STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DIANE C. BROWN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-0858GM
	)	
DEPARTMENT OF COMMUNITY AFFAIRS and BAY COUNTY,	)	
	)	
Respondents.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, D. R. Alexander, on November 8 and 9, 2010, in Panama City, Florida, and by videoconferencing on November 20, 2010.

APPEARANCES

For Petitioner: Diane C. Brown, pro se
241 Twin Lakes Drive
Laguna Beach, Florida 32413-1413

For Respondent: (Department) Matthew G. Davis, Esquire
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

For Respondent: (County) Terrell K. Arline, Esquire
Bay County Attorney
840 West 11th Street
Panama City, Florida 32401-2336

STATEMENT OF THE ISSUE

The issue is whether the Evaluation and Appraisal Report (EAR) amendments for the Bay County (County) Comprehensive Plan (Plan) are in compliance.

PRELIMINARY STATEMENT

On October 20, 2009, the County adopted its EAR-based amendments by Ordinance No. 09-36. On December 15, 2009, Respondent, Department of Community Affairs (Department), found the amendments to be in compliance.

On February 5, 2010, Petitioner, Diane C. Brown, filed with the Department her Petition for Administrative Hearing contending numerous amendments were not in compliance. She later filed an Amended Petition on March 22, 2010. By agreement of the parties, by Order dated October 15, 2010, jurisdiction over those amendments not subject to challenge was relinquished to the Department so that they could become effective immediately. One change to Conservation Element policy 6.11.3(3) was addressed in Case No. 10-0859GM.

Separate pre-hearing statements were filed by Respondents and Petitioner on November 5 and 8, 2010, respectively. At the final hearing, Petitioner presented the testimony of Dr. Ronald H. Saff, an allergy and asthma physician and accepted as an expert; Martin J. Jacobson, County Director of Planning and

Zoning; Richard Todd Kincaid, a geologist with GeoHydros, LLC, and accepted as an expert; Marilyn Shanholtzer, a former member of the County Planning Commission; Ian Crelling, a County Principal Planner; and Daniel K. Shaw, Assistant County Manager. Also, she offered Petitioner's Exhibits 3, 5, 7A, 7B, 8A, 8B, 22, 22B, 22C, 23A, 23B, 27B, 28B, and 28D. All were received except 8B. Exhibit 22C is the deposition of Susan Poplin, Regional Planning Administrator for the Department, while Exhibit 27B is the deposition of K. Marlene Conaway, a professional planner and accepted as an expert. The County presented the testimony of Martin J. Jacobson, who was accepted as an expert; Jennifer Bowes, County Transportation Planner and accepted as an expert; Ian Crelling, who was accepted as an expert; and Dr. Steven J. Peene, an environmental consultant and vice-president of Applied Technologies and Management, Inc., who was accepted as an expert. Also, it offered County Exhibits 1A-G, 4, 17, 22, 29, 35A, and 35B, which were received in evidence.[1] Exhibit 17 is the deposition of Daniel W. Garlick, a wetland scientist with Garlick Environmental Associates, Inc., and accepted as an expert. The Department did not present any evidence. Finally, the County's request to officially recognize Florida Administrative Code chapter 62-346, and the documents incorporated by reference into that chapter, was granted.

The Transcript (three volumes) of the hearing was filed on May 11, 2011. At the request of Petitioner, the time for filing proposed findings of fact and conclusions of law was extended to June 6, 2011. Petitioner and Respondents timely submitted their post-hearing submissions, and they have been considered in the preparation of the Recommended Order.

FINDINGS OF FACT

A. The Parties

1. Diane C. Brown resides and owns property within the County, and she submitted written and oral comments to the County during the adoption process of Ordinance No. 09-36.

2. The County is a local government that administers its Plan and adopted the Ordinance which approved the changes being contested here.

3. The Department is the state land planning agency charged with the responsibility for reviewing plan amendments of local governments, such as the County.

B. The EAR Process

4. The County's first Plan was adopted in 1990 and then amended through the EAR process in 1999. As required by law, on September 5, 2006, the County adopted another EAR and in 2007 a Supplement to the EAR. See County Ex. 1C and 1D. The EAR and Supplement were found to be sufficient by the Department on

December 21, 2007. See County Ex. 1E. After the EAR-based amendments were adopted by the County and transmitted to the Department for its review, the Department issued its Objections, Recommendations and Comments (ORC) report.

5. After making revisions to the amendments in response to the ORC, on October 20, 2009, the County enacted Ordinance No. 09-36, which adopted the final version of the EAR-based amendments known as "Charting Our Course to 2020." See County Ex. 1B. On December 15, 2009, the Department issued its notice of intent determining that the EAR-based amendments were in compliance. See County Ex. 1F. Notice of this determination was published in the Panama City News Herald the following day. See County Ex. 1G.

6. The EAR is a large document comprised of five sections: Overview Special Topics; Issues; Element Reviews; Recommended Changes; and a series of Maps. Section 163.3191(10), Florida Statutes, requires that the County amend its comprehensive plan "based" on the recommendations in the report; subsection (2) also requires that the County update the comprehensive plan based on the components of that subsection.

7. The EAR-based amendments are extensive in nature, and include amendments to all 13 chapters in the Plan. However, many provisions in the 1999 version of the Plan were left

unchanged, while many revisions were simply a renumbering of a provision, a transfer of a provision to another element, a change in the format, or an otherwise minor and non-substantive change.

8. Although the EAR discusses a number of issues and concerns in the first three sections of the report, the EAR-based amendments must only be based on the recommended changes. See § 163.3191(10), Fla. Stat. Therefore, it was unnecessary for the County to react through the amendment process to the discussions in the Issues and Element Reviews portions of the EAR. For example, the EAR discusses air quality and mercury but made no specific recommendations to amend the Plan to address either subject. Also, nothing in chapter 163 or Department rules requires that the County implement changes to the Plan that parrot each specific recommendation to the letter. So long as the revisions are "based" on an area of concern in the recommendations, the statutory requirement has been satisfied.

