IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CIVIL DIVISION AG

1000 FRIENDS OF FLORIDA, ALERTS OF PBC, INC., ROBERT SCHUTZER, and KAREN SCHUTZER,
Plaintiffs,

v. Case No. 502014CA014424XXXXMB

PALM BEACH COUNTY,
Defendant,
and

MINTO PBLH, LLC,
Intervenor-Defendant.
_____/

FINAL SUMMARY JUDGMENT

THIS CAUSE came before the Court April 18, 2016, upon Defendant Palm Beach County and Intervenor-Defendant Minto PBLH, LLC's Joint Motion for Summary Judgment (hereinafter "Defendants' Motion"). All parties were ably represented by counsel.

Plaintiffs originally filed their Complaint on December 3, 2014, pursuant to § 163.3215, Fla. Stat., alleging that three development orders issued by Palm Beach County ("County") for Minto PBLH's ("Minto") property are inconsistent with two policies in the County's Comprehensive Plan ("Plan"). Plaintiffs have amended their Complaint four times.

The challenged development orders are Resolution No. 2014-1646, which rezones the Minto property from Agricultural Residential and Public Ownership to Traditional Town Development, and Resolutions Nos. 2014-1647 and 2014-1648, which approve "hotel" and "college" respectively, as requested uses on the Minto Property (collectively the "development orders").

The Minto property has been designated by the Comprehensive Plan with the Agricultural Enclave Future Land Use Designation ("AGE") since 2008. Prior to adopting the development orders at issue, the County amended the Plan to include an AGE site specific amendment that increased the density and intensity of the Minto property under the Plan's Future Land Use Map. The AGE site specific amendment included a Conceptual Plan and Implementing Principles for the Minto Property. At the same time, the County amended the Plan's Future Land Use Element policies governing the Agricultural Enclave Future Land Use Category, including FLUE Policies 2.2.5-d, e, f and g ("AGE Plan Policies"). These amendments were all unsuccessfully challenged in an administrative action, were upheld by the First District Court of Appeal,[1] and are now in effect.

Plaintiffs admit that the development orders are consistent with the AGE site specific amendment in the Plan, including the adopted Conceptual Plan and Implementing Principles. *See* Plaintiffs' Joint Response in Opposition to Defendants Joint Motion for Summary Judgment at page 27, footnote 7. Plaintiffs have not alleged that the development orders are inconsistent with any of the AGE Plan Policies.

Plaintiffs allege that the development orders are inconsistent with two specific policies of the Plan: Future Land Use Element Policy ("FLUE") 1.4-a, and Transportation Element ("TE") Policy 1.4-r. *See* Plaintiffs' Fourth Amended Complaint ¶¶41-45.

FLUE Policy 1.4-a of the Plan states:

> The County shall protect and maintain the rural residential, equestrian and agricultural areas within the Rural Tier by:
>
> 1. Preserving and enhancing the rural landscape, including historic, cultural, recreational, agricultural, and open space resources;

[1] *Schutzer v. Palm Beach Cnty.*, Case No. 1D15-3659, (Fla. 1st DCA, March 31, 2016).

> 2. Providing facilities and services consistent with the character of the area;
>
> 3. Preserving and enhancing natural resources; and,
>
> 4. Ensuring development is compatible with the scale, mass, intensity of use, height, and character of the rural community.

TE Policy 1.4-r states:

> To further protect the Rural Tier communities from the impacts of surrounding development and to prevent encroachment of incompatible uses, proposed roads which are intended to serve as arterials or collectors and which pass through existing rural communities shall be aligned, where feasible, along the periphery of the existing community and not sited so that they bisect rural communities.

In their Joint Motion for Summary Judgment, Defendants argue that, as a matter of law, the development orders are consistent with FLUE Policy 1.4-a and TE Policy 1.4-r because these Policies are general Rural Tier Policies that the Plan, in FLUE Policy 2.2.5-d, says do not govern Agricultural Enclaves such as the Minto property.

