

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,  
IN AND FOR LEON COUNTY, FLORIDA

LAKE JACKSON PROTECTION  
ALLIANCE, INC.; JEFFREY S. PHIPPS;  
JOANNE E. KOWAL; C. TOMOKA BRADY;  
and C. PERRY BROWN,

Plaintiffs,

vs.

LEON COUNTY,

Defendant,

CASE NO. 2004-CA-2800

and

ARBOR PROPERTIES, INC.;  
SUMMERFIELD PUD, LLC;  
and SUMMERFIELD PUD II, LLC,

Intervenors.

---

**FINAL JUDGMENT**

This cause is before the Court by stipulation of the parties for entry of final judgment incorporating the rulings set forth in this Court's Order on Motions for Summary Judgment dated May 4, 2006; and the Court having considered the stipulation of the parties and being otherwise fully advised in the premises, it is hereby

**ORDERED AND ADJUDGED** as follows:

1. The Stipulation of the parties agreeing to entry of this Final Judgment is hereby approved.

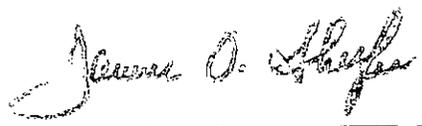
2. The rulings set forth in this Court's Order on Motions for Summary Judgment dated May 4, 2006, and filed with the Clerk on May 9, 2006, are hereby incorporated into this Final Judgment as if fully set forth herein. A copy of the Order on Motions for Summary Judgment is attached hereto and adopted by reference.

3. Any claim alleged by the Plaintiffs that was not determined by the Order on Motions for Summary Judgment or otherwise is hereby dismissed with prejudice. This Final Judgment disposes of all claims alleged in the case.

4. The parties shall bear their own costs.

**DONE AND ORDERED** in Chambers at Tallahassee, Leon County, Florida, this

21<sup>st</sup> day of September, 2009.



\_\_\_\_\_  
CIRCUIT JUDGE

Copies Furnished to:

Herbert W. A. Thiele, Esq.  
Laura M. Youmans, Esq.  
Leon County Courthouse  
301 S. Monroe Street, Room 202  
Tallahassee, FL 32301  
(850) 606-2500

William B. Graham, Esq.  
Carr Allison  
P.O. Box 2174  
Tallahassee, FL 32301  
(850) 222-2107

W. Douglas Hall  
CARLTON FIELDS, P.A.  
P.O. Drawer 190  
215 S. Monroe St., Suite 500  
Tallahassee, FL 32302  
(850) 224-1585

Terrell K. Arline, Esq.  
525 Bunkers Cove Road  
Panama City, FL 32401  
(850) 321-8726

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT  
IN AND FOR LEON COUNTY, FLORIDA

LAKE JACKSON PROTECTION ALLIANCE, INC.,  
JEFFREY S. PHIPPS, JOANNE E. KOWAL,  
C. TOMOKA BRADY and C. PERRY BROWN,

Plaintiffs,

v.

CASE NO. 04 CA 2800

LEON COUNTY,

Defendant,

and

ARBOR PROPERTIES, INC.; SUMMERFIELD  
PUD, LLC; and SUMMERFIELD PUD II, LLC,

Intervenors.

FILED  
CIRCUIT CIVIL DIV.  
06 MAY -9 PM 12:24  
CLERK CIRCUIT COURT  
LEON COUNTY FLORIDA

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This case is before me on the parties' cross motions for summary judgment. I have considered the motions, the arguments of counsel, and the authorities cited. For the reasons set forth below I find that partial summary judgment is appropriate on certain issues.

The Project

The plaintiffs, by authority of section 163.3215, Florida Statutes, challenge Leon County's approval of a development order for a Planned Unit Development ("PUD") known as "Summerfield, arguing that the development order is inconsistent with the Tallahassee-Leon County Comprehensive Plan. The project is located on a 100+ acre site on the west side of

FILED  
CIRCUIT CIVIL DIV.  
06 MAY -9 PM 12:24  
CLERK CIRCUIT COURT  
LEON COUNTY FLORIDA

North Monroe Street, across the four-lane highway from Lake Jackson, and bordering on Little Lake Jackson.

### Governing Law

A comprehensive plan sets forth the general guidelines and principles by which a county is to manage its growth. County actions in this area of land use and development must strictly adhere to the plan and be consistent with those guidelines and principles. The question in this case then, is whether the land uses, densities, intensities, and other aspects of the permitted development “are compatible with and further the objectives, policies, land uses and densities or intensities in the comprehensive plan . . . .” § 163.3194(3)(a), Fla. Stat.

