

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

GULF TRUST DEVELOPMENT, LLC AND )  
ROBINSON FARMS, INC., )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 11-4502GM  
 )  
MANATEE COUNTY, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

The final hearing in this case was held on November 17, 2011, by video teleconference at sites in Sarasota and Tallahassee, Florida, before Bram D. E. Canter, Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner Gulf Trust Development, LLC., and Robinson Farms, Inc.:

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For Respondent Manatee County:

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STATEMENT OF THE ISSUES

The issues to be determined in this case are whether the amendments to the Manatee County Comprehensive Plan adopted through Ordinance No. 11-01 ("Plan Amendments"), are "in compliance" as that term is defined in section 163.3184(1)(b), Florida Statutes (2011).<sup>1/</sup>

PRELIMINARY STATEMENT

On August 4, 2011, Manatee County adopted Ordinance No. 11-01, which amended the Manatee County Comprehensive Plan ("Manatee Plan") to make map amendments and text amendments regarding the Coastal High Hazard Area and the Coastal Evacuation Area. On September 9, 2011, the Department of Economic Opportunity issued a letter stating that it had identified no provision that necessitated a challenge to Ordinance No. 11-01.

On September 2, 2011, Petitioners filed a petition for an administrative hearing at DOAH to challenge the Plan Amendments. Katie Pierola and Greg Geraldson filed a petition to intervene, which was granted. However, following a telephone hearing on a motion to dismiss for lack of standing, the petition to intervene was dismissed.

At the final hearing, Petitioners presented the testimony of William C. Robinson, John Neal, Kathleen Thompson, Sharon Tarman, Laurie Feagans, Betti Johnson, Steven Simpson, and John Osborne. Manatee County presented testimony from the same witnesses.

Joint Exhibits 1-15; Petitioners' Exhibits 4, 5A through 5G, 8 through 11, and 12; and Manatee County Exhibit 16. Petitioners' Exhibit 4 was admitted for a limited purposes as discussed in the record.

#### FINDINGS OF FACT

##### The Parties

1. Gulf Trust Development, LLC ("Gulf Trust") is a Florida corporation doing business in Manatee County. Gulf Trust is the contract vendee of property owned by Robinson Farms, Inc.

2. Robinson Farms, Inc., is a Florida corporation doing business in Manatee County and owning real property in the County.

3. Manatee County is a political subdivision of the State of Florida and has adopted a comprehensive plan that it amends from time to time pursuant to section 163.3184.

##### Standing

4. John Neal, the owner and manager of Gulf Trust appeared and spoke at the May 5, 2011, transmittal hearing for the Plan Amendments and at a later work session of the Board of County Commissioners on the Plan Amendments. Neal testified that, on these occasions, he was speaking for Gulf Trust and for Robinson Farms. William Robinson, the president of Robinson Farms, confirmed that Neal was authorized in advance to represent Robinson Farms at the public meetings on the Plan Amendments.

5. The County contends that there is no evidence that Neal represented any entity other than himself, but the testimony of Neal and Robinson constitutes evidence.

The Plan Amendment

6. All coastal communities must have a coastal management element of their comprehensive plans that, among other things, designates the coastal high-hazard area ("CHHA"). See § 163.3178(2)(h), Fla. Stat. The CHHA is defined in the statute as "the area below the elevation of the category 1 storm surge line as established by the Sea, Lake, and Overland Surges from Hurricanes (SLOSH) computerized storm surge model." The CHHA must be mapped in the comprehensive plan. See § 163.3178(9)(c), Fla. Stat.

7. The Manatee County planning staff proposed the Plan Amendments as a response to the publication of the 2010 Statewide Regional Evacuation Study for the Tampa Bay Region ("Storm Tide Atlas") by the Tampa Bay Regional Planning Council.

8. The Storm Tide Atlas is a public safety planning tool used to assist local governments with hurricane evacuation planning in a four-county region in the Tampa Bay Area, which includes Manatee County. It incorporates the SLOSH model to predict storm surge heights during hurricanes and includes storm tide zone maps depicting the landward extent of anticipated storm surge for the five categories of storms.

9. The 2010 Storm Tide Atlas made use of a new mapping technique known as LIDAR, a remote-sensing laser terrain mapping system, which is more accurate than past technology used for topographic mapping.

