STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JACQUELINE ROGERS,

Petitioner,

vs. Case No. 17-5530GM

ESCAMBIA COUNTY,

Respondent.
_____/

RECOMMENDED ORDER

Administrative Law Judge D. R. Alexander conducted a final hearing in this case by video teleconference at sites in Pensacola and Tallahassee, Florida, on February 19, 2018.

APPEARANCES

For Petitioner: Jacqueline Rogers, pro se
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For Respondent: Meredith D. Crawford, Esquire
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STATEMENT OF THE ISSUE

The issue is whether the plan amendment adopted by Escambia County (County) by Ordinance No. 2017-53 on September 7, 2017, is in compliance.

PRELIMINARY STATEMENT

On September 7, 2017, the County adopted Ordinance No. 2017-53, which amended its Comprehensive Plan (Plan) by

permitting an 8.7-acre parcel to withdraw from the County Mid-West Optional Sector Plan and assigning the parcel a new Mixed-Use Suburban (MU-S) land use designation. The effect of the amendment is to allow more intense development on the property. On October 6, 2017, Petitioner, who resides near the subject property, filed her Petition for Formal Administrative Hearing (Petition) with the Division of Administrative Hearings (DOAH).

At the hearing, Petitioner presented the testimony of eight witnesses. Petitioner's Exhibits 1 through 28 were accepted in evidence. The County presented the testimony of three witnesses. Also, it offered County Exhibits 2, 3, 5 through 26, 31 through 35, 37, 38, and 40, which were accepted in evidence.

A one-volume Transcript of the proceeding has been filed. The parties submitted proposed recommended orders on April 16, 2018, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Background

1. Petitioner owns real property and resides in the County. She submitted written comments to the County during the adoption phase of the amendment. She is an affected person within the meaning of section 163.3184(1)(a), Florida Statutes.

2. The County is a local government that is subject to the requirements of chapter 163, Florida Statutes.

3. A sector plan is the process in which the local government engages in long-term planning for an area of at least 5,000 acres. §§ 163.3164(42) and 163.3245(1), Fla. Stat. It involves two levels of planning: a) a long-term master plan, and b) a Detailed Specific Area Plan (DSAP), which implements the master plan. A DSAP is created for an area that is at least 1,000 acres and identifies the distribution, extent, and location of future uses and public facilities. § 163.3245(3), Fla. Stat. While the DSAP is created by a local development order that is not subject to state compliance review, an amendment to an adopted sector plan is a plan amendment reviewed under the State Coordinated Review process. § 163.3184(2)(c), Fla. Stat. The development standards in the DSAP are separate and distinct from the development standards in non-sector plan properties.

4. On June 3, 2010, the County approved Ordinance No. 2010-16, which adopted Evaluation and Appraisal Report-based amendments to the Plan, including a new Optional Sector Plan (OSP). The Ordinance was challenged by the Department of Community Affairs (DCA) and assigned DOAH Case No. 10-6857GM.

5. In response to the DCA challenge, on February 3, 2011, the County adopted Ordinance No. 2011-3 as a stipulated remedial amendment. The Ordinance establishes a long-term master plan for central Escambia County known as the Mid-West Escambia

County Sector Plan (Sector Plan). The Sector Plan is comprised of approximately 15,000 acres, north of Interstate 10, west of Highway 29, and south of Highway 196. The area is depicted on the Future Land Use Map (FLUM) as the OSP. The DCA determined the Ordinance to be in compliance.

6. To implement the long-term master plan, on September 9, 2011, the County adopted Ordinance No. 2011-29, which establishes two DSAPs: Muskogee DSAP and Jacks Branch DSAP. Petitioner's residence and the subject property are located within the Jacks Branch DSAP. State compliance review of that action under section 163.3184(3) or (4) was not required.

7. In 2011, the Legislature created the right to opt out or withdraw from a sector plan. See § 163.3245(8), Fla. Stat. This can be accomplished "only with the approval of the local government by plan amendment adopted and reviewed pursuant to s. 163.3184." Id. In response to the statutory amendment, the County adopted a plan amendment which provides that any additions to, or deletions from, a DSAP must follow the established procedures in the Plan. See Ex. 40, p. 14.

8. In order to consolidate the County zoning districts, on April 16, 2015, the County adopted Ordinance No. 2015-12, which repealed the entire Land Development Code (LDC) and replaced it with a new LDC, which has a county-wide rezoning plan.

