

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CALVIN AND BECKY BABCOCK, JOHN)
AND JEAN BRITTL, and PETER AND)
PENNY WETTERMANN,)
)
Petitioners,)
)
vs.) Case No. 08-0679GM
)
MARION COUNTY and DEPARTMENT OF)
COMMUNITY AFFAIRS,)
)
Respondents,)
)
and)
)
GOLDEN OAKS 484, LLC, and ST.)
LUCIE SQUARE INVESTORS, LLC,)
)
Intervenors.)
_____)

RECOMMENDED ORDER

On October 1, 2009, a final administrative hearing was held in this case in Ocala before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether Plan Amendments 07-L08 and 07-L39, adopted by Marion County Ordinance 07-31, are "in compliance," as defined by Section 163.3184(1)(b), Florida Statutes.¹

PRELIMINARY STATEMENT

On November 20, 2007, the Marion County Board of County Commissioners adopted comprehensive plan amendments, including two designated 07-L08 and 07-L39. The Department of Community Affairs (Department or DCA) filed a petition at DOAH for a determination that several of the plan amendments were not "in compliance." The Babcocks, Brittlis, and Wettermanns intervened in support of the Department, and Golden Oaks 484, LLC, and St. Lucie Square Investors, LLC, owners and developers of the 359.30 acres, intervened in support of Marion County. The County, Department, and owners/developers entered into a stipulated settlement agreement. The County revised its capital improvements schedule, which addressed DCA's concerns about transportation impacts, and supplied additional information to

address DCA's concerns about urban sprawl. On May 13, 2009, the Department found the plan amendments "in compliance." The parties were realigned as reflected in the above caption, and the Babcocks, et al., as Petitioners, maintained that the plan amendments designated 07-L08 and 07-L39 (the Plan Amendments) still were not "in compliance" because they constituted "urban sprawl." The case was scheduled for a final hearing in Ocala on October 1, 2009.

On September 23, 2009, Respondents and Intervenors moved to exclude evidence on new allegations of environmental impacts and of internal inconsistency. The compliance issues were excluded as untimely under Section 163.3184(16)(f)1., Florida Statutes, but the evidence was allowed as relevant to the indicator of urban sprawl in Florida Administrative Code Rule 9J-5.006(5)(g)4.²

At the final hearing, Petitioners' request to be represented by Calvin Babcock was denied, but all Petitioners were allowed to rely on the evidence presented by Mr. Babcock. Mr. Babcock called three witnesses: Jason S. Polk, Ph.D., as an expert in karst geotechnology; Steven K. Luce, AICP, as an expert in land planning; and, in rebuttal, Jimmy Massey, Interim Director of the Marion County Planning Department. Mr. Babcock also had his Exhibits 1 through 6 admitted in evidence. Intervenors called three witnesses: Johnny Heath, as an expert in geotechnology; Michael W. Radcliffe, P.E., as an expert in civil engineering,

including the provision of public facilities; and David DeYoung, AICP, as an expert in land use planning. Intervenors also had their Exhibits 1, 2, 7, 9, 10, and 12 and their Supplemental Exhibits 1 and 2 admitted in evidence. The Department called no witnesses but had its Exhibit 1 admitted in evidence. Marion County presented no evidence.

No party filed a transcript of the final hearing, and the parties were given ten days to file proposed recommended orders (PROs). DCA's unopposed motion to extend the time for filing PROs to October 23, 2009, was granted. Mr. Babcock's PRO and the Joint PRO filed by Respondents and Intervenors have been considered.

FINDINGS OF FACT

1. Intervenors are the owners and developers of 359.30 acres of land south of Ocala in Marion County north of County Road (CR) 484, between Interstate Highway 75 (I-75) and the City of Belleview (the Golden Oaks site). They also own land in Marion County in the Ocala Ranchettes subdivision, which is in the extreme northeast corner of Marion County.

