

**FLWAC
ITEM #3**

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GINN-LA MARINA, LLLP, LTD,)
NORTHSHORE HAMMOCK LTD, LLLP,)
AND NORTHSHORE OCEAN HAMMOCK)
INVESTMENT, LTD, LLLP,)

Petitioners,)

vs.)

Case No. 10-9137DRI

FLAGLER COUNTY,)

Respondent,)

and)

OCEAN HAMMOCK PROPERTY OWNERS)
ASSOCIATION, INC., THE HAMMOCK)
BEACH CLUB CONDOMINIUM)
ASSOCIATION, INC., MICHAEL M.)
HEWSON, AND ADMIRAL)
CORPORATION,)

Intervenors.)
_____)



RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the
Division of Administrative Hearings (DOAH) by its assigned
Administrative Law Judge, D. R. Alexander, on December 15-17,
2010, in Bunnell, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues are: (1) what are the correct procedures and substantive criteria to be applied in reviewing Petitioners' proposed "local" changes to the Hammock Dunes Development of Regional Impact (DRI) Development Order (DO); (2) does Petitioners' application satisfy the applicable criteria for

approval; and (3) do Petitioners or Respondent, Flagler County (County), have the legal ability or obligation through the Notice of Proposed Change (NOPC) to the DO to change certain obligations of Intervenor, Admiral Corporation (Admiral), contained in the DO and in separate agreements related to the performance of certain DO obligations.

PRELIMINARY STATEMENT

Petitioners submitted a NOPC application to the County in 2009, later twice revised, seeking to amend their DO by extending for three years the DRI build-out date authorized by section 380.06(19), Florida Statutes; reducing the number of approved dwelling units in the DRI; creating a new residential Cluster 35 within the DRI boundaries and reallocating previously-approved, but un-built, dwelling units from other Clusters to new Cluster 35; agreeing to a further PUD-like review process before development permits are issued; and realigning a roadway at its own expense. The amended NOPC was considered by the County at a hearing on April 5, 2010. On April 23, 2010, the County issued its written decision, Resolution No. 2010-22. That decision determined that the requested changes did not constitute a substantial deviation of the DO; determined that the revisions were consistent with the County's Comprehensive Plan (Plan); recognized the legislative

extension of time that extended the expiration date of the DO to February 28, 2012; approved the request to reduce the total number of approved residential dwelling units from 4,400 to 3,800; but denied the request to create a new Cluster 35 with a transfer of 541 residential units to that Cluster on the ground this was inconsistent with certain provisions in its Land Development Code (LDC).

On May 26, 2010, Petitioners timely filed a Notice of Appeal and Petition for Appeal with the Florida Land and Water Adjudicatory Commission (Commission). The matter was referred by the Commission to DOAH on September 21, 2010, with a request that an administrative law judge conduct a formal hearing. By Order dated October 1, 2010, Admiral, Ocean Hammock Property Owners Association, Inc. (Ocean Hammock), The Hammock Beach Club Condominium Association, Inc. (Hammock Beach), and Michael M. Hewson (Hewson) were authorized to intervene as parties.

By agreement of the parties, a final hearing was scheduled on December 15-17, 2010, in Bunnell, Florida. A pre-hearing stipulation (stipulation) was filed by the parties on December 10, 2010. At the outset of the hearing, the County's Motion to Dismiss Petition for Appeal, Intervenors' Request for Judicial Notice, and Intervenors' Motion for Leave to Call Additional Witnesses were withdrawn. Petitioners presented the

testimony of Daniel Baker, a professional engineer and Regional Vice-President of Reynolds Development & Management Group and accepted as an expert; Adam Mengel, County Planning and Zoning Director and accepted as an expert; and Kenneth B. Metcalf, a certified land use planner with Greenberg Traurig, P.A., and accepted as an expert. Also, they offered Petitioners' Exhibits 1-15, 17, and 18, which were received in evidence. The County presented the testimony of David J. Tillis, Senior Project Manager of Planning at WilsonMiller Stantec and accepted as an expert; James E. Gardner, Jr., County Appraiser and accepted as an expert; and Anne Wilson, a realtor and scenic highway planner and accepted as an expert. Also, it offered County (Respondent) Exhibits 1-3, 4A and B, and 5-16, which were received in evidence. Intervenors Ocean Hammock, Hammock Beach, and Hewson presented the testimony of Hewson, a resident of Ocean Hammock; Robert DeVore, the original developer of the DRI; Linda Loomis Shelley, an attorney with Fowler White, P.A., and accepted as an expert; and Steven R. Davis, an architect and accepted as an expert. Also, they offered Intervenors' Exhibits 1-10, 12, and 13, which were received in evidence. Admiral presented no witnesses but offered Admiral Exhibits 1-5, 6A-D, 7, and 11, which were received in evidence.¹ Finally, the parties offered Joint Exhibits 1-12, which were received in evidence.

