IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR THE STATE OF FLORIDA
CIVIL DIVISION

STEVEN NORDBECK and MELISSA NORDBECK, husband and wife;
TIFFANY URENA; ELIZABETH WHITE;
TROY GOLDBERG; GERALD COSENTINO
and LYNN COSENTINO, husband and wife;
MATTHEW MONROE and MISTY MONROE,
Husband and wife; WARD NETSCHER;
BRIAN MURPHY and TARA MURPHY,
Husband and wife; WILLIAM A. JAMIESON;
PAUL J. GIANNOTTI; and BRANDON PERTILE,

Plaintiffs,

Case No. 2022-CA-4745
Division B

v.

HILLSBOROUGH COUNTY, FLORIDA, a
political subdivision of the State of Florida,

and

TAYLOR MORRISON OF FLORIDA, INC.

Defendants.

FINAL JUDGMENT

This cause came before the Court for a three-day non-jury trial on November 13-15, 2023. The Court, having considered the pleadings, memoranda, witness testimony, documentary evidence, argument of counsel, the Court file, and applicable law, finds and rules as follows:

Procedural Background

1. Count I of Plaintiffs' Complaint[1] (Doc. 209) brought a claim under Section 163.3215 and Chapter 86, Florida Statutes, seeking declaratory relief that a Subdivision Construction Plan Approval ("Construction Permit") issued by the County's Development Services for Taylor Morrison's single-family home subdivision development is a development order that materially

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[1] The operative complaint is the Second Amended Complaint filed April 20, 2023. (Doc. 209). The Court previously entered summary judgment on Count II of the Second Amended Complaint. (Doc. 257).

alters the use, density, or intensity of use on Taylor Morrison's property in a manner that is inconsistent with the County's Comprehensive Plan.

2. The owner and developer of the subject property, Taylor Morrison, was allowed to intervene as a party defendant. (Doc. 22).

Findings of Fact

3. The parties stipulated that at least one of the Plaintiffs has standing. (Doc. 264).

4. At a public hearing in October 1991, the Board of County Commissioners approved a Planned Development (PD) rezoning of the property. County staff, a zoning hearing master, and, ultimately, the Board of County Commissioners found the 1991 PD zoning application compliant with the County's Comprehensive Plan and land development code. The 1991 PD Zoning was not challenged. This 1991 PD Zoning approval contained a list of required conditions of development on the property and a General Site Plan. (Ex. J4).

5. Because the development has already been determined to be consistent with the Comprehensive Plan, subsequent development permits are reviewed against any conditions in the approved PD zoning, as well as the County's land development regulations (its "Land Development Code") and technical manuals, which are adopted to implement and be consistent with the Comprehensive Plan. (*Id.*; Ex. P10 at pp. 11-12); *see also* Fla. Stat. § 163.3213(6) (providing that where a land development regulation is not challenged within 12 months of adoption, it shall be deemed consistent with the comprehensive plan).

6. The land use and zoning side of development is the phase at which entitlements of use, density, and intensity are established for a property, and the permitting side is the implementation of those established entitlements in accordance with the zoning on the property and the County's Land Development Code and technical manuals. (T. 441-42, 448-50). As noted above,

subsequently issued permits must comply with the PD zoning and land development regulations which have already been determined to be consistent with the Comprehensive Plan. The Comprehensive Plan is not retroactively applied to development that has previously been approved under the Planned Development zoning. (T. 453-54, 567, 593-94, 643-44).

7. On June 14, 2021, the County issued its Preliminary Plat approval. (Ex. J9 and J10). A certified survey was submitted in connection with the Preliminary Plat application, and the Preliminary Plat established the precise 1991 PD Zoning acreage of 194.33 acres, as well as details of the site layout. (Ex. J10). The Preliminary Plat was not challenged.

8. On May 5, 2022—approximately one year after the Preliminary Plat had been approved—the County's Development Services department issued the challenged Construction Permit that implemented the PD zoning approved in 1991. (Ex. J12 and J13). Plaintiffs challenged this permit.

9. Six months later on December 15, 2022, the County issued a revised Subdivision Construction Plan Approval ("Revised Construction Permit"), approving Taylor Morrison's application for a revised preliminary plat approval and authorizing construction pursuant to the revised construction plans. (Ex. J16 and J17). The Revised Preliminary Plat and Revised Construction Permit principally made drainage changes and adjusted some lot lines to create areas for landscape buffering along the internal roads of the community. (T. 405-06). Plaintiffs did not file a separate challenge to the December 2022 revised plat approval.