2. On November 20, 2007, the Marion County Board of County Commissioners adopted Comprehensive Plan Amendments 07-L08 and 07-L39. Plan Amendment 07-L08 changes the Future Land Use Map (FLUM) designation for the Golden Oaks site from Rural Land to Medium Density Residential, which has an open space requirement of at least 350 square feet per residential unit. Plan Amendment

07-L39 is a text amendment to the Future Land Use Element (FLUE) limiting development on the Golden Oaks site to a maximum of 523 single-family residential units.

3. Mr. and Mrs. Babcock own land and reside in Marion County near the 359.30 acres subject to the FLUM change. No evidence was presented during the hearing as to whether the other Petitioners own land or reside in Marion County. However, Respondents and Intervenors stipulated in their Joint PRO that all Petitioners are "affected," as defined in Section 163.3184(1)(a), Florida Statutes.

4. Petitioners and Intervenors submitted oral or written comments on the Plan Amendments between the transmittal hearing and adoption of the Plan Amendments.

5. Petitioners contend that, as a result of the Plan Amendments, the Marion County Comprehensive Plan fails to discourage urban sprawl, as required by Rule 9J-5.006(3)(b)8.

6. Rule 9J-5.003(134) states:

"Urban sprawl" means urban development or uses which are located in predominantly rural areas, or rural areas interspersed with generally low-intensity or low-density urban uses, and which are characterized by one or more of the following conditions: (a) The premature or poorly planned conversion of rural land to other uses; (b) The creation of areas of urban development or uses which are not functionally related to land uses which predominate the adjacent area; or (c) The creation of areas of urban development or uses which fail to maximize the use of existing public facilities or the use of areas within which public services are currently provided. Urban sprawl is

typically manifested in one or more of the following land use or development patterns: Leapfrog or scattered development; ribbon or strip commercial or other development; or large expanses of predominantly low-intensity, low-density, or single-use development.

7. Whether a comprehensive plan or plan amendment fails to discourage urban sprawl is determined by Rule 9J-5.006(5), which includes a complicated method for evaluating 13 primary indicators of urban sprawl.

8. The first primary indicator is a plan or plan amendment that: "Promotes, allows or designates for development substantial areas of the jurisdiction to develop as low-intensity, low-density, or single-use development or uses in excess of demonstrated need."

9. The Plan Amendments are not "in excess of demonstrated need" when considered on a county-wide basis because Intervenors and the County entered into a binding Developer's Agreement not to develop 475 lots in the Ocala Ranchettes subdivision (leaving just five vested lots in the subdivision).³ However, the 523 maximum allowable residential units under the Plan Amendments exceed demonstrated need in the County's Planning District 14, where Golden Oaks is located.⁴

10. The second primary indicator is a plan or plan amendment that: "Promotes, allows or designates significant amounts of urban development to occur in rural areas at substantial distances from existing urban areas while leaping

over undeveloped lands which are available and suitable for development."

11. Golden Oaks is in an area that is in transition. It is approximately three miles east of I-75 and approximately three miles southwest of Belleview (approximately four road miles along CR 484). It is approximately a half-mile west of the western edge of the Urban Reserve area that extends southwest from Belleview. Much of the land surrounding Golden Oaks is rural in character. The Golden Oaks site has a flag-like shape. It is narrow where it fronts on the north side of CR 484 (the "flagpole") and widens at a distance to the north of CR 484 (the "flag"). Much frontage along CR 484 is now in commercial/business use (including frontage immediately east of the "flagpole" of the Golden Oaks site and south of the "flag" part of Golden Oaks) or designated for future commercial or mixed use (including the Goolsby mixed-use development and a rural activity center, which are on CR 484 approximately two miles east and west of Golden Oaks, respectively). Several tracts in the CR 484 corridor between I-75 and Belleview are developed with residential densities as high as or higher than the densities designated for Golden Oaks by the Plan Amendments. One of these is a sprawling, non-conforming, but vested subdivision approximately a half-mile east of Golden Oaks called Belleview Heights. CR 484 is being four-laned between I-75 and the City of Belleview. Additional sewer and water capacity is being placed

in the CR 484 corridor, which is transitioning into a more urban area. A new county library is being built along CR 484 approximately two miles east of Golden Oaks in the Goolsby mixed-use development.

