STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KATIE PIEROLA AND GREG GERALDSON,

Petitioners,

vs. Case No. 14-0940GM

MANATEE COUNTY,

Respondent,

and

ROBINSON FARMS, INC.,

Intervenor.
_____/

RECOMMENDED ORDER

The final hearing in this case was held on May 7, 2014, in Bradenton, Florida, before Bram D. E. Canter, Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioners: Thomas W. Reese, Esquire
2951 61st Avenue South
St. Petersburg, Florida 33712-4539

For Respondent: James A. Minx, Esquire
Sarah A. Schenk, Esquire
Office of the Manatee County Attorney
Post Office Box 1000
Bradenton, Florida 34206-1000

For Intervenor: Edward Volger, II, Esquire
Volgler Ashton, PLLC
2411-A Manatee Avenue West
Bradenton, Florida 34205-4948

STATEMENT OF THE ISSUE

The issue to be determined in this case is whether the amendments to the Manatee County Comprehensive Plan (Manatee Plan) adopted by the Board of County Commissioners of Manatee County via Ordinance No. 13-10 on December 5, 2013, are "in compliance," as defined in section 163.3184(1)(b), Florida Statutes (2013).

PRELIMINARY STATEMENT

On December 5, 2013, Manatee County adopted Ordinance No. 13-10 which amended the Future Land Use Map of the Manatee Plan to reclassify certain real property owned by Robinson Farms, Inc., from Residential 1 (RES-1) to Residential 3 (RES-3) and to add text in the Manatee Plan which limits the future development of the property to a maximum of 38 dwelling units (2013 Amendments).

Petitioners Pierola and Geraldson filed a petition for hearing to challenge the 2013 Amendments, using DOAH Case No. 11-0009GM, a case which involved a challenge by these same Petitioners to an earlier and different amendment to the Manatee Plan (2010 Amendment). An Order was issued in Case No. 11-0009GM, stating that the Recommended Order had already been issued in the case, the case was closed, and a new DOAH case file would have to be opened for the new petition. DOAH Case

No. 13-0940GM was then opened on Petitioners' challenge to the 2013 Amendments.

Manatee County and the Intervenors filed a motion to dismiss the petition. The motion was denied.

At the final hearing, Petitioners presented the testimony of Katie Pierola and John Osborne. Petitioners' Exhibit 9 was admitted into evidence. Petitioners' requests for official recognition of certain agency and appellate court orders were granted. Manatee County presented the testimony of John Osborne. Manatee County's Exhibits 1-2 and 5-13 were admitted into evidence. Manatee County and Robinson Farms' Joint Exhibits 3 and 4 were admitted into evidence. Robinson Farms presented the testimony of Frank Domingo.

The one-volume Transcript of the final hearing was filed with DOAH. The parties filed proposed recommended orders that were considered by the Administrative Law Judge in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. Katie Pierola is a resident and landowner in Manatee County. Mrs. Pierola made timely objections and comments to Manatee County on the 2013 Amendments.

2. Greg Geraldson is a resident and landowner in Manatee County. Mr. Geraldson made timely objections and comments to Manatee County on the 2013 Amendments.

3. Manatee County is a political subdivision of the State and has adopted the Manatee Plan, which it amends from time to time pursuant to section 163.3184, Florida Statutes.

4. Robinson Farms is a Florida corporation doing business in Manatee County and owning real property in the County. It owns the property affected by the 2013 Amendments.

The 2013 Amendments

5. The 2013 Amendments would amend the Future Land Use Map of the Manatee Plan to change the future land use classification of approximately 20 acres of land owned by Robinson Farms from RES-1 to RES-3. The land is described by metes and bounds in Exhibit A to Ordinance No. 13-10. It is located on the north side of 9th Avenue Northwest, about 600 feet east of 99th Street.

6. The RES-1 classification allows one dwelling unit per acre (du/a). The RES-3 classification allows up to three du/a.

7. The General Introduction chapter of the Manatee Plan, Section D – Special Plan Interpretation Provisions, would be amended to add the following new text:

> D.5.16 Ordinance 13-10 (ROBINSON FARMS PLAN AMENDMENT)
>
> The 20± acre property identified as the Robinson Farms Plan Amendment and designated

> RES-3 on the Future Land Use Map pursuant to Manatee County Ordinance No. 13-10 shall be limited to a maximum of thirty eight (38) residential units.