FLUE Policy 2.2.5-d of the Plan states:

> The County shall recognize Agricultural Enclaves pursuant to Florida Statutes section 163.3162(4) by assigning the Agricultural Enclave (AGE) Future Land Use Designation through a Future Land Use Amendment process in accordance with the procedures set forth in Florida Statutes Chapter 163 for Agricultural Enclaves. **An AGE site specific amendment that incorporates appropriate new urbanism concepts and supports balanced growth may occur in the Rural Tier and may exceed rural densities and intensities. To the extent an AGE site specific amendment conflicts with the policies of the Rural Tier, the site specific amendment approval shall be governed by this policy and policies 2.2.5-e, 2.2.5-f, and 2.2.5-g.[2] The site specific plan amendment ordinance adopting an Agricultural Enclave**

[2] It is not in dispute that the Development Orders are consistent with the Conceptual Plan and Implementing Principles adopted as part of the AGE site specific map amendment for the Property. It is also uncontested that the Development Orders are consistent with FLUE Policies 2.2.5-d, 2.2.5-e, 2.2.5-f, and 2.2.5-g.

> **future land use shall include a Conceptual Plan and Implementing Principles.** The Conceptual Plan shall include a Site Data table establishing an overall density and intensity for the project, as well as minimum and/or maximum percentages for the acreages of the Transects shown on the Plan and other maximum percentages for the acreages of the Transects shown on the Plan and other binding standards. The Conceptual Plan and Implementing Principles can only be revised through the Future Land Use Atlas amendment process. **All development orders must be consistent with the adopted Conceptual Plan and Implementing Principles**. Agricultural uses shall be permitted until such time as a specific area of the Enclave physically converts to the uses permitted by such development orders. Agricultural uses shall be permissible after conversion to the extent indicated on the Conceptual Plan. Outparcels lying within and surrounded by a qualifying agricultural enclave may also be assigned the AGE Future Land Use Designation."

In response, Plaintiffs argue that FLUE Policy 1.4-a and TE Policy 1.4-r apply to the development orders notwithstanding FLUE Policy 2.2.5-d, and that there are material issues of fact in dispute regarding the consistency of the proposed density and intensity of the project with the nature of the surrounding community. It is undisputed that the surrounding community lies within the Exurban Tier.

The question before the Court is whether, as a matter of law, the development orders are consistent with FLUE Policy 1.4-a and TE Policy 1.4-a of the County's Plan.

Section 163.3194(1)(a), Fla. Stat., mandates that once a comprehensive plan, or any provision thereof is adopted, all development orders issued by the local government, including the zoning resolutions at issue in this case, must be consistent with all provisions of the Comprehensive Plan.

Plaintiffs have correctly stated the applicable standard of review governing consistency challenges before this Court. The standard of judicial review in a § 163.3215 consistency challenge is non-deferential *de novo* strict scrutiny. *Bd. of Cnty Comm'rs of Brevard Cnty. v.*

Snyder, 627 So. 2d 469, 475 (Fla. 1993). As explained in *Machado v. Musgrove*, 519 So. 2d 629, 632 (Fla. 3d DCA 1987):

> The term strict scrutiny arises from the necessity of strict compliance with the comprehensive plan, and the standard is a process whereby a court makes a detailed examination of a[n] order of a tribunal for exact compliance with, or adherence to, a standard or norm. It is the antithesis of a deferential review.

While Plaintiffs have stated the correct standard of review, their arguments ignore specific language of the Plan and the applicable rules of statutory construction that require this Court to strictly apply the plain language of the Plan to the development orders at issue. As noted by the Fourth District Court of Appeal, "[i]n order to determine if the development order is consistent with the policy of the comprehensive plan, we have to look at the plain language of the policy. We apply the same rules of construction to a comprehensive plan that we would apply to other statutes." *1000 Friends of Fla., Inc. v. Palm Beach Cnty.*, 69 So. 3d 1123, 1126 (Fla. 4th DCA 2011). The rules of statutory construction require this Court to give the words of the Plan their plain and ordinary meaning. *Rinker Materials Corp. v. City of North Miami*, 286 So. 2d 552, 553-54 (Fla. 1973); *see also*, *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976).

The language of Policies FLUE 1-4.a and TE 1.4-r is clear that these Policies govern the Rural Tier only.

