IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

STEVEN NORDBECK, ET AL,

Plaintiffs,

v.

HILLSBOROUGH COUNTY, FLORIDA

Defendant.
_____/

CASE NO.: 2022-CA-4745

DIVISION: C

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION

Defendant, Hillsborough County, Florida ("County"), by and through its undersigned attorney, files its Memorandum of Law in Opposition to Plaintiffs' Emergency Motion for Temporary Injunction, and states:

Background

In its Emergency Motion, Plaintiffs seek to compel the County to suspend the approval of a subdivision construction plan that was issued by the County on May 5, 2022, ("2022 Construction Plan Approval") for the construction of a 194-unit residential development in the vicinity of Keystone-Odessa, in unincorporated Hillsborough County. Plaintiff has brought a challenge under Section 163.3215, Florida Statutes, alleging that the 2022 Construction Plan Approval materially alters the density and intensity of the subject property in a manner that is inconsistent with

the Hillsborough County Comprehensive Plan ("Comprehensive Plan"). Of primary importance in this matter, however, is that the 2022 Subdivision Construction Plan does not materially alter the density or intensity of the subject property at all—such material alteration actually occurred with the rezoning of the subject property thirty years earlier—and that the 2022 Construction Plan Approval is therefore not subject to a Section 163.3215 challenge.

Pertinent Facts

1. On or about October 10, 1991, the Hillsborough County Board of County Commissioners ("Board") approved RZ 91-0136-N ("1991 Zoning Approval"), allowing residential development not to exceed a density of one dwelling unit per gross acre on the subject, 209-acre property.
2. Thirty years later, following a submittal of a subdivision construction plan by the owner of the subject property, Taylor Morrison of Florida, Inc. ("Taylor Morrison"), County staff issued the 2022 Construction Plan Approval on or about May 5, 2022, allowing Taylor Morrison to begin construction on 194 residential units on the subject property, consistent with the conditions that were approved in the 1991 Zoning Approval.
3. Plaintiffs subsequently filed an action under Section 163.3215, Florida Statutes, claiming that the 2022 Construction Plan Approval is inconsistent

with the Hillsborough County Comprehensive Plan, and that said approval constitutes a development order subject to challenge under the statute.

Memorandum of Law

Defendant does not dispute Plaintiffs' general assertion that "[g]ranting or refusing an application for temporary injunction rests within the court's sound judicial discretion." *Muss v. City of Miami Beach*, 312 So.2d 553 (3rd DCA 1975). As the Court is aware, a temporary injunction may be entered if the party seeking the injunction establishes the following criteria: (1) the likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) a substantial likelihood of success on the merits; and (4) considerations of the public interest. However, as further refined by the *Muss* court, such discretion must be "guided by established rules of the principles of equity jurisprudence, in view of the particular facts presented in each case," *Muss* at 554. Moreover, the "issuance of a preliminary injunction is an extraordinary remedy which should be granted sparingly." *Yardley v. Albu*, 826 So.2d 467 (5th DCA 2002).

As the Plaintiffs' Emergency Motion for Temporary Injunction is not verified, the court must conduct an evidentiary hearing prior to granting injunctive relief. *Rittirucksa v. Barrette,* 254 So.3d 1194, 1194 (Fla. 5th DCA 2018). *See also* *Delbrouck v. Eberling*, 177 So.3d 66, 68-69 (Fla 4th DCA 2015).

The County contends that the development order in question (the 2022 Construction Plan Approval) is not subject to challenge under Section 163.3215, Florida Statutes, that Plaintiffs cannot as a matter of law succeed on the merits of their Amended Complaint, and that Plaintiffs motion for temporary injunction must therefore be denied.

1. Plaintiffs lack a substantial likelihood of success on the merits of their claims.

Section 163.3215, Florida Statutes, allows a de novo statutory challenge to certain types of development orders, as set forth in section 163.3215(3), Florida Statutes. However, the statute is limited by its terms, and only allows for a challenge to:

> any decision of such local government granting or denying an application for, or to prevent such local government from taking any action on, ***a development order***, as defined in s. 163.3164 ***which materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan*** adopted under this part.

