

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BELLE MER OWNERS ASSOCIATION,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 08-4753GM
)
SANTA ROSA COUNTY and)
DEPARTMENT OF COMMUNITY)
AFFAIRS,)
)
Respondents,)
)
and)
)
PAUL A. KAVANAUGH and BHR)
PELICAN PALACE, LLC,)
)
Intervenors.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the final hearing in the above-styled case was held on January 28, 2009, in Milton, Florida, before Charles A. Stampelos, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner Belle Mer Owners Association, Inc.:

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For Respondent Santa Rosa County:

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For Respondent Department of Community Affairs:

Kelly A. Martinson, Esquire
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Department of Community Affairs
2555 Shumard Oak Boulevard
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For Intervenors Paul A. Kavanaugh and BHR Pelican Palace,
LLC:

David L. McGee, Esquire
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501 Commendencia Street
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STATEMENT OF ISSUES

The issues in this proceeding are whether Santa Rosa County Comprehensive Plan Amendment 2007-R-047 adopted by Ordinance No. 2008-16, section 2, attachment A, on May 22, 2008 (Plan Amendment), is "in compliance," as that term is defined by Section 163.3184(1)(b), Florida Statutes, and, more specifically, whether the Plan Amendment is "internally consistent" with Objectives 7.1.B and 7.1.F and Policy 7.1.F.8 of the Santa Rosa County Comprehensive Plan (Plan) and supported by adequate data and analyses.¹

PRELIMINARY STATEMENT

On May 22, 2008, Santa Rosa County (County) adopted Ordinance No. 2008-16, which adopted several amendments to the Future Land Use Map (FLUM) of the Plan. The Plan Amendment is the only amendment relevant to this proceeding.

The Plan Amendment changes the future land use designation of a 1.89-acre parcel (Property) from Navarre Beach Low Density Residential (NBLDR) to Navarre Beach High Density Residential (NBHDR).

The Department of Community Affairs (Department) reviewed the Plan Amendment and caused to be published on August 27, 2008, a Notice of Intent (NOI) to find the Plan Amendment "in compliance."

On or by September 12, 2008, Petitioner filed a Petition for an Administrative Hearing (Petition) with the Department regarding this NOI. The Department forwarded the Petition to the Division of Administrative Hearings (DOAH).

A Petition to Intervene was filed on behalf of Paul A. Kavanaugh and BHR Pelican Palace, LLC, who are the applicants for the Plan Amendment and owners of the Property. The petition was granted and they appear as Intervenors in this proceeding.

On January 16, 2009, the parties filed a Joint Pre-Hearing Stipulation (JPS).

A final hearing was held on January 28, 2009. Joint Exhibits (JE) 1 through 7 were admitted into evidence without objection. Petitioner was given permission to submit Table 3-4 for inclusion in Joint Exhibit 3. Table 3-4 was filed at DOAH and is included as part of Joint Exhibit 3.

Petitioner's Exhibits (PE) 1 through 4, 7 (pages 1 through 6), and 14 were admitted into evidence. Petitioner's Exhibit 7 consists of six photographs of the Property and adjacent property. During the final hearing, Petitioner withdrew several proposed exhibits (5-6, 8-13) from consideration. These withdrawn exhibits were removed from the exhibit book containing all of the hearing exhibits. The photographs (Exhibit 7) were inadvertently removed at this time. Without objection, the photographs, as re-annotated in some cases, were filed at DOAH, and inserted in the exhibit book under Petitioner's Exhibit 7, pages 1 through 6, with two pages numbered 4 as explained in the Notice of Filing filed on April 2, 2009.

County Exhibits (CE) 1 and 2 and Department Exhibit 1 were admitted into evidence.

At the final hearing, Petitioner called the following witnesses: Billy Harbert, an officer and the developer of Belle Mer Condominium and owner of a Belle Mer Condominium unit; Lori Leonard, owner of a Belle Mer Condominium unit and a member of the condominium board of directors; Mary Ann Vance, a GIS

analyst in the County's planning and zoning department;
Jim Crumlish, state-wide regional evacuation program study
manager for the West Florida Regional Planning Council;
Beckie Faulkenberry, director of the planning and zoning
department for the County; Susan Poplin, A.I.C.P., a regional
planning administrator for the Department for three regions of
the state; Shawn Ward, planner II and coordinator for the
Coastal Planning Board; and Nancy Model, a transportation
planner for the County.