The Transcript of the hearing (five volumes) was filed on January 19, 2011. At the request of the County, Ocean Hammock, Beach Club, and Hewson, the time for filing proposed findings of fact and conclusions of law was extended to March 7, 2011. Also, the parties were authorized to file submissions that did not exceed 50 pages. Separate filings were timely made by Petitioners, the County, Admiral, and the other Intervenors. On March 8, 2011, the County filed a Motion for Leave to File Amended Proposed Recommended Order on the ground its original filing (totaling 49 pages) inadvertently omitted portions of the conclusions of law. While the Motion was initially agreed to by Petitioners on the assumption the amended filing would not exceed 50 pages, the new filing on March 8, 2011, totaled 57 pages, which exceeded the established page limitation. This triggered an objection by Petitioners. The objection is overruled.

FINDINGS OF FACT

A. The Parties

1. Petitioners are the current owners and developers of certain real property within the Hammock Dunes DRI in the County. They are some of many developers of real property within that DRI.

2. The County is a political subdivision of the State and the unit of local government responsible for issuing DOs for projects that are required to undergo DRI review within its geographic limits, including amendments to DOs of previously approved DRIs. Such reviews must be in conformity with the requirements of section 380.06.

3. Admiral is the original developer of the DRI but no longer owns any property or entitlements in the DRI. Its interest in the proceeding is based on long-standing obligations to provide certain infrastructure, described below, that run with the land until the expiration of the DRI, and whether the County can extend those obligations without its consent by extending the expiration date of the DRI.

4. Ocean Hammock is an incorporated property owners association comprised of approximately 1,500 unit owners within the DRI.

5. Hammock Beach is an incorporated condominium association composed of approximately 184 condominium unit owners within the DRI.

6. Hewson is an individual and an owner and resident of property within the DRI.

B. History Preceding the Application

7. On March 30, 1984, the County approved the original Hammock Dunes DRI by County Resolution 84-7. The resolution showed Admiral as the developer. Admiral is a wholly-owned subsidiary of ITT Community Development Corporation (ITTCDC). The DO covered 2,258 acres and entitled Admiral to construct a maximum of 6,670 dwelling units and related commercial, institutional, recreational, and other uses in 42 separate geographical areas known as "Clusters" covering 893 acres. The property is adjacent to the Atlantic Ocean, with approximately five miles of pristine beach bordering the DRI. Beginning in 1985 or 1986, development of the DRI began and now includes three subdivisions or phases: Hammock Dunes; Ocean Hammock; and Hammock Beach. Currently, 33 percent of all single-family homes authorized for construction in the DRI have actually been constructed; all platted and permitted condominiums have been constructed; and all Clusters have been platted. Due to financial considerations of their owners, one or two Clusters in the DRI have no vertical development.

8. The general and special conditions of development are contained in a 54-page document identified as Attachment A to the DO. See Joint Ex. 1, Attachment A, pp. A-1 through A-54. The original DO included a DRI Master Development Plan,

identified as Exhibits 17.5.1 and 17.5.2 in Attachment A. The Master Development Plan is basically a sketch plan that geographically depicts the uses authorized by the DO. The first exhibit depicts generally where the 42 residential Clusters and other uses were to be located. See Attachment A, p. A-45. The second exhibit is a Residential Cluster Data Table, which describes the type of development for each Cluster and designated the maximum number of dwelling units that may be built within each Cluster. See Attachment A, p. A-46.

9. The DO rezoned all of the property within the DRI as Planned Unit Development (PUD), which is a zoning district in the County zoning code. Also, section 17.5 of the DO described the substantive conditions for development relating to density, residential clusters, allowable building height, building spacing, and flexibility considerations. Subsection 17.5.g. provides in part that "any changes [to the project] must first be approved through the site development plan review procedures of Section 17.6."

10. Section 17.6 prescribes the PUD review procedures that apply to submitted development proposals. See Joint Ex. 1, pp. 63-68. The introductory language in section 17.6 states that "[t]his project shall be subject only to the following [PUD] review provisions which are an elaboration of the review

provisions of Article X." Joint Ex. 1, Attachment A, p. A-47. During the PUD review process, section 17.6 generally requires a pre-application conference by the applicant and County staff, the submission of a detailed site development plan which addresses specific issues set out in subsection 17.6(c), and approval (platting) of the site development plan leading to permitting. Id. Section 17.6 has not been changed or modified since the original DO was approved.

11. The DO also required Admiral to construct certain specific items of infrastructure associated with the DRI. Among the requirements were that Admiral construct two additional lanes on the Intracoastal Waterway bridge, to occur when the Florida Department of Transportation and County determined that a Level of Service C was met on the existing two lanes; and that Admiral four-lane the roads and bridges located on Palm Harbor Parkway between Clubhouse Drive and Florida Park Drive, to occur when traffic counts on these road segments exceeded 10,000 average daily trips. See Attachment A, §§ 4.1.b and 4.7. Neither of these prerequisites to construction of these infrastructure items has yet occurred.

12. Because DRIs generally take a substantial period of time to complete, the development plans are subject to periodic amendment in order to adjust to changing market conditions,

financial conditions, and other variables. Since its approval in 1984, the DO has been amended five times.