9. Section Four of the EAR contains the "Recommended EAR-Based Actions and Corrective Measures Section 163.3191(2)(i)." See County Ex. 1C, § 4, pp. 1-9. Paragraph (2)(i) of the statute requires that the EAR include "[t]he identification of any actions or corrective measures, including whether plan amendments are anticipated to address the major issues

identified and analyzed in the report." Section Four indicates that it was intended to respond to the requirements of this paragraph. Id. at p. 1.

10. Finally, the only issue in this proceeding is whether the EAR-based amendments are in compliance. Therefore, criticisms regarding the level of detail in the EAR and Supplement, and whether the County adequately addressed a particular issue in those documents, are not relevant. A determination that the EAR was sufficient in all respects was made by the Department on December 21, 2007.

11. In her Amended Petition, Petitioner raises numerous allegations regarding the EAR-based amendments. They can be generally summarized as allegations that various text amendments, including entire elements or sub-elements, are inconsistent with statutory and rule provisions or are internally inconsistent with other Plan provisions, and that the County failed to properly react to changes recommended in the EAR. Because this is a challenge to an in-compliance determination by the Department, Petitioner must show that even though there is evidence to support the propriety of these amendments, no reasonable person would agree that the amendments are in compliance. See Conclusion of Law 90, infra.

C. Objections

(a) Administrative Procedures - Chapter 1

12. Petitioner contends that new policy 1.4.1(4) is inconsistent with sections 163.3181 and 187.201(25)(a) and (b)6., which generally require or encourage effective citizen participation, and rule 9J-5.004, which requires a local government to adopt procedures for public participation. She also contends the County should not have deleted policy 1.4.2, which required the County to provide notices (by mail and sign postings) beyond those required by chapter 163.

13. The new policy simply provides that notice of public hearings be provided for in accordance with chapter 163. There is no statutory or rule requirement that more stringent notice requirements be incorporated into a plan. The new notice requirements are consistent with the above statutes and rule. It is fairly debatable that the changes to the Administrative Procedures part of the Plan are in compliance.

(b) Future Land Use Element (FLUE) - Chapter 3

14. Petitioner has challenged (a) one policy that creates a new planning area; (b) the County's failure to adopt new energy standards in the FLUE; and (c) the adoption of new development standards for two land use categories in Table 3A of the FLUE. Table 3A describes each land use category in the

Plan, including its purpose, service area, designation criteria, allowable uses, density, intensity, and development restrictions. See County Ex. 1A, Ch. 3, pp. 3-5 through 3-17. These contentions are discussed separately below.

i. Southport Neighborhood Planning Area

15. New FLUE policy 3.4.8 creates the Southport Neighborhood Planning Area (Southport), a self-sustaining community with a functional mix of uses. See County Ex. 1A, Ch. 3, pp. 3-20 and 21. The effect of the amendment is simply to identify Southport as a potential planning area that includes a mixture of uses. This follows the EAR recommendations to create "new areas where residents are allowed to work, shop, live, and recreate within one relatively compact area while preserving the rural and low density land uses in the area[,]" and to create "higher density rural development." County Ex. 1C, § 4, p. 2. Southport is located north of the greater Panama City area in an unincorporated part of the County near or adjacent to the proposed new intersection of County Road 388 and State Road 77. Southport is also identified in new policy 3.2.5(8) as a Special Treatment Zone (STZ) that is designated as an overlay on the Future Land Use Map Series. Id. at p. 3-5. (There are seven STZs in the Plan that act as overlay districts on the FLUM. Overlays do not convey development rights.) Petitioner contends

that policy 3.4.8 is inconsistent with sections 163.3177(6)(a) and (d), (8), and (9)(b) and (e), and rules 9J-5.005(2), (5), and (7), 9J-5.006(5), and 9J-5.013. More precisely, Petitioner generally contends that the amendment will encourage urban sprawl; that there is no need for the additional development; that there are no central water and wastewater facilities available to serve that area; that there is no mechanism for monitoring, evaluating, and appraising implementation of the policy; that it will impact nearby natural resources; that it allows increased density standards in the area; and that it is not supported by adequate data and analysis.

16. Most of the data and analysis that support the establishment of the new planning area are in the EAR. They are found in the Introduction and Overview portion of Section One and the FLUE portion of Section 3 of the Element Reviews. The County Director of Planning also indicated that the County relied upon other data as well.

17. Although the new policy allows an increase in maximum residential density from five to 15 dwelling units per acre, paragraph (b) of the policy specifically requires that "all new development [be] served by central water and sewer."

18. Petitioner's expert opined that the new community will create urban sprawl. However, Southport is located within the

suburban service area of the County, which already allows densities of up to five dwelling units per acre; it is currently developed with low-density residential uses; and it is becoming more urban in nature. Given these considerations, it is fairly debatable that Southport will not encourage urban sprawl.

19. The new STZ specifically excludes the Deer Point Reservoir Protection Zone. Therefore, concerns that the new policy will potentially threaten the water quantity and quality in that reservoir are not credited. In addition, there are other provisions within the Plan that are designed to protect the reservoir.

20. Petitioner criticized the County's failure to perform a suitability analysis before adopting the amendment. However, a suitability study is performed when a land use change is proposed. Policy 3.4.8 is not an amendment to the FLUM. In fact, the Plan notes that "[n]othing in this policy shall be interpreted as changing the land use category of any parcel of the [FLUM]." County Ex. 1A, Ch. 3, p. 3-21.

21. In determining the need for this amendment, the County took into consideration the fact that except for the Beaches STZ, the EAR-based amendments delete residential uses as an allowed use in commercially-designated lands. The number of potential residential units removed from the commercial land use

category far exceeds the potential number of residential units that could be developed at Southport. Thus, the new amendment will not result in an increase in residential units.

