explained how this amendment involves a request to increase or convey commercial land rights to an "alternate" site.

43. A market analysis is more typically associated with a specific development proposal, because that allows the analysis to be focused on a particular service or product. Petitioner argues that the policy requires a market analysis for any FLUM amendment that creates a new commercial land use designation. If she is correct, the market analysis would necessarily be a more general one. The City conducted a general market analysis and determined that the residential development in the surrounding area provided a market for a commercial use on the property. That is a reasonable conclusion. If FLUE Policy 1.6.1 I is applicable to this amendment, the amendment is consistent with the policy.

Archaeological Resources

44. Petitioner amended her petition to allege that the amendment was improper because it was incompatible with the protection of an Indian mound on the property. However, no admissible evidence was presented to show that an Indian mound exists on the property, where it is located, or how the

amendment would cause it to be disturbed. As with listed species, a local government's land use designations have no effect on the state regulation and protection of archaeological resources.

CONCLUSIONS OF LAW

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

46. Under the comprehensive planning scheme established in Chapter 163, Part II, Florida Statutes, the review of a comprehensive plan amendment is not to determine whether the amendment is the best alternative approach available to the local government for addressing a subject, but to determine whether the amendment is "in compliance," as defined in Section 163.3184(1)(b), Florida Statutes.

47. The term "in compliance" is defined in Section 163.3184(1)(b), Florida Statutes:

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.

48. Petitioner did not claim that the amendment is inconsistent with Sections 163.3178, 163.3180, 163.3191, and 163.3245, Florida Statutes. Petitioner's challenge focused on alleged inconsistency with certain provisions of Section 163.3177, Florida Statutes, portions of Florida Administrative Code Chapter 9J-5, and one provision of the State Comprehensive Plan.

49. Whether a FLUM amendment is "in compliance" must be determined without regard to any re-zoning or development order issued by the local government in conjunction with the FLUM amendment. Furthermore, a concurrent re-zoning or development order cannot be challenged under Section 163.3184(9), Florida Statutes. This case is restricted to determining whether the FLUM amendment is in compliance.

Standing

50. In order to have standing to challenge a plan amendment, or to participate as an intervenor, each challenger and intervenor must be an "affected person," which is defined as a person who resides, owns property, or owns or operates a business within the local government whose comprehensive plan amendment is challenged. § 163.3184(1) (a) , Fla. Stat.

Petitioner and Intervenor in this case have standing as affected persons.

Standard of Proof

51. Section 163.3187(3)(a), Florida Statutes, provides that, in a proceeding to determine whether a small-scale amendment is "in compliance," the local government's determination of compliance is presumed to be correct and "shall be sustained unless it is shown by a preponderance of the evidence that the amendment is not in compliance with the requirements of this act."

52. Under Sections 163.3184(9) and (10), Florida Statutes, the local government's determination that an amendment is internally consistent must be sustained if the determination is fairly debatable. In the Recommended Order issued in this case, the Administrative Law Judge included that, although this standard of proof for a local government's determination of internal consistency is not expressly stated in Section 163.3187(3)(a), addressing small-scale amendments, it would be illogical to apply a different standard of proof just because the amendment involves less than 10 acres.

53. On or about September 5, 2008, the Department of Community Affairs issued an Order of Remand, because it determined that the conclusion of law stated in paragraph 52, above, was an incorrect statement of the law. The Department

believes the standard of proof applicable to a local government's determination of internal consistency in the case of a small-scale plan amendment is preponderance of the evidence. Therefore, the matter was remanded to the Administrative Law Judge for a determination whether Petitioner demonstrated by a preponderance of the evidence that this particular FLUM amendment is internally inconsistent.

In Compliance Review

54. Subsection 163.3177(2), Florida Statutes, and Florida Administrative Code Rule 9J-5.005(5)(a) require the elements of a comprehensive plan to be internally consistent. A plan amendment creates an internal inconsistency when it has the effect of conflicting with an existing provision of the comprehensive plan. For the reasons set forth in the Findings of Fact, Petitioner failed to prove by a preponderance of the evidence that the amendment is inconsistent with any goal, objective, or policy of the City's comprehensive plan.

55. For the reasons set forth in the Findings of Fact, Petitioner failed to prove by a preponderance of the evidence that the amendment is inconsistent with any provision of Section 163.3177, Florida Statutes.

56. For the reasons set forth in the Findings of Fact, Petitioner did not prove by a preponderance of the evidence that the amendment is unsupported by appropriate data and analysis,

that the data used was not the best available data, or that the County did not use the data appropriately.

57. For the reasons set forth in the Findings of Fact, Petitioner failed to prove by a preponderance of the evidence that the amendment is inconsistent with the provisions of Florida Administrative Code Chapter 9J-5 related to the protection of wetlands and the discouragement of urban sprawl.

58. With respect to the City's interpretation and application of its Conservation land use designation, the City's practice of using the designation only for wetlands is consistent with the wetland protection requirements of Florida Administrative Code Chapter 9J-5. The use of a Conservation land use category is just one method for complying with those requirements.

59. "Compatibility" is defined in Florida Administrative Code Rule 9J-5.003(23) as:

A condition in which land uses or conditions can co-exist in relative proximity to each other in a stable fashion over time so that no use or condition is unduly negatively impacted directly or indirectly by another use or condition.

For the reasons set forth in the Findings of Fact, Petitioner failed to prove by a preponderance of the evidence that the amendment creates incompatible land uses.

60. For the reasons set forth in the Findings of Fact, Petitioner failed to prove by a preponderance of the evidence that the amendment is inconsistent with Section 187.201(9)(b)1., Florida Statutes, a provision of the State Comprehensive Plan related to the protection of natural resources.

61. In summary, Petitioner failed to prove that the amendment is not "in compliance," as the term is defined in Section 163.3184(1)(b), Florida Statutes.

62. Petitioner's desire for more protection of the upland wildlife species and their habitat is not unreasonable. Petitioner urges an alternative interpretation and application of the City's comprehensive plan that would provide greater protection. However, as stated above, the review of a comprehensive plan amendment is not to determine whether the amendment is the best alternative approach, but whether it is "in compliance." Petitioner failed to prove that the amendment is not in compliance.

RECOMMENDATION

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

RECOMMENDED that the Department of Community Affairs enter a final order determining that the amendment is "in compliance" as defined in Chapter 163, Part II, Florida Statutes.

DONE AND ENTERED this 9th day of September, 2008, in
Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of September, 2008.

ENDNOTES

^{1/} Unless otherwise noted, all references to the Florida Statutes are to the 2007 codification.

^{2/} Although the name appears in the transcript of the hearing as Jewell Brannigan, Respondent's Exhibit 15 shows an official public records listing of the name as Jewell Brennigan.

COPIES FURNISHED:

Thomas Pelham, Secretary
Department of Community Affairs
2555 Shumard Oak Boulevard
Suite 100
Tallahassee, Florida 32399-2100

Shaw Stiller, General Counsel
Department of Community Affairs
2555 Shumard Oak Boulevard
Suite 325
Tallahassee, Florida 32399-2160

Dwight W. Severs, Esquire
City of Titusville
Post Office Box 2806
Titusville, Florida 32781-2806

John H. Evans, Esquire
John H. Evans, P.A.
1702 South Washington Avenue
Titusville, Florida 32780

Kathleen Burson
2950 Knox McRae Drive
Titusville, Florida 32780

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.