13. The first amendment to the original DO, completed in July 1995, revised the Master Development Plan in the following respects: (a) residential acreage was reduced from 893 acres to 888 acres; (b) the maximum number of dwelling units was reduced from 6,670 to 4,400; (c) Cluster 1 was split into Clusters 1 and 1(a), resulting in an increase in the number of Clusters from 42 to 43; and (d) the maximum allowable building height in the Medium High density category was reduced from 20 stories to 12 stories. See Joint Ex. 2. Also, it realigned the spine road, clarified infrastructure construction obligations, and changed the geographic location, configuration, and area of Residential Clusters and other uses, including the golf course, within the boundaries of the DRI. Finally, Exhibits 17.5.1 and 17.5.2 were replaced by Exhibits 3A and 3B to the DO, and the amendment required the County to approve any successor developer to Admiral unless ITTCDC guaranteed all applicable DRI requirements, obligations, and conditions.

14. The second amendment to the original DO was completed in March 1998 and generally revised the Master Development Plan as follows: (a) the number of residential Clusters was reduced from 43 to 35 (numbered as 1, 1(a), and 2 through 34) together

with changes to location, configuration, and other uses of the residential Clusters; and (b) total authorized residential acreage was increased from 888 acres to 916 acres. See Joint Ex. 3. Unless or until the pending NOPC is approved, the 1998 Master Development Plan still applies to the DRI. In addition, the 1998 amendment provided for the conveyance of 33 acres of beachfront land at the intersection of 16th Road and the beach, previously intended to be a County park, from the County to the developer to enable the developer to construct part of a Jack Nicklaus signature golf course. The golf course was intended to be a buffer between development in the DRI and the beach. The developer was still required to construct a smaller public park on land retained by the County at the 16th Road access to the beach. Finally, although no revisions to section 17.6 were made, the amendment added a new section 17.10, which provided some specific PUD development criteria for Cluster 34.

15. On November 24, 1999, ITT Corporation (then known as ITT Industries, Inc.), the parent corporation of ITTCDC, entered into a Guaranty Agreement (Agreement) with the County regarding Admiral's obligations to provide additional infrastructure if certain transportation thresholds were exceeded. See Admiral Ex. 1. The Agreement provided in part:

The obligations of the Guarantor under this Guarantee Agreement shall be independent,

absolute and unconditional and shall remain in full force and effect until the earlier of (i) such time as the Major Obligations have been performed and discharged . . . , or (ii) such time as the Development Order, including all past and/or future amendments and extensions thereof, shall no longer be in effect.

16. The County did not execute the Agreement. However, ITT and ITTCDC unilaterally agreed to increase the existing bond guaranteeing Admiral's DO obligations from \$3 million to \$10 million in exchange for the County releasing its right to review and approve any successor developer as provided in the 1995 DO amendment. This Agreement further provided that the obligations of the guarantor would remain in effect until the obligations described therein were performed in compliance with the DO, or until the DO and/or any amendments or extensions thereof were no longer in effect. Id.

17. On December 17, 2001, the DO was again amended. See Joint Ex. 4. However, that amendment was repealed by the County on October 7, 2002. See Joint Ex. 5. Besides repealing the 2001 amendment, the 2002 ordinance modified certain requirements relating to public safety and park construction. Neither the 2001 nor 2002 amendments changed the proposed number or location of dwelling units within the DRI.

18. In 2003, the DO was amended a fifth time to extend the build-out date by five years and eleven months, or from

March 28, 2003, to February 28, 2009. See Joint Ex. 6. This amendment did not affect the permitted number of dwelling units, residential acreage, or residential Clusters, nor were any revisions made to section 17.5 or 17.6 of the DO regarding the PUD designation and review procedures. Accordingly, sections 17.5 and 17.6, and Revised Exhibits 3A and 3B, as adopted by the 1998 amendments, remained in effect when Petitioners filed the NOPC that is the subject of this proceeding.

19. Petitioners' predecessor developer was Lowe Ocean Hammock, Ltd. (Lowe). On December 20, 1996, Lowe executed a Development Order Allocation Agreement with ITTCDC, wherein those parties agreed that no applications would be filed to amend the DO without the written consent of the other party. See Admiral Ex. 5, p. 9. As one of Lowe's successor developers in the DRI, Petitioners became subject to this consent requirement through its inclusion in the deed by which Petitioners obtained ownership of their interest in the DRI. See Admiral Ex. 6A. Admiral contends that the responsibility for constructing the two additional lanes on Palm Harbor Parkway still remains with ITTCDC, but that the responsibility for constructing the two additional lanes on the Intracoastal Waterway Bridge was assumed by the Dunes Community Development District (DCDD), a community development district created in

1985 in the DRI. Neither Petitioners nor the County is a party to the agreements by which ITTCDC or DCDD assumed responsibility for construction of these two infrastructure projects.

20. Petitioners did not obtain Admiral or ITTCDC's written consent before filing the instant NOPC application. Admiral, ITTCDC, and ITT wrote two letters in 2009 and one in 2010 stating their objections to the NOPC and maintaining that such objections would only be withdrawn if their obligations under the Agreement and the associated bond were either terminated by the County or assumed by a successor developer. The letters indicated that their obligations expired on February 28, 2009, or the then-current DRI expiration date. The County considered the letters of objection but determined that the extension of the build-out date of the DRI was the result of an act of the Florida Legislature and therefore out of the County's legal control. Thus, the County determined that it would not consider those issues in connection with the NOPC application.