10. The Plan Amendments include an amendment to the definition of the CHHA, which brings the definition in line with the statutory definition. That change is not opposed by Petitioners. Petitioners' opposition focuses on the amended definition of Coastal Evacuation Area ("CEA") and the new maps of the CEA.

11. The CEA is not a term used in chapter 163. The CEA is now defined in the Introduction and Definitions section of the Manatee Plan as follows:

The evacuation for a Category 1 hurricane as established in the regional hurricane evacuation study applicable to Manatee County pursuant to Ch. [sic] 163.3178(2)(h), F.S. as updated on a periodic basis.

12. The CEA is a tool for emergency management. It identifies the area where people must evacuate in the event of a category 1 hurricane. The purpose of the CEA is described in Policy 2.2.2.4.2 as follows:

- a) To limit population in the Category 1 hurricane evacuation area requiring evacuation during storm events.
- b) To limit the amount of infrastructure, both private and public, within the CEA Overlay District and thereby limit magnitude

of public loss and involvement in mitigating for loss of private infrastructure to Manatee County residents.

c) To, through exercise of the police power, increase the degree of protection to public and private property, and to protect the lives of residents within the CEA, and reduce the risk of exposing lives or property to storm damage.

d) To accomplish shoreline stabilization along coastal areas by limiting development activity which may adversely impact shoreline stability.

e) To protect coastal water quality by reducing impervious surface along coastal areas, thereby reducing the risk of incomplete treatment of stormwater runoff before discharge into coastal waters.

f) To encourage, establish and maintain vegetative and spatial buffer zones, in order to maintain the capacity of natural vegetative communities in mitigating the negative effects of storm surge and tidal velocity, and the erosive effect of wave action.

13. Policy 2.2.2.4.5 prohibits any amendment to the Future Land Use Map that would increase allowable residential density on lands within the CEA.

Whether the CEA and the CHHA are the Same

14. The Plan Amendments would change the definition of the CEA to remove the reference to section 163.31878(2)(h):

Coastal Evacuation Area (CEA) - The evacuation Level A for a Category 1 hurricane as established in the hurricane evacuation study applicable to Manatee County, as updated on a periodic basis.

Petitioners claim that the current definition of the CEA, cited in paragraph 11, above, makes the CEA identical to the CHHA and that by removing the reference to section 163.3178(2)(h), the CEA and the CHHA would be different for the first time.

15. Although the definition of the CEA refers to section 163.3178(2)(h) where the CHHA is defined, the definition of the CEA does not express the proposition urged by Petitioners -- that the CEA and the CHHA are identical. As explained below, in order to map the CEA, the County begins with the map of the CHHA and then makes adjustments to it. Therefore, it is not illogical for the definition of the CEA to refer to section 163.3178(2)(h). The reference to the statute does not compel an interpretation that the CEA was intended to be identical to the CHHA.

16. Another definition of the CEA appears in Policy 2.2.2.4.1 of the Future Land Use Element ("FLUE"). There, the CEA is defined as "the geographic area which lies within the evacuation area for a Category 1 hurricane." This definition of the CEA does not refer to section 163.3178(2)(h).

17. Some of the testimony from County employees about the relationship between the CEA and the CHHA was ambiguous, but the ambiguity can be attributed to the way the witnesses were examined by Petitioners. Three County planners were each asked to admit that, because the definition of the CEA (in the

definitions section of the Manatee Plan) refers to section 163.3178(2)(h), the CEA and the CHHA must be the same thing. The questions confused the witnesses.

18. Kathleen Thompson, the Planning Manager, did not think the CHHA and the CEA are the same, Sharon Tarman, a planner, said they are. John Osborne, the Planning and Zoning Official, said the definition of the CEA "implied" that the CEA and CHHA are the same.

19. A quick glance at the existing maps of the CHHA and the CEA in the Manatee Plan is sufficient to reveal that that the CHHA and the CEA are not the same. See Manatee County Exhibit 1, pages 232-234. The CHHA has irregular boundaries. The CEA is larger and has many regular (straight line) boundaries.

20. Considering the two definition of the CEA, the ambiguous testimony of the County planners, and the CHHA and CEA maps, it is found that one definition of the CEA is ambiguous, but the County intended the CEA and the CHHA to be different and, as implemented, the CEA and the CHHA are different.

