STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IZAAK WALTON INVESTORS, LLC, Petitioner, vs. TOWN OF YANKEETOWN and DEPARTMENT OF COMMUNITY AFFAIRS, Respondents.	)	Case Nos. 08-2451GM 08-2473GM

RECOMMENDED ORDER

On August 10-12, 2009, an administrative hearing was held in Inglis, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner Izaak Walton Investors, LLC:

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For Respondent Department of Community Affairs:

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For Respondent Town of Yankeetown:

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STATEMENT OF THE ISSUE

The issue in this case is whether Town of Yankeetown (Town) plan amendment 08-01 (adopted by Ordinance 2007-10) and plan amendment 08-CIE1 (adopted by Ordinance 2008-03), as modified by remedial amendment 09-R1 (adopted by Ordinance 2009-02) (together, referred to as the Plan Amendments or the Revised Comprehensive Plan), are "in compliance" as defined in Section 163.3184(1)(b), Florida Statutes (2009).[1]

PRELIMINARY STATEMENT

On February 28, 2008, the Town enacted Ordinance 08-03, adopting plan amendment 08-CIE1 (amending the Capital Improvements Element, Chapter 8 of the Comprehensive Plan). On March 10, 2008, the Town enacted Ordinance 2007-10, adopting plan amendment 08-01 (amending other elements of the Comprehensive Plan).

On April 28, 2008, the Department of Community Affairs (DCA or Department) issued a Notice of Intent to find plan amendment 08-CIE1 not "in compliance"; and on May 1, 2008, DCA issued a Notice of Intent to find plan amendment 08-01 not "in compliance."

The two notices of intent were referred to DOAH and consolidated. Izaak Walton Investors, LLC (IWI or Petitioner), was granted leave to intervene, and the case was placed in abeyance while the parties attempted to settle.

DCA and the Town entered into a Compliance Agreement which was filed with DOAH on January 27, 2009, and contained additional supporting data and analysis and an agreed remedial plan amendment.

On March 23, 2009, the Town enacted Ordinance 2009-02, adopting the remedial amendment 09-R1.

On April 27, 2009, DCA published a Cumulative Notice of Intent to find amendment 08-CIE1 and 08-01, as modified by remedial amendment 09-R1, "in compliance."

The Cumulative Notice of Intent was filed with DOAH on May 29, 2009, and the parties were realigned as reflected in the caption above. The case was scheduled for a final hearing in Yankeetown on July 6-7, 2009, and re-scheduled for a final hearing in Inglis on August 10-14, 2009. The parties filed a Prehearing Stipulation on August 5, 2009.

At the final hearing, the parties had Joint Exhibits 1-7 admitted in evidence.[2] Petitioner called four witnesses: James Sherwood, its managing member; Henry H. Fishkind, Ph.D., an expert in econometrics and urban and regional economics; Gail Easely, an expert in urban and regional planning; and Randall L. Armstrong, an expert in water quality, septic systems, stormwater, and dredge and fill. The Town called seven witnesses: K. Marlene Conaway, an expert in comprehensive planning; Norman E. Shannahan, a Town Council member; Rebecca Jetton, an expert in comprehensive planning and land

development regulations and their implementation; Chris Fineout, the Town's zoning official; Mark Hooks, an expert in onsite treatment and disposal systems and water quality; James Nicholas, Ph.D., an expert in urban and regional economics and planning and land and development economics; and Lawrence E. Feldhusen, a Town Council member. Petitioner recalled Gail Easely in rebuttal.

After presentation of evidence, Petitioner requested a Transcript of the final hearing, and agreed requests to extend the time for filing proposed recommended orders (PROs) until October 12, 2009, were granted. The Petitioner's PRO (which actually summarizes the testimony) and the Joint PRO filed by the Department and the Town have been fully considered.

FINDINGS OF FACT

1. The Town is located in the southwest corner of Levy County. The Town is bounded on the east by the Town of Inglis, on the north by unincorporated Levy County, on the west by the Gulf of Mexico, and on the south by the Withlacoochee River.

2. The Town has significant planning challenges due to its geographic location. The maximum elevation in the Town is 10 feet, and the entire Town is located in the 100-year floodplain and Coastal High Hazard Area (CHHA). The Town is located in a rural area north of the banks of the Withlacoochee River and is surrounded by wetlands and environmentally-sensitive land. The Town is located at the end of County Road 40, and is separated from the nearest intersection of major roads (State/County Road

40 and U.S. 19) by the Town of Inglis.

3. The Plan Amendments are a community-generated plan that incorporates the results of an extensive community visioning survey conducted by the Town and numerous public meetings that exceeded the public participation requirements for plan amendments contained in Florida Administrative Code Rule Chapter 9J-5[3] and Chapter 163, Florida Statutes. The Plan Amendments resulted in a Revised Comprehensive Plan for the Town.

4. IWI is a legal entity that owns land within the Town and submitted oral or written comments on the Plan Amendments during the period of time beginning with the transmittal hearing for the Plan Amendments and ending with the adoption of the Plan Amendments. IWI contends that the Plan Amendments are not "in compliance" for several reasons.