§ 163.3215(3), Fla. Stat. (2021) (emphasis added). Where an "aggrieved or adversely affected party" properly states a cause of action under its requirements, a challenger must establish a new record before the circuit court on the issue of whether the decision is inconsistent with the Comprehensive Plan.

A "development order" covers broadly any order granting, denying, or granting with conditions an application for a "development permit." § 163.3164(15), Fla. Stat. A "development permit" is defined as "any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land." § 163.3164(16), Fla. Stat.

A development order challenged under section 163.3215, Florida Statutes must "materially alter the use, density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan." *Heine v. Lee County*, 221 So. 3d 1254, 1257 (Fla. 2d DCA 2017). In the lower court case, the Heines sued Lee County on the basis that a resolution approving a rezoning of the property to "Compact Planned Development" failed to comply with the county's comprehensive plan based on a failure to include enforcement conditions for the construction of a minimum square footage of commercial space and minimum residential density requirements, failure to ensure installation of plantings, buffers, and landscaping using xeriscape principles, failure to ensure that there will be a mix of housing types, failure to obtain prior approval by the University, failure to give adequate consideration to noise, security, and visual impacts on the property, and failure to meet the 2010 plan amendment's safety requirements pertaining to the University. *Id.* at 1256. The lower court determined that the Heines' challenge on these bases

was not within the scope of the Consistency Statute, section 163.3215, Florida Statutes. In reviewing the decision of the lower court, the Second District affirmed the lower court and held that the types of claims allowed under section 163.3215 are not unlimited:

> The statute authorizes an aggrieved party to bring an action to challenge a development order that "materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan. § 163.3215(3). ***A plain reading of this text*** compels us to conclude, as did the trial court, that the Heines' challenges to the rezoning resolution do not fall within the ken of these three areas.

Id. at 1257 (emphasis added). Significantly, *Heine* holds that Section 163.3215, Florida Statutes, will not be broadened in scope from its plain language. *Id.*

Another case which discusses the scope of claims allowed under section 163.3215, Florida Statutes, is *O'Neil v. Walton County.* 149 So. 3d 699. (Fla. 1st DCA 2014). In *O'Neil*, a development order approving a 20-unit planned development was challenged under section 163.3215. The First District Court of Appeal affirmed a summary judgment entered in favor of Walton County because any alteration to the use of the property was approved in an earlier development order which was not timely challenged. *Id*. at 701. The challenger could not identify any material alterations to the property not addressed in the earlier and

unchallenged development order. Because section 163.3215 "is predicated upon a showing of material alteration of property inconsistent with a Comp Plan," the challenge failed to meet the requirements of the statute. *Id*.

Plaintiffs assert in their Amended Complaint that the 2022 Construction Plan Approval "materially alters the density and intensity allowed on the property." This is incorrect on its face. It is, in fact, the 1991 Zoning Approval, voted on by the Board more than thirty years ago, that materially altered the density and intensity allowed on the subject property; the 2022 Construction Plan Approval merely implements the one-residential-unit-per-gross-acre entitlements that were approved as part of the 1991 Zoning Approval. Therefore, the remedy the Plaintiffs seek under Section 163.3215, Florida Statutes, is inapplicable because the 2022 Construction Plan Approval does not materially alter the density and intensity allowed on the property, and so does not constitute a development order that is subject to a Section 163.3215 challenge. Like in O'Neil, Plaintiffs are not challenging the appropriate development order. *Id*.

Plaintiffs further allege that the 1991 Zoning Approval is inconsistent with the Comprehensive Plan; specifically contending that it is inconsistent with the Keystone-Odessa Community Plan, which was originally adopted into the Comprehensive Plan in June 2000. But this allegation fails for several reasons. First, the 1991 Zoning Approval was October 8, 1991, and so the thirty-day statutory filing

period for relief under Section 163.3215 has long since passed. That alone is dispositive of Plaintiffs' claim regarding the 1991 Zoning Approval. Additionally, however, it should be noted that through its adoption of Resolution # RR 92-0823 in 1991, the Board expressly found that the 1991 Zoning Approval was "consistent with the goals, policies and objectives of the Comprehensive Plan enacted by the Board… pursuant to the authority contained in Chapter 75-390, Laws of Florida (1975), as amended, and Part II of Chapter 163, Florida Statutes…"; the 1991 Zoning Approval was therefore determined to be consistent with the Comprehensive Plan that was in effect as of the date of its approval. [attach resolution] Moreover, the text of the Keystone-Odessa Community Plan itself expressly states that its "adopted provisions do not apply to *previously approved planned developments*, previously approved subdivision, or any project with unexpired preliminary site development approval prior to… August 1, 2002," which was the effective date of land development regulations that were enacted to effectuate the guidelines of Keystone-Odessa Community Plan.