During the final hearing, the other parties questioned all
of the witnesses called by Petitioner in lieu of calling them
separately during their respective cases in-chief in the
interest of efficiency.

On February 19, 2009, the two-volume, final hearing
Transcript was filed at DOAH. On March 16, 2009, after
receiving an unopposed extension of time, Petitioner filed a
proposed recommended order and the County and the Department
filed a joint proposed recommended order. No proposed
recommended order was filed on behalf of Intervenors. All of
the post-final hearing submissions have been considered.

FINDINGS OF FACT

A. Parties

1. Petitioner, Belle Mer Owners Association, Inc. (Belle
Mer), is the condominium association for the Belle Mer

Condominium, which occupies a waterfront parcel of land immediately east of the Property. The Belle Mer condominium consists of 16 floors and 61 dwelling units and has a southwest orientation toward the Gulf of Mexico. PE 7 at 1, 3-4; CE 1-2.

2. The parties stipulated that Belle Mer is an "affected person" as defined in Section 163.3184(1)(a) Florida Statutes, which owns property in the County and timely submitted comments and objections to the Board of County Commissioners of Santa Rosa County (Board) with regard to the Plan Amendment.

3. Santa Rosa County is a local government subject to the requirements of the Local Government Comprehensive Planning and Land Development Regulations Act, Section 163.3161 et seq., Florida Statutes.

4. Intervenors are the owners of the Property that is the subject of the Plan Amendment.

5. The Intervenors possess leases from the County for each of the seven platted lots in Summer Place Subdivision, the location of the Property. In 1967, the relevant leases provided for the development of "multi-unit dwellings or light commercial." In 1987, the leases were amended to provide for the development of "up to 50 condominium units." In 1993, the lease was further amended at the lessee's request to provide a framework for the development of a single-family subdivision.

The present lease issued by the County for these lots restricts the use of the lots to single-family residential.

B. The Property and Vicinity

6. The Property consists of 1.89 acres of gulf front property located on Navarre Beach, Santa Rosa County, Florida. There are four single-family homes and several vacant lots on the Property, with a total of seven residential lots. PE 7 at 5; CE 1-2.

7. Since 1989, the Property has been zoned High Density.

8. Prior to approval of the Plan Amendment, the FLUM designated the Property as NBLDR. The FLUM was adopted after adoption of the zoning map and after the Property had been subdivided and leased for single-family lots. The NBLDR designation reflected the existing land use of the Property.

9. The Belle Mer property, including the condominium, is adjacent to and east of the Property and is designated NBHRD on the FLUM. The property to the east of the Belle Mer condominium contains approximately 84 condominium units (Navarre Towers), with a southeast orientation. T 54-55; PE 7 at 2; CE 1-2.

10. The property immediately to the west of the Property, also designated NBHDR on the FLUM, contains 45 condominium units known as Emerald Surf or Emerald Shore. Under current regulations and subject to change, a 17-floor condominium could be developed on this property. PE 7 at 5; CE 1-2.

11. The Navarre Beach Commercial Core Area is defined in the County's Land Development Code (LDC), Section 6.07.00. Prior to approval of the Plan Amendment, the Property was not included in the Commercial Core Area.

12. All the land on Navarre Beach subject to the Plan is owned by the County and either leased to individuals or entities, or held by the County.

13. Navarre Beach acreage that is designated Conservation/Recreation on the FLUM is owned by the County and has not been leased. However, the County is not prohibited from leasing this land to individuals.

14. The County is also not prohibited from modifying current leases to allow a different land use.

C. The Plan Amendment and Change in Density

15. The Plan Amendment changes the FLUM designation of the 1.89-acre parcel from NBLDR to NBHDR.

16. The maximum theoretical density permitted in the area designated NBLDR is four dwelling units per acre. The current density of the Property (1.89 acres) is approximately seven units.

17. The maximum theoretical density permitted in the area designated NBHDR is 30 dwelling units per acre. The Plan Amendment increases the maximum theoretical density allowed on

the Property from seven units to 56 units, an increase of 49 units.

18. While subject to change, under the current County Land Development Regulations (LDRs), the footprint for any building constructed on the Property cannot exceed 19 percent of the Property size, assuming all other LDR requirements are met, including setback requirements. T 227-231.

19. The maximum theoretical density permitted in the area designated Navarre Beach Medium Density Residential (NBMDR) is ten dwelling units per acre.