Coastal Evacuation Area and Coastal High Hazard Area

8. All 20 acres of the Robinson Farms property is within the Coastal Evacuation Area (CEA).

9. The CEA is defined in the Manatee Plan as:

> The evacuation Level A for a Category 1 hurricane as established in the regional evacuation study applicable to Manatee County, as updated on a periodic basis.

10. Future Land Use Element (FLUE) Policy 2.2.2.4.2, which addresses the purposes of the CEA, states in part:

> 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.

11. All but 4.68 acres is within the Coastal High Hazard Area (CHHA).

12. The CHHA is defined in the Manatee Plan as:

> The geographic area below the Category 1 storm surge line as established by a Sea, Lake, and Overland Surges from Hurricanes (SLOSH) computerized storm surge model, pursuant to applicable law, as updated on a periodic basis.

13. FLUE Policy 2.2.2.5.2, which addresses the purposes of the CHHA, repeats the same purposes that are set forth above for the CEA.

Relevant Goals, Objectives, and Policies

14. Goal 4.3 of the Coastal Element of the Manatee Plan is:

> Protection of the Residents and Property Within the Coastal Planning Area from the Physical and Economic Effects of Natural Disasters

15. Coastal Element Objective 4.3.1 states:

> Limit development type, density and intensity within the Coastal Planning Area and direct population and development to areas outside the Coastal High Hazard Area to mitigate the potential negative impacts of natural hazards in the area.

16. Coastal Element Policy 4.3.1.1 states:

> Direct population concentrations away from the Coastal Evacuation Area

17. FLUE Policy 2.2.2.4.5(a), which addresses development restrictions in the CEA, states:

> Prohibit any amendment to the Future Land Use Map which would result in an increase in allowable residential density on sites within the Coastal Evacuation Area.

18. FLUE Policy 2.2.2.4.4(a) states, in part:

> The area designated under the CEA Overlay District on the Future Land Use Map shall also be subject to all goals, objectives and policies for any land use category overlaid by the CHHA District, except where policies associated with the CEA Overlay conflict with such goals, objectives and policies. In this event, policies associated with the CHHA Overlay District shall override other goals, objectives and policies.

19. FLUE Policy 2.2.2.5.5(a), which addresses development restrictions in the CHHA, states:

> Prohibit any amendment to the Future Land Use Map which would result in an increase in allowable residential density on sites within the Coastal High Hazard Area Overlay District.

20. FLUE Policy 2.2.2.5.4(a) states that, in the event of a conflict between CHHA policies and other policies in the Manatee Plan, the CHHA policies shall override.

Data and Analysis

21. Petitioners contend that the 2013 Amendments are not based on best available data and analysis as required by Florida Administrative Code Rule 9J-5.005(2). However, that rule was repealed in 2011.

22. Section 163.3177(1)(f) requires that plan amendments be based on "relevant and appropriate data and analysis." This section 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.

23. Petitioners contend that the proposed reclassification of the Robinson Farms property from RES-1 to RES-3 does not react appropriately to the data which show the Robinson Farms property lies within the CEA and CHHA. However, as explained in the Conclusions of Law, it is not the mapping of the CEA and CHHA that creates a conflict with the 2013 Amendments. The conflict is created by the policies which address future land uses in the CEA and CHHA.

Internal Consistency

24. Petitioners contend that the 2013 Amendments make the Manatee Plan internally inconsistent with Coastal Element Objective 4.3.1 and Coastal Element Policy 4.3.1.1 which require "population concentrations" to be directed away from the Coastal Evacuation Area.

25. No evidence was presented by Petitioners or by Manatee County on the County's interpretation of the term "population concentrations." However, FLUE Policy 2.2.2.4.5(a) prohibits any increase in residential density in the CEA. Therefore, assuming as we must that the Manatee Plan is internally consistent, it follows that "population concentrations" in Coastal Element Objective 4.3.1 and Policy 4.3.1.1 means any increase in residential density. Because the 2013 Amendments increase

residential density in the CEA, they are inconsistent with this objective and policy.

26. Because the 2013 Amendments would amend the Future Land Use Map to increase allowable residential density on a site within the CEA they are inconsistent with FLUE Policy 2.2.2.4.5(a), which prohibits any amendment to the Future Land Use Map that would increase allowable residential density on sites within the CEA.

