

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

CIVIL DIVISION

1000 Friends of Florida, a Florida
not-for-profit corporation,
Florida Wildlife Federation, a
Florida not-for profit corporation
and the Jupiter Farms Environmental
Council, Inc., a Florida not-for-profit
corporation d/b/a Loxahatchee River
Coalition, Susan A. Kennedy, an
individual, and Maria Wise-Miller,
an individual,

CASE NO. 502004CA010993XXXXMB AO

Plaintiffs,

vs.

PALM BEACH COUNTY, FLORIDA,
a political subdivision of the State of
Florida, and SCRIPPS RESEARCH
INSTITUTE, INC.,

Defendants.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs, 1000 Friends of Florida, Inc., Florida Wildlife Federation, Jupiter Farms Environmental Council, Inc., d/b/a Loxahatchee River Coalition (“LRC”), Susan A. Kennedy, and Maria Wise (“Plaintiffs”) petition this Court for the Declaration of Partial Summary Judgment in favor of Plaintiffs on Count One of the First Amended Complaint filed on January 26, 2005. In support of this Motion, the Court is shown that:

Count One

1. Count One of the Complaint is summarized as follows:

Resolution R-2004-2101 through R-2004-2105 rendered by Palm Beach County on October 13, 2004 and October 22, 2004 (“the development orders”) were inconsistent at the time of adoption with the Palm Beach County comprehensive plan as follows:

- i. Contrary to applicable law, the County departed from the mandated process when it approved and issued the development orders for the Biotech Research Park before the amendments necessary to change the comprehensive plan to allow such drastic development orders received final approval from the appropriate state agency or Administration Commission.

2. Partial Summary Judgment is requested as to Count 1 or any part thereof to quash resolutions approving a development order, zoning amendments, requested uses, waivers related to the Palm Beach County Biotechnology Research Park (“Biotech Park”), a zoning petition for a research park multi-use site rendered by Palm Beach County on October 13, 2004 and October 22, 2004 (“the development orders”).

REFERENCES

3. References made are to the following pleadings:
 - a. Plaintiffs, 1000 Friends, et al.’s First Amended Complaint for Declaratory and Injunctive Relief is hereinafter referred to as the “Complaint”;
 - b. Defendant, Palm Beach County’s Answer to First Amended Complaint with Affirmative Defenses is hereinafter referred to as the “County’s Answer”; and
 - c. Defendant, Scripps Research Institute, Inc.’s Answer to First Amended Complaint with Affirmative Defenses is hereinafter referred to as “Scripps’ Answer.”

BACKGROUND REGARDING THE DEVELOPMENT ORDERS

4. Plaintiffs assert in their Complaint and Defendants admit in their Answers the following facts regarding the approval of the development orders:

5. On September 20, 2004, at a public hearing, the Palm Beach County Commission approved on first reading Resolutions R-2004-2101, R-2004-2102, R-2004-2103, R-2004-2104,

R-2004-2105, approving development orders, re-zonings, waivers, and requested uses to accommodate the Biotech Research Park at Mecca Farms (Complaint, Paragraph 33; County's Answer, Paragraph 33; Scripps' Answer, Paragraph 33).

6. The second reading and final approval of these items was scheduled for October 5, 2004. However, these items were continued to October 13, 2004 due to the effects of Hurricane Jeanne (Complaint, Paragraph 34; County's Answer, Paragraph 34; Scripps' Answer, Paragraph 34).

7. The aforementioned Resolutions were finally approved by the Palm Beach County Commission at a public hearing on October 13, 2004 and were filed with the Palm Beach County Clerk, and thus rendered, on October 22, 2004 (Complaint, Paragraph 35; County's Answer, Paragraph 35; Scripps' Answer, Paragraph 35).

WHAT THE DEVELOPMENT ORDERS APPROVED

8. There is no dispute regarding the text of the development orders at issue before the Court: (Complaint, Paragraph 39; County's Answer, Paragraph 39; Scripps' Answer, Paragraph 39)

a. **Resolution R-2004-2101** – a Resolution approving a development of regional impact for the Palm Beach County Biotechnical Research Park on Mecca Farms;

b. **Resolution R-2004-2102** – a Resolution approving a Zoning Map amendment (rezoning) for a Research Park Accessory Multi Use Site on land within the Corbett Wildlife Management Area;

c. **Resolution R-2004-2103** – a Resolution approving requested uses within the Biotechnical Research Park, including one or more of the following: 1) college or university; 2) daycare general; 3) dog daycare (2); 4) financial institution (2); 5) hospital or medical center;

6) laboratory, research; 7) school, elementary or secondary; and, 8) removal of excess fill (excavation, type ii);

d. **Resolution R-2004-2104** – a Resolution authorizing a waiver to reduce required separation of excavation from residential land use; and

e. **Resolution R-2004-2105** – a Resolution approving a zoning map from the Agricultural Residential and Special Agricultural Zoning Districts to Planned Industrial Park Development District.