D. Consideration of the Plan Amendment by the County and the Department

20. The Board of County Commissioners of Santa Rosa County (Board) voted to transmit the Plan Amendment at their meeting on September 27, 2007.² On November 29, 2007, the Board voted to transmit other plan amendments that had also been approved by the Local Planning Board. On December 14, 2007, the Department received the County's proposed plan amendments, including the Plan Amendment.

21. On February 12, 2008, the Department completed its review of several plan amendments adopted by the Board including the Plan Amendment, and issued its Objections, Recommendations, and Comments Report (ORC), raising concerns with the Plan Amendment. The Department objected to the Plan Amendment "based

on internal inconsistencies with the [County's Plan] by proposing high density development outside of the Navarre Beach commercial core, directing population concentrations to Navarre Beach, and by increasing evacuation times on Navarre Beach."

JE 4.

22. County staff developed a response to the Department's ORC and an updated staff analysis that were presented to the Board during the adoption hearing. JE 5.

23. In response to the Department's first objection and prior to the adoption of the Plan Amendment, the County amended its LDC to expand the boundaries of the Commercial Core Area on Navarre Beach to include the Property and additional acreage. See endnote 4; PE 4. The County had to expand the boundary of the Commercial Core Area because the NBHDR designation is permitted only within the Commercial Core Area. JE 1 at 3-10, Policy 3.1.A.8 16)(The NBHDR "category shall only be located within the commercial core area of Navarre Beach.").

24. The Department also commented in the ORC that the Plan Amendment was inconsistent with Plan Coastal Management Element Objective 7.1.B, which states that "[t]he County shall direct population concentrations away from Navarre Beach and the entire Coastal High Hazard Area" (CHHA) and Policy 7.1.F.8, which states that "[a]mendments to the [Plan] on Navarre Beach shall not be approved which will result in an increase in hurricane

evacuation times without mitigation of the adverse impact to evacuation times."³ The Department suggested that "[s]hould the County decide to increase the density on the amendment site, the County should coordinate with the West Florida Regional Planning Council to draft a professionally acceptable hurricane evacuation analysis, based on maximum development potential of the site, demonstrating that the County evacuation time will [be] maintained."

25. On May 22, 2008, the Board approved both the change to the LDC text, which included the Property and other parcels within the Navarre Beach Commercial Core Area,⁴ and the Plan Amendment.

26. On June 23, 2008, Belle Mer submitted a detailed letter to the Department, with attachments, stating objections to the Plan Amendment.

27. On August 27, 2008, the Department had published a NOI to find the Plan Amendment "in compliance."

E. Internal Inconsistencies and Data and Analysis

28. Petitioner alleges that the Plan Amendment is inconsistent with Objectives 7.1.B and 7.1.F and Policy 7.1.F.8 of the Plan and is not supported by adequate data and analysis.

1. Objective 7.1.B

29. Objective 7.1.B states that "[t]he County shall direct population concentrations away from Navarre Beach and the entire Coastal High Hazard Area."

30. When Objective 7.1.B of the Plan was adopted, all of Navarre Beach, including the Property, was within the CHHA. As a result of a 2006 change in state law, see Chapter 2006-68, Section 2, Laws of Florida, amending Section 163.3178(2)(h), Florida Statutes, and as applied to the Property, the Property is not located in the CHHA. It also appears that very little of Navarre Beach is currently in the CHHA. T 198-200.

31. Also, when the Plan was adopted, no state rule required the County to direct population concentrations away from areas other than the CHHA. The intent appears to "reflect the requirement of the state to direct populations away from the" CHHA and was not intended to apply to areas of Navarre Beach outside of the CHHA.

32. In order to interpret the intent of Objective 7.1.B in areas of Navarre Beach outside of the CHHA, it is appropriate to consider Policy 7.1.B.1 that states: "At least 45% of the developable land within the Navarre Beach Zoning Overlay District shall remain within the Low Density Residential and Conservation/Recreation Future Land Use Map Designations."⁵ The

persuasive evidence indicates that the Plan Amendment is not inconsistent with this policy.

33. In response to the Department's second ORC comment, County staff advised the Board that Objective 7.1.B⁶ "is implemented by Policies 7.1.B.1, 7.1.B.2 and 7.1.B.3."

