

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF COMMUNITY)
AFFAIRS,)
)
Petitioner,)
)
and)
)
DEPARTMENT OF THE AIR FORCE,)
)
Intervenor,)
)
vs.) Case No. 08-4820GM
)
CITY OF TAMPA,)
)
Respondent,)
)
and)
)
FLORIDA ROCK & TANK LINES,)
INC.)
)
Intervenor.)
_____)

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the
Division of Administrative Hearings by its assigned
Administrative Law Judge, Donald R. Alexander, on May 18-20,
2009, in Tampa, Florida.

APPEARANCES

For Petitioner: Matthew G. Davis, Esquire
David L. Jordan, Esquire
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-3000

For Intervenor: Major George L. Burnett, Esquire
(Air Force) United States Air Force
Environmental Law & Litigation Section
112 Luke Avenue, Suite 343
Bolling Air Force Base, DC 20032-6400

John F. Rudy, III, Esquire
Assistant United States Attorney
400 North Tampa Street, Suite 3200
Tampa, Florida 33602-4798

For Respondent: Ernest Mueller, Esquire
L. Robin McKinney, Esquire
City Attorney's Office
315 East Kennedy Boulevard, Fifth Floor
Tampa, Florida 33602-5211

For Intervenor: Karen A. Brodeen, Esquire
(Florida Rock) Fowler White Boggs, P.A.
Post Office Box 11240
Tallahassee, Florida 32302-1240

Mark S. Bentley, Esquire
Mark Bentley, P.A.
201 North Franklin Street, Suite 1650
Tampa, Florida 33602-5167

STATEMENT OF THE ISSUE

The issue is whether Plan Amendment 07-08 adopted by the City of Tampa (City) by Ordinance No. 2008-145 on August 21, 2008, is in compliance.

PRELIMINARY STATEMENT

City Ordinance No. 2008-145 adopted an amendment (PA07-08) to the Future Land Use Map (FLUM) of the City's Comprehensive Plan (Plan), which changes the land use category on a 25.51-acre parcel from Light Industrial to Community Mixed Use-35.¹ The parcel is located in close proximity to MacDill Air Force Base (MacDill), a military installation as defined by Section 163.3175(7)(b), Florida Statutes.² The amendment was adopted under the Alternative Review Process Pilot Program (Pilot Program), which is codified in Section 163.32465, Florida Statutes.

On September 26, 2008, Petitioner, Department of Community Affairs (Department), filed with the Division of Administrative Hearings (DOAH) a Petition for Formal Administrative Hearing (Petition) in which it contended the amendment is not in compliance because the amendment is internally inconsistent with other provisions within the Plan, Chapter 163, Florida Statutes, Florida Administrative Code Rule Chapter 9J-5, the State Comprehensive Plan, and the Strategic Regional Policy Plan; the amendment is not supported by the best available, relevant, and appropriate data and analyses; the amendment will result in neighboring incompatible uses; and the City exceeded its authority in adopting the amendment. (In its Proposed

Recommended Order, the Department states that it has voluntarily dismissed contentions that the amendment is inconsistent with the State Comprehensive Plan and that it raises potential traffic impact issues.)

On October 20, 2008, Intervenor, Florida Rock & Tank Lines, Inc. (Florida Rock), the applicant for the map change, was authorized to intervene in support of the amendment. By Order dated April 27, 2009, the United States Department of the Air Force (Air Force) was authorized to intervene in opposition to the plan amendment.

Various procedural and discovery disputes arose during the course of the proceeding, and the disposition of those matters is found in the Orders issued in this docket.

By Notice of Hearing dated November 17, 2008, a final hearing was scheduled on March 24-27, 2009, in Tampa, Florida. The parties' Joint Motion to Continue Hearing was granted, and the case was rescheduled to May 18-20, 2009, at the same location.

A Joint PreHearing Stipulation, as later supplemented, was filed by the parties on May 15, 2009. At final hearing, the Department presented the testimony of Chris A. Wiglesworth, a Senior Planner and accepted as an expert. Also, it offered Department Exhibits 1, 2, 4-7, 9-11, 14, and 15, which were

received in evidence.³ The Air Force presented the testimony of Burton R. Lester, Jr., an Air Installation Compatible Use Zone (AICUZ) Program Manager and accepted as an expert; Lynn Engleman, an AICUZ Program Manager and accepted as an expert; Lieutenant Colonel Brian N. Smith, Commander, 91st Air Refueling Squadron at MacDill; and Second Lieutenant Rebecca Heyse, Chief of Public Affairs for the Sixth Air Mobility Wing at MacDill. Also, it offered Air Force Exhibits a, b, d-g, g1, h, p, q, t, and u, which were received in evidence. The City presented the testimony of Randy Goers, City Urban Planning Coordinator and accepted as an expert; Anthony Rodriguez, City Construction Operation Manager and accepted as an expert; Nick D'Andrea, City Construction Permit Manager; and the deposition testimony of Anthony J. Garcia, a Principal Planner with the Hillsborough County City/County Planning Commission (Planning Commission) and accepted as an expert. Also, it offered City Exhibits 20, 27, 28, 32, 35, 37, and 39-43, which were received in evidence. Florida Rock presented the testimony of James W. Stutzman, a professional planner and president of Stutzman Consulting, Inc., and accepted as an expert. Also, it offered Florida Rock Exhibits 2, 3, 5, 20, 24, 28-30, 32, 34, and 35, which were received in evidence. Joint Exhibits 1 and 2 were received in evidence. Finally, official recognition was taken of 14 CFR

Part 150, Appendix A, which is the Federal Aviation Administration (FAA) land use compatibility table.

