

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE RICHMAN GROUP OF FLORIDA,
INC.,

Petitioner,

vs.

Case No. 13-2004GM

PINELLAS COUNTY BOARD OF COUNTY
COMMISSIONERS,

Respondent.

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RECOMMENDED ORDER

The final hearing in this case was held on August 27-28, 2013, in Clearwater, Florida, before Bram D.E. Canter, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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For Respondent: Nancy S. Meyer, Esquire
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STATEMENT OF THE ISSUE

The issue to be determined in this case is whether the proposed amendment to the Pinellas Countywide Plan Map, changing

the land use designations on 34.6 acres of land in Safety Harbor, Florida, should be approved.

PRELIMINARY STATEMENT

On August 29, 2012, Petitioner submitted its initial application to the City of Safety Harbor to amend the City of Safety Harbor Comprehensive Plan. A revised application was submitted on December 3, 2012, which included a Development Agreement. After a public hearing, the City approved the proposed amendment to its Comprehensive Plan, subject to the Countywide Plan amendment process.

On March 8, 2013, the City submitted an application to amend the Countywide Plan Map ("the Amendment") to the Pinellas Planning Council on behalf of the Petitioner. The Pinellas Planning Council recommended approval of the Amendment. On May 7, 2013, the Pinellas County Board of County Commissioners, in their capacity as the Countywide Planning Authority ("CPA") denied the application.

On May 28, 2013, pursuant to the Countywide Rules, Petitioner applied for an administrative hearing. Pursuant to a contract with DOAH, the matter was forwarded to DOAH to conduct an evidentiary hearing and prepare a recommended order in conformance with the procedures of chapter 120, Florida Statutes. A corrected petition was subsequently filed.

At the final hearing, Petitioner presented the testimony of Robert C. Pergolizzi, who was accepted as an expert in planning; Matt McLachlan, who was accepted as an expert in planning; Scott Cullen, who was accepted as an expert in marketing; Gordon Beardslee and Mike Meidel (via video of the May 7, 2013, CPA meeting); and Mike Crawford (via video deposition). Petitioner's Exhibits 1-13, 18-19, 29-31, 33-49, 52-54, 54A, 54C, 57, 59, and 60 were received into evidence.

Respondent presented the testimony of Mike Meidel, who was accepted as an expert in economic development; and Mike Crawford, who was accepted as an expert in planning. Respondent's Exhibits 8-17 were received into evidence.

The two-volume Transcript of the final hearing was filed with the DOAH. The parties filed proposed recommended orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. Petitioner is the contract purchaser of 34.6 acres of land ("the Property") located near the northeast corner of 10th Street South and McMullen-Booth Road in the City of Safety Harbor.

2. Respondent is the Board of County Commissioners of Pinellas County, in their capacity as the CPA.

The Proposed Amendment

3. The Amendment would change the land use designations for nine parcels within the Property. The Amendment would make the following changes to the current land use designations:

Countywide Future Land Use	Current Acreage	Proposed Acreage
Industrial Limited (IL)	15.8	-
Residential/Office Limited (R/OL)	5.1	2.8
Residential Low (RL)	5.0	-
Residential Urban (RU)	6.0	-
Preservation (P)	2.7	10.3
Residential Medium (RM)	-	21.5
TOTAL	34.6	34.6

4. However, the parties' dispute focuses on the 15.8-acre parcel that is now designated Industrial Limited ("IL"). The Amendment would change the designation of the parcel to Residential Medium ("RM").

Existing Land Uses on the Property and Surrounding Area

5. Located on the 15.8-acre parcel (referred to hereafter as the "IL parcel" or "Richman parcel") are numerous industrial buildings and structures associated with a citrus processing facility that is no longer in operation.

6. There are no uses being made of the other eight parcels that comprise the Property. The balance of the Property is undeveloped and relatively undisturbed. There are wetlands as well as a creek on the Property. There is an extensive tree canopy in the undeveloped area.

7. Access to the IL parcel is via 10th Street South (S.R. 590), which is a two-lane, undivided roadway on the southern boundary. There is no rail access to the IL parcel.

8. To the north and east of the Property are relatively affluent neighborhoods of single-family residences on lands designated Residential Suburban and Residential Low. The residences on the north are separated from the IL parcel by the large undeveloped area, but the residences to the east are immediately adjacent to the IL parcel.

9. McMullen-Booth Road, a six-lane arterial roadway, runs along the northwestern boundary of the Property.

10. On the southwestern boundary, adjacent to the IL parcel, are lands designated Residential/Office/Retail where there is a drug store, car wash, and bank.