9. The aforementioned zoning resolutions accommodate development of a Biotech Research Park on the property known as Mecca Farms (Complaint, Paragraph 33; County’s Answer, Paragraph 33; Scripps’ Answer, Paragraph 33). Prior to the approval of these resolutions, Mecca Farms was zoned Rural Residential 10 (RR10) which is an inappropriate zoning for the development of a Biotech Research Park and its concomitant ancillary uses (Complaint, Paragraphs 45, 46; County’s Answer, Paragraphs 45, 46; Scripps’ Answer, Paragraphs 45, 46).

THE LOCAL GOVERNMENT COMPREHENSIVE PLANNING AND LAND DEVELOPMENT REGULATION ACT

10. There is no dispute as to the following facts concerning the application of the governing sections of the Local Government Comprehensive Planning and Land Development Regulation Act:

11. Chapter 163, Part II, Florida Statutes, the Local Government Comprehensive Planning and Land Development Regulation Act (“Act”), requires each local government in Florida to prepare and adopt a local comprehensive plan containing mandatory elements that govern future land uses, protection of natural resources, and other issues. §163.3161, et seq., Fla.

Stat. (Complaint, Paragraph 40; County's Answer, Paragraph 40; Scripps' Answer, Paragraph 40).

12. The Act requires that, after a local government has adopted its comprehensive plan, all actions taken by the local government in regard to development orders, and all development, be consistent with the adopted local comprehensive plan and the elements thereof. §§163.3161(5), 163.3184(7), and 163.3194(1)(a), Fla. Stat. (Complaint, Paragraph 40; County's Answer, Paragraph 40; Scripps' Answer, Paragraph 40).

13. The Act defines "development order" as any order granting, denying, or granting with conditions an application for a development permit. § 163.3164(7), Fla. Stat. The Act defines development permit 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(8), Fla. Stat. (Complaint, Paragraph 41; County's Answer, Paragraph 41; Scripps' Answer, Paragraph 41).

14. The challenged approvals constitute development orders under the Act (Complaint, Paragraph 42; County's Answer, Paragraph 42; Scripps' Answer, Paragraph 42).

MOTION FOR SUMMARY JUDGMENT ON COUNT I

**THE DEVELOPMENT ORDERS WERE INCONSISTENT WITH THE
COMPREHENSIVE PLAN AT THE TIME OF ADOPTION**

15. There is no dispute to the fact that the Palm Beach County Comprehensive Plan, in effect on the day the development orders were adopted, contained policies, goals, and objectives inconsistent with the provisions of the development orders. (Complaint, Paragraph 50; County's Answer, Paragraph 50; Scripps' Answer, Paragraph 50.)

16. The future land use designation of the Mecca Farms site at the time of adoption was Rural Residential 10 (RR10) and the site was located within the County's Rural Tier. (Complaint, Paragraph 45; County's Answer, Paragraph 45; Scripps' Answer, Paragraph 45).

17. Under the County's Comprehensive Plan, the Rural Tier is designated for the promotion and encouragement of the continuation of rural uses and agricultural uses and low intensity development, and for the provision of a rural level of service (Complaint, Paragraph 46; County's Answer, Paragraph 46; Scripps' Answer, Paragraph 46).

18. The Comprehensive Plan discourages overdevelopment in the Rural Tier by limiting the provision of services or infrastructure that is incompatible with a rural lifestyle. (PBC Comprehensive Plan, Future Land Use Element (FLUE Objective 1.1(3)) (Complaint, Paragraph 46; County's Answer, Paragraph 46; Scripps' Answer, Paragraph 46).

19. Resolution R-2004-2105, which rezones the Mecca Farms site from "Agricultural Residential and Special Agricultural" to "Planned Industrial Park Development," and each of the related Development Orders, R-2004-2101 through R-2004-2104, will significantly increase the density and intensity on the site and will require major new public investments in capital facilities and related services in the Rural Tier. *See* Resolutions, *supra* (Complaint, Paragraph 50; County's Answer, Paragraph 50; Scripps Answer, Paragraph 50).