27. Because the 2013 Amendments would amend the Future Land Use Map to increase allowable residential density on a site within the CHHA they are inconsistent with FLUE Policy 2.2.2.5.5(a), which prohibits any amendment to the Future Land Use Map that would increase allowable residential density on sites within the CHHA.

Competing Policies

28. Manatee County and Robinson Farms argue that there are other policies in the Manatee Plan, such as those that discourage urban sprawl and encourage infill in the Urban Core Area, which the County must weigh along with the policies discussed above. The County contends that it weighed these conflicting policies and reached a fairly debatable determination that the 2013 Amendments are consistent with the Manatee Plan.

29. Contradicting this argument are FLUE Policy 2.2.2.4.4(a) and FLUE Policy 2.2.2.5.4(a), which state that the

CEA and CHHA policies shall override any conflicting goals, objectives, and policies in the Manatee Plan.

30. Urban sprawl, infill, and other policies of the Manatee Plan cannot be invoked to avoid the specific prohibitions in FLUE Policies 2.2.2.4.5(a) and 2.2.2.5.5(a) against any amendment to the Future Land Use Map that would result in an increase in allowable residential density on sites within the CEA and CHHA.

Density Offsets

31. Manatee County and Robinson Farms argue that the County's reduction in dwelling units in other parts of the CHHA over the past several years is a valid consideration in determining whether an increase in residential density on the Robinson Farms property is permissible despite the prohibition in FLUE Policy 2.2.2.5.5(a). In support of their argument, they cite Department of Community Affairs v. Leeward Yacht Club, LLC, DOAH Case No. 06-0049GM, 2006 WL 2497934 (Nov. 16, 2006). However, the Leeward Yacht Club case involved the comprehensive plan of Lee County, which did not prohibit increases in residential density in the CHHA.

32. In contrast, the Manatee Plan quite plainly prohibits "any amendment" to the Future Land Use Map that would increase residential density in the CHHA.

Previous Proceedings

33. These same parties were involved in a dispute regarding an earlier proposed amendment to the Manatee Plan to reclassify property owned by Robinson Farms from RES-1 to RES-3. The 2010 Amendment was different in that it affected 28 acres (which encompasses the 20 acres in the 2013 Amendments). The 2010 Amendment would have increased the residential density on the 28 acres from 28 dwelling units to 105 dwelling units, all in the CEA. It would have added 56 dwelling units to the CHHA.

34. Petitioners challenged the amendment and an evidentiary hearing was held before Administrative Law Judge D.R. Alexander (DOAH Case No. 11-0009GM). On April 13, 2011, Judge Alexander entered a Recommended Order which recommended that the 2010 Amendment be determined not in compliance because:

> a. The amendment was not based on relevant and appropriate data because the most current SLOSH model results were not used;
>
> b. The amendment was inconsistent with FLUE Policy 2.2.2.4.5(a) which prohibits any increase in residential density in the CEA.
>
> c. The amendment was inconsistent with Coastal Element Objective 4.3.1 and Policy 4.3.1.1 which require that population and development be directed to areas outside the CHHA.

35. The Recommended Order went to the Administration Commission, which ultimately dismissed the case when Manatee County rescinded Ordinance No. 10-02 and the 2010 Amendment.

36. In Manatee County Ordinance No. 11-035, which was the ordinance used to rescind the 2010 Amendment, the Board of County Commissioners determined that the 2010 Amendment was internally inconsistent with FLUE Policy 2.2.2.4.5(a), Coastal Element Objective 4.3.1, and Coastal Element Policy 4.3.1.1 because the amendment increased residential density in the CEA and CHHA.

CONCLUSIONS OF LAW

Standing

37. To have standing to challenge a comprehensive plan amendment, a person must be an "affected person" as defined in section 163.3184(1)(a), Florida Statutes (2013).

38. Petitioners meet the definition of affected persons and have standing to challenge the 2013 Amendments.

39. Intervenor meets the definition of affected person and has standing to intervene in this proceeding.

Scope of Review

40. An affected 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.

41. The statutes listed in section 163.3184(1)(b) do not include section 163.3184, which sets forth the procedures to be followed in adopting a plan amendment. It follows, therefore, that alleged procedural errors are beyond the scope of an "in compliance" determination. Petitioners were not allowed to present evidence or argument in support of their contention that, in adopting Ordinance No. 13-10, Manatee County failed to follow the appropriate procedures of section 163.3184.