Population Projections and Need

5. In its pleadings, IWI contended that "[t]here is inadequate data regarding projected population growth and the infrastructure needed to support the projected population growth for both the short term (five years) and the long term (horizon of the plan)"; "[t]he Plan Amendment is not in compliance with [Section] 163.3177(6)(a) Florida Statutes, by failing to provide future land use categories that are based on need"; and "[t]he Plan Amendment is not in compliance with the requirements of 9J-5.006, Florida Administrative Code, demonstrating that future land use is based on need." Prehearing Stipulation § 2.H., U.,

and GG. However, its expert planning witness, Gail Easely, conceded that the data and analysis submitted by the Town was adequate to demonstrate that the residential land uses in the Revised Comprehensive Plan are based on need. IWI limited its contention on this point to the alleged inadequacy of the data and analysis to support the Revised Comprehensive Plan's new Light Industrial land use and revised commercial land use designations.

6. The Revised Comprehensive Plan designates the same areas for commercial as the currently effective Comprehensive Plan, with the exception of one parcel that was changed from commercial to Light Industrial.

7. The Revised Comprehensive Plan designates the commercial parcels near the Withlacoochee River as Commercial Water Dependent and the other commercial parcels as Commercial Neighborhood, totaling approximately 51 acres. Of the 51 acres of commercially-designated land, approximately 26 acres are currently developed and 25 acres are vacant and undeveloped. Of the 26 developed commercial acres, 19 parcels are currently developed and utilized as residential. There is no shortage of land available for commercial development in the Town.

8. Inglis, a town located adjacent and to the east of Yankeetown, and Levy County near Yankeetown provide "more than adequate" existing commercial buildings on the market to serve the residents of Yankeetown and surplus vacant commercially-

designated land to serve the future needs of Yankeetown. There is no shortage of commercial potential near the Town.

9. The evidence was that it is acceptable for a local government to plan for the future need for the availability of commercial and industrial lands by maintaining the existing proportionate of availability of land use categories. Alternatively, it is acceptable to plan to mimic the proportions found to exist in other communities. This is essentially how the Town planned its allocation of commercial and industrial lands in its Revised Comprehensive Plan.

10. IWI also contended that the intensity standards for commercial and industrial land uses in the Revised Comprehensive Plan unduly restrict commercial development.

11. The existing Comprehensive Plan did not have explicit intensity standards and criteria for commercial land uses. After extensive debate at numerous public hearings, the Revised Comprehensive Plan established a floor/area ration (FAR) of 0.07, which limits the size for each single structure to a maximum of 3,000 square feet. It also allows for multiple 3,000 square foot structures on larger parcels in a "campus style" development.

12. These standards and criteria reflect the existing, built environment of the Town and the Town's vision of itself. Existing commercial buildings run from 960 square feet to 3,600 square feet. Although the existing Comprehensive Plan did not have an FAR ratio, other standards--such as setbacks, square

footage required for on-site septic tanks, drainfields, and parking, a 50 percent open space ratio, and a building height restriction of 35 feet--restricted commercial development in a manner similar to the Revised Comprehensive Plan.

13. Petitioner's expert economist, Dr. Fishkind, testified that the restrictions on intensity of commercial land uses are not financially feasible because not enough revenue can be generated to make a profit, given the cost of land in Yankeetown. His testimony was refuted by his University of Florida colleague, Dr. James Nicholas, who was called as an expert economist for the Town. Dr. Nicholas pointed out that there was some commercial use in the Town and that economics would lower the cost of land in the Town if it is too expensive to allow the kind of commerce desired by the Town to make a reasonable profit. Businesses requiring more space to make sufficient revenue could locate outside the Town but close enough in Inglis or Levy County to serve Yankeetown as well.

14. The character of the Town, its limited projected population growth, and the availability of commercial development nearby in Inglis and in Levy County all support the Town's decision to limit the intensity of commercial land use, and to maintain the existing amount of land available for commercial and light industrial uses.

15. Rules 9J-5.006(1)(a)(3) and 9J-5.006 (4)(a)(3) require the designation of some industrial lands, and the Revised

Comprehensive Plan changes the designation of six acres of land located to the west of the intersection of County Roads 40 and 40-A from "Commercial" to "Light Industrial." Since industrial uses are generally not compatible with residential uses, the Light Industrial parcel is separated from residential parcels by commercial. The Light Industrial parcel is allocated for more intense commercial uses (such as fishing trap and boat storage) or reserved for economic development of light industrial uses that may wish to locate in Yankeetown, such as aquaculture.

16. The existing ratio of residential to commercial land is adequate to supply the existing need as reflected by the existing surplus, vacant, and unused commercial lands. The Plan Amendments maintain residential lands and commercial lands in their general designations with refinements to the categories. The existing ratio and availability of vacant commercial land indicate that there is no deficit in any category, and maintaining the existing residential/commercial ratio preserves the existing character of the Town.

Urban Service Area versus Urban Service Boundary

17. IWI contends that "[t]he Plan Amendment is not in compliance with [Section] 163.3177(14), Florida Statutes, by failing to ensure that the urban service boundary was appropriately adopted and based on demonstrated need." This contention has no merit.

18. Section 163.3177(14), Florida Statutes, encourages a

local government to adopt an "urban service boundary." If one is adopted, there must be a demonstration "that the amount of land within the urban service boundary does not exceed the amount of land needed to accommodate the projected population growth at densities consistent with the adopted comprehensive plan within the 10-year planning timeframe." If a local government chooses to adopt an "urban service boundary" under Section 163.3177(14) and a community vision under Section 163.3177(13), Florida Statutes, it may adopt plan amendments within the urban service boundary without state or regional agency review. See § 163.3184(17), Fla. Stat.

