

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BONNIE CONKLIN AND WENDY)
GOODSON,)
)
Petitioners,)
)
vs.) Case No. 09-3597GM
)
PUTNAM COUNTY, FLORIDA,)
)
Respondent,)
)
and)
)
STOKES LANDING ENTERPRISES,)
LLC,)
)
Intervenor.)
_____)

RECOMMENDED ORDER

The final hearing in this case was held on August 31 through September 1, 2009, in Palatka, Florida, before Bram D. E. Canter, an Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether the amendment to the Putnam County Comprehensive Plan adopted by Ordinance 2009-23 is "in compliance," as that term is defined in Section 163.3184(1)(b), Florida Statutes (2008).^{1/}

PRELIMINARY STATEMENT

On June 9, 2009, Putnam County adopted Ordinance 2009-23, which amended the Future Land Use Map ("FLUM") of the Putnam County Comprehensive Plan to change the future land use designation for a 2.4-acre parcel from Agriculture II to Industrial. The parcel is owned by Intervenor and located at 597 Stokes Landing Road, which is south of Palatka in Putnam County ("the Property").

Because the amendment is a "small scale development amendment," as defined in Section 163.3187(1)(c), Florida Statutes, no compliance review was conducted and no notice of intent was issued by the Department of Community Affairs. Petitioners filed a petition for an administrative hearing with

DOAH to challenge the amendment. They subsequently amended their petition.

At the final hearing, Joint Exhibits 1 through 5 and 7 through 18 were admitted into evidence. Petitioners presented the testimony of Bonnie Conklin, Wendy Goodson, William Wilson, Cathy Jenkins, and expert planner Mack Cope. Petitioners' Exhibits 2.1 through 2.4, 3.1 through 3.90, 6, 9, 10, 12, 13.1 through 13.3, 17A, and 17B were admitted into evidence. The County and Intervenor presented the testimony of Kenneth Gstohl; planning experts Brian Hammons, Laura Dedenbach, and Lanny Harker; wetland expert Jonathan Napier; and surveyor Earl Wallace. The testimony of Lanny Harker was presented through the transcript of his deposition. Respondent/Intervenor's Exhibits 2, 3.1 through 3.4, 4 (pages 14 through 26, 28, 31 through 33, and 35 through 41), 7, 8(f), 8(g), 10, 17, 19, and 21 through 26 were admitted into evidence.

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

FINDINGS OF FACT

The Parties

1. Petitioner Bonnie Conklin resides and owns property at 600 Stokes Landing Road. She submitted oral comments to the County at the adoption hearing on the amendment.

2. Petitioner Wendy Goodson owns property at 595 Stokes Landing Road in Putnam County. She submitted oral comments to the County at the adoption hearing on the amendment.

3. Putnam County is a political subdivision of the State and has adopted a comprehensive plan which it amends from time to time pursuant to Section 163.3167(1)(b), Florida Statutes.

4. Intervenor Stokes Landing Enterprises, LLC ("Stokes Landing"), is a Florida limited liability company. It owns the Property affected by the amendment and submitted oral comments and evidence during the local hearings on the amendment.

The Amendment

5. The amendment changes the future land use designation of the Property from Agriculture II to Industrial. Section One of Ordinance 2009-23 provides that the re-designation of the Property is subject to the terms and conditions of the development agreement between the County and Stokes Landing, which is attached as an exhibit to the ordinance.

6. The Property has approximately 220 feet of frontage on the St. Johns River. The development agreement requires that

the Property be developed as a Planned Unit Development (PUD) for a "ship building and repair facility." Contemporaneous with the adoption of the amendment, the County rezoned the Property to PUD.

7. The development agreement includes the following recitals:

D. Developer and the County wish to enter into this Agreement to set forth the conditions under which development of the facility shall be used.

E. The County has entered into this Agreement in consideration of the commitment by Developer to construct certain improvements as further described in Section 3 below (hereinafter the "Improvements"); and to redevelop the site and utilize the Property as a Planned Unit Development (PUD) only, with the understanding that the Developer shall apply for a PUD to operate a ship building and repair facility.

* * *

G. The conditions specified within a Planned Unit Development (PUD) zoning district established by Developer pursuant to this Agreement will aid redevelopment of the Property, limit localized impacts of the Property and advance the implementation of the County's Comprehensive Plan.

8. Section 3 of the development agreement requires that the developer make the following improvements:

(a) Access Roadway Improvement: Developer at its sole cost and expense shall design, engineer, permit, construct and install in accordance with all applicable laws, rules and regulations and the County's approval of the design, the improvement(s) of the Access

Roadway from Stokes Landing Road to the subject site via the established access easements. County approvals shall not be unreasonably withheld.