21. Sometime after it adopted the original DO, the County amended Article III of its LDC by adding and/or amending sections 3.04.00 through 3.04.04, which set forth the processes and substantive criteria for the creation of new PUDs. However, the 1984 DO was never amended to incorporate the new sections of

the LDC by reference or to change the DO's PUD provisions to mirror those of the current LDC.

C. Petitioners' NOPC Application

22. Pursuant to section 380.06(19), on February 27, 2009, Petitioners filed a sixth amendment to the DRI DO. The first iteration of the current NOPC requested: (a) recognition of the three-year build-out date extension authorized by the Legislature in section 380.06(19)(c); (b) creation of a new residential Cluster 35 consisting of 34 acres and assigned a Medium-High density and designated "Ocean Recreation Hotel"; and (c) reallocation of 1,147 approved but un-built dwelling units from Clusters 21-34 into the new Cluster. Cluster 35 would be located on land designated by the DO as the beach club, portions of Cluster 33, and a part of the Ocean Hammock Golf Course. Of the 34 acres, eight would be located north of 16th Road on land currently occupied by a 77-foot high building, commonly known as the "Lodge," which contains a restaurant, 20 hotel rooms, offices, a golf pro shop, locker facilities, a swimming pool, spa facility, parking lot, and landscaping. The remaining 26 acres, south of 16th Road, currently feature a golf driving range, landscaped areas, buffer, and open space. Sixteenth Road is a public road that provides access to the beach, public beach parking, and public restroom facilities. Petitioners initiated

the NOPC because they had dwelling unit entitlements that could not be used in the Clusters from which the units would be transferred because the land in the donor Clusters had been fully platted, developed, and/or sold. As a consequence, no more dwelling units could be constructed in the donor Clusters.

23. On June 19, 2009, Petitioners submitted the second iteration of the current NOPC application. In that iteration, the size of the proposed new Cluster 35 was reduced from 34 to 24 acres; the number of units to be reallocated to Cluster 35 was reduced from 1,147 to 561 units (including 20 from the hotel); and the total number of dwelling units in the entire DRI was proposed to be reduced by 600, from 4,400 to 3,800.

24. After reviewing the amended NOPC, the County staff recommended approval, with conditions to assure consistency with the Plan and compatibility with existing development. However, after Admiral submitted letters of objection, and considerable public opposition to the proposal surfaced, on February 11, 2010, a third iteration of the NOPC was submitted to the County. This iteration proposed the following amendments to the DO:

- (a) recognizing the automatic extension of the build-out date for the DRI authorized by the Legislature in section 380.06(19)(c);
- (b) amending section 17.5.a. by reducing the total number of authorized dwelling units within the DRI from

4,400 units to 3,800 units; (c) modifying Exhibits 3A and 3B to create a new Cluster 35 encompassing only 12 acres (rather than 24 acres), and designating the new Cluster as Ocean Recreation Hotel with a maximum building height of 77 feet, and a reallocation of 541 un-built dwelling units from Clusters 21-24, 26, 27, and 29-34; (d) modifying condition 4.4 to allow the relocation, if necessary, of 16th Road farther south to enlarge the construction area for the new units, with the realignment occurring only after Petitioners applied for building permits for construction within Cluster 35; and (e) agreeing to a public hearing during the site development stage of the process.

25. The final version of the NOPC was reviewed by the Northeast Florida Regional Planning Council and Department of Community Affairs. Both agencies agreed that the proposal did not constitute a substantial deviation. The County staff agreed with this determination and recommended that the NOPC be approved subject to certain conditions, including one that before a development permit be issued for Cluster 35, the applicants submit maps, exhibits, and other supporting materials to show compliance with the LDC. Finally, the staff recommended that the designated residential acreage in the DRI be increased from 916 acres to 960 acres to accommodate the new Cluster and

to reflect the actual residential acreage (948 acres) that had previously been approved and developed.

26. On April 5, 2010, the Board of County Commissioners (Board) held a public hearing to consider the NOPC. The Board found the requested changes did not constitute a substantial deviation and approved that part of the NOPC. It also approved the reduction in the number of approved dwelling units from 4,400 to 3,800. The Board further found the revisions to be consistent with the County Plan. However, it denied the application to the extent that it would have created a new Cluster 35 and reallocated 541 residential units to that Cluster. Finally, the Board acknowledged that the Florida Legislature had extended the DRI expiration date and concluded that no formal action was necessary in that regard.