10. The 1991 PD Zoning established the use and density of the property as a single-family residential subdivision with the maximum *density* of one unit per acre on the property. Intensity of use of a single-family residential development is generally a product of its density (more units means more impacts on the property), and the 1991 PD Zoning also included the requirement that the development "shall be served by public water and wastewater services," and a condition

limiting access to Buck Lake to lots adjacent to the lake. (Ex. J4; T. 187, 460-62). The Construction Permit did not change the use, density, or intensity of use that was authorized by the 1991 PD Zoning. (T. 470-72, 640-41). The Construction Permit merely implemented the development rights that were authorized by the 1991 PD Zoning.

12. Plaintiff's witness Sean Parks testified that the Construction Permit purportedly allowed community access to Buck Lake and therefore increased the intensity of use. (T. 311:16-312:1). The 1991 PD Zoning included a condition providing, "Access to Buck Lake shall only be permitted to those lots that are adjacent to Buck Lake." (Ex. J4).

13. The 1991 PD Zoning's General Site Plan includes an arrow pointing across the boundary line of the PD Property onto the adjacent parcel to the northwest that abuts Buck Lake ("Adjacent Parcel"). (Ex. J4).

14. Adam Gormly, the County's Development Services Director, testified that the Preliminary Plat was the approval that established the connection point between the PD Property and the Adjacent Parcel, and that the County did not approve access to Buck Lake or even the wetland area around Buck Lake in the Preliminary Plat approval. (T. 467:17-24). The Court notes that, other than providing for access to and from the Adjacent Parcel, nothing regarding the Adjacent Parcel was approved by the County. (Ex. J13).

15. There is no access drive, boardwalk, dock or any other construction or development up to Buck Lake. (Ex. J13). However, the Construction Permit maintains the connection point to the Adjacent Parcel required by the 1991 PD Zoning.

16. The original conditions of approval did not include a condition limiting access to Buck Lake (Ex. J6), but the condition limiting access to Buck Lake was added to address residents' concerns at the public hearing on the rezoning. (T. 614:7-615:10).

17. Issues pertaining to whether the 1991 PD Zoning is "vested" only become relevant if Plaintiffs establish that the Construction Permit is inconsistent with the Comprehensive Plan and materially changed use/density/intensity as required in a section 163.3215 action. Since the adoption of the Resolution, the zoning classification on the property has not been changed, and the County has consistently maintained and confirmed that the property may be developed pursuant to the development rights under the 1991 PD Zoning. (T. 481-83). There was never any zoning conformance hearing for the property in order to "downzone" it, and there was never any process through which the landowner had notice and an opportunity to be heard concerning any efforts by the County to take away the property rights granted by the 1991 PD Zoning. (*Id.*; T. 645-46).

18. For the last three decades, the manner in which the County has interpreted and applied its land development regulations is that a PD zoning approved by the Board by Resolution does not need a "Vested Rights Order." The Keystone Plan specifically provides, "The 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 adoption date." (Ex. P12). Likewise, Section 3.08.02 of the Land Development Code, the implementing land development regulations pursuant to the Keystone Plan, provides that the regulations do not apply to previously approved Planned Developments. (Ex. D13).

19. There was no evidence of any change implemented by the Construction Permit that resulted in an inconsistency with the compatibility provisions of the Comprehensive Plan. The evidence demonstrated that the adjacent and surrounding properties include single-family residential development and that the project was extensively reviewed and found compatible with the surrounding area back in 1991, when the area was less developed than it is now. (T. 665; Ex. J5, J6, J7, J8).

20. The single-family residential use with the larger 1-acre lot sizes abutting the 1-acre lots on adjacent properties was compatible based on the fact that compatibility was reviewed and determined at the time of the 1991 PD Zoning and, since that time, there has been more single-family residential development in the Keystone area. (T. 664-665; Ex. J5, J6, J7, J8). The evidence demonstrated that the project is compatible with the surrounding area.

<u>Conclusions of Law</u>

I. Standing

21. At least one of the Plaintiffs has standing to bring this action pursuant to Section 163.3215(2), Florida Statutes.

II. Although the May 2022 Construction Permit is not the operative development order, having been superseded by the subsequently approved December 2022 Revised Construction Permit, Plaintiffs retain their standing to seek relief under section 163.3215.

22. Section 163.3215(3) provides a cause of action for declaratory and injunctive relief to challenge a local government's "development order." A "development order" means an order granting an application for a "development permit." Fla. Stat. § 163.3164(15). A "development permit" is an "official action of local government having the effect of permitting the development of land." Fla. Stat. § 163.3164(16) (emphasis supplied).