The Transcript of the hearing (five volumes) was filed on July 6, 2009. Proposed Recommended Orders were filed by the parties on August 7, 2009, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following facts are determined:

A. The Parties

1. The City is a municipality in Hillsborough County and has adopted a Plan that it amends from time to time. Its current Plan, as amended, was adopted in 1998 and has been determined to be in compliance. Since 2007, the City has participated in the Pilot Program for adoption of plan amendments, a process described in Section 163.32465, Florida Statutes. Under the Pilot Program, municipalities have "reduced state oversight of local comprehensive planning," and plan amendments may be enacted in "an alternative, expedited plan amendment adoption and review process." Id. The amendment being challenged here was adopted under the Pilot Program.

2. The Department is the state land planning agency and is statutorily charged with the duty of reviewing plan amendments.

Pursuant to the Pilot Program, the City must send a plan amendment transmittal package to the Department (and other designated agencies and entities) for its preliminary review. However, the Department does not issue an Objections, Recommendations, and Comments Report or a notice of intent. Instead, it "may provide comments regarding the amendment or amendments to the local government." § 163.32465(4)(b), Fla. Stat. The Department may also initiate an administrative proceeding for the purpose of determining whether an amendment is in compliance. See § 163.32465(6)(b), Fla. Stat.

3. Florida Rock owns property and operates a business within the City and submitted oral and written comments in support of the proposed amendment. The facts establish that it is an affected person and has standing to participate in this proceeding.

4. The Air Force owns property abutting Florida Rock's property and on which MacDill is located. The Air Force submitted written and oral comments to the City in opposition to the plan amendment. As such, it is an affected person and has standing to participate in this proceeding.

B. Background

5. A part of the City extends down a peninsula known as Interbay Peninsula with Hillsborough Bay to the east, Tampa Bay

to the south, and Old Tampa Bay to the west. MacDill is located at the southern tip of the peninsula and consists of 5,767 acres. The facility was established in 1941. Its primary runway (Runway 4/22) is 11,421 feet long, exclusive of the 995-foot overrun, and runs in a southwest-northeast direction. Because of prevailing winds and its proximity to other airports in the St. Petersburg area to the west, the majority of the takeoffs are to the northeast. Around ninety percent of the landings are from the southwest (over Tampa Bay on the approach) to the northeast.

6. Florida Rock owns two adjoining parcels of land on Interbay Peninsula, totaling 25.51 acres, located at 6604 South Dale Mabry Highway, which is a commercial corridor. The property lies just south of InterBay Boulevard, a few hundred feet west of Himes Avenue, and directly north of MacDill. At its closest, the site is less than three thousand feet from the edge of the overrun portion of the active runway.

7. To the north and east of the property are residential properties, many of which were developed between 1940 and 1959. Another surge of development occurred in the 1980s. The properties to the north have residential land use designations. Future residential development of parcels to the north and east are capped at ten units per acre because of their location near

MacDill. Directly to the south of the property is a vacant parcel with a Light Industrial land use. To the east of that property is land used as a park and includes baseball and soccer fields. MacDill lies south of the vacant parcel. The existing uses west of the property (and to the west of Dale Mabry Highway) are commercial, industrial, apartment, and office.

8. The subject property has been classified as Light Industrial under the City's Plan. As the name implies, that land use category allows for light industrial uses that have only minimal offsite impacts such as noise and odor, along with offices, manufacturing, warehousing, and other general commercial uses. Residential uses are prohibited under this category. Development is subject to a maximum floor area ratio of 1.5. (Floor area ratio measures the intensity of non-residential land uses.) Currently, a warehouse distribution facility (truck terminal) owned by Florida Rock is located on the northern end of the property. Approximately one-half of the parcel is vacant. A small part of the property (between eight and nine acres) on the southern end is wetlands and has been designated as an environmentally sensitive area by the Planning Commission.

9. On March 8, 2007, Florida Rock filed an application with the Planning Commission to change the land use on the

property from Light Industrial to Community Mixed Use-35 (CMU-5). See Joint Exhibit 2. The proposed use of the property was described in the application as a "Mixed Use Development." Id. The new land use designates "areas suitable for general commercial, professional office, and multi-family development" and, absent any other limiting conditions, would permit a development potential of eight hundred ninety-two residential units or a maximum commercial buildout of almost 1.7 million square feet. No text amendments were proposed.

10. On March 31, 2008, the Planning Commission recommended approval of the application and forwarded that recommendation to the City. On April 10, 2008, the City held its first public hearing on the amendment and voted to transmit the plan amendment to the Department and other entities that are required by law to receive copies of the amendment and supporting data and analyses. See § 163.32456(4)(a), Fla. Stat. The proposed amendment and supporting data and analyses were submitted to the Department and other entities on April 11, 2008. See Florida Rock Exhibit 2.