34. County staff determined that the Low Density Residential and Conservation/Recreation FLUM designated areas on Navarre Beach comprise 48.02 percent without the Plan Amendment. The addition of the 1.89 acres reduced the percentage to 47.77 percent, a change of .25 percent. JE 5 at 5.

35. Policy 7.1.B.2 states: "The County shall limit the densities and intensities of land use as defined within this Plan. Such limitations will assure generalized low density use of land within the majority of the Coastal High Hazard Area of Santa Rosa County." County staff determined that the County "is a coastal county with three bay systems, a 20 mile long peninsula, and more than 125 miles of shoreline, most of which falls within the CHHA. The subject property has approximately 200 feet of shoreline, and is less than two acres in size. The [FLUM] clearly shows that the vast majority of shoreline in [the County] is designated for low density development between 1 and 4 units per acre, and much of the CHHA is designated as Conservation/Recreation on the FLUM. This amendment, which accounts for approximately 0.03% of the County's CHHA shoreline,

will not result in a perceptible change in the generalized low density use within the majority of the CHHA as required by Policy 7.1.B.2." After also considering Policy 7.1.B.3, staff concluded that while the Plan Amendment increased "the total number of potential dwelling units on Navarre Beach by 49 units, it is not inconsistent with Objective 7.1.B or it's [sic] implementing policies." JE 5 at 5-6.

36. Since at least 1996, the Department has consistently determined that any increase above current density levels increases the population concentration in the CHHA. T 241-242. If the property under review is located in the CHHA, the Department's "review is very much heightened with regard to the" CHHA, but not applicable to the Property because it is not located in the CHHA. T 261-262. The Department has no rule or policy to address directing population concentrations away from areas not in the CHHA. T 265. (Within the last three years, the County has approved FLUM amendments within the CHHA, but has not approved an increase in density within the CHHA. In each case, the County directed population increases away from the CHHA and the County's action is consistent with the Department's prior determinations.)

37. The Department's position is credible, but not applicable to the Property, which is not in the CHHA, and in light of Policy 7.1.B.1.

38. Ms. Poplin testified she knew of no way to interpret a comprehensive plan objective, e.g., Objective 7.1.B, without considering it in context with the implementing policies, e.g., Policy 7.1.B.1, and this position is consistent with the Department's definition of "policy." See endnote 7. In other words, the Plan objectives should not be read in isolation without consideration of implementing policies. T 243-244.⁷

39. Each relevant Plan objective and policy must be considered. However, they are not considered as stand alone requirements as suggested by Belle Mer. See Petitioner's PRO at 27, ¶ 97.

40. At the time the County adopted the original comprehensive plan and FLUM (approximately 2003), densities allowed on Navarre Beach were reduced by more than 600 residential units. T 216, 225-226. Ms. Faulkenberry did not recall any additional reductions since that time.

41. The County considers an area as a whole in evaluating the direction of population densities rather than on an acre-by-acre basis. The County also does not require any density offset to occur concurrently with a density increase. T 217. See Lee County and Leeward Yacht Club, Inc., Case No. 06-0049GM (DOAH August 25, 2006, at ¶¶ 42-45; Admin. Comm. November 15, 2006, at ¶ 8).

42. It was not proven that the increase in maximum theoretical density that may occur on Navarre Beach as a result of the Plan Amendment is inconsistent with Objective 7.1.B as implemented, in part, by Policy 7.1.B.1 and is not otherwise supported by adequate data and analysis.

2. Objective 7.1.F

43. Objective 7.1.F states that "[t]he County shall maintain or reduce hurricane evacuation times by implementing Policies 7.1.F.1 through 7.1.F.11, among others."⁸

44. Policy 7.1.F.3 states: "The County shall maintain a minimum medium response roadway clearance time for hurricane evacuation of 12 hours on roads under local jurisdiction." Roads under local jurisdiction mean roads within the unincorporated area of the County, including state and Interstate roads, but excluding roads outside the County. The County uses this policy when evaluating the hurricane evacuation times from Navarre Beach and to determine whether the specific numerical criteria have been met.

45. Policy 7.1.F.8 states: "Amendments to the [Plan] on Navarre Beach shall not be approved which will result in an increase in hurricane evacuation times without mitigation of the adverse impact to evacuation times." The persuasive evidence indicates that the over-all reduction in densities on Navarre Beach since the Plan was adopted is adequate mitigation. There

is no persuasive evidence that the Plan Amendment is likely to adversely impact (increase) hurricane evacuation times beyond 12 hours.

