STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT A. SCHWEICKERT, JR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-1136GM
	)	
CITRUS COUNTY and DEPARTMENT OF COMMUNITY AFFAIRS,	)	
	)	
Respondents,	)	
	)	
and	)	
	)	
CITRUS MINING AND TIMBER, INC.,	)	
	)	
Intervenor.	)	
	)	

RECOMMENDED ORDER

The final hearing in this case was held on April 5, 2010, in Inverness, Florida, before Bram D.E. Canter, Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUES

The issues to be determined in this case are whether amendments CPA-09-13 and CPA-09-14 (“Plan Amendments”) to the Citrus County Comprehensive Plan, which were adopted by Ordinance 2009-A24, are “in compliance,” as that term is defined in Section 163.3184(1)(b), Florida Statutes (2009).[1/]

PRELIMINARY STATEMENT

On November 10, 2009, Citrus County adopted Ordinance 2009-A24, which included amendments to the Citrus County Comprehensive Plan. Amendment CPA-09-13 amends the Future Land Use Element ("FLUE") to create a new land use category, Port District. Amendment CPA-09-14 amends the FLUE to add a Subarea Plan for the Hollinswood Harbor Port Subarea, and amends the Future Land Use Map of the comprehensive plan to show the lands that are to be re-designated as the Hollinswood Harbor Port Subarea.

Citrus County sent the amendments to the Department of Community Affairs ("Department") for a compliance review. On January 4, 2010, the Department issued its Notice of Intent to find the amendments in compliance. Petitioner initiated this administrative proceeding by filing a Petition for Formal Administrative Hearing with the Department.

Intervenor, Citrus Mining and Timber, Inc. ("CMT"), filed a petition to intervene, which was granted by the Department. CMT moved to dismiss the petition for hearing and the Department granted the motion, giving Petitioner leave to amend his petition. The Department received Petitioner's amended petition and forwarded it to DOAH. Petitioner requested and was granted additional time to file his amended petition.

CMT demanded an expedited proceeding pursuant to Section 163.3189(3), Florida Statutes, and the final hearing was scheduled for April 5 through 7, 2010. Petitioner twice moved to continue the final hearing, complaining that he had insufficient time to prepare for the hearing. These motions were denied because the statute expressly states that a party's need for additional time for preparation is an insufficient ground for continuing a hearing.

At the beginning of the final hearing, Petitioner filed another amended petition and renewed his motion for continuance. The motion for continuance was denied. CMT moved to dismiss the

amended petition, but the motion was treated as a motion in limine. A number of issues raised by Petitioner were stricken and the case proceeded on the issues of whether the amendments were consistent with the Citrus County Comprehensive Plan, Chapter 163, Florida Statutes, and Florida Administrative Code Chapter 9J-5 with respect to urban sprawl, workforce housing, protection of manatees, and the provision of public water and sewer services.

At the final hearing, Petitioner testified on his own behalf. He offered no exhibits into evidence. CMT presented the expert testimony of Michael Czerwinski (biology), Kevin Mineer (planning), Gary Maidhof (planning), and Roger Wilburn (planning). CMT Exhibits 1, 3, 7, 13, 15, 16, 21, 27, 30, 35, and 36 were admitted into evidence. The County joined in the case presented by CMT. The Department presented no witnesses or exhibits.

FINDINGS OF FACT

The Parties

1. The Florida Department of Community Affairs is the state land planning agency and is statutorily charged with the duty of reviewing comprehensive plan amendments and determining they are "in compliance," as that term is defined in Section 163.3184(1)(b), Florida Statutes.

2. Citrus County has adopted a comprehensive plan that it amends from time to time pursuant to Chapter 163, Part II, Florida Statutes.

3. Petitioner, Robert Schweickert, Jr., is a resident of the City of Inverness in Citrus County.

4. Petitioner made oral comments about the Plan Amendments to Citrus County Commissioner John Thrumston in one or more telephone conversations during the period of time between the transmittal and adoption hearings for the Plan Amendments. In Petitioner's telephone conversations with Commissioner Thrumston, the Commissioner was on his personal cellular telephone or home telephone. No evidence was presented as to whether Commissioner Thrumston conveyed Petitioner's comments to the Board of County Commissioners or to the County's planning staff.