19. The Revised Comprehensive Plan does not use the term "urban service boundary," and the Town did not intend to adopt one under Section 163.3177(14), Florida Statutes, nor did it seek to avoid state and regional agency review of plan amendments under Section 163.3184(17), Florida Statutes. Instead, as explained on page 6 of the Revised Comprehensive Plan, it uses the term "urban area" to designate an area allowed to receive development rights from the sending area, namely the Residential Environmentally Sensitive (formerly Conservation) land use district.

20. The Revised Comprehensive Plan uses the term urban service "area" (rather than "boundary") as the area located generally between County Roads 40 and 40-A that can receive development rights transferred from the Residential

Environmentally Sensitive land use district. This area is depicted as "Urban Service Area Overlay Zones" Map 2008-02 of the Future Land Use Map (FLUM) series to more clearly designate the area on a larger scale than the FLUM map of the entire Town (Map 2008-05). The existing FLUM series also used the term "urban area" to depict the transfer of development rights receiving area.

Financial Feasibility and Capital Improvements

21. IWI's expert, Dr. Henry Fishkind, testified that he ran his Fiscal Impact Analysis Model for the Town and concluded that the Revised Comprehensive Plan is not financially feasible because the Town cannot generate sufficient operating revenue to cover its operating costs without increasing property tax rates. Dr. Fishkind was not asked to explain how his computer model works, give any specific modeling results, or explain how he reached his conclusion.

22. The Town's expert, Dr. James Nicholas, refuted his University of Florida colleague's testimony on this point as well. Essentially, Dr. Nicholas testified that a small and unique community like Yankeetown can choose to limit its operating costs by relying on volunteers and part-time employees. In this way, it can operate on a bare-bones budget that would starve a more typical and larger community. It also could choose to increase property tax rates, if necessary.

23. Recent amendments to Chapter 163, Florida Statutes, in

Senate Bill 360, the "Community Renewal Act," which became effective June 1, 2009, postponed and extended until December 1, 2011, the statutory requirement to maintain the financial feasibility of the five-year capital improvements schedule (CIS) for potable water, wastewater, drainage, parks, solid waste, public schools, and water supply. However, the Town concurred with Petitioner in requesting findings of fact and conclusions of law on this issue in case Senate Bill 360 is struck down in a pending constitutional challenge.

24. The Plan Amendments include a CIE (Chapter 8) with a five-year CIS and a table to identify sources of revenue and capital projects sufficient to achieve and maintain the adopted levels of service, supported by data and analysis submitted with the Remedial Amendments.

25. The Town's CIS five-year lists projects to achieve and maintain the adopted level of service (LOS) standards and identifies funding sources to pay for those projects. It describes the projects and conservatively projects costs and revenue sources. The CIS identifies revenue sources and capital projects for which there are committed funds in the first three years and identifies capital projects for which funds have not yet been committed in year four or year five. CIS is adequate to achieve and maintain the adopted level of service and is financially feasible.

Stormwater and Drainage

26. A drainage LOS is adopted in Revised Comprehensive Plan Policy 4.1.2.1, which states: "All new development and expansion of existing residential development greater than 300 square feet of additional impervious coverage shall meet requirements under Chapter 62-25, F.A.C. for Outstanding Florida Waters." The exemption of minor residential improvements of 300 square feet or less is reasonable and does not violate Rule Chapter 9J-5 or Chapter 163, Florida Statutes.

27. The Department's ability to require retrofitting for existing drainage problems is limited by Rule Chapter 9J-5.011(2)(c)5.b.i., which states that the Rule "shall not be interpreted or applied to [m]andate that local governments require existing facilities to be retrofitted to meet stormwater discharge water quality standards or stormwater management level of service standards." Nonetheless, the Town agreed in the Compliance Agreement to adopt appropriate policies and provide additional data and analysis on this issue.

28. Policy 4.1.2.13 requires that the "Established Storm Water Drainage Committee shall monitor storm water facilities in [the] town, oversee maintenance functions, and evaluate and recommend capital improvements projects and funding sources." To pay for stormwater capital improvement projects, Policy 4.1.2.14 in the Plan Amendments states: "Yankeetown shall adopt a storm water utility fee ordinance and establish storm water utility fees by December 31, 2009 to provide necessary funding for

capital improvements to the Town's storm water drainage facilities and maintenance of storm water drainage facilities."

29. In accordance with the Compliance Agreement, the Town modified CIS Table 1 by adding $120,000 to FY 2011-2012 (Year 5) for the stormwater drainage improvement project and adding Note 5 to Table 1, which states: "Anticipated to be funded by a 75%/25% matching grant from SWFWMD, DEP or DCA. The matching (town) funds will be obtained from the proposed stormwater improvement fund. If no grants can be obtained and the stormwater improvement fund is not approved[,] the project will be funded from the general fund reserves and long term loans." Because the stormwater utility fee ordinance must still be adopted, and these funds are not technically committed at the time of adoption of the Plan Amendments, the stormwater capital improvement project was placed in year 5 (2011-1012) of the CIS. As funding becomes available and committed, the project may be moved to an earlier year in required annual updates to the CIS.