46. In the ORC, the Department suggested that "[s]hould the County decide to increase the density on the amendment site," that it "coordinate with the West Florida Regional Planning Council to draft a professionally acceptable hurricane evacuation analysis, based on maximum development potential of the site, demonstrating that the County evacuation time will [be] maintained."

47. The Department does not usually examine evacuation times for plan amendments for property not located in the CHHA. The Department raised an issue regarding the evacuation times because Policy 7.1.F.8 refers to Navarre Beach and the requirement of mitigation of the adverse impact to evacuation times. T 268-269.⁹

48. County staff contacted the West Florida Regional Planning Council and determined that the latest study was the Northwest Florida Hurricane Evacuation Study Technical Data Report, July 1999 (Study). (The Department was not aware of models (to study hurricane evacuate times) other than as prepared by the regional planning councils. T 270.)

49. There is no statute or rule that requires the County to use "every detail" of the Study. Mr. Crumlish advised that he would expect the County to modify the Study over time.

50. A spreadsheet to aid in calculating clearance evacuation time was distributed with the Study by the U.S. Army Corps of Engineers. The County utilized the spreadsheet produced by the 1999 Corps Study. The spreadsheet is used by the County each year to perform an annual update of hurricane evacuation times, but had not been used by the County in conjunction with a land use change request before it was used during the evaluation of the Plan Amendment.

51. The spreadsheet incorporates various factors contained in the Study and is driven by assumptions and conclusions in the Study.¹⁰ There are assumptions made in the Study that when the number of units increases, other numbers may change in relationship to the change in dwelling units. T 149.

52. The spreadsheet is set up so that the County staff may only change or input three columns of data: number of single family units; number of mobile home units; and number of tourist units. Otherwise, "[t]he program is locked." Actual units are counted, e.g., a house, not platted lots without a unit. The spreadsheet also does not allow the County to update road improvements. "Another unknown is the response rate of the population to evacuation orders: rapid, medium or long."

53. According to the County, the spreadsheet is the only and best available data. If other data were used, other than dwelling units described above, the spreadsheet received from the Corps would be altered.

54. Each year the County updates the spreadsheet and accounts for all dwelling units constructed within the County as of the update. Except for consideration of the Plan Amendment, the information was not updated from June 2007 through May 22, 2008. There could have been a change and a significant difference in the number of dwelling units in the County between June 2007 and May 22, 2008, T 99-100, although the number of additional, existing dwelling units during this time period was not quantified.

55. When using the spreadsheet, the County planning staff added 49 units (accounting for the additional units that could be generated by the Plan Amendment) to the annual run of the spreadsheet that was last completed in June 2007. For the purpose of computing the hurricane evacuation time in light of the Plan Amendment, the County did not input any other data into the spreadsheet for the purpose of assessing the hurricane evacuation times.¹¹

56. County staff provided data and analysis indicating that "the clearance times for critical segments in the County remain less than 12 hours for Cat 1 - 3 hurricanes with the

[Plan Amendment]. For Cat 4 - 5 hurricanes, the clearance times already exceeded 12 hours at the following critical segments: US 90 east of Milton, Pensacola Bay Bridge, and I-10 eastbound, but the increased density with the amendment showed no increase in clearance times. The clearance time on SR 87 south of I-10 increased from 9.57 hours to 9.60 hours (again, the widening of that roadway is not factored in). Overall, the effect of the [Plan Amendment] was three hundredths of an hour or less on the critical segments. Therefore, we conclude that County evacuation times will be maintained with the amendment." JE 5 at 6.

57. The County did not assess whether the hurricane evacuation times would increase based on the County's redefinition of the Commercial Core Area other than the Property. According to the County, the changes to the Commercial Core Area were not relevant to its consideration of the Plan Amendment because it did not involve any other plan amendments or changes in density that would impact the hurricane evacuation analysis. T 272.

58. Overall, it was not proven that adverse impacts resulted from the Plan Amendment or that the Plan Amendment was inconsistent with the Plan's objectives and policies referred to herein and not based on appropriate data and analysis.

F. Impact of the Plan Amendment on Potential Loss of View and Financial Impacts on Belle Mer Condominium Unit Owners

59. Petitioner presented two witnesses who own Belle Mer Condominium units, units 1602 and 904 (PE 7 at 4), and who testified regarding their potential loss of view if the Plan Amendment is approved and also that their property values would be reduced.