5. CMT is a Florida corporation and owns the property that is the subject of Plan Amendment CPA-09-14, which would re-designate the property as the Hollinswood Harbor Port Subarea.

6. CMT submitted oral comments to the Citrus Board of County Commissioners at the transmittal and adoption hearings for the Plan Amendments.

The Site

7. The subject property is a 525-acre site situated on the Cross Florida Barge Canal. There is a channel "cut" from the barge canal into the property. CMT owns the submerged lands

beneath the channel cut, and owns the submerged lands along the southern boundary of its property to the middle of the barge canal.

8. Currently the site has future land use designations of "Industrial," "Conservation" (for the CMT-owned water bottom), "Extractive," and "Transportation, Communications, and Utilities."

9. A portion of the site is planted in pine trees, which CMT plans to harvest. The small area of the site designated Extractive is used to store mined materials. A power line and natural gas pipeline bisect the site.

10. The waterfront portion of the site was used in the past for a cruise ship operation. A docking facility, parking lot, and office used in conjunction with the cruise ship operation still exist on the site.

11. To the west of the site is other land owned by CMT, which is leased to a mining company and is used for mining limestone. To the east is land owned by the State of Florida, on which it proposes to build public boat ramps.

The Plan Amendments

12. Amendment CPA-09-13 amends the FLUE to create a new land use designation, "Port District." CPA-09-14 amends the FLUE to create the Hollinswood Harbor Port ("HHP") Subarea Plan, and amends the Future Land Use Map to designate the 525-acre site

owned by CMT as the HHP Subarea. The HHP Subarea Plan divides the 525-acre site into four land use districts: "Port-Industrial," "Port-Water Dependent," "Port-Commercial," and "Transportation Communication & Utility."

13. The HHP Subarea Plan proposes a mix of industrial, commercial, institutional, water dependent, and residential uses, and establishes minimum and maximum standards for those uses. The HHP Subarea Plan includes a requirement to comply with the FDEP 2007 Clean Marina Action Plan Guidebook.

14. Residential uses within the HHP Subarea cannot exceed a density of six units per acre, or a maximum of 600 units. Residential units must be clustered on no more than 20 percent of the site's total 525 acres.

15. The residential density may be increased by one unit per acre if workforce housing is provided.

Petitioner's Issues

16. Petitioner's issues were limited to whether the amendments were consistent with the Citrus County Comprehensive Plan, Chapter 163, Florida Statutes, and Florida Administrative Code Chapter 9J-5, with respect to manatee protection, workforce housing, the provision of public water and sewer services, and urban sprawl.

Manatee Protection

17. The barge canal is a manmade waterway with a depth of 12 to 14 feet. The canal is too deep to allow sunlight to penetrate to the bottom and, therefore, there are no grass beds in the area of the site. Water grasses are the primary food of the manatee. Although manatees are known to travel in the barge canal, the canal is not essential habitat for the manatee.

18. The proposed Plan Amendments would not prevent achievement of the criteria established in the Manatee Protection Element of the comprehensive plan.

19. Petitioner failed to demonstrate that the Plan Amendments would cause an unreasonable risk of harm to manatees or are otherwise inconsistent with any provision of the comprehensive plan.

Workforce Housing

20. Petitioner alleges that the County has more than sufficient affordable housing and that the Plan Amendments would add to the surplus of affordable housing by allowing for a residential density bonus if workforce housing is provided. "Workforce housing" is generally defined in Section 420.5095(3)(a), Florida Statutes, as "housing affordable to natural persons or families whose total annual household income does not exceed 140 percent of the area median income."