30. Drainage also is addressed in new Objective 4.3.2 and in new Policies 4.3.2.1. through 4.3.2.5. The Town has addressed stormwater and drainage appropriately in the Revised Comprehensive Plan.

Proportionate Share and Concurrency Management

31. Policy 4.1.2.6 in the Public Facilities Element states: "The Town shall consider, and adopt as appropriate, a means to ensure that new development shares proportionate responsibilities

in the provision of facilities and services to meet the needs of that development and maintain adopted level of service standards." Policy 8.1.3.4 in the CIE of the Revised Comprehensive Plan states:

> The Town shall consider, and adopt as appropriate, a means to ensure that new development shares a proportionate cost on a pro rata basis in the provision of facilities and services necessitated by that development in order to maintain the Town's adopted level of service standards. Proportionate costs shall be based upon, but not limited to:
>
> 1. Cost for extension of water mains, including connection fees.
>
> 2. Costs for all circulation and right-of-way related improvements to accommodate the development for local roads not maintained by Levy County. Costs to maintain County Road 40 and 40[-]A and any other road within the town that are maintained by Levy County shall be governed by the Levy County Proportionate Share Ordinance and Yankeetown will continue to adopt and ensure the level of service is maintained [through] coordination mechanisms between the two planning departments.
>
> 3. Costs for drainage improvements.
>
> 4. Costs for recreational facilities, open space provision, fire protection, police services, and stormwater management.

32. Although the Town does not have any public facility deficiencies, Rule Chapter 9J-5 requires that the CIE address "[t]he extent to which future development will bear a

proportionate cost of facility improvements necessitated by the development in order to adequately maintain adopted level of service standards"; and include a policy that addresses programs and activities for "[a]ssessing new developments a pro rata share of the costs necessary to finance public facility improvements necessitated by development in order to adequately maintain adopted level of service standards . . . ." Fla. Admin. Code R. 9J-5.016(3)(b)4. and (c)8. Policy 8.1.3.4 meets this requirement.

33. The statute forming the basis of IWI's contentions regarding proportionate fair share is Section 163.3180(16)(a), Florida Statutes, which requires local governments "to adopt by ordinance a methodology for assessing proportionate fair-share mitigation options." The evidence was that the requirements of this statute will be met by the Town's Proportionate Fair Share Concurrency Management Ordinance, which had been drafted and scheduled for adoption hearings at the time of the final hearing, and which will implement Policy 8.1.3.4.

34. IWI did not present any evidence regarding the alleged lack of a concurrency management system in the Revised Comprehensive Plan and did not prove that the Revised Comprehensive Plan fails to meet the requirements of Rule 9J-5.055 for concurrency management.

35. The Town is exempt from maintaining school concurrency requirements. Objective 8.1.3 and Policies 8.1.3.1 through

8.1.3.6 of the Revised Comprehensive Plan meet the requirements of Rule 9J-5.055 for concurrency management.

36. Policy 8.1.3.6 states: "The Town shall evaluate public facility demands by new development or redevelopment on a project by project basis to assure that capital facilities are provided concurrent with development."

37. Policy 8.1.3.3 states: "The Yankeetown Land Development Code shall contain provisions to ensure that development orders are not issued for development activities which degrade the level of service below the adopted standard as identified in each comprehensive plan element. Such provisions may allow for provision of facilities and services in phases, so long as such facilities and services are provided concurrent with the impacts of development."

38. The Town has a checklist system to track the specific impact of each development order on LOS concurrent with development. As indicated, a Proportionate Fair Share and Concurrency Management Ordinance had been drafted and scheduled for adoption hearings.

Wastewater Treatment and Water Quality

39. The Town is located entirely within the 100-year floodplain and coastal high hazard area. See Finding 2, supra. This presents challenges for wastewater treatment. The adoption of the Revised Comprehensive Plan followed public meetings and workshops held with representatives of DCA, including

Richard Deadman, and expert Mark Hooks, formerly with the State of Florida Department of Health and Rehabilitative Services and now with the State of Florida Department of Health.

40. The Plan Amendments include Policy 8.1.3.1.1, which states in part:

> Due to the location of the town within the 100 year flood plain and within the Coastal High Hazard Area (CHHA), there are no plans to provide central wastewater treatment until a regional system can be developed in conjunction with the neighboring town of Inglis and Levy County, and constructed outside the Coastal High Hazard Area east of U.S. Highway 19. In the interim period before a regional central wastewater system is available, the Town shall require in all land use districts: a. Yankeetown shall develop a strategy to participate in water quality monitoring of the Withlacoochee River; b. develop an educational program to encourage inspection (and pump-out if needed) of existing septic tanks; c. all new and replacement septic tanks shall meet performance based standards (10mg/l nitrogen).

41. The Town's approach to wastewater treatment under the circumstances is sound both economically and from planning perspective and is sufficient to protect natural and coastal resources, including water quality, and meet the minimum requirements of Rule Chapter 9J-5 and Chapter 163, Florida Statutes.

42. There is direction in the State Comprehensive Plan to: "Avoid the expenditure of state funds that subsidize development in high-hazard coastal areas." § 187.201(8)(b)3., Fla. Stat. This direction is also found in Chapter 163.3178(1), Florida

Statutes, and in Rule 9J-5.012(3)(b)5., which require local governments to limit public expenditures that would subsidize development in the CHHA. It also is impractical for the Town, with a population of 760 people, to fund and operate a central wastewater system. It is logical and economical to do this in partnership with the adjoining Town of Inglis and Levy County, which could share in the costs and provide a site for a regional wastewater facility located nearby but outside of the CHHA. In contrast, this approach was not a viable option for the entirety of the Florida Keys.