11. Across 10th Street South, on the southeast corner of its intersection with McMullen-Booth Road, is a gas station/convenience store. Also across 10th Street South, opposite the entrance to the citrus processing facility, is land designated IL and used for warehousing, auto-repair, and other uses.

The Scenic Non-Commercial Corridor

12. McMullen-Booth Road has been designated by Pinellas County as a Scenic Non-Commercial Corridor ("SNCC"). The SNCC designation includes lands bordering both sides of McMullen-Booth

Road. The SNCC designation identifies preferred land uses within the corridor to achieve the CPA's goal to preserve and enhance the scenic qualities of the corridor.

13. The western half of the IL parcel is within the McMullen-Booth Road SNCC. Under the SNCC policies, the preferred land use for the western half of the parcel is "Mixed Use." The Amendment would allow for land uses consistent with the SNCC.

The Development Agreement

14. The proposed Amendment is accompanied by a Development Agreement between Richman and the City of Safety Harbor which provides more specifically for how the Property would be developed. Among other items, the Development Agreement provides for:

- a. 246 apartment units in three-story and four-story buildings;
- b. a 25,000-square-foot office building fronting on McMullen-Booth Road;
- c. a 182-foot buffer between the nearest apartment unit and the residences to the east;
- d. a requirement that no three-story building will be located within 450 feet of the eastern property line; and
- e. the preservation of more than 10 acres of the undeveloped area, including the creek and wetlands.

Action on the Proposed Amendment

15. Changing a land use designation in the City of Safety Harbor requires an amendment to the Countywide Plan Map, which depicts all land use designations in Pinellas County and its municipalities.

16. Countywide Rules are used in conjunction with the Countywide Plan and they address amendments to the Countywide Plan Map.

17. The Countywide Plan and Countywide Rules are created and administered by the CPA.

18. Proposed amendments to the Countywide Plan Map are reviewed by the Pinellas County Planning Advisory Committee ("PAC"), which is comprised of planners from most of the local governments in Pinellas County. The PAC makes a recommendation to the Pinellas Planning Council on a proposed amendment. The PAC recommended approval of the Amendment.

19. The staff of the Pinellas Planning Council prepared an "Agenda Memorandum," which included the following findings which are supported by the preponderance of the evidence presented in this case and, therefore, are findings of fact in this Recommended Order:

a. The RM land use is well-suited to serve as a transition from non-residential areas to the west and south and the residential neighborhoods to the east and north.

b. The area is not part of a larger consolidated industrial area, but the Richman parcel, together with the IL parcel across 10th Street South, could function as a small industrial park.

c. The IL category, with all potential uses allowed, is "in the broadest sense" inconsistent with single-family uses to the north and east.

d. The IL parcel can accommodate certain "target employers." At the final hearing, target employers were identified as "office light industrial and research and development."

e. The environmentally sensitive areas on the Property and adjacent to single-family residences limit the types of industrial uses that could be located on the IL parcel.

f. The Amendment does not foreclose the opportunity to attract target employers to other parcels within the Property.

g. "On balance," the Amendment is consistent with the Countywide Rules.

20. The Council staff recommended approval of the Amendment. As partial mitigation for the loss of the IL land use, the staff recommended that Richman work with the County to attract target employers to other parcels within the Property.

21. The Council held a public hearing and voted to recommend approval of the Amendment.

22. The Pinellas County planning staff recommended approval of the Amendment to the CPA.

23. The CPA, at a public hearing, voted to deny the Amendment, based primarily on concern over the loss of industrial lands.

Relevant Criteria

24. Section 5.5.3.1 of the Countywide Rules states:

In the consideration of a regular Countywide Plan Map amendment, it is the objective of these Countywide Rules to evaluate the amendment so as to make a balanced legislative determination based on the following six (6) Relevant Countywide Considerations, as they pertain to the overall purpose and integrity of the Countywide Plan.

25. Of these six criteria, the parties stipulated that only the consideration stated in Section 5.5.3.1.1 is at issue in this case. That section states:

Consistency with Countywide Rules. The manner in, and extent to, which the amendment is consistent with Article 4, Plan Criteria and Standards of these Countywide Rules and with the Countywide Plan as implemented through the Countywide Rules.

26. The parties disputed what criteria are "implemented through the Countywide Rules." Richman contends that to be implemented through the Countywide Rules, a policy must be contained in the Countywide Rules. The CPA contends that there are provisions of the Plan that must be considered even if they do not also appear in the Rules.