20. The County's Future Land Use Policy 1.4-k (FLUE 1.4(k)) clearly directs that "The County shall not make future land use decisions that increase density and/or intensity which would require major new public investments in capital facilities and related services in the Rural Tier."

21. FLUE 1.4(k) directly prohibits proposed rezoning resulting from Resolution R-2004-2105, which Defendants admit will significantly increase the density and intensity on the

site, and will require major new public investments in capital facilities and related services in the Rural Tier (Complaint, Paragraph 50; County's Answer, Paragraph 50; Scripps' Answer, Paragraph 50).

22. FLUE Objective 1.1(3) describes the rural tier containing the Mecca site:

The Rural Tier shall be located outside the Urban Service Area and east of the Water Conservation Areas, Twenty Mile Bend, and the J.W. Corbett Wildlife Management Area, and shall include large tracts of lands, as well as lands platted prior to the adoption of the 1989 Comprehensive Plan with a predominant density of 1 dwelling unit per 10 acres, but less than 1 dwelling unit per 5 acres. These areas shall be afforded rural levels of service.

23. It is not disputed that the resolutions approve a development of regional impact for a biotechnical research park which allows for a biotechnical research park in the Rural Tier allowing research park accessory use zoning including colleges, universities, daycare, dog daycare, financial institutions, hospitals, medical centers, laboratories, research centers, and elementary and secondary schools all of which are inconsistent with the future land use designations in effect for the Mecca property at the time of adoption as outlined above (Complaint, Paragraphs 39, 50; County's Answer, Paragraphs 39, 50; Scripps' Answer, Paragraphs 39, 50).

AS A MATTER OF LAW, DEVELOPMENT ORDERS THAT ARE INCONSISTENT WITH THE APPROVED COMPREHENSIVE PLAN ARE INVALID

24. Section 163.3194(3), Fla. Stat., defines "consistency" as follows:

“(a) A development or land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspect of development permitted by such order or regulation are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.

(b) A development approved or undertaken by a local government shall be consistent with the comprehensive plan if the land uses, densities or

intensities, capacity or size, timing, or other aspects of the development are compatible with or further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.”

25. After a plan amendment has been adopted pursuant to Section 163.3184(9), (10), and (11), Fla. Stat., Section 163.3194(1)(a), Fla. Stat. (2003), requires that all actions taken in regard to development orders shall be consistent with the adopted local comprehensive plan.

26. Section 163.3161(5)-(7), Fla. Stat., provide legislative intent as follows:

“(5) It is the intent of this act that adopted comprehensive plans shall have the legal status set out in this act and that **no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with this act.**

(6) It is the intent of this act that the **activities of units of local government in the preparation and adoption of comprehensive plans, or elements or portions thereof, shall be conducted in conformity with the provisions of this act.**

(7) The provisions of this act in their interpretation and application are declared to be the **minimum requirements necessary** to accomplish the stated intent, purposes, and objectives of this act; **to protect human, environmental, social, and economic resources; and to maintain, through orderly growth and development, the character and stability of present and future land use and development in this state.”** (Emphasis added).

27. The “consistency” requirement established in Section 163.3194(1)(a), Fla. Stat. requires that all actions taken by the local government in regard to development orders be consistent and conform to each relevant element and objective of the local comprehensive plan as adopted. “A Comprehensive Land Use Plan is not a ‘vest-pocket tool,’ for making individual zoning changes based on political vagary.” Machado v. Musgrove 519 So.2d 629 (Fla. 3rd DCA 1987), review denied 529 So.2d 693 (Fla. 1988).

28. An inconsistent development order is void, and must be struck down by the courts, with any construction made pursuant to the order removed or demolished. Pinecrest Lakes v. Shidel, 795 So.2d 191 (Fla. 4th DCA. 2001) review denied 821 So.2d 300 (Fla. 2002).

29. As there is no genuine issue of material fact that the each of the challenged development orders are inconsistent with the adopted Comprehensive Plan in effect on the day they were approved, Summary Judgment should be granted determining that as a matter of law the development orders are inconsistent with the Palm Beach County Comprehensive Plan at the time of adoption. Moreover, as shown below, the “contingent adoption” theory posited by Defendants must be rejected.

**CONTINGENT ADOPTION: INAPPROPRIATELY ATTEMPTS TO CONFORM THE
COMPREHENSIVE PLAN TO THE DEVELOPMENT ORDERS**

30. On October 13, 2004 Palm Beach County adopted six amendments to its Comprehensive Plan that attempt and purport to amend the plan in such a manner that would authorize the approval of said development orders (Complaint, Paragraph 36; County’s Answer, Paragraph 36; Scripps’ Answer, Paragraph 36).