22. Petitioner also contends that the County should have based its needs analysis using Bureau of Economic and Business Research (BEBR) estimates. The County's population projections are found in the Introduction portion of the EAR and while they make reference to BEBR estimates, they are not based exclusively on those data. See County Ex. 1C, § 1, pp. 2 and 3. However, there was no evidence that the estimates used by the County are not professionally acceptable. Where there are two acceptable methodologies used by the parties, the Department is not required to evaluate whether one is better than the other. See § 163.3177(10)(e), Fla. Stat. ("the Department shall not evaluate whether one accepted methodology is better than another"). The County's estimates are professionally acceptable for determining need.

23. The other objections to the amendment have been considered and found to be without merit. Therefore, it is at least fairly debatable that the amendment is in compliance.

ii. Neighborhood Commercial - Table 3A

24. The purpose of this commercial category is to "provide areas for the convenience of residential neighborhoods so as to

generate a functional mix of land uses and reduce traffic congestion." County Ex. 1A, Ch. 3, p. 3-15. Allowable uses include, among others, supermarket centers, restaurants, public facilities, and other similar uses. The County amended the intensity standard for this category by allowing development that is "[n]o more than 50-feet in height." Id. Petitioner asserts that the new 50-foot height limitation for commercial buildings results in the amendment being inconsistent with rule 9J-5.006 because it is not based on adequate data and analysis. Petitioner further argues that the standard is internally inconsistent with FLUE objective 3.9 and policy 3.9.1 and Housing Element objective 8.5, which relate to compatibility. Finally, Petitioner alleges that it will cause unsustainable density in the category and create new demands for public services.

25. The EAR contains a section that analyzes data regarding residential development in commercial land use categories. See County Ex. 1C, § 2. There is, then, data and analysis that support the amendment. The 50-foot height limitation actually limits the intensity that would normally be allowed under current Land Development Regulations (LDRs) if this limitation were not in the Plan. Therefore, it will not increase the intensity of development within this district.

Because the Plan specifically provides that the category is for "areas [with] low-intensity commercial uses that will be compatible with adjacent or surrounding residential uses," and such uses must be located "outside subdivisions . . . unless intended to be included in the subdivisions," compatibility issues with adjacent residential areas should not arise. Petitioner failed to establish beyond fair debate that the amendment is not in compliance.

iii. Seasonal/Resort - Table 3A

26. This land use category is designed for transient occupancy (temporary seasonal visitors and tourists) under chapter 509, rather than permanent residents. It is limited to areas with concentrations of accommodations and businesses that are used in the tourist trade. See County Ex. 1A, Ch. 3, p. 3-12. The category includes a new intensity standard for buildings of "[n]o more than 230-feet in height." Id. Petitioner contends that this intensity standard is inconsistent with section 163.3177(6)(d), (8), and (9) and rules 9J-5.005(2) and (5), 9J-5.006, and 9J-5.013. These provisions require that an amendment protect natural resources, that it be based on the best available data and analysis, and that it be internally consistent with other Plan provisions. Petitioner also points out that the land use category is located in or adjacent to the

Coastal High Hazard Area, that the amendment allows an increase in density, and this results in an inconsistency with statutes and rules pertaining to hurricane evacuation zones.

27. Prior to the adoption of the EAR-based amendments, there was no intensity standard in the Plan for this land use category and all development was governed by LDRs. Pursuant to a recommendation by the Department in its ORC, the new standard was incorporated into the Plan. Before making a decision on the specific height limitation, the County considered existing condominium construction on the beach, current LDR standards for the district, and whether the new standard would create an internal inconsistency with other Plan provisions. Therefore, it is fair to find that adequate data were considered and analyzed.

28. The new height limitation is the same as the maximum height restriction found in the Seasonal Resort zoning district, which now applies to new construction in the district. Because condominiums and hotels that do not exceed 230 feet in height are now allowed within the district, and may actually exceed that height if approved by the County, the amendment is not expected to increase density or otherwise affect hurricane evacuation planning. Historically, transient visitors/tourists are the first to leave the area if a hurricane threatens the

coast. Petitioner also contends that the amendment will create compatibility problems between existing one- or two-story residential dwellings in the district and high-rise condominiums, and that the County failed to adequately consider that issue. However, before a condominium or other similar structure may be built, the County requires that the developer provide a statement of compatibility. It is fairly debatable that the new intensity standard is in compliance.

iv. Energy Issues

29. Petitioner alleges that the new amendments do not adequately address energy issues, as required by section 163.3177(6)(a). That statute requires, among many other things, that the FLUE be based upon "energy-efficient land use patterns accounting for existing and future electric power generation and transmission systems; [and] greenhouse gas reduction strategies." However, amendments to objective 3.11 and policy 3.11.5, which relate to energy-efficient land use patterns, adequately respond to these concerns. See County Ex. 1A, Ch. 3, pp. 3-27 and 3-28. In addition, new Transportation Element policy 4.10.3 will result in energy savings and reduce greenhouse gases by reducing idle times of vehicular traffic. See County Ex. 1A, Ch. 4, p. 4-12. It is fairly debatable that the energy portions of the Plan are in compliance, and they

promote energy efficient land use patterns and reduce greenhouse gas emissions, as required by the statute.

(c) Transportation Element - Chapter 4

30. The EAR contains 14 recommended changes for this element. See County Ex. 1C, § 4, pp. 2-4. Item 2 recommends generally that bike paths be installed in or next to certain areas and roadways. Id. at p. 2. Petitioner contends that this recommendation was not implemented because it is not included in the Recreation and Open Space Element. However, one section of the Transportation Element is devoted to Bicycle and Pedestrian Ways and includes objectives 4.14 and 4.15 and policies 4.14.1 and 4.15.1, which respond to the recommendation. See County Ex. 1A, Ch. 4, pp. 4-14 and 4-15. In addition, the General Strategy portion of the element requires the County to install alternative transportation systems where a demonstrated need exists. Id. at p. 4-1. Petitioner contends that by limiting bike paths only to where there is a demonstrated need, the County has not fully responded to the recommendation. This argument is illogical and has been rejected. It is fairly debatable that the above amendments are in compliance.