9. After the first (and only) application to opt out of the Sector Plan was filed by a property owner, on March 16, 2017, the County amended the LDC through Ordinance No. 2017-14, which establishes seven criteria for evaluating this type of request. See LDC, § 2-7.4. The Ordinance was not challenged. According to the County, the criteria were actually drafted by the Department of Economic Opportunity (DEO) and require it to consider the following:

> 1. All standard Comprehensive Plan map criteria;
>
> 2. Comprehensive Plan requirement for changes to an existing DSAP;
>
> 3. The size of the subject parcel in relation to the individual DSAP land use category and in relation to the overall Sector Plan, to specifically include the aggregate acreage of any previously granted opt-outs;
>
> 4. The existing transportation infrastructure and any impact the proposed opt-out may have on the capacity of the infrastructure;
>
> 5. The underlying existing zoning category and its compatibility with surrounding DSAP land use designations;
>
> 6. The consistency of the requested future land use designation with the underlying zoning; and
>
> 7. The previous future land use designation.

10. Besides the foregoing criteria, subsection 2-7.4(b) provides that when the County reviews an opt-out application:

> [t]o the extent possible, the staff analysis and the reviewing bodies shall consider whether the applicant lost development rights or was effectively downzoned as part of the Sector Plan adoption. The Board may take into consideration any other relevant factors in making its determination related to the request.

11. Once a parcel is removed from the County's Sector Plan, the underlying zoning that was in effect when the Sector Plan was created remains the same, but a new future land use (FLU) category must be assigned to the property by a plan amendment. § 163.3245(8), Fla. Stat. Withdrawing from a DSAP does not modify the DSAP because the DSAP is the development standard itself.

The Property

12. The parcel lies on the eastern edge of the DSAP about ten miles north of Interstate 10 on the northwest corner of Highway 29 and Neal Road. Highway 29 is a major four-lane arterial road running in a north-south direction with a median in the middle. The road is maintained by the state. Neal Road is a small, two-lane County road that intersects with Highway 29 from the west and provides access to a residential area where Petitioner resides. Existing commercial development is located on the east side of Highway 29. Most recently, a Family Dollar

Store was developed directly across the street from the property.

13. Currently, the parcel is vacant and lies in the Conservation Neighborhood District, which permits a maximum density of three dwelling units per gross acre and is the lowest density of residential development allowed in the Sector Plan. Only residential uses are allowed in the district, which is intended to treat stormwater and preserve open space and wildlife. Based on maps of the area, Petitioner's property appears to be no more than one-half mile west of the subject property. The character of the area in Petitioner's neighborhood is low-density residential development.

14. Before the Sector Plan was adopted, the assigned land use on the parcel was MU-S. This use is intended for "a mix of residential and non-residential uses while promoting compatible infill development and the separation of urban and suburban land uses." Its express purpose is to serve as a mixed-use area. As described by a County witness, "the mixed-use aspect of it allows a non-residential component first, but, again, it's predominately residential, low-density residential." The range of allowable uses includes residential, retail services, professional office, recreational facilities, and public and civic, with a maximum intensity of a 1.0 floor area ratio.

15. Until the Sector Plan was created, the parcel was zoned as Gateway Business District (GBD). Under the new rezoning plan established in 2015, all parcels outside the Sector Plan which were zoned GBD were consolidated with similar zoning categories into the new district of Heavy Commercial/ Light Industrial (HC/LI). Permitted uses under this district are residential, retail sales, retail services, public and civic, recreation and entertainment, industrial and related, agricultural and related, and "other uses," such as billboards, outdoor sales, trade shops, warehouses, and the like.

16. Once a parcel is withdrawn from the Sector Plan, it retains the underlying zoning in effect when the DSAP was established. Because the new zoning scheme consolidates GBD into HC/LI, the parcel will revert to HC/LI. Therefore, the zoning and land use will be the same as they were before the Sector Plan was created. This combination is not unusual, as there are "multiple parcels" outside the DSAP that have this zoning/land use pairing.

The Challenged Amendment

17. In June 2016, the property owner filed an application with the County requesting that his parcel be removed from the Mid-West Sector Plan. At that time, neither the County nor the applicant realized that a new land use must be assigned. Consequently, no request for a new land use was made.