12. The evidence was that there is some land closer to existing urban areas than Golden Oaks that is available and suitable for development, but it was not clear from the evidence how much. There also are areas of urban infill that could be developed or redeveloped, but it was not clear from the evidence how much is available or if any would be suitable for large-scale development.

13. The third primary indicator is a plan or plan amendment that: "Promotes, allows or designates urban development in radial, strip, isolated or ribbon patterns generally emanating from existing urban developments." The Plan Amendments are part of an emerging pattern of development in the CR 484 corridor.

14. The fourth primary indicator is a plan or plan amendment that: "As a result of premature or poorly planned conversion of rural land to other uses, fails adequately to protect and conserve natural resources, such as wetlands, floodplains, native vegetation, environmentally sensitive areas, natural groundwater aquifer recharge areas, lakes, rivers, shorelines, beaches, bays, estuarine systems, and other significant natural systems."

15. Much of Golden Oaks was part of the larger Belleview Forest that has been clear-cut.

16. There are at least two hydrated air-filled caves on the Golden Oaks site--the Belleview Formation Cave and the Loquat Cave. It has not been conclusively determined that there are no other similar caves on the site. The two known caves are worthy of preservation for scientific and other reasons. If preserved, they would have to be buffered from development by setbacks, and surface water would have to be managed to prevent contaminants from entering the caves, which likely are connected to the underlying aquifer. Care would have to be taken to strike a balance so that surface water management activities both protect water quality and do not lower the water table enough to dehydrate the caves. The evidence was that these objectives can be accomplished under the Marion County Comprehensive Plan, which requires springs protection.

17. The Ocala Ranchettes subdivision is in an environmentally sensitive area of wet prairie. The environmental benefits of the Developer's Agreement offset any environmental detriment from the Plan Amendments.

18. The fifth primary indicator is a plan or plan amendment that: "Fails adequately to protect adjacent agricultural areas and activities, including silviculture, and including active agricultural and silvicultural activities as well as passive

agricultural activities and dormant, unique and prime farmlands and soils."

19. With the 523-unit maximum, it should be possible to develop Golden Oaks and adequately protect adjacent agricultural areas (mainly, horse farms and pastures) through buffers and limited road access to CR 484 (versus access through the rural areas to the immediate west, north, and east).

20. One concern of Petitioners is the eventual conversion of more rural land to urban uses, which would be the subject of future land use decisions.

21. The sixth primary indicator is a plan or plan amendment that: "Fails to maximize use of existing public facilities and services." The seventh is the same but for future public facilities and services. The eighth primary indicator is similar--a plan or plan amendment that: "Allows for land use patterns or timing which disproportionately increase the cost in time, money and energy, of providing and maintaining facilities and services, including roads, potable water, sanitary sewer, stormwater management, law enforcement, education, health care, fire and emergency response, and general government."

22. Golden Oaks is several miles from most public facilities and services. However, closer public facilities and services are planned or being built (for example, the four-laning of CR 484, sewer force mains and lines, water lines, and schools). Because the Plan Amendments limit density at Golden

Oaks, they do not maximize the use of public facilities and services. Excess capacity is planned and being added for future development in the CR 484 corridor in addition to Golden Oaks.

23. The ninth primary indicator is a plan or plan amendment that: "Fails to provide a clear separation between rural and urban uses." Since the CR 484 corridor is in transition, urban uses are being introduced into what was a rural area. During the transition, there is not going to be a clear separation between rural and urban uses.