(b) Timing: Developer shall complete the Access Roadway Improvements prior to starting redevelopment of the site for the proposed ship building and repair use.

(c) Planned Unit Development (PUD) Zoning: Developer shall obtain approval of rezoning the Property to PUD prior to starting redevelopment of the site and shall maintain the approved PUD zoning throughout the duration of the Industrial future land use on the site. This requirement does not preclude any future request for a Comprehensive Plan Amendment to another future land use category and subsequent associated rezoning requests to a compatible zoning district.

The Property and Surrounding Land Uses

9. Most land uses contiguous to or adjacent to the Property are residential uses on lands designated Agriculture II. However, 100 feet south of the Property are lands along the St. Johns River designated Conservation. There are other Conservation lands across the river from the Property and north of the Property.

10. The only other land uses in the area are a commercial well-drilling business on land designated Agriculture II, and a shipyard known as St. Johns Ship Building on lands designated Industrial. The St. Johns Ship Building facility is located on 101 acres and is approximately 900 feet north of the Property.

11. The lands abutting the Property on the west, south, and east are currently undeveloped. Across the St. Johns River from the Property is Stokes Island, which is also undeveloped.

12. About 60 percent of the Property lies within the 100-year flood zone. There are wetlands on the Property which are generally of low quality due to invasive vegetation.

Historic Uses and Improvements on the Property

13. The staff report for the amendment states that the purpose of the amendment is to "make the land use designation of the property consistent with the existing use of the land," which "according to the applicant," has been ship building since the 1960's. This statement incorrectly characterizes both the existing use and the past use of the Property.

14. Aerial photography shows that much of the Property was cleared in 1943. In the 1940s and early 1950s, the County hauled shell rock from the Property for road building. The Property was used intermittently to build fishing vessels between the 1970's and 1998. The number of vessels that were built on the Property was not established by the record evidence. Some barge demolition activities also occurred on the Property in 2006 and 2007. Intervenor started to build a barge on the Property in 2008, but was almost immediately stopped by a County code enforcement officer because such activities are not allowed under the Property's agricultural zoning.

15. The evidence shows that the barge building and barge demolition activities, and probably the earlier boat building activities, were conducted in violation of the agricultural zoning of the Property.

16. Two steel mooring pilings and remnants of a dock or platform are still located on the Property.

17. There was some dispute about whether there still exist on the Property the rails or "ways" used in the past for hauling vessels out of the water and for launching vessels. Although a 2008 survey of the Property (Joint Exhibit 12) shows the rails, they do not appear in recent photographs of the Property (Respondent/Intervenor's Exhibits 3.1 through 3.4 and Petitioners' Exhibits 13.1 through 13.3).

18. The shoreline along the east boundary of the Property is not bulkheaded and, except for the clearing that has occurred on the Property, remains in a relatively natural condition.

Whether the Subject Property is a Port

19. The parties disputed whether the Property is an existing water port, which is relevant to the Comprehensive Plan policies regarding the location of industrial uses, as will be discussed below. The term "port" is not defined in the Comprehensive Plan. "Port facility" is defined in Florida Administrative Code Rule 9J-5.003(92) as:

[H]arbor or shipping improvements used predominantly for commercial purposes including channels, turning basins, jetties, breakwaters, landings, wharves, docks, markets, structures, buildings, piers, storage facilities, plazas, anchorages, utilities, bridges, tunnels, roads, causeways, and all other property or facilities necessary or useful in connection with commercial shipping.

This definition is not particularly helpful in resolving the dispute in this case, because it is a list of facilities (e.g., buildings) that can be associated with a port, rather than an identification of the elements that are essential to being a port.

20. In the traffic circulation section of the Putnam County Comprehensive Plan Data, Inventory, and Analysis, under the heading "Port Facilities," there is one water port identified:

Putnam County is currently served by a small barge port on the St Johns River, which is located between downtown Palatka and Rice Creek. . . . This barge facility is incorporated into a larger industrial park setting and provides an alternative method of moving certain types of goods and material into and out of the County.

21. The word "port" is defined in Webster's Dictionary as "a place where ships may ride secure from storms" and "a harbor town or city where ships may take on or discharge cargo."

Webster's New Collegiate Dictionary 889 (1979 ed.) The latter

definition indicates that the transport of cargo by water between land sites (ports) is the core of the meaning.