11. Comments regarding the amendment were submitted by the Department to the City on May 14, 2008. See Department Exhibit 10. Comments were also filed by the Air Force, the Florida Department of Transportation, and the Tampa Bay Regional

Planning Council, all voicing concerns.⁴ The Department concluded its comments by stating that it "strongly urges the City not to adopt the amendment." Id.

12. Notwithstanding the adverse comments, on August 21, 2008, the City adopted Ordinance No. 2008-145, which approved the application and changed the land use on Florida Rock's property to CMU-35. To counter at least in part the objections lodged by the Department and Air Force, the Ordinance contained a condition that "[r]esidential density shall not exceed ten (10) units per gross residential acre of land and/or a floor area ratio of 1.5." See Florida Rock Exhibit 3. This limitation on residential development is consistent with Future Land Use Element (FLUE) Policy A-3.1, adopted in 1989, which limits new residential development within the MacDill and Tampa International Airport flight paths, also known as Accident Potential Zones, to ten dwelling units per acre. Under either category, Florida Rock can build more than 1.5 million square feet of commercial uses. More than likely, the potential residential (and/or commercial) development on the property will be something less than ten dwelling units per acre because of setback, parking, mitigation, and other miscellaneous requirements. Also, density bonuses do not apply. One City

witness estimated that the maximum development potential will be around 8.6 units per acre.

13. The Department timely filed its Petition with DOAH on September 26, 2008. See § 163.32465(6)(b), Fla. Stat. ("[t]he state land planning agency may file a petition with the Division of Administrative Hearings pursuant to ss. 120.569 and 120.57, with a copy served on the affected local government, . . . within 30 days after the state land planning agency notifies the local government that the plan amendment package is complete").

14. Although the Petition and parties' Joint Prehearing Stipulation identify a number of issues to be resolved, the Department and Air Force's Proposed Recommended Orders address only two broad grounds for finding the amendment not in compliance: that the proposed land use is not compatible with the adjacent military installation, which the Department describes as being the "principal dispute in this proceeding"; and that the proposed plan amendment is not based on relevant and appropriate data and analyses, as required by Section 163.3177(6)(a), Florida Statutes, and Florida Administrative Code Rule 9J-5.005(2)(a). All other allegations are assumed to no longer be in issue, voluntarily withdrawn, or not supported by the preponderance of the evidence.⁵

C. Operations at MacDill

15. The host wing at MacDill is the Sixth Air Mobility Wing (Wing). Serving under that Wing is the 91st Air Refueling Squadron (Squadron), which owns sixteen KC-135R aircraft that are permanently based at MacDill. The Squadron's primary mission is refueling other military aircraft, a mission that requires the KC-135R to travel around the globe. The KC-135R can carry up to 200,000 pounds of Jet Propellant 8 (JP-8) aviation fuel, a kerosene-based jet fuel, depending on the nature and duration of its mission. Besides the KC-135R, other aircraft permanently based at MacDill include three C-37s (smaller jet aircraft) assigned to the 300LS Squadron, the 310th Airlift Squadron, and five or six aircraft associated with the National Oceanic and Atmospheric Administration.

16. MacDill also hosts approximately six-to-eight joint exercises per year (lasting between one and three weeks) involving numerous fighter and bomber aircraft that use the Avon Park bombing range for training, as well as C-17s and C-130s (transport aircraft) that use the facility for special training. In addition, Air Force and National Guard reserve units train at MacDill. Therefore, on any given day, multiple fighters and aircraft from other military branches, and occasionally even a commercial aircraft, may use the runways at MacDill.

17. On an average day at MacDill, there are sixty takeoffs and landings and up to five sorties. This does not include touch and go takeoffs and landings, which involve pattern or transition work.

18. Mainly residential uses are located in the flight path of Runway 4 as far south as, and to the east of, the Florida Rock property. That type of development continues in the flight path until the aircraft exit the Interbay Peninsula and pass over Hillsborough Bay. Due to this encroachment, when departing on Runway 4, the aircraft maintain a runway heading until reaching an altitude of four hundred feet; they then turn right on a heading of 080 and climb to, and maintain, one thousand, six hundred feet until air space is de-conflicted to ensure that all aircraft in the area are separated. Air traffic control requires that all flights are instrument departures using radar vectors. Also, because of existing residential encroachment and concerns about noise, MacDill has compromised some of its mission flexibility by limiting its hours of operation to 6:00 a.m. to 11:00 p.m. and limiting engine use on some fighter aircraft by reducing after-burning usage.

19. When departing on Runway 4 and passing just to the east of Florida Rock's property (and over the closest existing residential development), the KC-135R is at an elevation of

approximately three hundred feet and sometimes as low as one hundred forty feet, depending on its fuel load and wind conditions.

D. Air Installation Compatible Installation Zone (AICUZ)

20. The AICUZ program is a program developed by the United States Department of Defense for military airfields to promote land use compatibility in areas subject to aircraft noise and accident potential. There have been four AICUZ studies prepared for MacDill, which were published in 1976, 1978, 1998, and 2008. The latter study was not yet finalized and available to the public when Plan Amendment PA-07-08 was adopted. The 1998 study was prepared to present and document flying conditions at MacDill following the reassignment of KC-135R aircraft to the base in 1996.