(d) Groundwater Aquifer Recharge - Chapter 5F

31. As required by section 163.3177(6)(c), the County has adopted a natural groundwater aquifer recharge element. See

County Ex. 1A, Ch. 5F. The goal of this sub-element, as amended, is to "[s]afeguard the functions of the natural groundwater recharge areas within the County to protect the water quality and quantity in the Floridan Aquifer." County Ex. 1A, Ch. 5, p. 5F-1. The EAR contains three recommended changes for this part of the Plan: that the County update its data and analysis to identify areas of high and/or critical recharge for the Floridan aquifer; that it include in the data and analysis an examination of existing LDRs which affect land uses and development activities in high recharge areas and note any gaps that could be filled through the LDRs; and that it include within the data and analysis a study of potential impacts of increased development in high recharge areas, including reasonable development standards for those areas. See County Ex. 1C, §4, pp. 4-5.

32. Petitioner contends that "the objectives and policies pertaining to protecting water recharge areas" are inconsistent with sections 163.3177(6)(d) and 187.201(7) and rules 9J-5.5.011 and 9J-5.013, which require that the Plan protect groundwater; that they violate section 163.3177(8) and rule 9J-5.005(7), which require measurable objectives for monitoring, evaluating, and appraising implementation; and that the County violated

section 163.3191(10) by failing to respond to the recommended changes in the EAR.

33. In response to the EAR, in July 2009, the County prepared a watershed report entitled "Deer Point Lake Hydrologic Analysis - Deer Point Lake Watershed," which was based on a watershed management model used by County expert witness Peene. See County Ex. 4. The model used for that report is the same model used by the Department of Environmental Protection (DEP) and the United States Army Corps of Engineers. The study was also based on data and analysis prepared by the Northwest Florida Water Management District. The purpose of the analysis was to look at potential future land use changes in the Deer Point watershed and assess their ultimate impact upon the Deer Point Reservoir, which is the primary public water supply for the County. The model examined the entire Deer Point watershed, which is a much larger area than the Deer Point Lake Protection Zone, and it assumed various flows from rain, springs, and other sources coming into the Deer Point Reservoir. The study was in direct response to a recommendation in the EAR that the County undertake a study to determine if additional standards were needed to better protect the County's drinking water supply and the St. Andrews estuary. See County Ex. 1C, § 4, p. 5. Another recommendation was that the study be incorporated by reference

into the data and analysis of the Plan and be used as a basis for any amendments to the Plan that might be necessary. Id. at p. 6. Pursuant to that recommendation, the report was incorporated by reference into Objective 5F.1. See County Ex. 1A, Ch. 5, p. 5F-1. The evidence supports a finding that the report is based on a professionally accepted methodology and is responsive to the EAR.

34. The model evaluated certain future land use scenarios and predicted the level of pollutants that would run off of different land uses into the Deer Point Reservoir.

35. Based on this analysis, Dr. Peene recommended that the County adopt certain measures to protect the groundwater in the basin from fertilizers, stormwater, and pesticides. He also recommended that best management practices be used, that septic tanks be replaced, and that any new growth be on a centralized wastewater treatment plant.

36. Petitioner's expert criticized the report as not sufficiently delineating the karst features or the karst plain within the basin. However, the report addresses that issue. See County Ex. 4, p. 2-36. Also, Map 13 in the EAR identifies the Karst Regions in the County. See County Ex. 1C, § 5, Map 13.

37. One of the recommendations in the EAR was to amend all goals, policies, and objectives in the Plan "to better protect the Deer Point watershed in areas not included within the Deer Point Reservoir Special Treatment Zone, and [to] consider expanding the zone to include additional areas important to preserving the quantity and quality of water entering the reservoir." County Ex. 1C, § 4, p. 6. Besides amending the sub-element's goal, see Finding of Fact 31, supra, the County amended objective 5F.1 to read as follows:

> By 2010 protect groundwater resources by identifying and mapping all Areas of High Aquifer Recharge Potential to the Floridan Aquifer in Bay County by using the data and analysis contained in the Deer Point Lake Hydrologic Analysis - Deer Point Watershed, prepared by Applied Technology and Management, Inc., dated July 2009.

38. In addition, policy 5F-1.1 requires that the County use "the map of High Aquifer Recharge Areas to establish an Ecosystem Management overlay in the Conservation Element where specific land use regulations pertaining to aquifer water quality and quantity shall apply." Also, policy 5F-1.2 requires the identification of the Dougherty Karst Region. Finally, the EAR and Map 13A were incorporated by reference into the Plan by policy 1.1.4.4. These amendments sufficiently respond to the recommendations in the EAR.

39. While Petitioner's expert criticized the sufficiency of the EAR, and he did not believe the report adequately addressed the issue of karsts, the expert did not establish that the study was professionally unacceptable or otherwise flawed. His criticism of the County's deletion of language in the vision statement of the sub-element that would restrict development density and intensity in areas known to have high groundwater aquifer potential is misplaced. An amendment to a vision statement is not a compliance issue, and nothing in the EAR, chapter 163, or chapter 9J-5 requires the County to limit "density and intensity" in high aquifer recharge areas. On this issue, the EAR recommended that the County's drinking water supply be protected by using "scientifically defensible development standards." County Ex. 1C, § 4, p. 5. The amendments accomplish this result.

40. Petitioner also contends that while new policy 5F.3 and related policies are "good," the County should have collected additional data and analysis on the existence of swallets, which are places where streams flow underground. Again, nothing in chapter 163 or chapter 9J-5 requires the County to consider swallets. Also, a contention that policy 5F3.2 allows solid waste disposal facilities in high recharge areas is without merit. The policy requires that the County

continue to follow chapter 62-7 regulations (implemented by DEP) to protect water quality of the aquifers. In addition, a moratorium on construction and demolition landfills has been adopted, and current LDRs prohibit landfills within the Deer Point Reservoir Protection Zone.