23. Because not all of Plaintiffs' claims were rendered moot by the December 2022 revised site plan, those claims may proceed. *Cf. Nannie Lee's Strawberry Mansion v. City of Melbourne*, 877 So. 2d 793, 794 (Fla. 5th DCA 2004) (where challenge mooted by new city ordinance, court could not provide effectual relief). The situation presented is no different than a prematurely filed proceeding. *Cf. Barco v. School Bd. of Pinellas County,* 975 So. 2d 1116, 1123 (Fla. 2008) (establishing outside limit for filing motion eliminates uncertainty and prejudice created by late

motions); *State v. S.S.,* 8 So. 3d 425, 426 (Fla. 2d DCA 2009) (premature appeal is not subject to dismissal; rather, it matures upon rendition of appealable order).

III. Except as otherwise indicated, the Construction Permit does not materially alter the use, density, or intensity of use of the property, as contemplated by section 163.3215.

24. Section 163.3215(3), Florida Statutes (2022), provides for a cause of action as follows:

> [T]o challenge 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. (Emphasis supplied).

25. The Second District has held, and recently reaffirmed, that to maintain a Section 163.3215 comprehensive plan consistency challenge Plaintiffs must demonstrate that the Construction Permit both: (1) materially alters the use, density, or intensity of use of the property; and (2) that material alteration must be inconsistent with the County's Comprehensive Plan. *Heine v. Lee Cnty.*, 221 So. 3d 1254, 1257 (Fla. 2d DCA 2017); *Conservancy of Southwest Florida, Inc. v. Collier Cnty.*, 352 So. 3d 481, 485-86 (Fla. 2d DCA 2022). Here, Plaintiffs must show that the Construction Permit materially alters the density, intensity, and use approved in the 1991 PD zoning, such that it is inconsistent with the comprehensive plan.

26. Had the Construction Permit materially altered the use, density, or intensity of use that was already allowed on the property by the approved PD zoning, Plaintiffs might be afforded relief. But the Construction Permit was merely a subsequent development order that implemented and was in furtherance of the use, density, and intensity of use that were previously approved by the 1991 PD zoning. Separately, the Construction Permit was also a subsequent development order implementing and in furtherance of what was already approved by the Preliminary Plat.

27. In this case, as in *O'Neil v. Walton County,* 149 So. 3d 699 (Fla. 1st DCA 2014), a prior development order authorized the use, density, and intensity of use of the property. In both cases,

there was no challenge to the prior development order, rather, Plaintiffs filed a 163.3215 challenge to a later, subsequent approval that was implementing and in furtherance of the development rights already authorized by the previous approval -- here the Construction Permit and in *O'Neil* the 2013 Order. Just as with the 2013 Order in *O'Neil*, the subject Construction Permit did not materially alter the use, density, or intensity of development already approved on the property.

28. Although Plaintiffs have not, for the most part, met their burden to show that the Construction Permit materially alters the density, intensity, or use of the approved 1991 PD, the Court finds that the "stub-out" purporting to connect the PD to the Adjacent Parcel for the eventual possible construction of a community center, parking lot, or turnaround, violates the spirit and letter of the 1991 PD's proscription against granting access to Buck Lake to anyone except owners of property on the lake and violates section 163.3215.

IV. No "Vested Rights Order" for the 1991 PD Zoning was required.

29. The Court concludes that the development rights granted under the 1991 PD Zoning are valid and vested, and no "Vested Rights Order" needed to be obtained. *Vanderbilt Shores*, 891 So. 2d at 585; *Persaud Properties FL Investments, LLC, v. Town of Ft. Myers Beach*, 310 So. 3d 493, 495-96 (Fla. 2d DCA 2020); *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10, 15 (Fla. 1976).

IT IS THEREFORE ADJUDGED:

1. Partial summary judgment was previously entered against Plaintiffs on Count II. (Doc. 257).

2. To the extent the Construction Permit authorizes construction on the abutting property in violation of the PD's mandate limiting access to Buck Lake only to owners of property abutting the lake, the Court finds that it both violates the mandate of the PD and constitutes an alteration in the intensity and use of the property not contemplated by the PD zoning. Accordingly, Defendant Taylor Morrison is prohibited from any

such development without express approval of the County. This prohibition includes construction of the stub-out depicted on the Construction Permit.

3. Except as provided above, Final Judgment is entered in favor of Defendants, Hillsborough County, Florida and Taylor Morrison of Florida, Inc. The Court reserves jurisdiction to enforce this Final Judgment and enter such further relief as may be necessary and proper.

DONE and **ORDERED** in Chambers in Tampa, Hillsborough County, Florida on this

_____ day of ______, 2023.

Electronically Conformed 12/14/2023
Mark Wolfe

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The Honorable Mark R. Wolfe

cc: Counsel of Record

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