21. The AICUZ delineates a Clear Zone, Accident Potential Zone I (APZ I), and Accident Potential Zone II (APZ II) for each runway and makes land use recommendations for each of those areas. These areas are based on standardized data compiled from military airfields around the globe to determine areas of increased accident potential. However, the studies do not assess risk nor consider the safety record of each individual airfield.

22. Based on the standardized data, the Clear Zone is the area with the highest potential for accidents, then the APZ I, and finally the APZ II. Accident potential increases toward the centerline of the runway, and away from the ends of those zones. The southwest corner of Florida Rock's property abuts the Clear Zone for Runway 4, while the remainder of the site lies within the APZ I north-northeast of the runway. Two aerial photographs submitted into evidence provide an excellent view of the zones, the flight path of Runway 4, the existing development north of the airfield, and the location of Florida Rock's property. See Air Force Exhibits g and g1.

23. The AICUZ land use compatibility chart recommends no residential uses in a Clear Zone or in an APZ I. (The chart identifies a number of examples of uses that are compatible with APZ I and flight operations at MacDill, such as miscellaneous manufacturing and low intensity office use. See Department Exhibit 3, pages 46 through 50.) In an APZ II, the AICUZ only recommends approval of single-family detached units for residential uses. These recommendations apply to all military installations with airfields and do not take into consideration unique local situations. However, the AICUZ recommendations are not binding on local governments and are to be balanced by the local government along with other planning considerations.

24. The active runway at MacDill is three thousand feet wide. At the end of the overrun for Runway 4 (and Runway 22 to the southwest) is the Clear Zone, which is normally three thousand feet wide and three thousand feet long. At the end of the Clear Zone is the APZ I, which ordinarily is three thousand feet wide and five thousand feet long. At the end of the APZ I is the APZ II, which ordinarily is three thousand feet wide. By using standardized APZs, the Air Force can alter the mission of a base (e.g., change from fighters to bombers) without having to alter the APZs.

25. The southeastern end of Runway 22 is surrounded by Tampa Bay. Therefore, the Clear Zone, APZ I, and APZ II for Runway 22 are located over the water and conform to the standard dimensions described above. Because aircraft departing on Runway 4 are required to make a right turn to a heading of 080 shortly after departure, the flight track for Runway 4 has an atypical split to the right. This deviation from a straight extension from the runway is permitted only when a majority of the aircraft fly predominately in the alternate direction. This split causes the APZ I for Runway 4 to deviate from the ordinary rectangular shape and to have two distinct APZ IIs, one directly northeast of, and aligned with, Runway 4, and the other to the east-northeast tracking the alternate direction of the aircraft

after takeoff. The City's Plan depicts the Clear Zone, APZ I, and APZ II on Figure 11 of the Transportation Element and shows the outline of those areas on the FLUM. See Fla. Admin. Code R. 9J-5.019(2)(a)5. and (5)(a)7., which requires that both the Transportation Element and FLUM depict "clear zones and obstructions."

26. Besides the delineation of a Clear Zone, APZ I, and APZ II, the AICUZ also includes noise contours and land use recommendations based on these noise contours. Noise contours are specific to each airfield based on one year of flight data applying noise variables, such as aircraft type, altitude, and engine power. An additional ten decibel (dB) noise penalty is added for flights after ten o'clock in the evening.

27. Noise contours are mapped in five dB increments between sixty-five and seventy dB. A noise of sixty-five dB is equivalent to the sound of normal conversations. A noise of seventy-five dB is perceived by most persons to be twice as loud as a sixty-five dB noise.

28. The AICUZ land use guidelines include a determination that residential uses in the Day Noise Level (DNL) sixty-five to sixty-nine contour and seventy to seventy-four contour are generally compatible with noise attenuation of twenty-five dB and thirty dB, respectively. The guidelines further note that

residential use is discouraged in DNL sixty-five to sixty-nine and strongly discouraged in DNL seventy to seventy-four, but if residential uses must be allowed, measures to achieve outdoor to indoor Noise Level Reduction (NLR) for DNL sixty-five to sixty-nine dB and DNL seventy to seventy-four dB should be incorporated into building codes.

29. The subject property is located mostly in the DNL sixty-five to sixty-nine dB contour, while less than nine acres in the southern portion are located within the DNL seventy to seventy-four dB contour.

30. The FAA compatibility guidelines codified in 14 CFR Part 150, Appendix A, which apply to civilian airports, include a determination that residential uses are compatible with the DNL sixty-five to sixty-nine contour.

31. Nothing in Chapter 163, Florida Statutes, or Florida Administrative Code Rule Chapter 9J-5 requires noise contours to be mapped or for comprehensive plans to include noise standards.

E. The Joint Land Use Study (JLUS)

32. The JLUS is a Department of Defense program administered through its Office of Economic Adjustment and funded by the Federal Government. It provides funds and resources for local governments located adjacent to military

installations, such as the City, to evaluate a study area of properties affected by the military installation.

33. The City and MacDill conducted a JLUS, which was finalized in June 2006, or before Amendment PA07-08 was adopted. The study was initiated at the request of MacDill because of its concern that urban encroachment might affect its operations and future viability. Two of the stated goals of the JLUS were to promote "comprehensive planning for long term land use compatibility between MacDill and the surrounding community" and to restrict "land uses that are deemed to be incompatible with MacDill operations by the AICUZ study." See Department Exhibit 4.