41. Petitioner also criticized the sufficiency of policy 5F.4, which requires the implementation of LDRs that limit land uses around high aquifer recharge areas. The evidence establishes that the new policy is sufficient to achieve this purpose.

42. It is at least fairly debatable that the new amendments protect the natural resources, are based on the best available data and analysis, include measurable objectives for overseeing the amendments, and respond to the recommended changes in the EAR.

(e) Conservation Element - Chapter 6

43. The purpose of this element is to conserve the natural resources of the County. Petitioner contends that "many of the amendments [to this chapter] are not consistent with applicable rules and statutes, and that a number of recommendations in the EAR pertaining to the Conservation Element were not implemented as required by Section 163.3191(10)." These contentions are discussed below.

i. Air pollution

44. While the EAR discusses air pollution, there were no specific recommendations to amend the plan to address air quality. See County Ex. 1C, Element Reviews, Ch. 6, pp. 1 and 2. Petitioner contends, however, that current Plan objective 6.3, which was not amended, is not protecting air quality and should have been revised to correct major air quality problems in the County, including "the deposition of atmospheric mercury caused by fossil fuel burning power plants and incinerators."

45. Objective 6.3 requires the County to maintain or improve air quality levels, while related policies 6.3.1 and 6.3.2 require that the County's facilities will be constructed and operated in accordance with state and federal standards. The policies also require that the County work through state and federal agencies to eliminate unlawful sources of air pollution. Notably, the County does not regulate emissions or air pollution, as that responsibility lies within the jurisdiction of other state and federal agencies. It is fairly debatable that the County reacted to the EAR in an appropriate manner.

ii. Policies and Objectives in Chapter 6

46. Petitioner contends that policy 6.1.1 is inconsistent with section 163.3177(8) and rule 9J-5.005(2) because: it is not supported by adequate data and analysis; it does not implement

the EAR recommendations, as required by section 163.3191(10); it is inconsistent with section 163.3177(9)(b) and (f) because it results in "inconsistent application of policies intended to guide local land use decision[s]"; it is inconsistent with sections 163.3177(6)(d) and 187.201(9) and (10) and rule 9J-5.013 because it fails to adequately protect natural resources, including isolated wetlands; and it is internally inconsistent with other Plan provisions.

47. Policy 6.1.1 provides that as a subdivision of the State, the County "will, to the maximum extent practicable, rely upon state laws and regulations to meet the conservation goals and objectives of this Plan." Item 9 in the recommended changes recommends that the County should resolve the ambiguities and inconsistencies between various policies and objectives which rely on the jurisdiction of state laws and regulation on the one hand, and objective 6.11 and implementing policies, which appear to extend wetland jurisdiction to all wetlands, including isolated wetlands not regulated by the Northwest Florida Water Management District. See County Ex. 1C, § 4, p. 6.

48. The real issue involves isolated wetlands, which at the time of the EAR were not regulated by the Northwest Florida Water Management District. The EAR did not recommend a specific solution, but only to resolve any apparent "ambiguity."

49. Through amendments to policy 6.11.3, which implements objective 6.11, the County reacted to the recommendation. These amendments clarify the Plan and provide that wetlands in the County will be subject to the Plan if they are also regulated by state and federal agencies. Any ambiguity as to the Plan's application to isolated wetlands was resolved by the adoption of new rules by the Northwest Florida Water Management District, which extend that entity's jurisdiction to isolated wetlands. See Fla. Admin. Code Ch. 62-346. This was confirmed by County witness Garlick, who explained that the Plan now defers to the wetland regulations of state and federal agencies. Therefore, any inconsistencies or ambiguities have been resolved.

50. Petitioner contends that objective 6.2 and implementing policy 6.2.1 are inconsistent with statutes and a rule which require protection of natural resources because they focus on "significant" natural resources, and not all natural resources. With the exception of one minor change to the policy, the objective and policy were not amended, and the EAR did not recommend that either be revised. Also, testimony established that existing regulations are applied uniformly throughout the County, and not to selected habitat. Finally, the existing objective and related policies already protect rare and endangered species in the County.

51. Objective 6.3 requires that the County "maintain or improve air quality levels." For the reasons cited in Finding of Fact 45, the objective is in compliance.

52. Objective 6.5 requires the County to maintain or improve estuarine water quality consistent with state water quality standards, while policy 6.5.1 delineates the measures that the County will take to achieve that objective. See County Ex. 1A, Ch. 6, pp. 6-4 and 6-5. Except for one minor change to paragraph (3) of the policy (which is not in issue), neither provision was revised. Also, the EAR did not recommend any changes to either provision. Notwithstanding Petitioner's contention to the contrary, the County was not required to revise the objective or policy.

53. Policy 6.5.2 requires that the County "protect seagrass beds in those areas under County jurisdiction" by implementing certain enforcement measures. County Ex. 1A, Ch. 6, p. 6-5. The policy was only amended in minor respects during the EAR process. Petitioner contends that the County failed to amend the policy, as required by the EAR, and this failure results in no protection to natural resources. However, the EAR only discusses the policy in the Issues section. See County Ex. 1C, § 2, p. 7. While the EAR emphasizes the importance of seagrass beds to marine and estuarine productivity, it has no

recommended changes to the objective or policy. Even so, the County amended policy 6.5.2(5) by requiring the initiation of a seagrass monitoring program using Geographic Information System (GIS) mapping by 2012. See County Ex. 1A, Ch. 6, p. 6-6. It is at least fairly debatable that the objective and policy are in compliance.

54. Objective 6.6 requires the County to "protect, conserve and appropriately use Outstanding Florida Waters, Class I waters and Class II waters." County Ex. 1A, Ch. 6, p. 6-6. Its purpose is to ensure the quality and safety of the County's primary drinking water supply. Id. The objective was not amended and remains unchanged since 1999. Except for a recommendation that the County give a land use designation to water bodies, there were no recommended changes for this objective or related policies in the EAR. Because land use designations are for land, and not water, the County logically did not assign a land use to any water bodies.