27. The Board's decision was memorialized in Resolution No. 2010-22, which states in pertinent part that the request to create a new Cluster 35 and transfer 541 units from other Clusters was being denied for two reasons: that it would adversely affect the orderly development of the County in contravention of LDC section 3.04.02.F.1.; and that it would adversely affect the health and safety of residents and workers in the area and would be detrimental to the use of adjacent properties and the general neighborhood in contravention of LDC

section 3.04.02.F.2. See Joint Ex. 10. No specific findings of fact were made as to how Cluster 35 was inconsistent with these provisions. This appeal followed. Because this proceeding is de novo in nature, the County and Intervenors have raised additional grounds for denying the application. These grounds were also raised at the local hearing but were not addressed in Resolution 2010-22.

D. The Procedures for Reviewing the NOPC

28. Petitioners contend that the Board's review of a NOPC involves only two steps: (a) a determination as to whether the revisions constitute a substantial deviation requiring further review and analysis; and (b) a determination as to whether the revisions are consistent with the local comprehensive plan. If the revisions do not require a substantial deviation analysis, and they are consistent and compatible with the local plan, the NOPC would be approved, and any future development would then be controlled by the PUD review process contained in the DO. They also assert that it is inappropriate to have a PUD review concurrent with the NOPC review, as the Board did here; instead, they argue that the PUD review process should occur at the site development plan stage.

29. The process described by Petitioners would normally apply were this not a unique NOPC requesting substantial

revisions to the DO (but not regional impact implications) in the sense that it requests creation of a new Cluster where no residential development had been previously permitted, and the proposed residential development will occur in an area specifically prohibited for development by the DO. Requests to redistribute uses on property subject to PUD zoning, or to amend the sketch plan for an approved PUD zoning, are normally treated by the County as a rezoning of the PUD, even if, as here, the property has previously been assigned PUD zoning. The LDC labels this process as a "reclassification" of the property, which triggers the consideration of other LDC criteria. See § 3.04.02, LDC. When this occurs, a change to the PUD must go through the same type of process that the original adoption of the PUD went through, which is a rezoning process. This procedure contemplates that a simultaneous NOPC/PUD review takes place, and the County is authorized to take into account the general issues of public health, safety, and welfare described in sections 3.04.02.F.1. and 2., as well as any other sections in the article that may apply. The evidence shows that this procedure is used by many local governments throughout the State, including the County, and was specifically used by the County in 1998 when the last substantial changes to the Master Development Plan were requested by predecessor developers.

While conflicting testimony was submitted on this issue, the more persuasive evidence supports a finding that these procedures and substantive criteria are the most logical and reasonable interpretation of the County's LDC and the DO, and they should be used in reviewing the NOPC.

E. Does the NOPC Satisfy Applicable Criteria?

30. Consistent with above-described procedure, in determining whether the NOPC may be approved, the following process should be followed. First, it is necessary to determine whether the revisions are a substantial deviation, as defined by section 380.06(19), creating further regional impacts that require additional review and analysis. Second, it is necessary to determine whether the proposed revisions are consistent with the County's Plan, as required by section 163.3194(1)(a). The record below does not disclose the specific Plan provisions reviewed by the County for consistency or compatibility. However, County Planner Mengel indicated that prior to the Board's decision, he made "a very cursory review" that relied largely upon representations by the applicants and concluded, as did the Board in its Resolution, that the revisions are consistent with the Plan. In addition, four policies in the Future Land Use Element (FLUE) of the Plan relating to compatibility were addressed by Petitioners during the DOAH

evidentiary hearing: policies 13.1, 13.2, 13.3, and 13.5. Also, objective 3 and policies 3-3 and 3-6 of the Recreation and Open Space Element of the Plan were addressed by the County. The next consideration is whether the NOPC revisions comply with applicable LDC criteria since a simultaneous DRI/PUD review is being made. Finally, Petitioners are vested only as to what was approved in the 1984 DO, as later amended. Therefore, it is necessary to determine whether the revisions being sought are vested development rights.

a. Substantial Deviation

31. The parties have stipulated, and Resolution 2010-22 acknowledges, that the NOPC does not constitute a substantial deviation from the DO requiring further review and analysis.

b. Consistency with the Comprehensive Plan

32. Section 163.3194(1)(a) requires that all development orders be consistent with the local government's adopted comprehensive plan.

33. Resolution 2010-22 states that the NOPC is consistent with the County Plan. See Joint Ex. 10. At hearing, evidence regarding FLUE Policies 13.1, 13.2, 13.3, and 13.5 was offered by Petitioners' expert, Kenneth B. Metcalf. Although compatibility is not defined in the Plan, he opined that the FLUE, and especially the foregoing policies, are the Plan

provisions that focus on compatibility, and that to the extent these provisions are applicable to the proposed changes, the NOPC revisions are not inconsistent with these provisions or the FLUE. This testimony was undisputed.

34. Highway A1A is a north-south route that runs along the western boundary of the DRI. It has received a scenic highway designation by both the State and federal governments and is more commonly known as the A1A Scenic Highway (Scenic Highway). It includes not only A1A, but also the public roads that run from A1A through the DRI to the beach, including 16th Road and the park at its terminus at the beach next to proposed Cluster 35. The 16th Road park is superior to the other beachfront parks in the County. Also, 16th Road serves as the entryway to the beach from A1A and is the beach access road most heavily used by residents of the communities surrounding the DRI. The County has expended more planning attention and funding to the 16th Road entryway to the beach than any other beach access road in the County. To obtain state and federal designation of the roadway as a scenic highway, the County was required to complete a scenic highway corridor management plan to ensure its protection. Also, the County has adopted protective measures regarding the Scenic Highway as part of the Recreation and Open Space Element of the Plan.