21. The proposed change to the definition of the CEA in the definitions section to remove the reference to section 163.3178(2)(h) eliminates the ambiguity in the definition and makes it conform to the definition in FLUE Policy 2.2.2.4.1. It is not a substantive change.



22. The CHHA is the area below a category 1 storm surge line as produced by a computer model. In contrast, the CEA is an evacuation zone. The Storm Tide Atlas states that emergency management officials use several factors in determining evacuation zones, not just storm surge data:

[I]t is important to note that the storm tide boundaries are not the only data used in this determination. Local officials use their knowledge of the area and other data such as: areas of repetitive loss, surge depth, freshwater flooding, isolation issues and debris hazards, and typically choose known landmarks to identify boundaries for public warning and information.

23. In Manatee County, emergency management officials started with the CHHA line, and then adjusted the boundaries to follow streets, natural geographical features, and parcel boundaries so that the resulting CEA provided a better tool for emergency management and public information. That is why the CHHA has irregular boundaries, but the CEA has many regular (straight line) boundaries.

24. The proposed CEA includes 10,690 fewer acres than the existing CEA because of the substantial changes that resulted from using the newest generation of the SLOSH model and the new LIDAR technology.

25. The proposed CEA includes 8,365 more acres than are within the proposed CHHA as a result of the adjustment of the

CHHA line to coincide with nearby streets and other geographic features, and with parcel boundaries.

26. Petitioners argue that the effect of the change in the definition of the CEA is to add 8,365 acres to the area which is subject to the prohibition in Policy 2.2.2.4.5 against increases in allowable residential density. However, because the change in the definition of the CEA is not substantive, the real effect of the new mapping of the CEA is to reduce the lands subject to the prohibition by 10,690 acres.

#### Public Notice

27. Petitioners contend that public notice requirements were not met for the public hearings for the Plan Amendments. That contention is based on the claim that the Plan Amendments cause 8,365 acres of land to be added to the area subject to the prohibition against future increases in allowable residential density. Because that claim is rejected, Petitioners public notice issues are also rejected. Furthermore, as discussed in the Conclusions of Law, allegations of inadequate public notice are irrelevant in a compliance determination.

#### Data and Analysis

28. Petitioners argue that the Plan Amendments are not based on relevant and appropriate data and analysis. The argument is based in large part on Petitioners' contention that

the CEA and the CHHA used to be co-extensive, which is rejected above.

29. Petitioners claim that the County failed to consider flooding, wave height, and other factors when mapping the CEA. The CEA boundaries were placed at streets and other physical landmarks as well as parcel boundaries, in order to make the area subject to evacuation clearer for emergency management officials and the public.<sup>2/</sup> This is a sufficient basis to explain the boundaries of the CEA. The relevant data for such a purpose would be the location of the CHHA in relationship to nearby streets, other physical landmarks, and parcel boundaries. Petitioners did not show that any particular CEA boundary was illogical or inappropriate.

#### Mitigation

30. Petitioners contend that the Plan Amendments do not include the mitigation measures referred to in section 163.3178(9)(a). The statute states that a proposed amendment shall be found in compliance with the state coastal high-hazard provisions if:

1. The adopted level of service for out-of-county hurricane evacuation is maintained for a Category 5 storm event as measured on the Saffir-Simpson scale; or
2. A twelve hour evacuation time to shelter is maintained for a Category 5 storm event as measured on the Saffir-Simpson scale and shelter space reasonably expected to

accommodate the residents of the development contemplated by a proposed comprehensive plan amendment is available; or

3. Appropriate mitigation is provided that will satisfy Subparagraph 1 or Subparagraph 2 above. Appropriate mitigation shall include, without limitation, payment of money, contribution of land and construction of hurricane shelters and transportation facilities. Required mitigation may not exceed the amount required for a developer to accommodate impacts reasonably attributable to development. A local government and a developer shall enter into a binding agreement to memorialize the mitigation plan.

31. These provisions are stated as alternatives. The mitigation measures referred to in subparagraph 3. are only applicable if the criteria stated in subparagraph 1. or 2. are not met. Petitioners did not prove that the County does not meet the standard described in subparagraph 2. Furthermore, as discussed in the Conclusions of Law, section 163.3178(9) does not require that the mitigation measures described in subparagraph 3. must be included in a comprehensive plan.