27. As set forth in the Conclusions of Law, in order for a provision of the Countywide Plan to be implemented through the

Countywide Rules so that the provision can act as a criterion applied by the CPA in the approval or denial of a proposed amendment to the Countywide Plan Map, the provision must be repeated, paraphrased, or adopted by reference in the Countywide Rules.

28. In this regard it is noted that Resolution 06-3 of the Pinellas Planning Council, which discusses the need to reserve industrial parcels for target employers, was referred to in the Council's Agenda Memorandum and discussed in the public hearing before the CPA. However, Resolution 06-3 is not implemented through the Countywide Rules and, therefore, is not a source of criteria applicable to the Amendment.

29. The SNCC designation for McMullen-Booth Road is in the Countywide Rules and, therefore, must be considered by the CPA in its review of the Amendment.

30. Section 2.3.3.6.1 of the Countywide Rules is relevant to the issues raised and states in part:

Category/Symbol - Industrial Limited (IL)

Purpose - It is the purpose of this category to depict those areas of the county that are now developed, or appropriate to be developed, in a limited industrial manner; and so as to encourage the reservation and use of consolidated areas for industrial and industrial/mixed use in a manner and location consistent with surrounding use, transportation facilities, and natural resource characteristics.

In addition to this statement of purpose, the section addresses locational characteristics, traffic generation characteristics, density/intensity characteristics, density/intensity standards, and "other standards."

31. Section 2.3.3.6.1 identifies the "primary uses" allowed in the IL land use category as office, research/development, light manufacturing/assembly, wholesale/distribution, and storage/warehouse. The "secondary" uses allowed are residential, retail/commercial; personal service/office support, commercial/business service, commercial recreation, temporary lodging, institutional, transportation/utility, recreation/open space, transfer/recycling, incinerator facility, and agricultural.

32. The CPA's desire for certain target employers to use the IL parcel fails to account for the fact that there are industrial uses of the site that are allowed under the IL land use category in the Countywide Plan that would cause noise, odor, truck traffic, or other conditions that are incompatible with adjacent residential uses. Understandably, the CPA would like to see the Richman parcel used in the future by one of the target employers, but the CPA does not acknowledge that the IL designation authorizes other uses that would be incompatible with surrounding uses.

33. At the final hearing, the County's Director of Economic Development testified that the Richman parcel is "perfect" for an IL land use, but that testimony only makes sense in the context of certain target employers. In the context of all the IL uses that are allowable under the Countywide Plan and Countywide Rules, the site is imperfect and impracticable because of the proximity of single-family homes and the access from an undivided, two-lane street used by residential traffic.

34. Several years of marketing efforts by Richman and the County have not generated a single offer to purchase or lease the Richman parcel for any of the allowed IL uses, including target employers.

35. Following the CPA's denial of the Amendment, the staff of the Pinellas Planning Council undertook a review of its current policies regarding the preservation of industrial lands and recommended amending the Countywide Rules to identify industrial properties "worthy of preserving" and to develop criteria for the evaluation of proposed amendments to convert industrial land. These recommendations highlight the current lack of adequate guidance in the Countywide Rules.

36. The determination by the CPA that the Amendment is inconsistent with the Countywide Rules is based primarily on three propositions which are contrary to the preponderance of the evidence. First, that the Richman parcel is being reserved for IL

uses. The preponderance of the evidence shows that the parcel is inappropriate for several authorized IL uses and the CPA wants the parcel reserved only for a few target employers.

37. Second, that the IL designation is not inconsistent with the McMullen-Booth Road SNCC. The identification of preferred land uses in the corridor would have no effect unless it was a factor to be considered by the CPA when it reviews proposed amendments to the Countywide Plan Map. The IL designation within the McMullen-Booth SNCC is inconsistent with the goal of the corridor and is a factor (not a requirement) in favor of changing current IL designation to another designation that qualifies as Mixed Use.

38. Third, that the Richman parcel is part of a "consolidated area" for industrial uses in a location "consistent with surrounding uses" as described in Section 2.3.3.6.1. The preponderance of the evidence shows that this is not a consolidated area for industrial uses. It was once a consolidated area, but past land use decisions have eliminated more than half the industrial acreage. If Richman had proposed to consolidate its parcel with the IL parcel south of 10th Street South to create a large, integrated warehousing and distribution operation served by rail, the proposal would have been consistent with the core purpose for IL lands as expressed in Section 2.3.3.6.1. The impracticability of such a proposal, however,

highlights the problem with the current IL designation for the Richman parcel.