43. The Town already has begun water quality testing under Policy 8.1.3.1.1.a. The Town will be required to prepare educational programs to encourage inspection of existing septic tanks (and pump-out, if needed) under Policy 8.1.3.1.1.b. and under new Policy 4.3.1.2. In the short-term, while the Town pursues a regional treatment facility located outside the CHHA, Policy 8.1.3.1.c. in the Revised Comprehensive Plan will be implemented by new Policy 4.1.2.1.IV.B., which states:

> Yankeetown shall require that all new or replacement sanitary sewage systems in all land use districts meet the following requirements:
>
> > a) All new or replacement sanitary sewage systems shall be designed and constructed to minimize or eliminate infiltration of floodwaters into the system and discharge from the system into floodwaters. Joints between sewer drain components shall be sealed with caulking, plastic or rubber

> gaskets. Backflow preventers are required.
>
> b) All new or replacement sanitary sewage systems shall be located and constructed to minimize or eliminate damage to them and contamination from them during flooding.
>
> c) The DCA has objected and recommended, and Yankeetown has concurred that all new and replacement septic systems are to be performance-based certified to provide secondary treatment equivalent to 10 milligrams per liter maximum Nitrogen.

44. Performance-based treatment systems that are accepted as achieving the 10 mg/l nitrogen standard have already been tested by the National Sanitation Foundation and approved by the State of Florida Department of Health. Performance-based systems achieving the 10 mg/l nitrogen standard have been certified and approved for use in Florida and are now available on the market "in the $7,200 range" for a typical two- or three-bedroom home, and there are systems that would meet the 10mg/l nitrogen standard for commercial and multi-family buildings.

45. Compliance with the performance-based 10 mg/l nitrogen standard is measured at the treatment system, not in the receiving water, and additional nutrient removal and treatment occurs in the drainfield soils.

46. Performance-based treatment systems also require an operating permit and routine inspection and maintenance, unlike conventional septic tanks.

47. The United States Environmental Protection Agency stated in its 1997 report to Congress: "Adequately managed decentralized wastewater systems are a cost-effective and long-term option for meeting public health and water quality goals."

48. The existing Comprehensive Plan addresses wastewater in Chapter 4, Policy 13-2, which states: "Prohibit the construction of new publicly funded facilities or facilities offered for maintenance in the coastal high hazard area (including roads, water, sewer, or other infrastructure)." It also is addressed in the existing Comprehensive Plan in: Chapter 1, Policies 3-1 and 3-2 (Vol. II p. 11); and Chapter 4, Policies 1-2-1 and 1-2-7 (Vol. II, pp. 32, 34). A more in-depth analysis of the Town's previous approach to wastewater treatment is found in Volume III, Infrastructure Element, pp. 107-109 ("Facility Capacity Analysis, Sanitary Sewer"), which expresses similar long-term and interim approaches to wastewater treatment. The Revised Comprehensive Plan removes confusing and out-of-date references to "class I or other DOH-approved aerobic systems" used in the existing Comprehensive Plan.

49. The Plan Amendments contemplate that the Town will pursue a long-term solution of a regional wastewater facility with the Town of Inglis and Levy County to be located outside the CHHA. The Revised Comprehensive Plan is adequate to protect the natural resources in Yankeetown and includes a short-term requirement that all new and replacement septic tanks meet the

10 mg/l nitrogen standard measured at the performance-based treatment system, together with a long-term requirement that the Town pursue a regional wastewater treatment plant to be located outside the CHHA.

50. The Plan Amendments include: Objective 4.1.3; Policies 4.1.3.1 through 4.1.3.3 and 4.1.2.8 through 4.1.2.11; Policy 5.1.4.4; Policy 7.1.22.6; Policy 8.1.3.1; Policy 10.1.2.1; and Policy 10.1.2.3. These provisions move the Town in the direction of a regional central wastewater treatment located outside the CHHA and establish appropriate interim standards.

51. Petitioner contended that the Town has allocated money for a new park when it needed a new central wastewater treatment facility. But the evidence was that the money for the new park came from a grant and could not be used for a new central wastewater treatment facility.

Protection of Natural Resources and Internal Consistency

52. The Future Land Use Element (FLUE) and the FLUM in the Revised Comprehensive Plan contain "Resource Protection" and "Residential Environmentally Sensitive" land use designations. In the existing Comprehensive Plan, these lands are designated Public Use Resource Protection and Conservation, respectively.

53. The Plan Amendments reduce density in the Residential Environmentally Sensitive land use district, which contains a number of islands, to a maximum gross density of one dwelling unit per ten gross acres and maximum net density of one dwelling

unit per five acres of uplands. Policy 1.1.2.1 in the Plan Amendments would allow development rights to be transferred from the Residential Environmentally Sensitive land to the development rights area receiving zone located between County Roads 40 and 40-A, as shown in Map 2008-02.

54. The current Conservation designation for those lands sets a "maximum density of 1 unit per 5 acres"; and Policy 1-2 in the existing Comprehensive Plan allows the transfer of development rights within the Conservation district "as long as gross density does not exceed 1 dwelling unit per 5 acres."