42. However, there is no dispute about the procedures that Manatee County followed in adopting the 2013 Amendments. The County used the procedures applicable to the adoption of a plan amendment following a compliance agreement. Petitioners contend that the County should have followed the procedures applicable to a new plan amendment. Petitioners did not allege they were prejudiced by the procedures the County followed.

43. Petitioners concede that procedural errors cannot be reviewed and determined in this proceeding, but argue that they should have been allowed to make a record at the final hearing because procedural errors can be considered and determined for the first time on appeal of a comprehensive plan case.

44. In support of this argument, Petitioners cite the statement in section 163.3184(10) that "this section shall be the sole proceeding" for determining whether a plan amendment is in compliance with "this act." However, because the term "in

compliance" is defined to exclude the procedural requirements for adopting a plan amendment, section 163.3184(10) does not make this the proceeding for determining whether procedural errors were made.

45. The decisions cited by Petitioners involve different kinds of claims which arose in different procedural contexts.

46. Procedural errors made by local governments in the adoption of ordinances are generally reviewable in the circuit courts. Petitioners' argument is unpersuasive.

Estoppel by Judgment

47. Petitioners contend that the doctrine of estoppel by verdict, more commonly known as estoppel by judgment, is applicable in this case and should bar Manatee County from litigating the same issues that were litigated in DOAH Case No. 11-0009GM.

48. Estoppel by judgment is applicable where the same parties are involved in a subsequent suit involving a different cause of action, in which event the judgment in the first suit estops the parties from litigating in the second suit points and questions common to both causes of action and which were actually adjudicated in the first suit. See Deep Lagoon Boat Club, LTD v. Sheridan, 784 So. 2d 1140, 1143 (Fla. 2d DCA 2001).

49. The cases cited by Petitioners, Wiregrass Ranch, Inc. v. Saddlebrook Resorts, Inc., 645 So. 2d 374 (Fla. 1994) and City of

North Port, Florida v. Consolidated Minerals, Inc., 645 So. 2d 485 (Fla. 2d DCA 1994), deal with a different legal issue: whether a party can unilaterally divest an agency of jurisdiction after a recommended order has been issued. Both courts answered the question in the negative. There is no attempt here to unilaterally divest an agency of jurisdiction. Wiregrass Ranch and City of North Port were appeals to contest an agency's action in terminating the proceedings, but Petitioners here did not appeal the Administration Commission's Final Order of Dismissal.

50. Petitioners assert Wiregrass Ranch held that "a Recommended Order of a DOAH Hearing Officer after an evidentiary hearing is a verdict which is binding upon the parties pursuant to the estoppel by verdict doctrine." However, nowhere in the opinion is there such a holding. Instead, the court quotes from Middlebrooks v. St. Johns River Water Management District, 529 So. 2d 1167, 1169 (Fla. 5th DCA 1988), which refers to a recommended order as a "tentative" verdict and makes no mention of the doctrine of estoppel by verdict or estoppel by judgment.

51. The Supreme Court of Florida stated in Wiregrass Ranch that "the [agency] could have agreed with some of the points made by Wiregrass" (the petitioner who had filed a notice of voluntary dismissal). In other words, it was still up to the agency to make the final determination of whether the challenged permit should be issued, and the agency could have disagreed with the

recommended order. The court recognized that the adjudication process is not concluded with the issuance of a recommended order. See also Dykes v. Quincy Telephone Co., 539 So. 2d 503, 504 (Fla. 1st DCA 1989)(Findings of fact in a recommended order cannot support a summary judgment in a civil action because a recommended order is not a final order.).

52. The Administration Commission's Final Order of Dismissal in DOAH Case No. 11-0009GM stated, "There is no final action to be taken on the ALJ's Recommended Order because Ordinance 10-02 has been and remains rescinded, thereby rendering the Petitioners' original challenge moot." The Administration Commission did not determine whether the findings of fact in the recommended order were based on competent substantial evidence or whether the conclusions of law were based on a correct application of the law to the facts.