18. Because this was the first time an opt-out application had been filed with any local government, the County had a series of meetings with DEO seeking guidance on how to proceed. It was told by DEO that the opt-out application and a FLU change should be processed in the same manner as a FLUM amendment and then reviewed under the State Coordinated Review process. DEO also provided suggested criteria that should be considered when processing such an application. These criteria were adopted as new LDC section 2-7.4. The County followed all steps suggested by DEO.

19. DEO instructed the County to require a second application from the property owner, which included a request for a new land use category. After the second application was filed, the County began the process of determining whether the application satisfied the opt-out criteria in section 2-7.4 and relevant Plan requirements.

20. The second application addressed the FLU requirement and contained the analysis required for each component of the Plan. A future land use of Mixed-Use Urban (MU-U) was initially requested by the owner. This category is consistent with HC/LI zoning, but is a much more intense land use category than MU-S. Because of concerns that the MU-U land use would not be compatible with the surrounding neighborhood in the DSAP, the County changed the proposed new land use to MU-S, the use assigned to the property before the Sector Plan was adopted.

MU-S is the same land use assigned to other non-Sector Plan parcels surrounding the subject property, and there are non-industrial uses within the HC/LI zoning district that are consistent with MU-S. If the application is approved, only 25 potential residential units will be removed from the total Sector Plan, and the reduction in total developable area will be de minimis. Except for a change to the DSAP map and the acreage table, no changes to the text of the DSAP are made.

21. During the application process, the County addressed natural resources, wetlands, historically significant sites, and impacts on the environment. The County also evaluated the application in light of the criteria found in section 2-7.4 and determined that, as a whole, it satisfied those requirements. See Cnty. Ex. 34, pp. 28-39. Because a proposed use of the property was not submitted with the application, an analysis of a specific use was not made. When a site plan to develop the property is filed, the proposed use will be evaluated by the Development Review Committee, and then by the Board of County Commissioners. That review will ensure that the intended development will not be inconsistent with the zoning district and land use assigned to the parcel.

22. The opt-out request was debated extensively during a series of ten public hearings that began in September 2016. Members of the public were allowed to speak for or against the proposal. On September 7, 2017, the County voted to amend

the Plan by (a) allowing the parcel to withdraw from the OSP, (b) removing the Sector Plan overlay on the parcel, and (c) amending the FLUM by assigning the property a MU-S land use designation. No other changes were made. The amendment does not create a remnant area or fragmented DSAP.

23. The amendment was transmitted to DEO for review under the State Coordinated Review process. DEO determined it met the requirements of chapter 163 for compliance purposes. The State Coordinated Review is more comprehensive than the Expedited Review process under section 163.3184(3). On November 8, 2017, a Notice of Intent to find the amendment in compliance was issued by DEO. See Cnty. Ex. 39. Petitioner filed her Petition within 30 days after the Ordinance was adopted, but before DEO issued its Notice of Intent. Therefore, it was timely.

24. Besides DEO's review, the Department of Transportation and Department of Education reviewed the proposal for impacts on transportation and school concurrency, respectively. No further information was requested from the County by any agency.

Petitioner's Objections

25. In the parties' Pre-hearing Stipulation, Petitioner raises a procedural objection to the manner in which the withdrawal application was adopted. She also alleges generally that the amendment creates inconsistent and incompatible zoning and future land use pairing in violation of sections 163.3177(2) and 163.3194(1); is inconsistent with the FLU Element; conflicts

with statutory provisions regarding compatibility of adjacent land uses; and lacks sufficient data and analysis required by section 163.3177(1)(f). These contentions, and others not directly related to a compliance challenge, are addressed below.

26. Petitioner first contends an opt-out application must be adopted by a local development order, rather than by a plan amendment. She argues the County erred by not providing her the opportunity to cross-examine witnesses at the adoption hearing and failing to subject the proposal to more "intense review and analysis." The quasi-judicial process requires strict scrutiny of a local government's action, rather than a fairly debatable standard of review, and provides third parties the right to challenge the local government's decision in circuit court, rather than in a section 163.3184 proceeding. This contention has been rejected and is addressed in the Conclusions of Law.

27. Petitioner contends approval of the application will lead to further requests by other property owners to opt out of the Sector Plan. Currently, there are over 1,000 property owners in the Sector Plan. During the County hearings, staff identified 24 or 25 other properties that might choose to file an opt-out application in the future. Whether those owners will do so is no more than speculation at this point. The County responds that it will evaluate each application on a case-by-case basis. A case-by-case analysis is necessary because an application involving a large parcel of property would

clearly have a different analysis than one which involves only 8.67 acres. More importantly, because the opt-out process is a statutory right created by the Legislature, the County is obligated to consider every opt-out application filed, and if it satisfies the applicable criteria, it must be approved. In any event, there is nothing in sections 163.3184 or 163.3245 which requires the local government to deny an application merely because another property owner might file a similar application at some point in the future.