35. The County and Intervenors contend that the NOPC is inconsistent with objective 3 and policies 3-3 and 3-6 of the Recreation and Open Space Element of the Plan. Objective 3 requires the County to preserve and enhance "[t]he natural, recreational, archeological, scenic, historical and cultural resources of the A1A Scenic Highway." Policy 3-3 requires the County to "support the River and Sea Scenic Highway Corridor Management Plan," while policy 3-6 requires the County to "improve recreational facilities without adversely impacting natural resources along the Scenic Corridor."

36. The management plan for the Scenic Highway emphasizes "context sensitive design" for development occurring within the corridor. This means that whatever is built around the corridor should fit in or blend with the location where it is proposed. The mass and scale of development that is authorized under the NOPC will dwarf the 16th Road park and marginalize the public beach access. Also, those persons occupying the new dwelling units in Cluster 35 (up to 561 units) will be concentrated directly at the intersection of the beach and the park. These impacts, whether collectively or singularly, would change the pristine, rural character of the beachfront and park at 16th Road, which continues to exist despite the development in the DRI to date. Therefore, the revisions conflict with the

corridor management plan and are inconsistent with the requirement in policy 3-3 that the County support that plan.

37. Policy 3-6 requires that the County "improve recreational facilities without adversely impacting natural resources along the Scenic Corridor." When the DRI was originally approved in 1984, there were 20 dune cuts distributed across the five miles of beach bordering the DRI, which provided direct access to the beach. The DO required all but four to be restored, i.e., filled and stabilized, with each remaining dune cut providing access to one of the four public parks on the beach. One of the remaining dune cuts is at the 16th Road park, which is adjacent to proposed Cluster 35. Besides the adverse impacts caused by the mass and scale of development adjacent to that public park, the NOPC allows Petitioners to relocate 16th Road and the 16th Road park facilities further south. The dune cut at 16th Road would have to be abandoned as an access point to the beach. This would require the construction of a dune walkover, relocation of restroom facilities, and relocating public parking further from the beach. Collectively, the impacts to natural resources and recreational facilities conflict with objective 3, which requires the County to preserve the natural and recreational resources of the Scenic Highway. The revisions also contravene policy 3-6, which requires the

County to improve recreational facilities without adversely affecting natural resources along the Scenic Corridor.

38. For the reasons stated above, the NOPC is inconsistent with objective 3 and policies 3-3 and 3-6 of the Recreation and Open Space Element of the Plan and in these respects is inconsistent with the County Plan.

c. Land Development Regulations

39. Sections 3.04.02.F.1. and 2. require that in order to approve a PUD reclassification application such as the one submitted by Petitioners the following criteria must be met:

1. The proposed PUD does not affect adversely the orderly development of Flagler County and complies with the comprehensive plan adopted by the Flagler County Board of County Commissioners.

2. The proposed PUD will not affect adversely the health and safety of residents or workers in the area and will not be detrimental to the use of adjacent properties or the general neighborhood.

40. In making the following findings regarding the impact of the NOPC on residents, adjacent properties, and the general neighborhood, the undersigned has relied upon the testimony presented to the Board and evidence submitted at the DOAH hearing. See Joint Ex. 9.

41. The proposed new development is immediately adjacent to the beach and a public park, and it will eliminate the intended buffer between other DRI development and the ocean for

which the golf course now serves. While the DRI is not fully built out, it is 26 years old and is substantially developed and platted. At this stage of development in the DRI, the residents of the area and the County have the right to rely on the stability of the Master Development Plan. Substantial changes to the Master Development Plan such as those proposed here will likely cause adverse impacts to residents owning property in the DRI and to the community as a whole. The present Lodge building, while 77 feet high, is configured with its narrowest end facing the beach, minimizing any visual impact to the public using the beach and unit owners looking out to the ocean. This building orientation also minimizes shadowing of the beach adjacent to the site. The Lodge building blends into the area where it is located and by appearance is no more intensive than a single-family beachfront home found in other parts of the County.

42. By contrast, the scale and intensity of development permitted by the NOPC will obstruct or eliminate ocean views of property owners, principally in Cluster 33 behind the golf course where several condominium buildings are now located. The evidence shows that these unit owners with an obstructed view can also expect a substantial loss (around 45 percent) in value of their properties.

43. Likewise, the relocation of the existing access to the public beach and relocation of the public park will adversely impact the public since they will no longer have the ease of access to the beach and use of facilities the current park and beach access provide.

44. Finally, the rural character of the beach area would be lost, and the new development would not be compatible with the adjacent residential areas. While Petitioners suggest that Cluster 35 will be compatible with adjacent areas because the land uses (residential) are the same, compatibility is better defined as whether two land uses can co-exist over time without one having an adverse effect on the other. Given the mass and scale of development that can occur in the buffer area (golf course) between the ocean and the other DRI development, the new Cluster will have an adverse effect on adjacent Clusters. As such, the NOPC will not be compatible with adjacent land uses.