34. The JLUS relied heavily upon information regarding flight operations, accident potential, and noise impacts in the 1998 AICUZ. It analyzed each zone in the AICUZ to identify existing development encroachment densities and ultimately made recommendations regarding development issues adjacent to MacDill. According to the 2006 study, residential uses constitute ninety-one percent of the three hundred twenty-seven acres of property that lie within the APZ I and most are single-family detached homes. As of 2003, the AICUZ was almost fully developed and only 72.2 acres were held in private ownership. Most of this development has existed for years. The study

further indicated that almost eight thousand people lived in APZ-1, and that the average net density in the APZ I is 5.78 units per acre, although higher densities exist in some areas.

35. The JLUS included four sets of land use options for the Clear Zones and APZs, which vary in intensity from three to ten units per acre, none of which followed the AICUZ recommendation of no new residential uses in APZ I. One recommended option was that within APZ I, densities for residentially-designated parcels be limited to zero to six dwelling units per acre and a 0.5 floor area ratio. Another recommended option was to maintain the status quo within the APZ I, as expressed in FLUE Policy A-3.1, of ten dwelling units per acre. Ultimately, the committee preparing the report adopted the zero to six dwelling units per acre option. The JLUS further recommended that the City amend FLUE Policy A-3.1 by establishing a new land use category entitled "Military Installation Airport Compatibility Plan Category" with a density/intensity range of zero to six dwelling units per acre and a 0.5 floor acre ratio within APZ I. See Department Exhibit 4, page 5-5. Although the Planning Commission recommended to the City that these changes be approved, to date the City has not formally adopted either recommendation in its Plan. See Department Exhibit 19.

F. The Objections

a. Compatibility

36. The Department and Air Force contend that the proposed future land use on the Florida Rock property (CMU-35) is not compatible with MacDill. Although the Department has not adopted any rule specific to military installation compatibility or to airport APZs, the word "compatibility" is defined in Florida Administrative Code Rule 9J-5.003(23) as follows:

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

Whether or not adjacent property is "unduly negatively impacted" and therefore compatible or not is a fact-specific determination made by the Department on a case-by-case basis.

37. Section 163.3177(6)(a), Florida Statutes, was amended in 2004 to require that the FLUE of each local government "include criteria to be used to achieve the compatibility of adjacent or closely proximate lands with military installations."

38. To assist local governments with all types of land use compatibility issues, including those involving military installations, in May 2004 the Department prepared a PowerPoint presentation, presumably for the benefit of various local

government planning officials. See Florida Rock Exhibit 34. Among other things, the document includes a list of twelve "Suggested Best Practices" in addressing military installation compatibility. One suggested practice is for the local government to adopt noise attenuation standards in either the plan itself or land development regulations.

39. To ensure compliance with the 2004 statutory amendment, as well as requirements of Florida Administrative Code Rule Chapter 9J-5, the City's Plan includes a number of provisions to achieve compatibility with MacDill operations. Most, if not all, of these provisions were actually in effect before the change in the law, having been adopted in response to the 1998 AICUZ. Specifically, Transportation Element Objective 9.6, and underlying Policies 9.6.1 through 9.6.5, generally require that the City ensure that new development will not obstruct military aircraft operations; that MacDill representatives be included in the review of all proposed plan amendments within the APZs and Approach Zones; that the City consult the AICUZ recommendations when proposing land use changes within APZ I and II; that the City promote compatibility within the APZs and Approach Zones through reduced densities; that the City and Planning Commission continue to review the impacts of development within the Approach Zones; and that

communication towers and antennas be prohibited in APZ I and II. See Fla. Admin. Code R. 9J-5.019(4)(c)21., which requires that the Transportation Element include policies to "[protect] airports from the encroachment of incompatible land uses."

40. In addition, FLUE Objective A-3, and underlying Policies A-3.1, A-3.3, A-3.4, A-3.6, and A-3.7, some of which apply only to MacDill, and others to both MacDill and Tampa International Airport, generally require that "adjacent development be compatible with airport related activities"; that future residential development be restricted to ten dwelling units per acre; that new construction and redevelopment which inhibits the safe and efficient operation of airport facilities with the APZs be prohibited; that "noise sensitive" development be prohibited unless noise attenuation features are included; that new development not obstruct aircraft operations; and that floor area ratios be promoted to guarantee the efficient operation of the airports. See Fla. Admin. Code R. 9J-5.006(3)(c)2., which requires policies in the FLUE that "[p]rovi[de] for compatibility with adjacent uses." As noted earlier, all of these provisions have been found to be in compliance.

41. The compatibility argument by the Department and Air Force centers around two concerns: accident potential and noise impacts of aircraft departing from and/or landing at MacDill.

42. In response to the accident potential concern, Florida Rock and the City point out that no witness could recall a Class I accident (one resulting in a property loss of over \$1 million, a loss of life, or a permanent injury) ever occurring at a MacDill Clear Zone or APZ. They also point out that aircraft safety is continually improving, and that the Air Force itself concedes that the number of accidents has decreased "tremendously" over the last forty years. Finally, they point out that ninety percent of the landings at MacDill are from the southwest over Tampa Bay and thus pose no threat to Florida Rock's property.