39. The County's 2008 Target Employment and Industrial Land Study found that two-thirds of the "target industries" operating in Pinellas County are on lands not designated industrial, because these uses can often be accommodated on lands designated for office uses.

40. The 2008 study recommended that the industrial designations of lands in five "prime industrial areas" be preserved. Richman's IL parcel is not in one of these prime industrial areas. When all relevant factors are considered, the CPA appears to be taking a stand for preservation of industrial lands in the wrong place.

CONCLUSIONS OF LAW

41. This is a de novo proceeding. The standard of proof is a preponderance of the evidence.

42. The CPA contends that the IL classification for the Richman parcel is presumptively valid and Richman must prove the classification is invalid, citing Lee County v. Sunbelt Equities, II, 619 So. 2d 996 (Fla. 2d DCA 1993). However, the Sunbelt Equities case arose in a different context. This proceeding is not governed by either chapter 125 or chapter 163, Florida Statutes. It is a unique proceeding established by the CPA.

43. Section 5.5.3.1.1 of the Countywide Rules expressly states, and the parties have stipulated, that the issue to be determined is "[t]he manner in, and extent to, which the amendment is consistent with" certain criteria in the Countywide Rules. The CPA established this review procedure and review standard. It cannot ignore its own standard and insist, instead, that a challenger prove the existing land use classification is invalid.

44. The CPA contends that industrial use-related policies and strategies of the Countywide Plan can be applied to the proposed Amendment, even if they do not appear anywhere in the Countywide Rules. The CPA treats all related Plan provisions as implemented by the Rules and, therefore, as potential criteria to be applied by the CPA in its review of a proposed Countywide Plan Map amendment. Its position requires an illogical construction of the phrase "implemented by the Countywide Rules" that is contrary to the ordinary meaning of the words used. Its position makes the determination of what criteria are applicable to a map amendment difficult to determine and open to debate.

45. The CPA is not foreclosed from considering related matters discussed in the Countywide Plan that give context to words and concepts used in the Countywide Rules. However, nothing in the Countywide Plan can be transformed into a Countywide Rule criterion that requires IL lands to be reserved for certain target employers when the Countywide Rules addressing industrial uses do

not mention target employers and allow uses that are not target employers.

46. It is concluded that a criterion must appear somewhere in the Countywide Rules in order to be reasonably described as "implemented through the Countywide Rules." This conclusion harmonizes with the title of Section 5.3.3.1.1, "Consistency with the Countywide Rules," and with Section 2.2.3 of the Countywide Rules, which states that "[a]ll Countywide Plan Map amendments shall be made in accordance with the provisions of these Countywide Rules, as amended."

47. Section 2.2.3.6.1, which describes the IL classification, is a Countywide Rule directly relevant to a proposed map amendment involving IL lands and must be considered by the CPA in its review of Amendment.

48. Section 5.3.3.1.1 requires consideration of the extent to which an amendment is consistent with Article 4 of the Countywide Rules and with the provisions of the Countywide Plan that are implemented through the Countywide Rules. Every professional planner that reviewed the Amendment leading up to its presentation to the CPA opined, and the preponderance of the evidence shows, that the Amendment creates more points of consistency and fewer points of inconsistency than the existing IL land use classification.

49. Nevertheless, under Section 5.3.3 of the Countywide Rules, the review of a proposed Countywide Plan Map amendment requires a "a balanced legislative determination." The CPA is bound by factual findings made by the Administrative Law Judge which are supported by competent substantial evidence, but the CPA is not bound by the balance struck by the Administrative Law Judge, based on his perception of the differential importance of various findings. The ultimate balancing and determination of consistency is for the CPA to make. See Save Anna Maria, Inc. v. Dep't of Transp., 700 So. 2d 113, 116 (Fla. 2d DCA 1997) (The Department of Environmental Protection did not reject any of the hearing officer's findings regarding the proposed mitigation of environmental impacts, but balanced the findings to reach the ultimate legal conclusion that DOT had provided reasonable assurance.) Save Anna Maria involved a statute that specifically directed the agency to determine whether mitigation was sufficient and no similar statute is involved here. However, the ultimate authority of the CPA is similar, because it is making a legislative decision, which cannot be delegated to an Administrative Law Judge.

RECOMMENDATION

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

RECOMMENDED that the Countywide Planning Authority issue a Final Order approving the Amendment.

DONE AND ENTERED this 18th day of November, 2013, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
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Filed with the Clerk of the
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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.