55. Petitioner contends that the objective and related policies are not based on the best available data and analysis and are not measurable, and that they fail to protect Lake Powell, an Outstanding Florida Water, whose quality has been declining over the years. Because no changes were recommended, it was unnecessary to amend the objective and policies.

Therefore, Petitioner's objections are misplaced. Notably, the Plan already contains provisions specifically directed to protecting Lake Powell. See, e.g., policy 6.6.1(1), which requires the County to specifically enforce LDRs for Lake Powell, and objective 6.21, which requires the County to "[m]aintain or improve water quality and bio-diversity in the Lake Powell Outstanding Florida Water (OFW)." County Ex. 1A, Ch. 6, pp. 6-6 and 6-24. Petitioner's expert also criticized the objective and related policies on the ground the County did not adequately identify karst areas in the region. However, nothing in the EAR, chapter 163, or chapter 9J-5 requires the County to collect new data on the existence of karst areas.

56. Petitioner also points out that objective 6.6 and policy 6.6.1 are designed to protect Deer Point Lake but were not amended, as required by the EAR, and they fail to adequately protect that water body. For the reasons expressed in Finding of Fact 55, this contention has been rejected.

57. Objective 6.7, which was not amended, provides that the County "[c]onserve and manage natural resources on a systemwide basis rather than piecemeal." County Ex. 1A, Ch. 6, p. 6-8. Related policies, which were not amended except in one minor respect, require that the County implement programs in "Ecosystem Management Areas." These areas are illustrated on

Map 6.1 of chapter 6. Petitioner contends that even though they were not amended, the objective and policies are not supported by adequate data and analysis, they fail to contain measurable standards, and they are not responsive to a recommendation in the EAR. Because no changes were made to these provisions, and the EAR does not recommend any specific changes, the contentions are rejected.

58. The 17 water bodies comprising the Sand Hill Lakes are identified in policy 6.9.1. Policy 6.9.3, which also implements objective 6.9, continues the practice of prohibiting development with a density of greater than one unit per ten acres on land immediately adjacent to any of the Sand Hills Lakes outside designated Rural Communities. See County Ex. 1A, Ch. 6, p. 6-13. (The three Rural Communities in the County have been designated as a STZ and are described in FLUE policy 3.4.4.) The policy has been amended by adding new language providing that "[p]roposed developments not immediately adjacent to, but within 1320 feet of a Sand Hill Lake, and outside of a designated Rural Community, will provide, prior to approval, an analysis indicating that the development will not be too dense or intense to sustain the lake." Id. Other related policies are unchanged. The amendment was in response to a recommendation in the EAR that all goals, objectives, and

policies be amended to more clearly define the area around the Sand Hill Lakes within which densities and intensities of land must be limited to ensure protection of the lakes. See County Ex. 1C, § 4, p. 6. Petitioner contends that the amended policy is inconsistent with various statutes and rules because it contains no specific standards for site suitability assessment and does not restrict density bordering on the lake; it does not implement the EAR; it is not based on EAR data and analysis; and it does not contain procedures for monitoring and evaluating the implementation of all policies.

59. Policy 6.9.3 applies to agricultural areas outside of rural communities where the maximum density is now one dwelling unit per ten acres, and to properties that are designated as agriculture timber, which allows one dwelling unit per 20 acres. Contrary to Petitioner's assertion, it does not change the established densities on those land use categories. Before a property owner can convert a land use affected by the policy, the applicant will be required to provide an analysis that the new development will not be too intense or dense to sustain the lake. It is at least fairly debatable that the amendment responds to the EAR recommendation, that it will not increase density, that it is based on sufficient data and analysis in the

EAR, and that adequate standards are contained in the policies to ensure proper implementation.

60. Objective 6.11 requires the County to "[p]rotect and conserve wetlands and the natural functions of wetlands." County Ex. 1A, Ch. 6, p. 6-14. A challenge to an amendment to policy 6.11.3(3), which relates to setbacks or buffers for wetlands, has already been addressed in Case No. 10-0859GM. Policy 6.11.3 provides that in order "[t]o protect and ensure an overall no net loss of wetlands," the County will employ the measures described in paragraphs (1) through (6) of the policy. Petitioner contends that by using the standards employed by state and federal agencies for wetlands in paragraph (2), the County has abdicated its responsibility to protect natural resources. However, as previously discussed, the recent assumption of jurisdiction over isolated wetlands by the Northwest Florida Water Management District allows the County to extend these measures to all wetlands in the County.

61. Petitioner also contends that the term "no net loss" in policy 6.11.3 is not measurable. Through its GIS system, though, the County can monitor any loss of wetlands. This was confirmed by County witness Garlick. In addition, the County will know at the development order phase whether any federal or state agency requires mitigation to offset impacts to wetlands.

It is at least fairly debatable that the amendments to policy 6.11.3 will protect all wetlands, including isolated wetlands.

62. Objective 6.12 requires that by the year 2012, the County will "develop a GIS layer that provides baseline information on the County's existing wetlands. This database will be predicated on the USFWS [United States Fish and Wildlife Service] National Wetlands Inventory (Cowardin et al 1979) hierarchy of coastal and inland (wetlands) represented in North Florida. This inventory shall be developed through a comprehensive planning process which includes consideration of the types, values, functions, sizes, conditions and locations of wetlands." County Ex. 1A, Ch. 6, p. 6-15. Related policies 6.12.1, 6.12.2, and 6.12.3 require that the County (a) use the GIS database to identify, classify, and monitor wetlands; (b) adopt LDRs which further the objective and policies; and (c) track in the GIS database the dredge and fill permits issued by DEP. Id.

63. Petitioner criticizes the County's decision to wait until 2012 to develop a GIS layer; contends that policy 6.12.2 improperly defers to LDRs; asserts that the policy lacks meaningful standards; and contends it is not responsive to the EAR. The evidence presented on these issues supports a finding

that it is at least fairly debatable that the amendments are in compliance.