45. Collectively, these considerations support a finding that the proposed development will adversely affect the orderly development of the County, and it will be detrimental to the use of adjacent properties and the general neighborhood.

d. Compliance with Section 14.5 and the Golf Course Plat

46. The County and Intervenors contend that the reallocation of 561 residential dwelling units to the new

Cluster 35 with an assignment of the "Ocean Recreation Hotel" community type is not a land use permitted by section 14.5 of the DO, this conflicts with the plat and deed restrictions recorded to enforce its terms, and section 14.5 must be amended before the NOPC can be approved. The essence of the argument is that Petitioners have no vested right to develop that portion of the DRI in this manner. Section 14.5 provides that:

Land identified for golf course usage on the Master Development Plan map . . . shall be deed and plat restricted to ensure that the usage of this land is limited to golf courses (including associated or appropriate golf club facilities), open space, parks or, if approved by the County Commission, other appropriate recreational usages. . . .

Joint Ex. 1, Attachment A, p. A-36. This provision in the DO has never been amended.

47. Because the final configuration of the two proposed golf courses (Hammock Dunes Course and Ocean Hammock Course) was not known at the time, section 14.5 further provided that:

Applicant at the time of platting shall identify the specific acreage for golf course use. The plat shall show the boundaries and configurations for golf course use. The plat shall show the boundaries and configuration of the golf courses. The plat and all deeds of land within the area so identified as golf course usage on the plat shall contain restrictions limiting the usage of the property platted to golf courses (including appropriate associated golf club facilities), open space, parks or, if approved by the County

Commission, other appropriate recreational or governmental usages.

48. As noted earlier, the 1998 NOPC amendment granted the developer's request for the County to convey back to the developer 33 acres of property originally designated for the 16th Road public park. In exchange, the developer conveyed two parcels within the DRI to the County, one of which expanded the size of an oceanfront park on Malacompra Road, while maintaining a smaller oceanfront park, with improvements, at 16th Road. The exchange was made so that the developer could increase the amount of oceanfront acreage available to the developer for the design and construction of the Ocean Hammock Golf Course and golf clubhouse. As noted above, one of the primary purposes of the exchange was that the golf course would serve as a buffer between the other development and the ocean.

49. Consistent with the intent of section 14.5, Lowe, one of the successor developers to Admiral, submitted the Plat for the Ocean Hammock Golf Course, which was approved by the County on November 1, 2001. On December 10, 2001, the County and Lowe executed a Plat Addendum covering the land described in the golf course plat. See Respondent Exhibit 10. Section 6 of the Addendum states that:

The parcels shown hereon will be perpetually used as golf course land, lake, clubhouse, appropriate associated golf course

facilities, open space, parks, dune preservation or such other appropriate recreational or governmental usages approved by the Board of County Commissioners.
(Emphasis added)

50. When read in conjunction with the recorded Plat, Plat Addendum, and deed restrictions running with the golf course assumed by Petitioners when they obtained ownership of the golf course in 2006, section 14.5 strictly limits the uses allowable on the lands within the Ocean Hammock Golf Course Plat to a golf course, associated golf course facilities, open space, or upon approval by the Board, other appropriate recreational uses. The most reasonable interpretation of those documents, as further explained by testimony at hearing, is that Petitioners' proposal to reallocate up to 561 dwelling units to the proposed Cluster 35 within the golf course land and assign the "Ocean Recreation Hotel" community type to that Cluster, is not a use permitted by section 14.5.

51. Petitioners contend, however, that despite their inclusion in the golf course plat, the various uses occurring on the Lodge property (e.g., a 20-unit lodge, swimming pool, parking lot, and landscaping) were never intended to be limited to use by golfers, and that other development can be approved by the County on land not devoted exclusively to the golf course. However, the County has always interpreted section 14.5, the

Plat, and the Plat Addendum to mean that the golf course land will remain a golf course in perpetuity and cannot be developed for residential purposes. Notwithstanding contrary evidence presented by Petitioners, the County's interpretation of those documents has been credited as being the most persuasive. Given these considerations, Petitioners have no vested right under the current DO to develop the 12 acres for residential purposes and must request an amendment to section 14.5 in order to authorize another form of development. For this reason, the NOPC should be denied.

F. The Legislature Extension of the DRI Expiration Date

52. Section 380.06(19)(c), adopted in 2007, provides that the expiration dates for DRIs under active development on July 1, 2007, were extended for three years, regardless of any prior extension. Based on this provision, by operation of law, the expiration date for the instant DRI, February 28, 2009, was extended by three years to February 28, 2012.

53. Section 14 of chapter 2009-96, Laws of Florida, extended the expiration date of DRIs then having an expiration date of September 1, 2008, through January 1, 2012, by two additional years. Similarly, section 46 of chapter 2010-147, Laws of Florida, also extended the expiration date for DRIs then having an expiration date of September 1, 2008, through

January 1, 2012, again by two additional years. The extensions for DRIs provided in those provisions do not apply to the instant DRI, because the expiration date for the instant DRI does not fall within the September 1, 2008, through January 1, 2012, time period. Thus, the expiration date for the instant DRI is February 28, 2012.

