

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANGELO'S AGGREGATE MATERIALS,)
LTD, ANGELO IAFRATE)
CONSTRUCTION COMPANY, AND STONY)
POINTE LIMITED PARTNERSHIP,)
)
Petitioners,)
)
vs.) Case No. 10-1540GM
)
PASCO COUNTY AND DEPARTMENT OF)
COMMUNITY AFFAIRS,)
)
Respondents.)
_____)

RECOMMENDED ORDER

On October 27-28, 2010, a final administrative hearing was held in this case in Dade City before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioners: Leigh K. Fletcher, Esquire
Tina M. Fischer, Esquire
Stearns, Weaver, Miller, Weissler,
Alhadefe & Sitterson, P.A.
Post Office Box 3299
Tampa, Florida 33601-3299

Gerald A. Figurski, Esquire
Gerald A. Figurski, P.A.
2550 Permit Place
New Port Richey, Florida 34655

For Respondent Pasco County:

David Goldstein, Esquire
W. Elizabeth Blair, Esquire
Pasco County Attorney's Office
7530 Little Road, Suite 340
New Port Richey, Florida 34654-5598

For Respondent Department of Community Affairs:

L. Mary Thomas, Esquire
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

STATEMENT OF THE ISSUE

The issue in this case is whether Pasco Comprehensive Plan Amendments CPA 09-1(12), adopted by Ordinance 09-25, and CPA 09-1(10), adopted by Ordinance 09-26, are "in compliance," as defined by section 163.3184(1)(b), Florida Statutes.¹

PRELIMINARY STATEMENT

The Department of Community Affairs (DCA) reviewed the plan amendments at issue, plus others adopted by Pasco County, and found them to be in compliance. Petitioners filed a Petition for Formal Proceedings (Petition) challenging the parts of DCA's determination relating to the plan amendments at issue, plus CPA 09-1(7) and 09-1(13), adopted by Ordinance 09-24. The Petition was referred to DOAH for a hearing.

At DOAH, the parts of the challenge relating to plan amendments adopted by Ordinance 09-24, except for Section 2.W., were voluntarily dismissed; the Petition was amended to delete

those challenges; and jurisdiction was relinquished to DCA for entry of a final order as to those plan amendments. A Joint Pre-Hearing Stipulation was filed on October 25, 2010, reflecting that Petitioners' challenge to DCA's in-compliance finding as to Section 2.W. of Ordinance 09-24 also was dismissed voluntarily.

During the week before the final hearing, Pasco County filed six motions to either partially relinquish jurisdiction or limit the evidence as to issues stated more expansively in the Joint Pre-Hearing Stipulation than in the Amended Petition. Those motions were heard and decided at the outset of the final hearing. The first, second, fifth, and sixth motions were granted in that the evidence was limited to the issues stated in the Amended Petition. As to the third motion, Petitioners agreed that no evidence would be presented as to Section 2.W. of Ordinance 09-24 or the part of CPA 09-1(12), adopted by Ordinance 09-25, which amended Policy SWT 4.5.2. The fourth motion was denied. In addition, Petitioners' unopposed Request for Judicial Notice was granted, and the designated documents were officially recognized and included as exhibits in the evidentiary record of the case.

After opening statements, Petitioners called the following witnesses: John Arnold, Petitioners' non-attorney party representative; Roger Wilburn, an expert in land use planning;

as an adverse party witness, Richard Gehring, Pasco County's Growth Management Administrator, and an expert in land use planning; and Bruce Kennedy, Pasco County's Utilities Director, also as an adverse party witness, and an expert in solid waste planning. As part of Petitioners' presentation, Exhibits A-4, A-6, A-11, A-12, A-14, A-68, A-72 through A-82, A-87, and A-88 were received in evidence. Pasco County presented its case through cross-examination of Messrs. Gehring and Kennedy and the testimony of: Carol Clarke, Pasco County's Executive Planner, and an expert in land use planning; and Chris Wiglesworth, a Senior Planner with DCA, and an expert in land use planning. As part of Pasco County's presentation, or for official recognition, Exhibits B-1 through B-3, B-5 through B-13, B-15 through B-20, and B-33 were received in evidence. DCA did not present any evidence.

A three-volume Transcript of the final hearing was filed on November 23, 2010. Proposed recommended orders filed by Petitioners and Pasco County (joined by DCA) have been considered.

FINDINGS OF FACT

1. Petitioners, Angelo Iafrate Construction Company and Angelo's Aggregate Materials, Ltd., own property and operate businesses in Pasco County. Petitioner, Stony Pointe Limited Partnership, owns property in Pasco County. Petitioners

submitted oral or written comments, recommendations, or objections to Pasco County Ordinances 09-25 and 09-26 during the time period beginning with the transmittal hearing and ending with the adoption hearing.