28. Petitioner contends the County acted "unreasonably" because it did not establish opt-out criteria until after the application was filed. The County's action was reasonable under the circumstances because it had no standards or precedent for reviewing this type of application; at the direction of DEO, the criteria were adopted before final action on the application was taken; and the criteria were considered by the County.

29. Petitioner contends the criteria in section 2-7.4 are vague and lack specific, objective evaluation standards. However, Ordinance No. 2017-14 was never challenged and is presumed to be valid.

30. Petitioner contends HC/LI zoning is inconsistent with the MU-S land use and violates sections 163.3177(2) and 163.3194(1)(b).[1/] Those provisions require generally that zoning regulations and land uses be consistent with one another and the elements of the Plan.

31. The zoning and land use will be the same as existed before the Sector Plan was adopted. They correlate with the zoning and land use on numerous other non-Sector Plan parcels in the immediate area and throughout the County. MU-S contemplates a mixed-use area, while HC/LI contains a variety of residential, commercial, and industrial uses. Although industrial uses are inconsistent with the land use, see Endnote 1, there are many other uses within the zoning district that are compatible with MU-S. It is fairly debatable that the zoning and land use designation are compatible.

32. FLU Objective 1.3 provides that future land use designations should "discourage urban sprawl, promote mixed use, compact development in urban areas, and support development compatible with the protection and preservation of rural areas." By allowing more intensive development next to the Conservation Neighborhood District, Petitioner contends the plan amendment is inconsistent with this directive because it encourages urban sprawl. "Sprawl" is defined in chapter 3 of the Plan as

> [h]aphazard growth of dispersed, leap-frog and strip development in suburbs and rural areas and along highways; typically, sprawl is automobile-dependent, single use, resource-consuming, and low-density development in previously rural areas and disconnected from existing development and infrastructure.

33. The parcels on the east side of Highway 29 have similar zoning and land uses as the subject property and are

interspersed with commercial development. Therefore, future development on the subject property would not be "disconnected from existing development and infrastructure," and it would not leap-frog into non-developed areas. It is fairly debatable that the plan amendment does not encourage urban sprawl.

34. Petitioner contends the underlying zoning on the parcel is incompatible with the land use in her neighborhood. Although the County considered this issue, it points out that the Sector Plan and Comprehensive Plan have different development standards, and therefore there is no requirement that it consider the compatibility of non-Sector Plan property with property in the DSAP. Moreover, to restore the property rights that an owner once had, when the withdrawal application is approved, the property should revert to the underlying zoning in existence when the Sector Plan was established.

35. Notwithstanding the foregoing, LDC section 2-7.4(a)5. requires that when reviewing an opt-out application, the County must consider "[t]he underlying existing zoning category and its compatibility with surrounding DSAP land use designations." To this end, the County addressed this factor by assigning a less intense MU-S land use to the parcel so that more intense uses allowed by HC/LI would be prohibited or minimized. It is fairly datable that the underlying zoning will be compatible with the neighboring area.

36. Petitioner contends the amendment is not supported by data and analysis, as required by section 163.3177(1)(f).

37. Prior to adopting the amendment, the County staff made a qualitative and quantitative analysis of impacts on natural resources, wetlands, historically significant sites, the environment, and adjacent lands.

38. Because Highway 29 is a state road, the County has limited planning responsibilities for traffic impacts. Even so, a limited analysis of traffic impacts is found in County Exhibit 17. In addition, the Department of Transportation performed a more complete analysis of traffic impacts attributable to the amendment. Because the parcel is currently vacant, traffic impacts on Neal Road cannot be fully analyzed until a site plan is filed.

39. A review of school concurrency issues was performed by the Department of Education and no adverse comments were submitted. The County verified that Emerald Coast Utility Authority had available water, sewer, and garbage capacity to serve the parcel. Finally, the County took into account the fact that removal of such a small parcel from the edge of the eastern side of the Sector Plan would have minimal, if any, effect on the Sector Plan goals and objectives.