24. The tenth primary indicator is a plan or plan amendment that: "Discourages or inhibits infill development or the redevelopment of existing neighborhoods and communities." Because they allow development that is not infill or redevelopment, the Plan Amendments discourage or inhibit infill or redevelopment to a limited extent.

25. The eleventh primary indicator is a plan or plan amendment that: "Fails to encourage an attractive and functional mix of uses." The Plan Amendments themselves provide for residential use only. It was not proven that they will fail to encourage an attractive and functional mix of uses. Limiting access to Golden Oaks to CR 484 (versus access through the rural areas to the immediate west, north, and east) or through the existing commercial areas fronting CR 484 to the immediate south of Golden Oaks (east of the "flagpole" and south of the "flag"

part of the site) could help encourage an attractive and functional mix of uses.

26. The twelfth primary indicator is a plan or plan amendment that: "Results in poor accessibility among linked or related land uses." Golden Oaks is several miles from most existing linked or related land uses. As development proceeds in the emerging pattern along the CR 484 corridor, more linked or related land uses will be closer.

27. The thirteenth primary indicator is a plan or plan amendment that: "Results in the loss of significant amounts of functional open space." To the extent that the Plan Amendments result in a loss of functional open space, the loss is countered by the Developer's Agreement on the Ocala Ranchettes subdivision.

28. Considering the extent, amount and frequency of the indicators of urban sprawl, and the presence and potential effects of multiple indicators, it is fairly debatable whether the indicators of urban sprawl collectively reflect a failure of the Plan Amendments, and the Marion County Comprehensive Plan as a whole, to discourage urban sprawl. See Fla. Admin. Code R. 9J-5.006(5)(d) and (h).

CONCLUSIONS OF LAW

29. Petitioners and Intervenors are "affected" and have standing under Section 163.3184(1)(a), Florida Statutes.

30. The only timely compliance issues under Section 163.3184(1)(b), Florida Statutes, relate to alleged failure to discourage urban sprawl.

31. Under Section 163.3184(16)(f)1, Florida Statutes, the burden of proof in this case is governed by Section 163.3184(9)(a), Florida Statutes, which states: "In this proceeding, the local plan or plan amendment shall be determined to be in compliance if the local government's determination of compliance is fairly debatable."

32. The phrase "fairly debatable" is not defined in the Act or in Rule Chapter 9J-5. The Supreme Court of Florida has stated that the fairly debatable standard under Chapter 163, Florida Statutes, is the same as the common law "fairly debatable" standard applicable to decisions of local governments acting in a legislative capacity. In Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997), the Court stated that the fairly debatable standard is deferential and requires "approval of a planning action if reasonable persons could differ as to its propriety." Quoting from City of Miami Beach v. Lachman, 71 So. 2d 148, 152 (Fla. 1953), the Court stated further: "An ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity."

33. Petitioners did not prove beyond fair debate that the Plan Amendments fail to discourage urban sprawl so as not to be "in compliance."

RECOMMENDATION

Based upon 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 Plan Amendments are "in compliance."

DONE AND ENTERED this 19th day of November, 2009, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of November, 2009.

ENDNOTES

- 1/ All statutory references are to the 2009 Florida Statutes.
- 2/ All rule references are to the version of the Florida Administrative Code in effect on October 1, 2009.
- 3/ The PRO submitted by Mr. Babcock attempted to raise an issue of internal consistency of the Developer's Agreement with a new Marion County Comprehensive Code FLUE provision adopted at the

same time as the Plan Amendments that excludes Rural Lands as possible receiving areas for transfer of vested development rights. Because this compliance issue is not timely, it is excluded from consideration in this case. In addition, the date of the Developer's Agreement is not clear from the record, and there was no evidence that the validity of the Developer's Agreement has been challenged for inconsistency with the new FLUE provision.

4/ The PRO submitted by Mr. Babcock attempted to raise an issue of internal consistency with a Marion County Comprehensive Code FLUE provision on determination of need by planning district. Because this compliance issue is not timely, it is excluded from consideration in this case.

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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.