22. When deep harbors, channels, and turning basins occur naturally or are created and used by ships, there is little cause to dispute that a port exists. Here, there are no such natural or man-made features. The shoreline at the subject Property was not shown to differ from much of the shoreline along the St. Johns River.^{2/}

23. As indicated above, a port is a transportation facility where waterborne goods are loaded and unloaded. A port is distinct from a "boatyard," which is defined as "a yard where boats are built, repaired, and stored and often sold or rented." Merriam-Webster's On-Line Dictionary (2009)

24. The remnant boat building facilities on the Property do not make a port. It is found that the Property was used intermittently in the past as a boatyard, but it was never a water port.

Road Access to the Property

25. The Property's connection to the nearest public, paved road, is currently by easements over an unpaved drive. A 50-foot-wide easement extends north from the Property approximately 240 feet over an unpaved drive, then makes a 90-degree turn to the west along a 25-foot-wide, unpaved easement that runs about 325 feet to the beginning of a paved portion of the easement,

then continues 545 feet further west to the publicly owned and paved Stokes Landing Road.

26. Petitioners Conklin and Goodson own property and reside along the 25-foot easement. There are about a dozen other residences along the easements. There are many other residences along the public portion of Stokes Landing Road to its connection with U.S. 19.

27. Petitioners attempted to show that Intervenor's access to the Property from the public portion of Stokes Landing Road is legally insufficient because a small strip of land at the intersection of the 50-foot easement and the 25-foot easement is not included in the easements held by Intervenor. However, because Intervenor showed colorable easement rights over the entire private roadway, the Administrative Law Judge declined to take evidence on or determine the merits of the adverse real property claim.

28. Stokes Landing Road is classified as a "local road" by Putnam County. It is not an arterial or collector road. Although the properties along the unpaved road have a mailing address of Stokes Landing Road, some of the official documents that describe or depict Stokes Landing Road do not include the private easement segments.

29. It was estimated that the proposed boatyard would generate about 30 daily employee vehicle trips and one trip for pickup or delivery.

30. Intervenor presented evidence that a truck with a wheel base of 50 feet (typical of a truck and semi-trailer) could make the 90-degree right turn from a 25-foot-wide roadway onto a 50-foot-wide roadway. However, to do so, the truck would have to use the left side of the 25-foot easement and the left side of the 50-foot easement (from the driver's perspective). In other words, the truck would have to enter the lanes used by oncoming traffic.

Internal Consistency

31. Petitioners contend that the amendment is inconsistent with Policy A.1.9.3.A.6.d of the Future Land Use Element (FLUE) of the Comprehensive Plan. That policy states:

Industrial Uses shall be located on sites that "use existing utilities or resources; utilize one or more transportation facilities such as air ports, water ports, collector roads, arterial roads, and railroads; do not require significant non-residential vehicular traffic to pass through established neighborhoods; and are sufficiently separated and/or buffered when necessary from residential and other urban uses to minimize adverse impacts of noise, glare, dust, smoke, odor or fumes.

32. The Property is not located on a collector road or arterial road. It is not a water port.

33. The amendment would require significant non-residential vehicular traffic to pass through an established neighborhood. The non-residential traffic is significant because it more than doubles the existing traffic in the most rural portion of Stokes Landing Road and would create an unsafe condition for every trip to and from the Property by a large truck. It is not sound planning to locate an industrial use on property that is served only by a narrow residential driveway. It is not sound planning to locate an industrial use on a road where access by large trucks will require that the trucks travel in the oncoming traffic lanes.

34. The Property is not sufficiently separated or buffered from residential uses to minimize the adverse impacts of noise, glare, dust, smoke, odor, and fumes. Currently, there are vacant, wooded parcels adjacent to the Property, but the Intervenor has no control over these parcels and they will not always be vacant. The proposed industrial use is incompatible with the dominant pattern of development surrounding the Property, which is rural residential.

35. Intervenor argues that the Agriculture II land use designation allows "intensive" agricultural land uses, such as slaughter houses, suggesting that the residents are already subject to the possibility of adverse impacts from noise, glare, dust, smoke, odor, and fumes. However, there are no intensive

agricultural uses in the area and no evidence to suggest that such development is likely to occur in the future. The dominant land use is likely to remain rural residential.

36. Petitioners contend that the amendment is inconsistent with Goal 1 of the FLUE, which is to maintain the quality of life by "establishing a pattern of development that is harmonious with the County's natural environment and provides a desired lifestyle for County residents." The proposed boat building and repair operation in this rural residential neighborhood would significantly degrade the desired lifestyle of the residents in the area.