31. By operation of state law, those amendments were not yet legally effective, may not have become legally effective, and could not become legally effective unless and until the taking of subsequent formal action by the State of Florida and, depending upon such state action, the taking of a subsequent formal action by the Palm Beach County Board of County Commissioners. *See* Sections 163.3184(9), (10), and (11), Fla. Stat. (Complaint, Paragraph 36; County’s Answer, Paragraph 36; Scripps’ Answer, Paragraph 36).

32. Under Section 163.3189(2)(a), Fla. Stat., amendments to an adopted comprehensive plan are not legally effective until the State of Florida Department of Community Affairs or the Administration Commission (Governor and Cabinet) issue a final administrative

order determining the amendment to be “in compliance” with the Act (Complaint, Paragraph 56; County’s Answer, Paragraph 56; Scripps’ Answer, Paragraph 56).

33. The proper role of the administrative review process and hearings are to assist in formulating agency action and “not for solely for review of action taken earlier and preliminarily” Boca Raton Artificial Kidney Center v. Department of Health and Rehabilitative Services, 475 So.2d 260, 262 (Fla. 1st DCA 1975); McDonald v. Department of Banking and Financing, 346 So.2d 569, 584 (Fla. 1st DCA 1977).

34. It is undisputed that the development orders issued were evaluated and approved by Palm Beach County based upon plan amendments that were still under state evaluation or the formulation process defined under Boca Raton and McDonald, *supra*, and were not yet found to be “in compliance” by the State and, which were not yet legally effective or solidified (Complaint, Paragraph 54; County’s Answer, Paragraph 54; Scripps’ Answer, Paragraph 54).

35. The development orders contain a clause stating that “[t]his Development Order shall become effective upon the effective date of the amendments to the Palm Beach County Comprehensive Plan adopted in amendment round 2004-04 ERP” (Complaint, Paragraph 54; County’s Answer, Paragraph 54; Scripps’ Answer, Paragraph 54).

36. The Comprehensive Plan Amendments adopted by the County Commission on October 13, 2004 **were not yet effective** or final on the date of the approval of the development orders, because neither the State land planning agency nor the Administration Commission had issued a final order determining the plan amendments to be in compliance with state law. See §163.3189(2)(a), Fla. Stat. (Complaint, Paragraph 56; County’s Answer, Paragraph 56; Scripps’ Answer, Paragraph 56).

37. In fact, the State of Florida, Department of Community Affairs, under its authority under the Local Government Comprehensive Planning and Land Development Act, (Ch. 163, Part II, Fla. Stat.) issued a Notice of Intent to find the proposed amendments *not in compliance* on November 16, 2004 (Complaint, Paragraph 57; County's Answer, Paragraph 57; Scripps' Answer, Paragraph 57).

38. The proposed amendments to the Comprehensive Plan, upon which the development orders are contingently approved, were not yet in effect and would not be in effect until the issuance of a final order by the State of Florida determining the amendments to be "in compliance" with the Local Government Comprehensive Planning and Land Development Regulation Act (Complaint, Paragraph 59; County's Answer, Paragraph 59; Scripps' Answer, Paragraph 59).

39. Moreover, since the language of the development order makes it contingent only on the comprehensive plan amendments in round 2004-04 ERP, changes to the amendments in that round made by the DCA or the County during the formulation period could have rendered the development orders inconsistent. Therefore, since the DCA and the County did not complete the formulation process under Boca Raton and McDonald, *supra*, it was unknown whether the zoning as submitted would have been consistent with the amendments yet to be fully formulated and adopted.

**AS A MATTER OF LAW THE DEVELOPMENT ORDERS ARE INCONSISTENT
WITH THE COMPREHENSIVE PLAN BECAUSE THE AMENDMENTS NECESSARY
FOR CONSISTENCY WERE NOT YET EFFECTIVE**

40. The Comprehensive Plan Amendments did not become effective until May 9, 2005 when the final order of the Department of Community Affairs was issued. 1000 Friends v. Palm Beach County, DOAH Case No. 04-4492GM.

41. As this Court has recognized in its Order of May 17, 2005 in dismissing Larson v. Palm Beach County, Case No. 502004CA011575XXXXMBAO, “Florida Statute 163.3215 establishes the exclusive method for challenging development orders as being inconsistent with a local Comprehensive Plan. Section 163.3125(3) provides in pertinent part as follows:

(3) Any aggrieved or adversely affected party may maintain a de novo action for declaratory, injunctive, or other relief against any local government to 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. The de novo action must be filed no later than 30 days following the rendition of a development order or other written decision, or when all local administrative appeals, if any, are exhausted, whichever occurs later. (Emphasis added).”