54. Although Admiral did not consent to Petitioners filing the NOPC request, the mutual obligations of Petitioners and Admiral created under the various contracts associated with Admiral's guaranty, and their impact on Petitioners' ability to file the application, are matters to be resolved in the appropriate circuit court.

G. Equitable Estoppel

55. Intervenors claim their members relied on a marketing video that asserted, among other things, that no more oceanfront condominiums would be built within Hammock Beach, and that Petitioners are equitably estopped from developing any buildings on proposed Cluster 35. A review of the standard condominium purchase contracts used in the DRI shows, however, that the purchasers clearly acknowledged that they could not, and did not, rely on oral representations or representations contained in marketing materials.

H. Other Issues

56. All other issues raised by the parties have been considered and are either rejected or found to be matters that need not be addressed in order to resolve this dispute.

CONCLUSIONS OF LAW

57. The parties have stipulated to the facts necessary to establish that Admiral and Intervenors have standing to participate as parties in this proceeding.

58. This is a de novo proceeding regarding Petitioners' NOPC application, not an appellate review of the action taken by the Board. Transgulf Pipeline Co. v. Gadsden Cnty., 438 So. 2d 876, 879 (Fla. 1st DCA 1983). However, the record of the proceeding below was received in evidence and has been considered by the undersigned in making a decision.

59. As the party challenging the DO, Petitioners have the burden of proving that the NOPC should be approved. See, e.g., Young v. Dep't of Community Affairs, 625 So. 2d 831, 835 (Fla. 1993). Specifically, Petitioners must show by a preponderance of the evidence that the proposed revisions to the DO are not a substantial deviation causing additional regional impacts and requiring further review; and that the revisions are consistent with the applicable provisions of the Plan and LDC and are not incompatible with surrounding development. Finally, Petitioners

are only vested with what was approved in the original DO and previously approved modifications and have no development rights beyond what is approved in those documents. Bay Point Club, Inc. v. Bay Cnty., 890 So. 2d 256, 259 (Fla. 1st DCA 2004).

60. For the reasons previously found, the process and criteria used by the County are reasonable and appropriate and should be used in reviewing the NOPC.

61. The evidence supports a conclusion that the NOPC is not a substantial deviation, as defined by section 380.06(19).

62. For the reasons previously found, the evidence supports a conclusion that the NOPC revisions are not consistent with objective 3 and policies 3-3 and 3-6 of the Recreation and Open Space Element of the Plan. Therefore, the NOPC does not satisfy the requirement in section 163.3194(1)(a) that the DO is consistent with the local comprehensive plan.

63. For the reasons previously found, the evidence supports a conclusion that the NOPC does not satisfy relevant portions of the LDC.

64. For the reasons previously found, the evidence supports a conclusion that Petitioners have no vested right, either in the original DO, or subsequent amendments, to place up to 561 dwelling units on land now subject to restrictions that limit the usage of the property to golf courses and other uses

associated with golf club facilities, open space, parks, or recreational facilities if approved by the Board. Absent the amendment of section 14.5 of the DO, the proposed uses and development are barred by that provision.

65. Finally, the extension of the DO expiration date until February 28, 2012, is the result of a legislative act. Whether Admiral's obligations under the DO are extended to the new expiration date is a matter that should be resolved in the appropriate circuit court.

RECOMMENDATION

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

RECOMMENDED that the Florida Land and Water Adjudicatory Commission enter a final order determining that the NOPC is not a substantial deviation; extending the expiration of the DO to February 28, 2012, by virtue of legislative action in 2007; approving the reduction in residential units from 4,400 to 3,800; determining that the proposed revisions in the NOPC to create a new Cluster 35 and transfer 561 dwelling units to that Cluster are inconsistent with one objective and two policies of the County Comprehensive Plan; determining that the new Master Development Plan (which creates a new Cluster 35 and transfers 541 units) is inconsistent with criteria in LDC sections

03.02.04.F.1. and 2.; and determining that Petitioners have no vested right to construct up to 561 dwelling units on 12 acres of land located in the Ocean Hammock Golf Course that is now platted and restricted in perpetuity for golf course purposes only.

DONE AND ENTERED this 6th day of April, 2011, in Tallahassee, Leon County, Florida.



D. R. ALEXANDER
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of April, 2011.

ENDNOTE

1/ The exhibits offered by Admiral did not correlate in all respects with the exhibit numbers used in the parties' stipulation or the exhibit list in the Admiral exhibit binder. For ease of reference, Admiral Exhibits 1-5 correlate to the exhibits under tabs 1-5 in its exhibit binder; Admiral Exhibits 6A-6D are special warranty deeds not listed in the exhibit binder; the exhibit found under tab 6 in the exhibit binder has been renumbered Admiral Exhibit 7; and the exhibit found under tab 8 in the exhibit binder has been renumbered as Admiral Exhibit 11.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.