60. These issues were raised in the JPS at pages 2-3, but not expressly raised in the Petition. See, e.g., T 31-37, 73-75; see also Petition at 3, ¶¶ 9-12.

61. Assuming for the sake of argument that the two issues were timely raised and may be considered, resolution of the issues is speculative at best given the nature of this proceeding. Notwithstanding the lay testimony of what might be constructed on the Property in the event the Plan Amendment is approved, such as a "needle" or "high rise," T 41-42, the nature, scope, and extent of the loss of view and financial impact can not be readily determined without, among other information, a site plan showing the actual development of the Property.

CONCLUSIONS OF LAW

A. Jurisdiction

62. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), and 163.3184(9), Fla. Stat.

B. Standing

63. Belle Mer Owners Association, Inc., is an "affected person" as that term is defined in Section 163.3184(1)(a), Florida Statutes, and has standing to participate as a party in this proceeding.

C. In Compliance

64. In this proceeding, which follows the Department's issuance of a NOI to find the Plan Amendment to be in compliance, the Plan Amendment "shall be determined to be in compliance if the local government's determination is fairly debatable." § 163.3184(9)(a), Fla. Stat. Petitioner bears the burden of proving beyond fair debate that the challenged Plan Amendment is not "in compliance." See Young v. Dep't of Cmty. Affairs, 625 So. 2d 831 (Fla. 1993). "The fairly debatable standard of review is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety." See Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997)(citation omitted). The court also stated that "even with the deferential review of legislative action

afforded by the fairly debatable rule, local government action still must be in accord with the procedures required by chapter 163, part II, Florida Statutes, and local ordinances." Id. (citation omitted).

65. Under Section 163.3184(1)(b), Florida Statutes, "in compliance" means:

consistent with the requirements of ss. 163.3177, when a local government adopts an educational facilities element, 163.378, 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.

66. Section 163.3177(2), Florida Statutes, provides that the several elements of a comprehensive plan must be coordinated and consistent. See also Fla. Admin. Code R. 9J-5.005(5)(a). Any amendment to the FLUM must be internally consistent with the other elements of the comprehensive plan. See Coastal Dev. of N. Fla., Inc. v. City of Jacksonville, 788 So. 2d 204, 208 (Fla. 2001).

67. As found herein, Petitioner failed to prove to the exclusion of fair debate that the Plan Amendment is inconsistent or not coordinated with several objectives and policies of the County's Plan.

68. Any plan amendment must be based upon appropriate data. Although such data need not be original data, local governments are permitted to utilize original data as long as appropriate methodologies are used for data collection. § 163.3177(8) and (10)(e), Fla. Stat.

69. The requirement for data and analysis in support of comprehensive plan and plan amendments is set forth in Florida Administrative Code Rule 9J-5.005(2)(a): "All goals, policies, standards, findings and conclusions within the comprehensive plan and its support documents, and within plan amendments and their support documents, shall be based upon relevant and appropriate data and analysis applicable to each element. To be based on data means to react to it in an appropriate way and to the extent necessary indicated by the data available on that particular subject at the time of adoption of the plan or plan amendment at issue." The data must also be the "best available existing data" and "collected and applied in a professionally acceptable manner." Fla. Admin. Code R. 9J-5.002(2)(a)-(c); see also § 163.3177(10)(e), Fla. Stat.

70. This rule requires only that data exist and be available at the time the plan amendment is adopted. It does not require that such data be submitted by the local government to the Department. In a de novo proceeding such as this one, the question is not whether the local government submitted

sufficient data and analysis to the Department, but rather whether the data in existence and available at the time of adoption supports the plan amendment. If the data existed and was available at the time of adoption, analysis of that data may be made at the compliance hearing. See Zemel v. Lee County and Dep't of Cmty. Affairs, Case No. 90-7793GM (DCA June 22, 1993), aff'd, 642 So. 2d 1367 (Fla. 1st DCA 1994). See also Alessi, et al. v. Wakulla County, et al., Case No. 03-0052GM (DOAH Recommended Order, July 11, 2003; DCA Order, October 8, 2003, at 3-5; DOAH Order on Remand, October 29, 2003; DCA Amended Determination of Noncompliance, April 1, 2004; Admin. Comm. Final Order, July 1, 2004).