2. Pasco County Ordinance 09-25 amended the "Future Land Use Appendix, Section FLU A-6, The Official Future land Use Map, General Application, Paragraph 4." Before the amendment, that part of the comprehensive plan provided that land use classifications on the Future Land Use Map (FLUM) were identified according to the predominant use or maximum level of intensity intended and that other uses, including "public and semipublic uses, may be permitted in any land use classification consistent with the applicable Goals, Objectives, and Policies of the Future Land Use Element." As amended, that part of the comprehensive plan provided that other uses, including "minor public/semi public uses may be permitted in any land use classification consistent with the applicable Goals, Objectives, and Policies of the Comprehensive Plan." The amendment also made it explicit that, while minor public/semi-public (P/SP) uses may be permitted in any land use classification, major P/SP uses require either the P/SP Future Land Use Designation or specific inclusion in the range of potential uses of another Future Land Use classification. Also, by insertion of the adjective "sanitary," it specified that the landfills included

in the general range of potential uses in the P/SP future land use category referred to sanitary landfills.

3. Ordinance 09-25 amended the Glossary to define "Construction and Demolition Debris" and "P/SP Facilities." It stated that P/SP Facilities "conducted entirely by the public sector shall be considered public; uses not entirely public shall be considered semi-public." It also gave examples of major and minor P/SP facilities. Major P/SP facilities include: "Power plants, sanitary landfills, wastewater treatment plants larger than 4 mgd, and other similarly scaled uses." Minor P/SP facilities include: "Roads, sidewalks, libraries, parks, street lights, lift stations, transfer stations, pumping stations, fire stations, police/sheriffs [sic] stations, electric substations, transportation corridors and other similarly scaled uses." Ordinance 09-25 also states: "In circumstances where this Comprehensive Plan does not establish the major/minor status of a proposed facility, the Growth Management Administrator shall make that determination based on the size, scale, and impact of the proposed facility. Further delineation of major and minor may be provided in the Land Development Code."

4. Before those amendments, public facilities were defined as: "Publicly owned, operated, franchised, licensed, or regulated facilities which provide water, sewer, solid waste[,] drainage, schools, and transportation services to the residents

and visitors of Pasco County." P/SP facilities were defined as: "Land uses, such as schools, hospitals, and airports, in which government is a major participant and from which the public benefits." The definition of "landfill" ("Those lands, public and private, which are used for the purpose of disposing sanitary solid waste.") was deleted. A definition for "sanitary landfill" was added: "Any solid waste land disposal area for which a permit, other than a general permit, is required by s. 403.707 Florida Statutes, and which receives solid waste for disposal in or upon land. The term does not include a land-spreading site, an injection well, a surface impoundment, or a facility for the disposal of construction and demolition debris."

5. Ordinance 09-25 amended the "Solid Waste Sub-Element of the Public Facilities Element, Summary of Solid Waste Issues, Disposal." The amendment added a statement that there are private solid waste disposal facilities throughout the County; added Policy SWT 4.1.3, stating that semi-public solid waste management facilities can be integrated into the solid waste management system to achieve the adopted LOS standard; deleted Policy SWT 4.4.5, which prohibited landfills in certain environmentally sensitive areas where they would not be consistent with other elements of the Comprehensive Plan; and amended Policy SWT 4.5.2, which limited the location of

landfills, to limit the location of sanitary landfills by prohibiting them in those sensitive areas, consistent with other elements of the Comprehensive Plan.

6. Pasco County Ordinance 09-26 added Future Land Use Objective 1.10.1 on Compatibility and Policies 1.10.1 through 1.10.4 on compatibility review, compatibility through appropriate design, residential compatibility/transition, and industrial compatibility and performance measures. It also renamed the "Appropriate Transitional Land Uses" general guide table, which is now called the "Transitional Land Uses General Guide," and made minor changes in the guide.

A. Principal Effect of Amendments

7. Before Ordinance 09-25, minor P/SP facilities were allowed in any land use classification "consistent with the applicable goals, objectives, and policies of the Future Land Use Element." Ordinance 09-25 clarifies that such facilities also have to be consistent with applicable goals, objectives, and policies elsewhere in the comprehensive plan. Before Ordinance 09-25, minor P/SP facilities did not have to be mapped; after Ordinance 09-25, minor P/SP facilities do not have to be mapped.

8. Before Ordinance 09-25, sanitary landfills had to be in the P/SP future land use category or another category that specifically allowed them; the County did not consider

construction and demolition debris facilities to be landfills, and they did not have to be in the P/SP future land use category or in another category that specifically allowed them; they just had to be consistent with other elements of the comprehensive plan. Ordinance 09-25 clarifies this interpretation of the comprehensive plan.