37. Petitioners contend that the amendment is inconsistent with FLUE Policy A.1.1.1.A.3., which prohibits land uses that generate, store, or dispose of hazardous waste in "areas of special flood hazard". However, Policy A.1.1.1.A.2.b. expressly allows water-dependent components of a development to be located in areas of special flood hazard. When FLUE Objective A.1.1 and its accompanying policies are read in pari materia, they indicate that a water-dependent land use can be allowed in the floodplain as long as any generation, storage, or disposal of hazardous waste will occur outside of the floodplain. Petitioners did not show that the proposed boatyard cannot be operated in conformance with these policies.

38. For similar reasons, Petitioners' contention that the amendment is inconsistent with FLUE Policy A.1.1.E. is unpersuasive. That policy encourages the clustering of development away from flood-prone areas. However, in the case of water-dependent land uses, the water-dependent components of the land use must be located near the water.

39. Petitioners contend that the amendment is inconsistent with FLUE Objective A.1.3 and FLUE Policy A.1.3.1, which encourage the elimination or reduction of non-conforming uses. Petitioners argue that past boat building and boat repair operations at the Property were non-conforming uses under the Agriculture II land use category and should be eliminated.

40. Petitioners' arguments are not persuasive because, if the amendment is approved, the boatyard uses would not be inconsistent with the FLUM. Furthermore, Petitioners showed that there is no existing, non-conforming use of the Property, so there is no non-conforming use that needs to be reduced or eliminated.

41. Petitioners contend that the amendment is inconsistent with FLUE Policy A.1.3.2, which states:

Adequate buffering and separation between land uses of different densities and intensities shall be provided in accordance with the Land Development Code to minimize compatibility issues.

This policy directs that the Land Development Code ("Code") shall establish buffering requirements to minimize incompatibility. Compatibility is also a comprehensive planning issue that can cause an amendment to be "not in compliance," regardless of the buffering regulations contained in the Code, but this particular policy is only directed to the Code. Petitioners did not show that the Code does not contain buffering requirements.

42. Petitioners contend that the amendment is inconsistent with FLUE Policy A.1.4.9, which requires a vegetated upland buffer for any waterfront development. The Petitioners' evidence on this issue was insufficient to establish that the required buffer could not be provided. Furthermore, the policy directs the County to adopt regulations to establish the buffer requirements. Petitioners did not show that such regulations were not adopted by the County.

43. Petitioners contend that the amendment is inconsistent with FLUE Policy A.1.6.1, which encourages infill within the designated urban service areas of the County. Water-dependent uses must be located where the water is located. Therefore, infill policies cannot be applied to water-dependent uses in the same manner as with other land uses. Although the availability of necessary urban services is still a relevant inquiry, Petitioners did not present evidence on this point.

Consistency with Rule 9J-5

44. Petitioners contend that the amendment is inconsistent with Florida Administrative Code Rule 9J-5.003(23), which defines the term "compatibility"; Rule 9J-5.006(3)(b)3., which encourages the reduction or elimination of inconsistent uses; Rule 9J-5.006(3)(c)2., which requires that comprehensive plans provide for "compatibility of adjacent land uses"; and Rules 9J-5.006(5)(h)6. and 8., which require that amendments be reviewed for compatibility and "functional relationship" with adjacent land uses.

45. The term "compatibility" is defined in Florida Administrative Code Rule 9J-5.003(23) as:

[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.

A definition is not a regulation that requires compliance. A definition simply shows the intended meaning for a term used in a regulation. Therefore, a comprehensive plan amendment cannot be inconsistent with a definition.

46. Florida Administrative Code Rule 9J-5.006(3)(b)3. requires the future land use elements of comprehensive plans to contain one or more objectives that encourages the elimination or reduction of uses inconsistent with the community's character

and future land uses. This rule addresses existing non-conforming uses. The Property is no longer being used in a manner that is inconsistent with the community's character. Therefore, there is no inconsistent use of the Property that needs to be reduced or eliminated.

47. Florida Administrative Code Rule 9J-5.006(3)(c)2. requires the future land use element of a comprehensive plan to contain one or more policies that provide for compatibility of adjacent land uses. It was found, above, that the rural residential neighborhood adjacent to the Property would be negatively impacted by boat building and boat repair uses of the Property. The amendment is incompatible with the surrounding rural residential neighborhood.

48. Florida Administrative Code Rules 9J-5.006(5)(h)6. and 8. relate specifically to the analysis of whether an amendment fails to discourage the proliferation of urban sprawl. Because Petitioners did not raise urban sprawl as an issue, they cannot claim inconsistency with these rules.