71. Petitioner contends that the Plan Amendment is not supported by adequate data because the County did not consider whether there were any increases in dwelling units in Okaloosa County since 1999, and in the County between June 2007 and the date the Plan Amendment was adopted in May 2008, as well as any increased travel on adjacent county highways, which, according to Petitioner, necessarily led the County to underestimate the County hurricane evacuation clearance times.

72. In this de novo hearing, the Petitioner has the burden to prove the precise nature of the best existing and available data overlooked or not considered by the local government and how consideration of such data causes the Plan Amendment to be

not "in compliance." Also, such evidence may not be based on conjecture. See, e.g., Alessi, Case No. 03-0052GM (DOAH Order on Remand, October 29, 2003, at ¶¶ 8-11; DCA Amended Determination on Noncompliance, April 1, 2004, at 10, ¶ D.).

73. A County staff member stated that there could have been a significant difference in the evacuation times if there was an increase in and consideration of the construction of three types of residential dwelling units between June of 2007 and May of 2008. T 99. However, Petitioner did not prove the precise nature of the existing and available data that could have been considered and whether an increase in dwelling units would have altered or increased the analyzed hurricane evacuation times.

74. As found, Petitioner did not prove to the exclusion of fair debate that the Plan Amendment is not based on appropriate data and analysis.

75. Petitioner also contends that approval of the Plan Amendment interferes with two condominium unit owners' view of the Gulf of Mexico and will have an adverse financial impact on them. See § 163.3161(9), Fla. Stat.; Fla. Admin. Code R. 9J-5.005(8). In essence, Petitioner claims that the County should have considered these alleged adverse impacts when considering the Plan Amendment. These issues were not expressly raised in the Petition.

76. Section 163.3161, Florida Statutes, provides for a legislative recognition and protection of private property rights. Any relief, such as a claim for compensation, which may be afforded "must be determined in a judicial action." This proceeding does not involve a judicial action or, as Petitioner agrees, a claim for damages.

77. Florida Administrative Code Rule 9J-5.005(8) also recognizes private property rights and vested rights, but provides that "[l]ocal governments may include appropriate provisions in their plans for the recognition of statutory and common law vested rights." Petitioner does not argue that the Plan Amendment is inconsistent with any such provision in the County's Plan, if one exists.

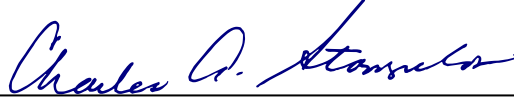
78. The issues raised by Petitioner are premature and speculative.

RECOMMENDATION

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

RECOMMENDED that a final order be issued determining that the Plan Amendment 2007-R-047, adopted by Santa Rosa County in Ordinance No. 2008-16, section 2, attachment A, on May 22, 2008, is "in compliance" as defined in Section 163.3184(1)(b), Florida Statutes.

DONE AND ENTERED this 7th day of April, 2009, in
Tallahassee, Leon County, Florida.



CHARLES A. STAMPELOS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of April, 2009.

ENDNOTES

^{1/} All citations are to the 2008 version of the Florida Statutes unless otherwise noted.

^{2/} At some point in 2007 and prior to the Board's September 27, 2007, transmittal hearing and consideration of the Plan Amendment, in response to a plan amendment application, staff prepared an initial staff analysis and concluded that the proposed plan amendment, which did not differ materially from the Plan Amendment, was inconsistent, in part, with Objective 7.1.B. PE 3; T 162. This staff analysis was submitted to the Local Planning Board. On May 10, 2007, the Local Planning Board approved the FLUM change application. The Board denied the application. See T 160-163, 281-283; JE 5 at 2, Background and 10. Thereafter, there was a second application submitted to the Board that was substantially the same as the first. T 164, 170. County staff prepared another staff analysis that materially mirrored the first stating in part that the proposal was inconsistent with Objective 7.1.B because the Property was located on Navarre Beach. T 167-170. This staff analysis was presented to the Board for its transmittal hearing held on September 27, 2007. T 170-171. (The second application was not presented to the Local Planning Board because the first

application had been approved by this board in May 2007.) The Board approved the Plan Amendment and the matter was transmitted to the Department. Thereafter, staff prepared another staff analysis included with the recommendation and staff's response to the ORC Report that was presented to the Board on May 22, 2008. JE 5 at 8-11. This staff analysis stated in part "that the amendment is generally consistent with the [Plan], except as noted in this staff analysis." JE 5 at 11. See also endnote 6.