55. Under Policy 1-2 of the existing Comprehensive Plan, a minimum of "two (2) acres of uplands" is required for a development in the Conservation land use district. Likewise, under Policy 1.1.2.1.2 of the Plan Amendments, a minimum of "two (2) contiguous natural pre-development upland acres" is required in the Residential Environmentally Sensitive land use district.

56. Although allowed, few if any transfers of development rights actually occurred under the existing Comprehensive Plan. To provide additional incentive to transfer development out of the "Residential Environmentally Sensitive" land use district and into the urban receiving area, Policy 1.1.2.7.F. of the Plan Amendments would allow the land owner to retain private ownership and passive recreational use on the "sending" parcel, including one boat dock. All other development rights on the sending parcel would be extinguished.

57. Besides facilitating the transfer of development rights, it is expected that use of boat docks on the islands will decrease environmental damage from boats now grounding to obtain access to the islands.

58. Although the policies for Environmentally Sensitive Residential and Conservation Lands are slightly different, the minor differences do not fail to protect natural or coastal resources or fail to meet the minimum criteria set forth in Rule Chapter 9J-5 and Chapter 163, Florida Statutes.

59. Numerous policies in the Plan Amendments establish standards and criteria to protect natural and coastal resources, including: Policy 1.1.2.1.7(i), restricting dredging; Policies 1.1.1.2.10, 5.1.5.7, and 5.1.6.10, restricting the filling of wetlands; Policy 5.1.6.7, establishing wetlands setback buffers; Policy 5.1.6.4, establishing nutrient buffers; Policy 5.1.5.1, limiting dredge and fill; Policies 1.1.3.4 and 5.1.5.5, establishing standards and criteria for docks and walkways; Policy 5.1.16.1, protecting certain native habitats as open space; Policy 1.1.1.3, establishing low-impact development practices for enhanced water quality protection; and Policy 5.1.5.1, protecting listed species, including manatees. These provisions are more protective than the provisions of the existing Comprehensive and are supported by data and analysis.

60. The Plan Amendments acknowledge and protect private property rights and include Objective 1.1.11 (Determination and

Protection of Property Rights), providing for vested rights and beneficial use determinations to address unintended or unforeseen consequences of the application of the Plan Amendments in cases where setbacks cannot be achieved for specific development proposals due to lot size or configuration. FLUE Policy 1.1.1.2.8 and Conservation and Coastal Management Element Policy 5.1.6.4 in the Plan Amendments sets out procedures, standards, and criteria (including mitigation) for variances from the 150-foot Nutrient Buffer Setback.

61. Taken as a whole, the Plan Amendments protect natural and coastal resources within the Town.

Internal Consistency

Docks, Open Space, and Dredge and Fill

62. IWI contends that the Plan Amendments are internally inconsistent because policies addressing docks, open space, and dredging requirements use different language and with different meanings in different contexts.

63. Policies in the Revised Comprehensive Plan establish 100 percent open space requirements for certain natural habitats, namely: (a) submerged aquatic vegetation; (b) undisturbed salt marsh wetlands; (c) salt flats and salt ponds; (d) fresh water wetlands; (e) fresh water ponds; and (f) maritime coastal hammock. Pile-supported, non-habitable structures such as boat docks and walkways are allowed if sited on other portions of a site. (Conservation and Coastal Management Element Policies

5.1.5.7, 5.1.6.7, 5.1.6.10, and 5.1.16.1).

64. Other policies limit dredging to maintenance dredging. Policy 5.1.5.1 states that the Town will:

> Prohibit all new dredge and fill activities, including construction of new canals, along the river and coastal areas. Maintenance dredging of existing canals, previously dredged channels, existing previously dredged marinas, and commercial and public boat launch ramps shall be allowed to depths previously dredged only when the applicant demonstrates that dredging activity will not contribute to water pollution or saltwater intrusion of the potable water supply. Applicant must also demonstrate that development activities shall not negatively impact water quality or manatee habitat. Maintenance dredging is prohibited within areas vegetated with established submerged grass beds except for maintenance dredging in public navigation channels.

This prohibition does not preclude the minor dredging necessary to construct "pile supported structures such as docks and walkways that do not exceed 4’ in width and constructed in accordance with OFW and Aquatic Preserve regulations," which are specifically exempted and allowed by Policy 5.1.5.7 of the Plan Amendments. Additional dredging and filling activities (beyond installation of pile supports) would not be required for docks sited where adequate water depth exists. Docks and walkways allowed under Policy 5.1.5.7 are not counted as open space.

65. The policies concerning docks and walkways can be reconciled and do not render the Plan Amendments internally inconsistent.

Low-Impact Development Policies

66. IWI also contends that policies in the Plan Amendments requiring and encouraging low-impact development (LID) practices (which are not required or mandated under minimum requirements of Rule Chapter 9J-5 F.A.C. and Chapter 163, Florida Statutes, but adopted for additional water quality protection) are internally inconsistent.

67. The Plan Amendments require LID practices for some new uses (new subdivisions, planned unit developments, and commercial development) and encourage them for existing uses. The Plan Amendments require or encourage these practices in different land use districts, which address different commercial or residential uses, and also discuss these practices in different elements of the Revised Comprehensive Plan, which addresses different purposes and concerns, including the FLUE (Chapter 1), the Public Infrastructure Element (Chapter 4), and the Coastal Management Element (Chapter 5).