43. The two stages of a flight with the greatest potential for accident are on takeoff and landing. Based on historical locations of accidents, the APZ has the greatest potential for accidents when aircraft are in distress. The Florida Rock parcel is located within APZ I.

44. Although no Class I accidents have occurred at MacDill for at least the last forty years, and aircraft safety has dramatically improved over the years, there is no guarantee that an accident will not happen in the future. If an accident

occurred, the results could be highly destructive. This is particularly true since the KC-135R routinely departs over or close to the southeastern corner of the Florida Rock parcel, sometimes at altitudes as low as one hundred forty feet, carrying up to 200,000 pounds of JP-8 aviation fuel. Debris scatter from a larger, heavier aircraft such as the KC-135R typically covers around eight acres. The debris scatter from a smaller aircraft, such as a fighter jet, is around three acres. Therefore, an aircraft accident would obviously be catastrophic for residents living around the site of the accident.

45. Depending on its location, residential encroachment in the APZ can erode operational flexibility. As noted earlier, due to long-existing residential housing north and northeast of the airfield, the hours of operation at MacDill have been curtailed by eliminating flights between 11:00 p.m. and 6:00 a.m., more than likely due to noise concerns rather than safety issues. The KC-135R must make a right turn towards Hillsborough Bay when it reaches an elevation of only four hundred feet. Pilots must use instruments (rather than visual flight rules) and vectors when departing the airfield, but the evidence suggests this limitation is due to congested traffic in the area and the fact that MacDill air traffic control only

"owns" the airspace below one thousand, six hundred feet, and not because of residential encroachment.

46. According to an Air Force witness, depending on the type of development in the APZ and the height of the structures, it might cause the KC-135R to maintain a higher altitude on takeoff (with a corresponding lower fuel load) and/or to make a slight change in direction. However, FLUE Policy A-3.3 prohibits new construction "which inhibits the safe and efficient operations of airport facilities within the [APZ]"; FLUE Policy A-3.6 provides that "[n]ew development shall not obstruct aircraft operations"; and FLUE Policy A-3.7 provides that "[a]ll building regulations (floor area ratios (FAR) and height) shall be promoted to guarantee the continued efficient operation of the airport and ensure public safety." Also, Transportation Element Policy 9.6.5 prohibits the construction of communication towers and antenna in the APZ I and II zones. Presumably, these restrictions are enforced during the site approval process.

47. MacDill has always been located in an urban area and residential development has existed for decades directly in the flight path of Runway 4. In fact, the AICUZ was nearly fully developed in 2003. Therefore, it is fair to characterize the area in and around the flight path as already developed and

built out with a residential character. While the potential for an accident is always present, the evidence does not show that this consideration has unduly negatively interfered with the missions or operational flexibility of the base. Even the 1998 AICUZ describes the risk to people on the ground of being killed or injured by aircraft accidents as "minute." See Department Exhibit 3, page 42.

48. Even though the proposed change in land use will result in more residential development to the west of the flight path for aircraft using Runway 4, it should not unduly negatively impact, directly or indirectly, the use or condition of MacDill. (Under the Light Industrial land use, Florida Rock can now construct a building that employs hundreds of people.) The more persuasive evidence shows that the plan amendment is not incompatible in this respect.

49. Most of the Florida Rock property lies entirely within the DNL sixty-five dB noise contour zone. This means that the average noise exposure is sixty-five dB, but the actual noise of all aircraft in the fleet is much louder than that on takeoff. For example, fighter aircraft are around one hundred ten dB at one thousand feet and would be much louder at lower altitudes. Some types of bombers, which occasionally use the base for training operations, were described as being so loud that you

have "to hold the table down or things will fall over." Even so, CMU-35 residential development within this category of noise exposure is consistent with the FAA land use compatibility table and is generally compatible with AICUZ land use guidelines. The southern end of the site, which is a wetland area, is within the DNL seventy to seventy-four dB noise contour, but it is highly unlikely that development could ever occur in that area, given its designation as an environmentally sensitive area by the Planning Commission.

50. The City has adopted a land development regulation, codified as Section 27-137.5, which requires that all residential development within the APZ-I be "designed and constructed to reduce noise levels by twenty-five (25) decibels." Another land development regulation, Section 5-301.1 requires noise level reduction, or abatement, of twenty-five dB for construction in the APZ-I. Both provisions were enacted in order to ensure compatibility with MacDill's operations. While the Department points out that there are no specific provisions such as these in the Plan to reduce noise impacts, FLUE Policy A-3.4 "[p]rohibit[s] future 'noise sensitive' development such as residences . . . which do not provide the required noise attenuation features within those noise contour areas adjacent to MacDill AFB which may pose health hazards."

51. The Air Force acknowledged that curtailment of flight operations for the KC-135R has not occurred due to noise complaints from residents or users of property around the base. In making this admission, it may have overlooked the fact that late-night operations (between 11:00 p.m. and 6:00 a.m.) have been curtailed for an unknown period of time, presumably because of concerns that operations during these hours would disturb the nearby residential areas. But this is due to existing development, and not future development, and there is no evidence that development by Florida Rock would likely cause a further reduction in MacDill's hours of operation.