53. The points and issues in DOAH Case No. 11-0009GM were not "actually" or fully adjudicated. Therefore, the doctrine of estoppel by judgment is inapplicable in this proceeding.

Burden and Standard of Proof

54. As the parties challenging the 2013 Amendments, Petitioners have the burden of proof.

55. Manatee County's determination that the 2013 Amendments are "in compliance" is presumed to be correct and must be sustained if the County's determination of compliance is fairly debatable. See § 163.3184(5)(c), Fla. Stat.

56. The term "fairly debatable" is not defined in chapter 163. In Martin County v. Yusem, 690 So. 2d 1288 (Fla. 1997), the Supreme Court of Florida explained:

> The fairly debatable standard is a highly deferential standard requiring approval of a planning action if a reasonable person could differ as to its propriety. In other words, an ordinance may be said to be fairly debatable when for any reason that is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity.

Id., 1295.

57. The standard of proof for findings of fact is preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

Data and Analysis

58. Petitioners contend that the proposed reclassification of the Robinson Farms property from RES-1 to RES-3 does not react appropriately to the data which show the Robinson Farms property lies within the CEA and CHHA and, therefore, the 2013 Amendments violate section 163.3177(1)(f). However, it is not the mapping of the CEA and CHHA that gives rise to a conflict. If the Manatee Plan already allowed up to two du/a within the CEA and CHHA, there would be no conflict with the 2013 Amendments. The conflict is created by the policies which prohibit any increase in residential density in the CEA and CHHA.

59. Generally, conflict with an existing policy will not constitute a failure to react appropriately to data. Otherwise,

every instance of internal inconsistency between a proposed amendment and an existing policy would also be a violation of the requirement in section 163.3177(1)(f) that amendments be based on relevant and appropriate data and analysis. It is clear in chapter 163 that the requirement for an amendment to be internally consistent and the requirement that it be based on relevant and appropriate data and analysis are intended to be distinct criteria. In this case, there was no dispute about data or the analysis of data.

60. Petitioners failed to prove that the 2013 Amendments are not based on relevant and appropriate data and analysis.

Internal Consistency

61. Petitioners proved beyond fair debate that the 2013 Amendments would create internal inconsistency with FLUE Policies 2.2.2.4.5(a) and 2.2.2.5.5(a), Coastal Element Objective 4.3.1, and Coastal Element Policy 4.3.1.1.

62. The inconsistency is clear. The Manatee Plan prohibits "any amendment" that would increase residential density in the CEA and the CHHA and directs that these prohibitions shall override any other policies that may be in conflict. The inconsistency is not open to dispute or controversy on grounds that make sense or point to a logical deduction.

63. Manatee County and Robinson Farms assert that the County meets the mitigation criteria described in section

163.3178(8)(a) for a proposed amendment affecting lands in the CHHA. However, section 163.3178(8)(a) addresses state criteria. The 2013 Amendments must also satisfy local criteria in the Manatee Plan. As explained herein, they do not.

Summary

64. Petitioners proved beyond fair debate that the 2013 Amendments are not in compliance.

RECOMMENDATION

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

RECOMMENDED that the Administration Commission issue a final order determining that the 2013 Amendments adopted by Manatee County Ordinance No. 13-10 are not in compliance.

DONE AND ENTERED this 8th day of July, 2014, in Tallahassee, Leon County, Florida.

BRAM D. E. CANTER
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 8th day of July, 2014.

COPIES FURNISHED:

James A. Minix, Esquire
Manatee County Attorney's Office
Post Office Box 1000
Bradenton, Florida 34206

Edward Vogler, II, Esquire
Vogler Ashton, PLLC
2411-A Manatee Avenue West
Bradenton, Florida 34205-4948

Thomas W. Reese, Esquire
2951 61st Avenue South
St. Petersburg, Florida 33712-4539

Barbara Leighty, Clerk
Transportation and Economic
Development Policy Unit
The Capitol, Room 1801
Tallahassee, Florida 32399-0001

Peter Antonacci, General Counsel
Office of the Governor
The Capitol, Suite 209
Tallahassee, Florida 32399-0001

Robert N. Sechen, General Counsel
Department of Economic Opportunity
Caldwell Building, MSC 110
107 East Madison Street
Tallahassee, Florida 32399-4128

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.