40. It is fairly debatable that the amendment is supported by relevant and appropriate data and analysis.

41. All other contentions not specifically discussed have been considered and rejected.

CONCLUSIONS OF LAW

42. To have standing to challenge or support a plan amendment, a person must be an "affected person" as defined in section 163.3184(1)(a). Petitioner is an affected person within the meaning of the law.

43. Because section 163.3245(3) requires a DSAP to be adopted by a local development order, Petitioner argues that an application to withdraw from the Sector Plan must be processed in the same manner. As noted earlier, the adoption of a local development order constitutes quasi-judicial action, rather than legislative action.

44. Whether an action is legislative or quasi-judicial determines the level of review it receives under Florida law. A local government's legislative action is subject to review under a deferential "fairly debatable" standard of review, while rulings made in its quasi-judicial capacity are subject to review by certiorari in circuit court and will be upheld only if they are supported by competent substantial evidence.

45. All comprehensive plan amendments are legislative decisions and subject to the fairly debatable standard of review. Coastal Dev. of N. Fla. v. City of Jacksonville Bch., 788 So. 2d 204, 209-10 (Fla. 2001); Martin Cnty. v. Yusum, 690 So. 2d 1288, 1295 (Fla. 1997). The plain language in two

statutes supports a conclusion that an opt-out application is a plan amendment. First, section 163.3245(8) provides that "an owner may withdraw his or her property from the master plan only with the approval of the local government by plan amendment adopted and reviewed pursuant to s. 163.3184." Second, in contrast to the process for adopting a local development order, section 163.3184(2)(c) provides that "an amendment to an adopted sector plan . . . must follow the state coordinated review process in subsection (4)." Given these clear statutory directives, the County correctly processed the application under section 163.3184, and it afforded Petitioner all rights to which she was entitled.

46. Under the process described in section 163.3184(4), plan amendments reviewed under the State Coordinated Review process are sent to the reviewing agencies within ten working days after the first public hearing. If DEO elects to review the amendment, it has 60 days in which to issue objections, recommendations, and comments regarding the amendment. Within ten days after the second public hearing, the local government shall transmit the amendment to DEO and other interested agencies for additional review. After a determination of completeness is made, DEO reviews the final version of the amendment and issues a notice of intent. In this case, a Notice of Intent to find the amendment in compliance was issued by DEO.

47. "In compliance" means that a plan amendment is consistent with the requirements of sections 163.3177, 163.3194, 163.3245, and other statutes not relevant here. See § 163.3184(1)(b), Fla. Stat.

48. The "fairly debatable" standard, which provides deference to the local government's disputed decision, applies to any challenge filed by an affected person. Therefore, Petitioner bears the burden of proving beyond fair debate that the challenged plan amendment is not in compliance. This means that "if reasonable persons could differ as to its propriety," a plan amendment must be upheld. Yusem, 690 So. 2d at 1295.

49. As previously found, it is fairly debatable that the plan amendment is internally consistent with other Plan provisions, it is not inconsistent with sections 163.3177, 163.3194(1), and 163.3245, the new land use and zoning are compatible with the surrounding area, and the amendment is supported by relevant data and analysis. Accordingly, the plan amendment is in compliance.

RECOMMENDATION

Based on the 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 amendment adopted by Ordinance No. 2017-53 is in compliance.

DONE AND ENTERED this 10th day of May, 2018, in Tallahassee, Leon County, Florida.

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of May, 2018.

ENDNOTE

[1/] A final hearing in this case was conducted in February 2018. On November 30, 2017, the County adopted Ordinance No. 2017-65, which amended the HC/LI zoning category to address certain inconsistencies created by the HC/LI zoning with the MU-S future land use category. On January 16, 2018, Petitioner filed a Petition with DEO pursuant to section 163.3213 in which she challenged the new regulation on the ground it is inconsistent with the Plan and does not implement the character of the MU-S land use. After conducting an investigation, on April 3, 2018, DEO determined that to the extent the regulation permits "light industrial" uses within the MU-S land use, the regulation is not consistent with the Plan. In all other respects, the regulation was deemed to be consistent. See Determination of Consistency of Land Development Regulation, Apr. 3, 2018. DEO's determination was appealed by Petitioner to DOAH. See Case No. 18-2109GM. Petitioner also filed a second Petition with DOAH challenging the Ordinance which adopted the regulation. See Case No. 18-2103GM. Therefore, the amended regulation is not yet effective.

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.