42. The development orders at issue are inconsistent with the requirements of Chapter 163 because they are inconsistent with the Comprehensive Plan in effect on the day they were adopted. The “contingent adoption” theory advanced by Defendants cannot be reconciled with the law. As shown by the very plan amendments relied upon by Defendants here - the “2004-04 ERP” plan amendments – such amendments are subject to further amendment and formulation after the date of the 30 day period in which to file challenges to development orders. Therefore, logically, changes to the pending round of comprehensive plan amendments could render the contingent development orders inconsistent with the law, and any challenges thereto would have been time barred. Clearly, this is what the Legislature contemplated when the proper procedure was established in Chapter 163 which makes no provision for contingent development orders used by the County. Thus, the carefully crafted contingent language in the Resolutions does not resolve this procedural deficiency.

43. There are no genuine issues of material fact in regard to the Comprehensive Plan amendment approval process necessary to make the development orders consistent with the Comprehensive Plan. There are also no genuine issues of material fact that the plan amendments necessary to allow the challenged development orders to be consistent with the Plan were not in effect when the development orders were approved. Thus, Plaintiffs should be granted Summary Judgment on the question of whether the challenged development orders were consistent with the Comprehensive Plan.

APPLICABLE LAW GENERALLY

SUMMARY JUDGMENT

44. Summary judgment is appropriate when a case can be resolved as a matter of law, without the need for a trial, when there are no genuine issues of material fact and the application of the relevant law leads to only one conclusion as a matter of law. See Rule 1.510, Fla.R.Civ.P.; Jones v. Stoutenburgh, 91 So.2d 299 (Fla. 1957); See also, Palm Beach County v. Trinity Industries, Inc., 661 So.2d 942 (Fla. 4th DCA 1996); Castle Construction Co. v. Huttig Sash and Door Co., 425 So.2d 573 (Fla. 2nd DCA 1982); Ball v. Florida Podiatrist Trust, 620 So.2d 1018 (Fla. 1st DCA 1993) (same where only legal construction of documents is at issue).

45. Where the law to be construed is the “consistency” requirement established in Ch. 163, Part II, Fla. Stat., courts are to apply “strict scrutiny” to a claim that a development order is consistent with the entire comprehensive plan, and is not to accord any particular deference to the construction or interpretation given by local government, Pinecrest Lakes, *supra*. As the First District explained in Dixon v. City of Jacksonville, 774 So.2d 763 (Fla. 1st DCA 2000) rev. dismissed 831 So.2d 861 (Fla. 2002), strict scrutiny is:

“a process which involves a detailed examination of the development order for exact compliance with, or adherence to, the comprehensive plan.

We reject, moreover, the City's argument that deference should be given to the City's interpretation of a law that it administers, thereby requiring its approval so long as its construction falls within the range of possible interpretations. We are instead presented with a question which is purely one of law, and we are not constrained by more deferential standards from substituting our judgment for that of the lower tribunal.”

46. “Strict scrutiny” without deference, is the standard of review this court must apply to determine whether a development order is consistent with the Comprehensive Plan under §163.3215, Fla. Stat.; Pinecrest Lakes v. Shidel, 795 So.2d 191 (Fla. 4th DCA. 2001) review denied 821 So.2d 300 (Fla. 2002); Bd. of County Comm’rs v. Snyder, 627 So.2d 469, 475 (Fla. 1993).

47. If summary judgment is granted on this issue, it is dispositive of the case, (i.e., the development order is not consistent with the Policies contained in the Palm Beach County Comprehensive Plan as required under §163.3215, Fla. Stat.), the case can be resolved as a matter of law without the need for trial, and the Court may enter Final Summary Judgment, an appealable order under Fla. Rule of App. P. 9.110(b).

WHEREFORE, Plaintiffs respectfully request that the Court enter an order for Partial Summary Judgment on Count One (invalid as a result of procedural and substantive inconsistency) or any part thereof.

REPECTFULLY SUBMITTED this 23rd day of June 2005.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided by facsimile and United States mail to Andrew J. McMahon, Patrick E. Quinlan and Amy Taylor Petrick, Assistant County Attorneys, P.O. Box 1989, West Palm Beach, Florida 33402 and Sidney Stubbs, Esq., Jones, Foster, Johnson & Stubbs, P.A., 505 South Flagler Drive, Suite 1100, West Palm Beach, FL 33401 on this 23rd day of June, 2005.

Respectfully submitted,

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