^{3/} Florida Administrative Code Rule 9J-5.012(3)(b)6. requires a local government to have one or more objectives for each goal statement which "[d]irect population concentrations away from known or predicted coastal high-hazard areas." The term "population concentrations" is not defined in any statute or rule. In the context of Rule 9J-5.012, it would appear that the term means population densities (dwelling units per acre) of a certain level, but the level is not stated. There is no statute or rule requiring that population concentrations be directed away from any property or area other than the CHHA. The rule is used in the context of plan amendments within the CHHA and it is synonymous with residential density. See generally Dep't of Cmty. Affairs v. Lee County and Leeward Yacht Club, Inc., Case No. 06-0049GM (DOAH August 25, 2006 at ¶¶ 29-31; Admin. Comm. November 15, 2006). The Plan Amendment does not increase the density in the CHHA. T 264-265.

^{4/} The Commercial Core Area was expanded to include several hundred feet of Gulf of Mexico property, including the Property, and a narrow strip of nine acres running south to north within an area that appears to be designated Navarre Beach Utilities (waste water treatment plant) on the FLUM. T 176, 219-220; PE 4.

^{5/} This case is the County's first application of the 45 percent policy to a FLUM amendment. T 190, 290. According to the County's planning director, the 45 percent rule subsumes the requirement to direct population concentrations away from Navarre Beach. The planning director was also questioned about several scenarios involving conversion of acreage from one land use designation to another without exceeding the minimum 45 percent rule. T 190-198.

^{6/} In the staff analysis, staff determined that the Plan Amendment "results in a very minimal increase in coastal density and is not inconsistent with" Objective 7.1.B. T 164-166; JE 5 at 11. The Plan does not expressly provide for consideration of

de minimus impacts regarding directing population away from Navarre Beach, "just the 45 percent criteria." T 187.

^{7/} By definition, a "goal" "means the long-term end toward which programs or activities are ultimately directed." Fla. Admin. Code R. 9J-5.003(52). An "objective" "means a specific, measurable, intermediate end that is achievable and marks progress toward a goal." Fla. Admin. Code R. 9J-5.003(82). A "policy" "means the way in which programs and activities are conducted to achieve an identified goal." Fla. Admin. Code R. 9J-5.003(90). See also Fla. Admin. Code R. 9J-5.012(3) for the requirements for Coastal Management Goals, Objectives, and Policies and particularly subsection (3)(c)6. requiring the plan element to "contain one or more policies for each objective and shall identify regulatory or management techniques for" "6. Designating coastal high-hazard areas and limiting development in these areas." In other words, a policy is "supposed to describe the programs and activities that one would undertake to achieve the objective, which should be a measurable intermediate end." "The definition of objective is a measurable intermediate end towards achieving the goals." The goals are broader statements. T 250-251, 267-268.

^{8/} Florida Administrative Code Rule 9J-5.012(3)(b)7. requires a local government to have one or more objectives for each goal statement which "[m]aintain or reduce hurricane evacuation times." This rule means no increase. Also, the maintain and reduce provision has usually been tied to plan amendments within the CHHA. The Department usually uses the best available model for a particular regional hurricane evacuation analysis. T 245-247.

^{9/} Policies 7.1.F.3 and 7.1.F.8 are not mutually exclusive. T 273.

^{10/} The Study contains several analyses including the behavioral analysis section and a list of critical facilities that have not been updated since 1999. Population projections have not been updated. There is inconclusive testimony that a study to update the behavioral analysis factor was completed before May 22, 2008. The vulnerability analysis in the Study is in the process of being updated, but the updates are not complete or approved. T 122-128, 142.

^{11/} The Study also states that "[e]stimates of evacuation clearance times for the study area must include the effects of

evacuation traffic generated by neighboring counties that will use other counties' roadways." JE 3 at 6-1.

In analyzing the Plan Amendment, the County did not evaluate the impact of any increase in population and dwelling units in the western portion of adjacent Okaloosa County that might use Highway 87. Mr. Crumlish suggested that the County should utilize growth in housing units in adjacent counties when evaluating hurricane evacuation times. He also indicated that counties will do their own updates in light of particular circumstances. T 133. But, Ms. Faulkenberry stated that the County has no "way to do that." The tool used by the County does not allow the County to "incorporate that data" and the tool used showed appropriate hurricane evacuation times. T 205-207.

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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.