68. FLUE Policy 1.1.1.3 states that:

> In addition to complying with Outstanding Florida Water (OFW) standards, all new subdivisions, planned unit developments, and commercial development in all land use districts shall utilize "low impact" development practices appropriate for such use including:
>
> (a) Landscaped biofiltration swales;
> (b) Use native plants adapted to soil, water and rainfall conditions;
> (c) Minimize use of fertilizers and pesticides;
> (d) Grease traps for restaurants;
> (e) Recycle storm water by using pond water for irrigation of landscaping;

(f) Dry wells to capture runoff from roofs;
(g) Porous pavements;
(h) Maintain ponds to avoid exotic species invasions;
(i) Aerate tree root systems (for example, WANE systems);
(j) Vegetate onsite floodplain areas with native and/or Florida-friendly plants to provide habitat and wildlife corridors;
(k) Rain barrels and green roofs where feasible; and
(l) Use connected Best Management Practices (BMPs) (treatment trains flowing from one BMP into the next BMP) to increase nutrient removal.

Existing development shall be encouraged, but not required to use the above recommendations and shall not be considered nonconforming if they do not.

69. In the Residential Low Density land use district, FLUE Policy 1.1.2.2.5 states: "All (a) new planned unit residential developments or (b) new platted subdivisions of 2 or more units (construction of 1 single family dwelling unit or duplex is exempt) shall utilize 'low impact' development practices for storm water management. Individual dwelling units and duplexes are encouraged to utilize those 'low impact' development practices that may be required or recommended in the Land Development Regulations."

70. In the Residential Highest Density land use district, FLUE Policy 1.1.2.3.3 states: "Existing platted parcels are encouraged to utilize site suitable storm water management such as connecting to swales where available. All (a) new planned unit residential developments or (b) new platted subdivisions of 2 or more units (construction of 1 single family dwelling unit or

duplex is exempt) shall utilize 'low impact' development practices for storm water management. Individual dwelling units and duplexes are encouraged to utilize those 'low impact' practices that may be required or recommended in the Land Development Regulations."

71. In the Resource Protection and Public Use land use districts, FLUE Policies 1.1.2.5 and 1.1.2.6. require LID practices for all development.

72. In the Neighborhood Commercial land use district, FLUE Policy 1.1.2.7.6 requires LID practices for "all development."

73. In the Commercial Water-Dependent land use districts, FLUE Policy 1.1.2.8.9 requires LID practices for "all new commercial development."

74. In the Light Industrial land use district, FLUE Policy 1.1.2.9.2 requires LID practices for "all development."

75. These policies can be reconciled. The use of slightly different language in a particular district, or creation of an exemption for existing uses, does not render the policies internally inconsistent.

76. Policy 4.2.2.2 of the Public Infrastructure Element (Chapter 4) of the Plan Amendments requires the adoption of land development regulations (LDRs) establishing minimum design and construction standards for new subdivisions, planned unit developments, and commercial development that will ensure that post development runoff rates do not exceed predevelopment runoff

rates and encourage the same LID practices set out in FLUE Policy 1.1.1.3.

77. IWI also contends that the inclusion of the phrase "as appropriate for such use" in the LID policies is internally inconsistent. To the contrary, it acknowledges that some of the listed practices may not be appropriate for a proposed specific use. For example, subsection (d) on "grease traps for restaurants" would not be appropriate if no restaurant is proposed.

78. Under Section 163.3202, Florida Statutes, the Town has a year to adopt implementing LDRs providing further details, standards, and criteria for low-impact development BMPs for specific uses and within specific districts. The use of the phrase "as appropriate for such use" in the low-impact development policies allows for the exercise of engineering discretion in formulating LDRs. It does not render the policies internally inconsistent.

Setbacks and Variances

79. IWI also contends that the Plan Amendments are internally inconsistent because buffers contain different setback distances and allow for a variance to the setback buffers.

80. The policies addressing setbacks can be read together and reconciled. The Plan Amendments include two types of setback buffers adopted for different purposes: (1) for structures, a 50-foot setback from the river and wetlands in Policies 1.1.1.2.7

and 5.1.6.7; (2) for sources of nutrient pollution other than septic systems (such as fertilized and landscaped areas and livestock sources), a 150-foot nutrient buffer setback from the river in Policies 1.1.1.2.8 and 5.1.6.4; and (3) for septic systems, special setbacks in Policy 1.1.1.2.11 (which is referred to in the nutrient buffer setback policies). These different setback policies were adopted for different purposes and are not internally inconsistent. Data and analysis supporting the establishment of these different setbacks further explains the different purposes of the different types of setbacks adopted in the Revised Comprehensive Plan.

81. The availability of variances to the 150-foot nutrient buffer setback allows some use on a parcel to ensure protection of private property rights in the event of an unforeseen taking of all use on a specific parcel where an applicant cannot meet the setback but can meet the listed criteria for a variance and provide the mitigation required for impacts. Protection of private property rights is a competing concern that must be addressed under Chapter 163, Florida Statutes, and Rule Chapter 9J-5.