52. Although the Department argues that residents in the neighborhood adjacent to MacDill constantly complain to the base and City officials, recorded noise complaints numbered only seventeen in 2007, twenty-five in 2008, and sixteen through the date of the hearing in 2009. One person living in APZ II was the source of eleven of the twenty-five recorded complaints in 2008 and four of the sixteen in 2009, while many of the other complaints came from persons who live in other counties or cities in the area. It is fair to say that all of the noise complaints are associated with fighter and bomber aircraft, which occasionally use the base for training missions, and not the KC-135R, which is permanently stationed at the base.

53. Even though the Florida Rock property may be subjected to potentially more than a hundred takeoffs and landings per day, with aircraft operating at altitudes as low as one hundred forty feet, there is insufficient evidence to support a finding that military operations will be affected by noise concerns. This is evidenced by the fact that literally hundreds of existing residences in the APZ are now subjected to the same conditions, yet they have coexisted with MacDill operations for many years. Further support for this finding is based on the fact that very few complaints have been filed by persons living in the immediate area. Even though a City witness conceded that the noise from aircraft may be a "nuisance" to some area residents, the greater weight of evidence supports a finding that from a noise perspective, the proposed change in land use would not be incompatible with MacDill operations or use.⁶

54. The evidence supports a finding that a change in the land use for the Florida Rock property will be compatible with adjacent uses, including MacDill, as that word is defined in Florida Administrative Code Rule 9J-5.003(23).

b. Data and Analysis

55. The map change on the FLUM must be based on surveys, studies, and data regarding the area, including the compatibility of uses on lands adjacent to or closely proximate

to military installations. See § 163.3177(6)(a), Fla. Stat. Florida Administrative Code Rule 9J-5.005(2) implements that provision and spells out the requirements for satisfying the statute. These include requirements that the data must be "relevant and appropriate," "taken from professionally accepted existing sources, such as . . . existing technical studies," and "collected and applied in a professionally acceptable manner." See Fla. Admin. Code R. 9J-5.005(2)(a). The City must also "react to it in an appropriate way" at the time the amendment is adopted. Id. Finally, a local government may rely on data and analysis used to support the original plan or a previous plan amendment unless "the previously submitted data and analysis no longer include and rely on the best available existing data." See Fla. Admin. Code R. 9J-11.007(1).

56. The Department and Air Force argue that the 1998 AICUZ and the June 2006 JLUS are the best available, relevant, and appropriate data regarding land uses around MacDill, and that the City failed to appropriately react to that data when it adopted the amendment. They further argue that the City relied on data and analyses supporting the 1998 Plan, which is no longer the best available existing data. On the other hand, Florida Rock and the City assert that there is adequate data and analysis that support the adopted map change, including the

Transportation Element and FLUE policies listed above (Joint Exhibit 1), the JLUS data and recommendations (Department Exhibit 4), the Planning Commission report (Florida Rock Exhibit 3), the City Community Planning Division staff report (City Exhibit 28), the portion of the Department's PowerPoint relating to Military Installation Compatibility (Florida Rock Exhibit 34), and 14 CFR Part 150, Appendix A, which was officially recognized.

57. The 2006 JLUS includes as one option a recommendation that the status quo for density in FLUE Policy A-3.1 be maintained for development around MacDill. The Planning Commission staff report noted that both land use categories have the same maximum commercial buildout potential; that the site will never be developed to its maximum potential; that the change is consistent with recent trends away from light industrial in that area; that the new designation is consistent with the surrounding area; that the amendment is consistent with all other provisions in the Plan; and that the City must ensure that any development will not obstruct operations at MacDill. Similarly, the City Community Planning Division staff report noted that MacDill and the South Tampa community have coexisted for sixty-five years; that the predominant land use in the area is residential; that the change is consistent with FLUE Policy

A-3.1; that noise attenuation measures will be employed; that the CMU-35 designation continues the land use trend away from light industrial; that the site will not be able to develop to its full potential; and that the change would be consistent with the future development pattern of the area. The map change is also supported by the land use compatibility policies in the AICUZ study for noise contours, as well the FAA noise compatibility guidelines. Finally, the change is consistent with existing policies in the FLUE and Transportation Element. They provide further support for the requested change and the City's determination that the map change is compatible with surrounding uses, including MacDill flight operations. The City reacted appropriately to these data and analyses when it enacted the amendment.

58. The AICUZ is based on standardized data compiled from airbases around the world to determine areas of increased accident potential. It did not assess the individual risk nor consider the safety record of MacDill; it did not give consideration to any unique local situations, including the fact that MacDill is located in a fully developed urban area and has coexisted with residential development in the Runway 4 flight path for decades; and it characterized the risk of an aircraft accident as "minute." Because residential development under the

map change will be subject to noise attenuation requirements, the new use will be consistent with the AICUZ and FAA guidelines.

59. The JLUS presented four options for residential use within the APZ I, one of which continues the existing policy of allowing ten dwelling units per acre in APA I. Although the committee ultimately recommended that more restrictive measures be implemented, this recommendation was not adopted by the City.