64. The EAR-based amendments deleted objective 6.13, together with the underlying policies, which related to floodplains, and created new provisions on that subject in the Stormwater Management Sub-Element in Chapter 5E. This change was made because the County concluded that floodplain issues should more appropriately be located in the stormwater chapter. The natural resource values of floodplains are still protected by objective 5E-9 and related policies, which require that state water quality standards are maintained or improved through the County's stormwater management programs. See County Ex. 1A, Ch. 5E, p. 5E-7. Also, "flood zones" are retained as a listed "significant natural resource" in Conservation Element policy 6.2.1. See County Ex. 1A, Ch. 6, p. 6-3. It is at least fairly debatable that the transfer of the floodplain provisions to a new element does not diminish protection of that resource.

65. Finally, Objective 6.21 (formerly numbered as 6.23) requires the County to "[m]aintain or improve water quality and bio-diversity in the Lake Powell Outstanding Florida Water (OFW)." Except for renumbering this objective, this provision was not amended, and there is no specific recommendation in the

EAR that it be revised. Therefore, the contentions that the existing policy are not in compliance are not credited.

(f) Coastal Management Element - Chapter 7

66. The recommended changes for this element of the Plan are found on pages 7 and 8 of Section 4 of the EAR. In her Proposed Recommended Order, Petitioner contends that the entire element is inconsistent with section 163.3191(10) because the County did not follow the recommendations in items 1, 2, and 4. Those items generally recommended that the County update the data and analysis supporting the element to reflect current conditions for, among other things, impaired waters. This was done by the County. Accordingly, the County adequately responded to the recommendations.

67. Petitioner also contends that policy 7.1.1 improperly deferred protection of coastal resources to the LDRs. The policy reads as follows:

> 7.1.1: Comply with development provisions established in the [LDRs] for The Coastal Planning Area (Chapter 10, Section 1003.2 of the Bay County [LDRs] adopted September 21, 2004) which is hereby defined as all land and water seaward of the landward section line of those sections of land and water areas seaward of the hurricane evacuation zone.

68. County witness Crelling established, however, that there are numerous other policies in the element that govern the protection of natural resources.

69. Petitioner contends that no changes were made to provide additional guidance in policy 7.2.1 (formerly numbered as 7.3.1) to improve estuarine water quality even though multiple water bodies are listed as impaired. Except for a few clarifying changes, no revisions were made to the policy.

70. Policy 7.2.1 does not reduce the protection for impaired waters. The minor rewording of the policy makes clear that the protective measures enumerated in the policy "will be taken" by the County to maintain or improve estuarine water quality. It is fairly debatable that the element and new objectives and policies are in compliance.

71. Petitioner contends that amended objective 7.2 (formerly numbered as 7.3) will lead to less protection of water quality. The objective requires the County to "[m]aintain or improve estuarine water quality by regulating such sources of pollution and constructing capital improvements to reduce or eliminate known pollutants." County Ex. 1A, Ch. 7, p. 7-2. Its purpose is to regulate all known potential sources of estuarine pollution. The evidence fails to establish that the amended objective will reduce the protection of water quality.

72. Policy 7.3.1 was amended to delete the requirement that areas with significant dunes be identified and mapped and to provide instead that the County may impose special conditions on development in dune areas as a part of the development approval process. See County Ex. 1A, Ch. 7, p. 7-4. This change was made because the EAR recommended that a requirement to map and identify dune systems be deleted due to the "extremely dynamic nature of beach and dune systems." County Ex. 1C, § 4, p. 7. A similar provision in the Conservation Element was transferred to the Coastal Management Element to respond to the recommended change. The County adequately responded to the recommendation.

73. Petitioner contends that amended policy 7.3.2 (formerly numbered as 7.4.1) does not include sufficient standards to protect significant dunes. The amended policy requires that where damage to dunes is unavoidable, the significant dunes must be restored and revegetated to at least predevelopment conditions. It is at least fairly debatable that the standards in the policy are sufficient to protect dunes.

74. In summary, the evidence does not establish beyond fair debate that the revisions to chapter 7 are not in compliance.

(g) Housing Element - Chapter 8

75. Petitioner contends the entire element is inconsistent with section 163.3191(10) because the County failed to react to recommendations in the EAR; and that new objective 8.16 and related policies 8.16.1, 8.16.2, and 8.16.3 are inconsistent with section 163.3177(9)(e) and rules 9J-5.005(6) and (7) because they fail to identify how the provisions will be implemented and thus lack specific measurable objectives and procedures for monitoring, evaluating, and appraising implementation.

76. Petitioner focused on item 4 in the Recommended Changes for the Housing Element. That recommendation reads as follows:

> 4. The revised data and analysis should also include a detailed analysis and recommendations regarding what constitutes affordable housing, the various state and federal programs available to assist in providing it; where it should be located to maximize utilization of existing schools, medical facilities, other supporting infrastructure, and employment centers taking into consideration the costs of real property; and what the likely demand will be through the planning horizon. The objectives and policies should then be revised consistent with the recommendation of the analysis, including the creation of additional incentives, identification on the Future Land Use Map of areas suited for affordable housing, and, possibly amending the County Land Development Regulations to

> require the provision of affordable housing if no other alternatives exist.

County Ex. 1C, § 4, p. 8.

77. Item 1 of the Recommended Changes states that "[t]he County should implement those policies within the Housing Element which proactively address affordable housing, and in particular Policy 8.15.1 outlining density bonuses, reduced fees, and streamlined permitting, to provide incentives for the development of affordable housing." Id. Policy 8.15.1 was amended to conform to this recommendation.

78. The new objective and policies address incentives for the development of affordable housing. While item 4 is not specifically addressed, the new objective and policies address the County's housing concern as a whole, as described in the Recommended Changes. Also, the new objective and policies contain sufficient specificity to provide guidance to a user of the Plan. It is fairly debatable that the element as a whole, and the new objective and policies, are in compliance.