The language of FLUE Policy 2.2.5-d of the Plan is also clear. It establishes the relationship between the AGE Future Land Use and the Rural Tier policies. Policy 2.2.5-d begins by stating that "[a]n AGE site specific amendment that incorporates appropriate new urbanism concepts and supports balanced growth may occur in the Rural Tier and may exceed rural densities and intensities." This is a clear statement of the County's intention to permit higher

density and intensity within agricultural enclaves in the Rural Tier than ordinarily permitted in order to achieve specific planning goals such as new urbanism and balanced growth.

To implement the AGE planning form in the Rural Tier, the County reconciles the Rural Tier Policies with the AGE Plan Policies expressly in FLUE Policy 2.2.5-d:

> [T]o the extent an AGE site specific amendment ***conflicts with the policies of the Rural Tier***, the site specific amendment approval shall be governed by this policy and policies 2.2.5-e, 2.2.5-f, and 2.2.5-g.

This language plainly states that the County has carved out Agricultural Enclaves from the application of the Plan's general Rural Tier Policies to achieve specific planning goals through the AGE site specific amendment and the AGE Policies.

FLUE Policy 2.2.5-d is equally clear that development orders adopted for property designated with the AGE future land use category must be consistent with the AGE site specific amendment and the Conceptual Plan and Implementing Principles adopted as part of the site specific amendment. The Policy states that:

> The site specific plan amendment ordinance adopting an Agricultural Enclave future land use shall include a Conceptual Plan and Implementing Principles. … All development orders must be consistent with the adopted Conceptual Plan and Implementing Principles.

The plain language of FLUE Policy 2.2.5-d makes clear that the development orders at issue are governed by the AGE site specific amendment and the AGE Plan Policies, which prevail over any conflicting language in the general Rural Tier Policies. It is not unusual for comprehensive plans to include both general language governing a large area and specific language that makes exceptions to the general policies for specific projects aimed at achieving specific goals. *See Stroemel v. Columbia Cnty.*, 930 So. 2d 742, 746 (Fla. 1st DCA 2006) (noting that "[w]here there is in the same statute a specific provision, and also a general one

which in its most comprehensive sense would include matters embraced in the former, the particular provision must control"). Such language does not create an inconsistency within the Plan or as to development orders adopted pursuant to it.

Applying the applicable rules of statutory construction to the relevant language in FLUE Policies 1.4-a and 2.2.5-d, and TE Policy 1.4-r, this Court concludes that FLUE Policy 1.4-a and TE Policy 1.4-r are general Rural Tier Policies that do not govern the development orders at issue in light of the AGE site specific amendment and the specific AGE Plan Policies. Because it is not in dispute that the development orders are consistent with AGE site specific amendment and the AGE Plan Policies, this Court finds that the development orders are consistent with the Comprehensive Plan.

Plaintiffs' assertion that there are material facts in dispute rests on allegations that the density and intensity permitted by the development orders are inconsistent with the surrounding Exurban Tier community and that the development orders require new roads to be constructed within the Exurban Tier Community. Preliminarily, Policy 2.2.5-d expressly provides that the density and intensity of an AGE site specific amendment may exceed Rural Tier densities and intensities to achieve other planning goals. The AGE site specific amendment has established a density and intensity for this property, and it is undisputed that the development orders are consistent with the AGE site specific amendment. Therefore, as a matter of law, the density and intensity of the development orders are consistent with the Plan.

The rest of Plaintiffs' arguments, including their allegations regarding new roads within the surrounding community, rest on an application of FLUE Policy 1.4-a and TE Policy 1.4-r to the surrounding community, which is in the Exurban Tier. This application of the Policies requires this court to insert the word "Exurban" into the language of the Policies. By their own

terms, Policy 1.4-a applies "within the Rural Tier," and Policy 1.4-r applies to "protect the Rural Tier communities." The words "Exurban Tier" do not exist in these Policies and they cannot added by the Court. As stated by the Florida Supreme Court in *Rinker Materials Corp.*:

> [C]ourts generally may not insert words or phrases in municipal ordinances in order to express intentions which do not appear, unless it is clear that the omission was inadvertent, and must give to a statute (or ordinance) the plain and ordinary meaning of the words employed by the legislative body.