The Housing Element of the comprehensive plan encourages affordable housing. Citrus County has not established in its comprehensive plan a "cap" on affordable housing units. There is also no cap on affordable housing units established in Chapter 163, Florida Statutes, or in Florida Administrative Code Chapter 9J-5. Petitioner did not adequately explain how an amendment that encourages the provision of affordable housing for some of the persons who work on a site or in the local area could be inconsistent with the comprehensive plan, Chapter 163, or Rule 9J-5.

Public Water and Sewer Services

21. At the final hearing, Petitioner claimed that the Plan Amendments for the HHP Subarea require that the district be served by central water and sewer services, but do not specify what entity is required to provide the services. Stated in this form, Petitioner's issue is without merit because Petitioner did not identify a provision of the comprehensive plan, Chapter 163, or Rule 9J-5 that requires an identification of the entity that will provide water and sewer services in the future.

22. Petitioner stated at the final hearing that "What I'm attempting to do is to narrow [the issues] down to the urban sprawl issue because to me that is the strength and the meat of the argument." Therefore, Petitioner's issue regarding the provision of public water and sewer services is treated as an

aspect of his allegation that the Plan Amendments would encourage urban sprawl, and is addressed below.

Urban Sprawl

23. Petitioner alleges that the Plan Amendments encourage urban sprawl because they would result in the prematurely and poorly planned conversion of rural lands, would "leapfrog" over undeveloped lands, and would add new residential units there are not needed.

24. Florida Administrative Code Rule 9J-5.006(5), entitled "Review of Plans and Plan Amendments for Discouraging the Proliferation of Urban Sprawl," includes 13 primary indicators that a plan amendment does not discourage the proliferation of urban sprawl. Discussed below are the indicators implicated by the evidence presented by the parties.

25. The first indicator of urban sprawl refers to "low-intensity, low-density, or single-use development or uses in excess of demonstrated need." The Plan Amendments call for a mix of land uses which are relatively high in intensity and density. Therefore, this indicator is not presented by the proposed Plan Amendments.

26. The second indicator of urban sprawl is promoting significant amounts of urban development in rural areas at substantial distances from existing urban area while leapfrogging over undeveloped lands available and suitable for development.

Respondents and Intervenor claim that this would not be leapfrog development because the land was used in the past for industrial and commercial purposes and because the port uses are water-dependent. A County planner testified that there is a deficit of residential units in the planning district in which the HHP site is located. However, the addition of 600 residential units (even more, if workforce housing units are included) a substantial distance from urbanized areas is an indicator of urban sprawl.

27. The fourth indicator is failing to protect and preserve natural resources as a result of the premature or poorly planned conversion of rural lands. Petitioner presented no evidence to show that the Plan Amendments would fail to protect or preserve natural resources. Therefore, this indicator of urban sprawl is not present.

28. Indicators 6 through 8 are related to the orderly and efficient provision of public services and utilities. Generally, urban sprawl is indicated when public facilities must be created or expanded to serve a proposed land use due to its density or intensity, and its distance from existing facilities. Public water and sewer lines are not currently available to the site, and the County has no plans to extend public water and sewer services to the site.

29. The Plan Amendments require all development within the HHP to be served by central water and sewer. If on-site, central

wastewater facilities are used, they must provide advanced wastewater treatment and reuse capability.

30. Respondents and Intervenor assert that the Plan Amendments would reduce the development intensity that is allowed under the current land use designations and development approvals for the site. They presented evidence that there would be a reduction of the water and sewer usage that potentially could have been required to serve the land uses on the site.

31. Florida Administrative Code Rule 9-5.006(5)(k) states that the Department "shall not find a plan amendment to be not in compliance on the issue of discouraging urban sprawl solely because of preexisting indicators if the amendment does not exacerbate existing indicators." However, there was insufficient evidence presented on past, present, and future public water and sewer utility capacity. The evidence was insufficient to determine whether there are pre-existing indicators of urban sprawl, or whether the current situation indicates urban sprawl based on a need to expand the capacity of public utilities to serve the site.

32. Petitioner has the burden of proof. The record evidence is insufficient to support his claim that the Plan Amendments show a failure of Citrus County to discourage the proliferation of urban sprawl.

CONCLUSIONS OF LAW

33. 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.