9. Density and intensity standards for P/SP have not changed as a result of Ordinance 09-25. Before Ordinance 09-25, they were "not applicable"; after Ordinance 09-25, they are "not applicable."

10. Before Ordinance 09-25, P/SP facilities did not have to be publically owned; rather, they were defined as "publicly owned, operated, franchised, licensed or regulated facilities." This definition has been interpreted by the County as including private facilities that are franchised, licensed, or regulated. Ordinance 09-25 clarifies this interpretation.

B. Intensity Standards

11. Petitioners contend that Pasco County Ordinance 09-25 makes substantive changes to the Comprehensive Plan and does not include the intensity standards required for P/SP under Section 163.3177(6) (a) and Rule 9J-5.006(3) (c) (7).

12. Even if the changes are considered to be substantive, it is appropriate not to have intensity standards for P/SP. Intensity applies to non-residential use, but logically should

only apply to such uses that generate impacts and the need for public services. P/SP responds to impacts and the need for public services generated by other uses. It is logical and appropriate not to have intensity standards for P/SP.

C. Meaningful and Predictable Standards

13. Petitioners allege that Ordinance 09-25 does not establish meaningful and predictable standards and meaningful guidelines for land development regulations (LDRs) because: (1) it does not provide a clear distinction between major and minor P/SP facilities; (2) it does not provide adequate guidance to determine when the P/SP category applies to a particular use; (3) it does not provide meaningful and predictable standards for the growth management administrator; and (4) it does not provide meaningful and predictable standards for private owners. Petitioners' specific concern is that the amendment does not make clear whether a construction and demolition debris facility will be determined to be major or minor.

14. Before Ordinance 09-25, construction and demolition debris facilities were considered to be minor. Ordinance 09-25 does not require them to be major but leaves open the possibility that they could be considered major, depending on their size, scale, and impact. This determination will require the exercise of judgment. But the requirement that comprehensive plans provide meaningful and predictable standards

and meaningful guidelines for LDRs does not prohibit the exercise of judgment.

15. Petitioners contend that Ordinance 09-25 is deficient because its lists of examples of major and minor P/SP facilities are not exhaustive or explicit, and many factors must be taken into account to determine whether a particular facility would be major or minor. In addition, Petitioners point out that libraries, parks, and police stations are listed generally as examples of minor facilities, but those facilities could be considered to be major if regional and of sufficient size, scale, and impact. But those examples of minor facilities were intended to connote typical neighborhood-scale libraries, parks, and police stations. Although the amendment could have been written more clearly, Ordinance 09-25 as a whole gives the growth administrator sufficient guidance to make a judgment whether a particular construction and demolition debris facility is major or minor.

16. The growth management administrator's exercise of judgment is subject to review by the Board of County Commissioners (BOCC). Petitioners contend that this review procedure removes the standards and guidelines in Ordinance 09-25. But the BOCC must be guided by the same considerations as the growth management administrator. The procedure for review

by the BOCC does not detract from the standards and guidelines that govern both.

17. Petitioners contend that Ordinance 09-26 makes substantive changes to the Comprehensive Plan that do not provide predictable and meaningful standards and meaningful guidelines for LDRs because it does not: (1) provide standards related to the land use classifications to which it applies; (2) specify how the policies are to be integrated into LDRs; and (3) direct that it shall be implemented by the LDRs.

18. The comprehensive plan has residential compatibility standards in Future Land Use Element (FLUE) policies 1.4.2, 1.4.3, and 1.4.4. These have been found to be in compliance.

19. Ordinance 09-26 adds an objective and four policies on compatibility in general. Ordinance 09-26 provides predictable and meaningful standards and meaningful guidelines for LDRs. It is not necessary to name all the future land use classifications to which Ordinance 09-26 applies; it is not necessary to further specify how Ordinance 09-26 is to be integrated into LDRs; and it is not necessary to direct that Ordinance 09-26 shall be implemented by the LDRs.

D. Data and Analysis

20. Petitioner contend that Ordinance 09-25 is not supported by data and analysis demonstrating that solid waste LOS standards will be met and maintained, that there will be

adequate land for solid waste facilities and other major P/SP facilities to support future land use needs, and that the County will be able to monitor compliance with the solid waste LOS standards.

21. Ordinance 09-25 does not change the County's solid waste capacity or its solid waste stream. The solid waste LOS standard in Pasco's comprehensive plan is for solid waste requiring a sanitary landfill and for other solid waste other than construction and demolition debris. Ordinance 09-25 has no effect on the LOS standard because the amendment does not add to the solid waste stream or subtract from capacity. For the same reasons, it does not affect the County's ability to monitor compliance.