#### CONCLUSIONS OF LAW

##### Standing

32. To have standing to challenge a comprehensive plan amendment, a person must be an "affected person," which is defined as a person owning property, residing, or owning or operating a business within the boundaries of the local

government, and who made timely comments to the local government regarding the amendment. See § 163.3184(1)(a), Fla. Stat.

33. There is no express language in section 163.3184 that would deny a corporation standing as an affected person if the corporation's representative makes timely comments, but does not identify the name of the corporation at the time the comments are made. It is academic whether the statute should require such identification at the time the comments are made. The statute does not require it.

34. In this case, the evidence is sufficient to show that Mr. Neal made his comments on behalf of Petitioners. Therefore, Petitioners have standing as affected persons.

#### The Ultimate Issue

35. A person challenging a plan amendment must show that it is not "in compliance" as that term is defined in section 163.3184(1)(b):

"In compliance" means consistent with the requirements of ss. 163.3177, 163.3178, 163.3180, 163.3191, 163.3245, and 163.3248, with the appropriate strategic regional policy plan, and with the principles for guiding development in designated areas of critical state concern and with part III of chapter 369, where applicable.

36. The statutes listed in section 163.3184(1)(b) do not include the provisions of chapter 163 that impose public notice requirements. Therefore, a plan amendment cannot be determined

to be not in compliance because of a failure to comply with public notice requirements.

The Burden and Standard of Proof

37. As the challengers, Petitioners have the burden of proof. Manatee County's determination that the Plan Amendments are "in compliance" is presumed to be correct and shall be sustained if the County's determination of compliance is fairly debatable. See § 163.3184(5)(c), Fla. Stat.

38. The term "fairly debatable" is not defined in chapter 163. The Florida Supreme Court held in Martin County v. Yusem, 690 So. 2d. 1288 (Fla. 1997) that "[t]he fairly debatable standard is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety." Id. at 1295.

39. The standard of proof to establish a finding of fact is preponderance of the evidence. See § 120.57(1)(j), Fla. Stat.

Data and Analysis

40. Section 163.3177(1)(f) requires that all plan amendments be based on relevant and appropriate data and an analysis by the local government. The statute explains:

To be based on data means to react to it in an appropriate way and to the extent necessary indicated by the data available on that particular subject at the time of adoption of the plan or plan amendment at issue.

41. The data which may be relied upon in this proceeding is not limited to the data identified or used by the local government. All data available to the local government and in existence at the time of adoption of the Plan Amendments may be presented. See Zemel v. Lee Cnty., 15 F.A.L.R. 2735 (Dep't of Cmty. Affairs Final Order, June 22, 1993), aff'd, 642 So. 2d 1367 (Fla. 1st DCA 1994).

42. Relevant analyses of data need not have been in existence at the time of adoption of a plan amendment. Data existing at the time of adoption may be analyzed through the time of the administrative hearing. Id.

43. Data supporting an amendment must be taken from professionally accepted sources. See § 163.3177(1)(f)2., Fla. Stat. However, local governments are not required to collect original data. Id.

44. The methodology used in data collection must be professionally acceptable, but the question of whether one professionally acceptable methodology is better than another cannot be evaluated. Id.

45. Petitioners failed to prove that the Plan Amendments are not based on relevant and appropriate data and analysis.

#### Mitigation

46. Section 163.3178(9)(a) requires mitigation measures to be used if a local government does not comply with the adopted

level of service for out-of-county hurricane evacuation or a twelve-hour evacuation time "to shelter" for a category 5 storm event. The statute does not require that any such mitigation measures be made a part of a local government's comprehensive plan.

47. Petitioners failed to show that the Plan Amendments are not consistent with section 163.3178(9).

Summary

48. In summary, Petitioners failed to prove beyond fair debate that the Plan Amendments are not in compliance.

RECOMMENDATION

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

RECOMMENDED that the Department of Economic Opportunity enter a final order determining that the Plan Amendments adopted by Manatee County Ordinance No. 11-01 are in compliance.



DONE AND ENTERED this 2nd day of March, 2012, in  
Tallahassee, Leon County, Florida.



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BRAM D. E. CANTER  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 2nd day of March, 2012.

ENDNOTES

1/ All references to the Florida Statutes are to the 2011  
codification.

2/ It is much easier to understand, for example, that everyone  
who resides east of Pine Street must evacuate, rather than  
everyone who resides on property lying below elevation 2.4 feet  
mean sea level.

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