(h) Intergovernmental Coordination Element - Chapter 10

79. Although discussed in the Element Reviews portion of the EAR, there are no recommended changes for this element. See County Ex. 1C, § 3, pp. 1-5.

80. Petitioner contends that because the County deleted objective 10.5, the entire element conflicts with the EAR

recommendations, and it is inconsistent with two goals in the state comprehensive plan, sections 163.3177(6)(h)1. and (9)(b) and (h), and rules 9J-5.015 and 9J-5.013(2)(b)8. The deleted provision required the County to "establish countywide resource protection standards for the conservation of locally significant environmental resources." Besides deleting this objective, the County also deleted objective 10.1, which provided that the County "will take the lead role toward the creation of an 'intergovernmental forum' as a means to promote coordination between various jurisdictions and agencies." County Ex. 1A, Ch. 10, p. 10-1.

81. To support her argument, Petitioner relies upon a concern in the Issues part of the EAR that states that "countywide resource protection standards have not been established" and that "consistency of regulation between jurisdictions" must be observed. See County Ex. 1C, § 2, p. 45.

82. Mr. Jacobson, the County Planning and Zoning Director, pointed out that the County currently has numerous interlocal agreements with various municipalities and does not require authorization from the Plan to adopt these agreements. Objective 10.5 was deleted because the County cannot implement its regulations in the various municipalities, and protection of natural resources is addressed in other portions of the Plan.

He also noted that the "intergovernmental forum" discussed in deleted objective 10-1 is not required by any statute or rule.

83. It is at least fairly debatable that the element is in compliance and does not violate any statute or rule.

(i) Capital Improvements Element - Chapter 11

84. Petitioner contends that the County failed to implement three recommended changes in the EAR and therefore the entire element is in violation of section 163.3191(10). Those recommendations include an updating of information on the County's current revenue streams, debts, commitments and contingencies, and other financial matters; a revision of policy 11.6.1 to be consistent with Recreation and Open Space Element policy 9.71 with regard to recreational levels of service (LOS); and the development of a five-year schedule of capital improvements. See County Ex. 1, § 4, p.9.

85. Policy 11.6.1 has been substantially revised through the EAR process. Table 11.1 in the policy establishes new LOSs, including one for local parks, regional parks, and beach access points. The County has also adopted an updated five-year Capital Improvement Plan. See County Ex. 36. That exhibit includes a LOS Analysis for recreational services. The same exhibit contains a breakdown of financial matters related to

capital improvements. It is fairly debatable that the element is in compliance.

86. Petitioner also contends that objective 11.1 and policy 11.1.1 are not in compliance. Both provisions remain unchanged from the 1999 Plan, and the EAR did not recommend that either provision be amended. The contention is therefore rejected.

D. Other Issues

87. All other issues not specifically addressed herein have been considered and found to be without merit, contrary to the more persuasive evidence, or not subject to a challenge in this proceeding.

CONCLUSIONS OF LAW

88. On June 2, 2011, House Bill 7207 was signed by the Governor and became effective immediately. See Ch. 2011-139, Laws of Fla. Among other things, it repealed chapter 9J-5 and moved some, but not all, of its requirements into chapter 163. The compliance criteria in chapter 163 have also been substantially revised. Because these changes are substantive in nature, they cannot be given retroactive application. Therefore, the compliance criteria in effect prior to the enactment of House Bill 7207 have been used to adjudicate this dispute.

89. In order to have standing to challenge a plan amendment, a challenger must be an affected person as defined in section 163.3184(1)(a). The parties agree that Petitioner owns property and resides within the County and she submitted oral or written comments to the County during the adoption process. Therefore, she is an affected person and has standing to participate in this matter.

90. Once the Department renders a notice of intent to find a plan amendment in compliance, as it did here, that plan provision "shall be determined to be in compliance if the local government's determination of compliance is fairly debatable." § 163.3184(9)(a), Fla. Stat. Therefore, Petitioner bears the burden of proving beyond fair debate that the challenged plan amendments are not in compliance. This means that "if reasonable persons could differ as to its propriety," a plan amendment must be upheld. Martin Cnty. v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997). Where there is "evidence in support of both sides of a comprehensive plan amendment, it is difficult to determine that the County's decision was anything but 'fairly debatable.'" Martin Cnty. v. Section 28 Partnership, Ltd., 772 So. 2d 616, 621 (Fla. 4th DCA 2000).

91. For the reasons given in the Findings of Fact, Petitioner has failed to establish beyond fair debate that the

amendments are not in compliance. Therefore, the challenged EAR-based amendments adopted by Ordinance No. 09-36 are in compliance.

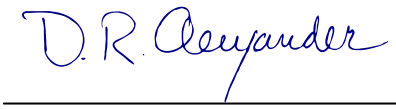
92. Finally, on June 22, 2011, Petitioner filed a Motion to Disqualify Secretary Buzzett from making a final decision in this matter. Because that motion must be filed with, and addressed by, the Secretary, no ruling on the motion has been made.

RECOMMENDATION

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

RECOMMENDED that the Department of Community Affairs enter a final order determining that the EAR-based amendments adopted by Ordinance No. 09-36 are in compliance.

DONE AND ENTERED this 30th day of June, 2011, in Tallahassee, Leon County, Florida.



D. 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 30th day of June, 2011.

ENDNOTE

1/ Although reference was made by the County at the commencement of the hearing to Joint Exhibits 1-7, those exhibits were marked as County Exhibits 1A-G, and they have been referred to in that manner in this Recommended Order.

COPIES FURNISHED:

William A. Buzzett, Secretary
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

Deborah K. Kearney, General Counsel
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

Diane C. Brown
241 Twin Lakes Drive
Laguna Beach, Florida 32413-1413

Lynette Norr, Esquire
Department of Community Affairs
2555 Shumard Oak Boulevard, Suite 325
Tallahassee, Florida 32399-2100

Terrell K. Arline, Esquire
Bay County Attorney
840 West 11th Street
Panama City, Florida 32401-2336

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.