286. 2d at 553.

The fact that the County has several distinct Policies within its Plan that govern the Exurban Tier (which can be found under Objective 1.3 in the Future Land Use Element) also persuades the Court that neither FLUE Policy 1.4-a or TE Policy 1.4-r was intended to apply to the Exurban Tier. "When the legislature has used a term as it has here, in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded. The legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended." *Gabriele v. School Bd. of Manatee Cnty.*, 114 So. 3d 477 (Fla 2d DCA 2013).

Plaintiffs' attempt to apply Rural Tier Policies 1.4-a and TE Policy 1.4-r to the Exurban Tier through the reference to "rural community" and "rural communities" in the Policies respectively, similarly must fail. The plain language of the Policies makes clear that "rural communities" as used therein mean only those rural communities within the Rural Tier.

Plaintiffs' proffered interpretation of FLUE Policy 2.2.5-d is also unpersuasive because it would require this Court to read the language of the Policy to create an internal inconsistency in the Plan. As acknowledged in their Joint Response on page 27 at footnote 7, Plaintiffs' interpretation of the Policy would result in a development order that cannot be consistent with

the AGE site specific amendment for the property because it must be consistent with the Rural Tier policies. This interpretation defies the plain language of Policy 2.2.5-d, would render the plain language of the Policy meaningless, and would lead to an absurd result. Courts must refrain from interpreting statutes in this way:

> As a fundamental rule of statutory interpretation, courts should avoid readings that would render part of a statute meaningless. Furthermore, whenever possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another. This follows the general rule that the legislature does not intend to enact purposeless and therefore useless, legislation.

Unruh v. State, 669 So. 2d 242, 245 (Fla. 1996); *see also*, *M.D. v. State*, 993 So. 2d 1061, 1063 (Fla. 1st DCA 2008) ("Another basic rule of statutory construction requires a court to avoid a literal interpretation that would result in an absurd or ridiculous conclusion.").

Plaintiffs referenced a number of Plan provisions in their Joint Response and at hearing that are outside of their Fourth Amended Complaint. As stated in this Court's ruling in *Johnson v. Space Coast Credit Union*, "issues that are not pled in a complaint cannot be considered by the trial court at summary judgment hearing." 184 So. 3d 1247, 1249 (Fla. 4th DCA 2016); *see also*, 925 So. 2d 1096, 1101 (Fla. 3d DCA 2006).

Finally, the Second District Court of Appeal decision in the *Howell v. Pasco Cnty.*, 165 So. 3d 12 (Fla. 2d DCA 2015), presented to this Court at hearing, does not require this Court to hold in Plaintiffs favor. In *Howell*, conflicting expert opinions were presented at the summary judgment hearing on the issue of whether the development orders were consistent with the comprehensive plan. The Second District Court of Appeal reversed the trial court's entry of summary judgment because "there was a disputed issue of material fact that could be resolved only by weighing the credibility of the experts and their opinions – something that is not

permitted in a summary judgment proceeding." This Court's decision is not based on the weighing of evidence. Rather, it is based on this Courts' interpretation of the Plan itself. This is an issue of law and is a proper basis for issuing a summary judgment. *See Bay Cnty. v. Town of Cedar Grove*, 992 So. 2d 164, 167 (Fla. 2008) and *Arbor Properties, Inc. v. Lake Jackson Prot. Alliance, Inc.*, 51 So. 3d 502, 505-06 (Fla. 1st DCA 2010).

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Defendants' Motion is hereby **GRANTED**. Final Summary Judgment is entered in favor of Defendants Palm Beach County and Minto PBLH, LLC. Plaintiffs shall take nothing from this action and Defendants shall go hence without delay.

This Court reserves jurisdiction to consider an award of costs and attorneys fees.

DONE AND ORDERED this 26 day of April, 2016, in Chambers at West Palm Beach, Palm Beach County, Florida.

Honorable Edward A. Garrison
Acting Circuit Judge

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