22. The comprehensive plan designates enough P/SP land to meet the County's solid waste needs. If needed, more land is available to be added to the County's solid waste disposal capacity. There also are other ways to handle excess solid waste beside adding P/SP land. Solid waste can be placed under contract to be hauled and disposed of outside the County. Under Ordinance 09-25, as before, minor construction and demolition debris facilities can be sited in any land use category. No additional data and analysis are required.

E. Internal Consistency

23. Petitioners contend that Ordinance 09-25 is internally inconsistent because it fails to coordinate land uses and public facilities, including utilities, and allows premature provision of central water and sanitary sewer, inconsistent with comprehensive plan policies: (1) related to capital improvements; (2) establishing LOS standards for transportation and public facilities; and (3) discouraging the premature provision of central water and sanitary sewer.

24. As indicated, Ordinance 09-25 has no effect on the County's ability to meet LOS standards. For that reason, it has no effect on the County's plans for needed capital improvements or the provision of central water and sanitary sewer; and it is not inconsistent with any plan provision on those subjects.

CONCLUSIONS OF LAW

25. Petitioners have standing as "affected persons" under section 163.3184(1) (a), Florida Statutes.

26. Section 163.3184(1) (b) states:

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

27. "In this proceeding, the local plan or plan amendment shall be determined to be in compliance if the local government's determination of compliance is fairly debatable." § 163.3184(9)(a), Fla. Stat. This is a deferential standard that requires "approval of a planning action if reasonable persons could differ as to its propriety." Martin Cty. v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997) (quoting City of Miami Beach v. Lachman, 71 So. 2d 148, 152 (Fla. 1955)).

28. Section 163.3177(6)(a) states that future land use categories "must include standards to be followed in the control and distribution of population densities and building and structure intensities." Neither this statute nor Florida Administrative Code Rule 9J-5.006(3)(c)7. requires intensity standards for Pasco's P/SP category, which is designed to serve the needs generated by the density and intensity of residential and non-residential development under a comprehensive plan. See Fla. Admin. Code R. 9J-5.003(60) (defining "intensity" as "an objective measurement of the extent to which land may be developed or used, including the consumption or use of the space above, on or below ground; the measurement of the use of or demand on natural resources; and the measurement of the use of or demand on facilities and services."). It was not proven

beyond fair debate that the plan amendments fail to include necessary intensity standards.

29. Comprehensive plan goals, objectives, and policies must "establish meaningful and predictable standards for the use and development of land and provide meaningful guidelines for the content of more detailed land development and use regulations." Fla. Admin. Code R. 9J-5.005(6). It was not proven beyond fair debate that the plan amendments fail to meet these requirements.

30. "Coordination of the several elements of the local comprehensive plan shall be a major objective of the planning process. The several elements of the comprehensive plan shall be consistent" § 163.3177(2), Fla. Stat. See also Fla. Admin. Code R. 9J-5.005(5)(a) ("The required elements and any optional elements shall be consistent with each other."). It was not proven beyond fair debate that the plan amendments are internally inconsistent.

31. Sections 163.3177(6)(a) and 163.3177(8), and rule 9J-5.005(2)(a), require that comprehensive plan be based on relevant and appropriate data and analysis. It was not proven beyond fair debate that the plan amendments are not based on relevant and appropriate data and analysis.

RECOMMENDATION

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

RECOMMENDED that DCA enter a final order finding the comprehensive plan amendments adopted by Pasco County Ordinances 09-25 and 09-26 to be in compliance.

DONE AND ENTERED this 22nd day of December, 2010, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
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 22nd day of December, 2010.

ENDNOTE

1/ Unless otherwise noted, all statutory references are to the 2010 codification of the Florida Statutes.

COPIES FURNISHED:

David Goldstein, Esquire
W. Elizabeth Blair, Esquire
Pasco County Attorney's Office
7530 Little Road, Suite 340
New Port Richey, Florida 34654-5598

Gerald A. Figurski, Esquire
Gerald A. Figurski, P.A.
2550 Permit Place
New Port Richey, Florida 34655

Leigh K. Fletcher, Esquire
Stearns Weaver Miller Weissler
Alhadeffe & Sitterson, P.A.
Post Office Box 3299
Tampa, Florida 33601-3299

L. Mary Thomas, Esquire
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

Thomas G. Pelham, Secretary
Department of Community Affairs
2555 Shumard Oak Boulevard, Suite 100
Tallahassee, Florida 32399-2100

Shaw Stiller, General Counsel
Department of Community Affairs
2555 Shumard Oak Boulevard, Suite 325
Tallahassee, Florida 32399-2100

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.