Plaintiffs, therefore, fail this criterion for injunction.

2. Plaintiffs are not materially or irreparably harmed by the 2022 Construction Plan Approval.

Plaintiffs allege that, absent an injunction, the 2022 Construction Plan Approval will cause them to suffer irreparable harm because the work being done

by Taylor Morrison is permanent and irreparable; rural land is being altered; trees are being removed; and utility lines are being extended. In their Amended Complaint, Plaintiffs more specifically allege being harmed by increased traffic, noise, health and safety issues, diminished property values, light pollution, and loss of peaceful and quiet enjoyment of rural residential property. However, only four of the fifteen plaintiffs live adjacent to the Taylor Morrison property, while the remainder live anywhere from two to nine miles from said property. Additionally, Plaintiffs seem to acknowledge that as many as 173 residential units can be constructed on the Taylor Morrison property, as opposed to the 194 residential units that were permitted under the 2022 Construction Plan Approval. Therefore, the irreparable harm that the Plaintiffs contend they will suffer arises from the construction of as few as 21 additional residential units located miles away from most of them.

Far more importantly, however, is the fact that the 2022 Construction Plan Approval merely implements the zoning entitlements that were previously approved as part of the 1991 Zoning Approval, which is the actual development order that altered the density and the intensity of the Taylor Morrison property.

Plaintiffs, therefore, fail this criterion for injunction.

3. Plaintiffs fail to allege that there exists no adequate legal remedy at law to address their injuries.

Plaintiffs assert that no adequate remedy at law exists to prevent the "immediate danger of construction of a subdivision" and the extension of utilities into the rural area. Again, in their Amended Complaint, Plaintiffs specifically allege being harmed by increased traffic, noise, health and safety issues, diminished property values, light pollution, and loss of peaceful and quiet enjoyment of rural residential property. Again, Plaintiffs do not allege that no residential development can occur on the Taylor Morrison property; they even go so far as to acknowledge that as many as 173 residential units may be permittable. Therefore, the Plaintiffs are claiming that no adequate remedy at law exists to address their injuries allegedly caused by as few as 21 additional residential units. Diminution of property value is certainly a quantifiable injury, and the remaining injuries alleged are vague and speculative.

Plaintiffs, therefore, fail this criterion for injunction.

4. A temporary injunction would not serve the public interest.

In the present case, Plaintiffs seek to halt the lawful development of property that was properly zoned over thirty years ago. Such a result, were it applied across unincorporated Hillsborough County, would inevitably create confusion among property owners as to whether past zoning approvals remain valid. The uncertainty

and instability that would arise from such a result would clearly be contrary to the public interest.

Plaintiffs, therefore, fail this criterion for injunction.

Conclusion

For all of the reasons presented, Plaintiffs' Motion for Temporary Injunction should be denied.

/s/ Cameron S. Clark
Cameron S. Clark, Esquire
Sr. Assistant County Attorney
Florida Bar No. 0365660
Mary J. Dorman, Esquire
Sr. Assistant County Attorney
Florida Bar No. 0917222
Robert E. Brazel, Esquire
Chief Assistant County Attorney
Florida Bar No. 0866430
Office of the County Attorney
Post Office Box 1110
Tampa, Florida 33601-1110
(813) 272-5670
Fax: (813) 272-5758
Attorneys for Defendant
Service Emails:
ClarkC@hillsboroughcounty.org
DormanM@hillsboroughcounty.org
BrazelR@hillsboroughcounty.org
MeyersR@hillsboroughcounty.org
JohnsonNi@hillsboroughcounty.org
BrownD@hillsboroughcounty.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 12, 2022, the foregoing Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for Temporary Injunction was filed via the Florida Courts E-Filing Portal and thereby has been provided to all counsel of record.

/s/ Cameron S. Clark
Cameron S. Clark, Esquire
Sr. Assistant County Attorney