34. Respondents and Intervenor contend that Petitioner is not an “affected person" because his telephone conversations regarding the Plan Amendments with one County commissioner is not the kind of communication with a local government that is contemplated by Section 163.3814(1)(a), Florida Statutes. They cite the Final Order of the Department of Community Affairs in Starr v. DCA and Charlotte County, 22 F.A.L.R. 3837 (Fla. Dept. of Community Affairs 2000). The Starr case involved a person who made comments to a county code enforcement board about matters only indirectly related to a subsequent comprehensive plan amendment, and the comments were not made during the period of time beginning with the transmittal hearing and ending with the amendment’s adoption. These facts are distinguishable from this case because Petitioner Schweickert’s comments to Commissioner

Thrumston were directly related to the proposed Plan Amendments and his comments were made during the appropriate time period.

35. However, in the Starr Final Order, the Department also discussed the essential element that a person must have "submitted oral or written comments, recommendations, or objections to the local government." In this regard, the Department referred to the definition of "local government," local planning agency," and "governing body" in Section 163.3164, Florida Statutes, and determined that the communication between the "affected person" and the local government must be with the local planning agency or the local governing body. Id. at § VI(D).

36. Petitioner presented no evidence to establish that he asked Commissioner Thrumston to relay his comments to the Board of County Commissioners when they met in a public hearing to consider the Plan Amendments, or that Commissioner Thrumston did relay Petitioner's comments to the full Board or to the County's planning staff.

37. It might not be unreasonable to interpret Section 163.3184(1), Florida Statutes, as allowing a private conversation with one member of a county or city commission to be sufficient to qualify a person as an "affected person." However, the interpretation advocated by Respondents and Intervenor is a

reasonable interpretation and is probably the better interpretation.

38. Fundamentally, the requirements in Chapter 163 for public participation in the comprehensive planning process are aimed at making the governing body of the local government consider the public's input before acting on a comprehensive plan amendment. A private conversation with one commissioner does not achieve this fundamental objective because the other members of the governing body are unaware of and, therefore, unable to consider or act on the comments.

39. Petitioner failed to demonstrate that he is an affected person with standing to challenge the Plan Amendments. However, because an evidentiary hearing was held to resolve the parties' disputed issues, it is appropriate to make Findings of Fact and Conclusions of Law on the issues raised by Petitioner.

40. Petitioner has the burden in this proceeding to prove that the Plan Amendments are not in compliance. The term "in compliance" is defined in Section 163.3184(1)(b), Florida Statutes, as follows:

> In compliance means consistent with the requirements of ss. 163.3177, 163.3176, 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.

41. The County's determination of compliance must be upheld if is it is fairly debatable. See § 163.3184(9), Fla. Stat. The term "fairly debatable" is not defined in Chapter 163, Florida Statutes, but in Martin County v. Yusem, 690 So. 2d 1288, 2195 (Fla. 1997), the court said, "The fairly debatable standard of review is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety."

42. Petitioner failed to prove beyond fair debate that the Plan Amendments are inconsistent with any goal, objective, or policy of the Citrus County Comprehensive Plan.

43. Petitioner failed to prove beyond fair debate that the Plan Amendments are inconsistent with any provision of Chapter 163, Florida Statutes, or Florida Administrative Code Chapter 9J-5.

44. In summary, Petitioner failed to prove beyond fair debate that the Plan Amendments are not "in compliance," as that term is defined in Section 163.3184(1)(b), Florida Statutes.

RECOMMENDATION

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

RECOMMENDED that the Department of Community Affairs enter a Final Order finding that amendments CPA-09-13 and CPA-09-14 to the Citrus County Comprehensive Plan are "in compliance."

DONE AND ENTERED this 11th day of May, 2010, in Tallahassee, Leon County, Florida.

BRAM D. E. CANTER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of May, 2010.

ENDNOTE

1/ Unless otherwise noted, all references to the Florida Statutes are to the 2009 codification.

COPIES FURNISHED:

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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 should be filed with the agency that will issue the Final Order in this case.