82. The Plan Amendments need not address every possible or potential set of facts and circumstances. Additional detail can be provided in implementing LDRs adopted under Section 163.3202, Florida Statutes. Specific implementation and interpretation of policies and LDRs applicable to any particular development

proposal will be made by the Town during application review process. Seemingly inconsistent policies can be reconciled by applying the most stringent policy. Seemingly inconsistent policies also could be reconciled by application of a specific exemption, variance, or beneficial use determination.

83. Site-specific application and interpretation of policies and LDRs in development orders, and issues as to their consistency with the goals, objectives, and policies of the Revised Comprehensive Plan, can be addressed under Section 163.3215, Florida Statutes.

Small Local Governments

84. IWI contends that the Town was not held to the same data and analysis standards under Section 163.3177(10)(i), Florida Statutes, as larger local governments.

85. Under that statute and Rule 9J-5.002(2), the Department can consider the small size of the Town, as well as other factors, in determining the "detail of data, analyses, and the content of the goals, objectives, policies, and other graphic or textual standards required . . . ."

86. Prior to adoption of the remedial amendments, the Town was unable to utilize GIS mapping. However, for the remedial amendments, GIS mapping was provided with the assistance of the Regional Planning Council.

87. IWI did not prove beyond fair debate that the Town's data and analyses were insufficient under Chapter 163, Florida

Statutes, and Rule Chapter 9J-5.

State and Regional Plans

88. IWI also contends, for essentially the same reasons addressed previously, that the Plan Amendments are inconsistent with State Comprehensive Plan provisions on water resources, natural systems, and public facilities and Withlacoochee Strategic Regional Policy Plan provisions on natural resources, fisheries, and water quality.

89. A plan is consistent with the State Comprehensive Plan and regional policy plan if, considered as a whole, it is "compatible with" and "furthers" those plans. "Compatible with" means "not in conflict with" and "furthers" means "to take action in the direction of realizing goals or policies of the state or regional plan." § 163.3177(10)(a), Fla. Stat.

90. Using those definitions, IWI failed to prove beyond fair debate that the Revised Comprehensive Plan, as a whole, is inconsistent with the State Comprehensive Plan or the Withlacoochee Strategic Regional Policy Plan.

CONCLUSIONS OF LAW

91. IWI owns land within the boundaries of the Town and submitted oral or written comments, recommendations, or objections during the period of time beginning with the transmittal hearing for the Plan Amendments and ending with the adoption of the Plan Amendments. IWI is an affected person with standing to challenge the Plan Amendments under Section

163.3184(1)(a), Florida Statutes.

92. Most administrative proceedings initiated after preliminary agency review and notice of the agency's intent to take final action are de novo proceedings under Sections 120.569 and 120.57(1), Florida Statutes, designed to "formulate final agency action, not to review action taken earlier and preliminarily." McDonald v Florida Department of Banking and Finance, 346 So. 2d 81 (Fla. 1st DCA 1977). However, the Legislature has chosen to treat administrative review of comprehensive plans and plan amendments cases differently. In proceedings under Section 163.3184(9)(a), Florida Statutes, a different standard of review is established: "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."

93. 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."

94. Under Section 163.3184(1)(b), Florida Statutes: "'In compliance' means consistent with the requirements of 163.3177, 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."

95. IWI failed to prove beyond fair debate that the Plan Amendments are not "in compliance."

96. Petitioner contends that Section 163.3177(3)(a), Florida Statutes, required the Town to correct previously identified deficiencies in its water quality treatment facilities by planning and building within its boundaries its own new central wastewater treatment facility (and modifying its vision for the Town as necessary in order to pay for the new facility.) Actually, the statute requires a component in the CIE that "outlines principles for correcting existing public facility deficiencies, which are necessary to implement the comprehensive plan." The Revised Comprehensive Plan meets that requirement.

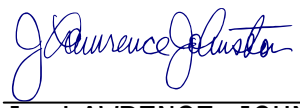
97. In arguing that the Town is compelled by statute and rule to plan for and construct its own new central wastewater treatment facility within its boundaries, Petitioner points out that, strictly speaking, Sections 163.3177(6)(g)1.g. and 163.3178, Florida Statutes, and Rule 9J-5.012(3)(b)5 and 6 do not prohibit the construction of public infrastructure in the CHHA; rather, they discourage public investment in infrastructure designed to serve increased population concentrations in the CHHA. However, it is logical that public infrastructure constructed in the CHHA would serve increased population concentrations primarily in the CHHA. In addition, it is logical to avoid investment of public infrastructure that would be vulnerable to destruction or damage from coastal storms.

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 finding the Plan Amendments to be "in compliance."

DONE AND ENTERED this 30th day of October, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of October, 2009.

ENDNOTES

1/ Unless otherwise noted, all statutory references are to the 2009 version of the Florida Statutes.

2/ The Joint Exhibits were: 1. the Town's existing Comprehensive Plan with data and analysis; 2. the Plan Amendments and Remedial Amendment, with data and analysis; 3. Bureau of Economic and Business Research population estimate tables; 4. Visioning Survey dated February 14, 2007, and Results dated March 5, 2007; 5. Evaluation and Appraisal Report Survey Compilation Spread Sheet; 6. School Concurrency Exemption Letter dated May 24, 2007; and 7. Insurance Services Office Fire Classification Survey(s) and Results prior to March 2008.

3/ All rule references are to the version of the Florida Administrative Code in effect at the time of the final hearing.

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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.