49. Petitioners contend that the amendment is inconsistent with Section 163.3177(8), Florida Statutes, and Florida Administrative Code Rule 9J-5.005(2), which require that an amendment be based on relevant and appropriate data and analysis. Petitioners believe that there is no demonstrated need for additional industrial uses in the County.

50. Petitioners' argument and evidence on the issue of need failed to take into account the water-dependent use that is proposed. Petitioners' computations to show that there are substantial acres of unused industrial lands in the County fails to address the question of whether there is a need for additional water-dependent land uses.

CONCLUSIONS OF LAW

51. The Division of Administrative Hearings has jurisdiction over the subject matter of and parties to this proceeding pursuant to Sections 120.569, 120.57, and 163.3187(3)(a), Florida Statutes.

52. In order to have standing to challenge a plan amendment, a challenger must be an "affected person," which is defined in Section 163.3184(1)(a), Florida Statutes, as a person who resides, owns property, or owns or operates a business within the local government whose comprehensive plan amendment is challenged, and who submitted comments, recommendations, or objections to the local government during the period of time beginning with the transmittal hearing and ending with amendment's adoption.

53. Petitioners Conklin and Goodson and Intervenor Stokes Landing are "affected persons" as that term is defined in Section 163.3184(1)(a), Florida Statutes.

54. Pursuant to Chapter 163.3184, the Department of Community Affairs is charged with the duty to determine whether comprehensive plan amendments are "in compliance." However, because this amendment involves a parcel of land that is smaller than ten acres, it is a "small-scale development amendment" and is not subject to a compliance review by the Department.

See § 163.3187(1)(c), Fla. Stat.

55. If the Administrative Law Judge recommends that a small scale development amendment be found not in compliance, the recommendation is submitted to the Administration Commission for final action. If the Administrative Law Judge recommends that a small scale development amendment be found in compliance, the recommendation is submitted to the Department of Community Affairs for final action. See § 163.3187(3)(b), Fla. Stat.

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

In compliance means consistent with the requirements of ss. 163.3177, when a local government adopts an educational facilities element, 163.3178, 163.3180, 163.3191, and 163.3245, with the state comprehensive plan, with the appropriate strategic regional policy plan, and with chapter 9J-5, Florida Administrative Code, where such rule is not inconsistent with this part and with the principles for guiding development in designated areas of critical state concern and with part III of chapter 369, where applicable.

57. A local government's determination that a small scale amendment is "in compliance" is presumed to be correct and shall be sustained when challenged unless it is shown by a preponderance of the evidence that the amendment is not in compliance. § 163.3187(3)(a), Fla. Stat.

58. The amendment is inconsistent with Section 163.3177, Florida Statutes, because the amendment violates Subsection 163.3177(2), Florida Statutes, which requires the elements of a comprehensive plan to be internally consistent. Petitioners proved by a preponderance of the evidence that that the amendment is internally inconsistent with FLUE Goal 1 and FLUE Policy A.1.9.3.A.6.d.

59. The amendment is inconsistent with Florida Administrative Code Chapter 9J-5, because Petitioners proved by a preponderance of the evidence that the amendment fails to comply with Florida Administrative Code Rule 9J-5.005(3)(c), which requires compatibility with adjacent land uses.

60. Petitioners failed to prove by a preponderance of the evidence that the amendment was not supported by appropriate data and analysis with regard to the issue of the need for additional water-dependent, industrial land uses. Despite this conclusion, the more persuasive evidence in the record shows that the proposed industrial use should not be placed in this location.

61. Because Intervenor showed colorable easement rights over the entire private portion of Stokes Landing Road, the Administrative Law Judge declined to take evidence or determine the merits of Petitioners' argument that Intervenor's easement rights were subject to an adverse claim. The circuit courts have exclusive jurisdiction to resolve real property disputes. See § 26.012, Fla. Stat.

62. In summary, Petitioners proved by a preponderance of the evidence that the amendment is not "in compliance," as the term is defined in Section 163.3184(1)(b), Florida Statutes.

RECOMMENDATION

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

RECOMMENDED that the Administration Commission enter a Final Order determining that the amendment adopted by Putnam County through Ordinance 2009-23 is not in compliance.

DONE AND ENTERED this 24th day of December, 2009, in
Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of December, 2009.

ENDNOTES

^{1/} All references to the Florida Statutes are to the 2008
codification.

^{2/} In contrast, St Johns Ship Building constructed a dry dock,
turning basin, and artificial channel to connect its facilities
to the St Johns River.

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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.