60. Standing alone, the JLUS contains competing data that support a less intense residential classification on the Florida Rock property. But the City has no land use category that allows the site a mixed use with a maximum of six residential units per acre. When taken as a whole, the data and analyses relied upon by the City constitute adequate support for the plan amendment. Accordingly, the Department and Air Force have failed to show by a preponderance of evidence that the plan amendment contravenes Section 163.3177(6)(a), Florida Statutes, or Florida Administrative Code Rules 9J-5.005(2)(a) and 9J-11.007(1). See, e.g., Geraci, et al. v. Hillsborough County, et al., DOAH Case No. 95-0259GM, 1999 Fla. ENV Lexis 11 at *114-15 (DOAH Oct. 16, 1998, DCA Jan. 12, 1999)(even though the data and analysis may support another classification, a local government is not required to demonstrate that its land use classification

choice is perfect, or that the data and analysis support that use to the exclusion of any other classification).

61. The more persuasive evidence supports a finding that the challenged plan amendment is in compliance.

CONCLUSIONS OF LAW

62. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569, 120.57(1), and 163.32465(6), Florida Statutes.

63. Except for the Department, only affected persons, as defined by Section 163.3184(1)(a), Florida Statutes, have standing to challenge, or intervene in a proceeding involving, a Pilot Program amendment. See § 163.32465(6)(a), Fla. Stat. As previously found, the evidence establishes that the Air Force and Florida Rock are affected persons and have standing to participate in this proceeding.

64. In a proceeding involving a plan amendment adopted under the Pilot Program, "[t]he local government's determination that the amendment is 'in compliance' is presumed to be correct and shall be sustained unless it is shown by a preponderance of the evidence that the amendment is not 'in compliance'." See § 163.32465(6)(d), Fla. Stat. This language is identical to the language used in small-scale amendment cases. Therefore,

challenges to compliance are evaluated under the preponderance of the evidence standard rather than the typical fairly debatable standard. The test in this case is whether the evidence supports or contradicts the City's determination that the amendment is in compliance. Denig v. Town of Pomona Park, DOAH Case No. 01-4845GM, 2002 Fla. ENV LEXIS 220 at *4-5 (DOAH June 18, 2002, Admin. Comm. Oct. 23, 2002).


65. For the reasons given in the Findings of Fact, the greater weight of evidence supports a conclusion that the City's determination that the plan amendment is in compliance is correct.

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

RECOMMENDATION

RECOMMENDED that the Department of Community Affairs enter a final order determining that the plan amendment adopted by Ordinance No. 2008-145 is in compliance.

DONE AND ENTERED this 26th day of August, 2009, in
Tallahassee, Leon County, Florida.



DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of August, 2009.

ENDNOTES

1/ On the same date, the City also adopted Ordinance No. 2008-144, which effected a similar land use change (Amendment PA07-02) for a 26.07-acre parcel owned by Spray Miser International, Inc. (Spray Miser). Because the Department challenged both amendments, the two map changes were scheduled to be heard at the final hearing. In the parties' Joint Prehearing Stipulation, however, they agreed that the Spray Miser amendment should be bifurcated from this proceeding and placed in abeyance pending settlement negotiations by the parties. Accordingly, only the Florida Rock amendment is in issue. Because of this, Spray Miser has been dropped from the style of this case.

2/ All statutory references are to the 2008 version of the Florida Statutes.

3/ The parties' Proposed Recommended Orders indicate that Department Exhibit 12 (the Petition filed by the Department to initiate this case) was also received in evidence. During the Department's case-in-chief, its witness relied upon the Petition to refresh his recollection. Although the document was

identified as Department Exhibit 12 in the Joint Prehearing Stipulation, it was never moved into evidence.

4/ The Department of Transportation raised concerns about noise from military aircraft; the Air Force was concerned with both noise and safety issues; and the Tampa Bay Regional Planning Commission cited concerns with a number of issues including the conversion of industrial uses to other land use designations, affordable housing, hurricane evacuation, and a lack of compatibility with MacDill operations. Also, the Southwest Florida Water Management District submitted a one-page letter expressing concerns about the possibility of flooding on the property. See Florida Rock Composite Exhibit 35.

5/ These include allegations that the plan amendment is internally inconsistent with other Plan provisions, that the plan amendment is inconsistent with the Tampa Bay Strategic Regional Policy Plan and the State Comprehensive Plan, and that the City lacked authority to adopt the amendment.

6/ It is illogical to assume that a potential buyer or lessee of property in APZ I (including the Florida Rock property) would assume ownership or sign a lease without full knowledge that extremely loud military aircraft were taking off and landing throughout the day and continuing until just before midnight, and that the property on which they intended to reside or work was located just north of MacDill.

COPIES FURNISHED:

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

Shaw P. Stiller, General Counsel
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

Matthew G. Davis, Esquire
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

Major George L. Burnett, Esquire
United States Air Force
Environmental Law & Litigation Division
112 Luke Avenue, Suite 343
Bolling Air Force Base, DC 20032-6400

John F. Rudy, III, Esquire
Assistant United States Attorney
400 North Tampa Street, Suite 3200
Tampa, Florida 33602-4798

Karen A. Brodeen, Esquire
Fowler White Boggs, P.A.
Post Office Box 11240
Tallahassee, Florida 32302-1240

Ernest Mueller, Esquire
Assistant City Attorney
315 East Kennedy Boulevard, Fifth Floor
Tampa, Florida 33602-5211

Mark S. Bentley, Esquire
Mark Bentley, P.A.
201 North Franklin Street, Suite 1650
Tampa, Florida 33602-5167

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.