Such a review is de novo, independent of any prior administrative proceedings and irrespective of any land development regulations or other ordinances adopted by the County. Such a review must necessarily consider the plan as a whole, reconciling where possible inconsistencies or seeming contradictions, using as the polestar the stated objectives and purposes of the plan.

### Special Development Zones and Lake Protection Designation

The Conservation Element of the Tallahassee/Leon County 2010 Comprehensive Plan contains the following policies setting forth special development criteria regarding “Special Development Zones” (SDZ's) for property within the Lake Jackson Basin.

*Policy 2.2.12: [C] (Rev. Effective 12/15/03)  
Special development zones with accompanying criteria shall be established and implemented through the LDRs for the following lakes:*

*Lake Jackson-- Zone A = below elevation 100 feet NGVD<sup>1</sup>  
(criteria) 5% or 4,000 sq. ft. may be disturbed Zone B = between 100 feet NGVD  
and 110 feet NGVD(criteria) 50 % of the site must be left natural. (Conservation  
Element page IV-15)*

*Policy 2.1.10: [L] (Effective 12/10/91)  
Cluster of residential development in areas designated for Lake Protection Land Use  
shall be permitted only on those portions of parcel not located within the Lake Jackson  
Special Development Zone and lying below one hundred ten (110) feet NGVD nor  
determined to be severely limited by environmental constraints. Such constraints may be  
determined by on-site environmental analysis, building or soil limitation ratings in the  
Leon County Soil Survey, or other natural resource inventory determined appropriate by  
the local government. (Land Use Element, page 72 of the pdf "Online Version")  
(Emphasis added)*

Thus, the plan clearly establishes two zones based upon elevation and limits the amount of land within each zone that may be disturbed for development. There is no dispute that the Summerfield property contains areas of Zone A elevations that are below 100 feet NGVD and areas of Zone B elevations that are between 100 and 110 feet NGVD. And, pursuant to Policy 1.1.8 of the Land Use Element, all of the land use controls and permissions are specifically subordinate to the environmental controls established in the Conservation Element. That policy reads as follows:

*Policy 1.1.8: [L] (Effective 7/16/90)  
Compliance with the Conservation Element shall be met prior to consideration of  
requirements in the Land Use Element.*

The County and Intervenors argue that the SDZs do not apply to much of the Summerfield property because it is located within several "closed basins" that have no

---

<sup>1</sup> NGVD apparently refers to the National Geodetic Vertical Datum, which is a standard reference point for measuring topographic features above the mean sea level.

connection to Lake Jackson.<sup>2</sup> Their argument is that this provision of the plan must be interpreted and applied with due consideration of its stated purpose, i.e. to "restrict activities that impact the quality of stormwater." Comp. Plan, Policy 2.3.1 [C].

Indeed, pursuant to this provision, the County adopted a land development regulation ("LDR") to govern application of the SDZs. See § 10-192(b), LDC, and therein specifically provided that the SDZs restrictions do not apply to property located within a closed basin. See §10-192(3), LDC. However, as noted above, the fact that a development order is consistent with a LDR, does not mean that it is consistent with the comprehensive plan. And, on its face, there is no exception for closed basins in the above quoted language from the plan.

The defendant and intervenors argue that common sense and logic support the conclusion that these restrictions do not apply to a development within a closed basin because stormwater from a closed basin by definition never reaches the lake. Thus, such a development does not affect Lake Jackson water quality. Since the SDZs were established to "restrict activities that impact the quality of stormwater," they say, the SDZ restrictions would serve no purpose in a closed basin. Comp. Plan, Policy 2.3.1 [C]. They argue that a strict interpretation, without such an exception, would lead to nonsensical results by imposing significant development restrictions on activities that indisputably would not impact Lake Jackson's water quality.

This is an appealing argument. It does seem to make sense. But there are a couple of problems. First, the plaintiffs dispute the assertion that development in a closed basin can not adversely impact Lake Jackson's water quality. I am not an expert in this field and have no record before me to make such a conclusion as a matter of law one way or the other. I'm

---

<sup>2</sup> The Comprehensive Plan defines a closed basin as "a naturally depressed portion of the earth's surface for which there is no natural outlet for runoff other than percolation, evaporation, or transpiration." Comp. Plan, Glossary at VIII-2.

certainly not prepared to conclude that, under the definition of closed basin, a development therein could never have storm water run off that would reach Lake Jackson, depending on its size, location, the amount of water during what period and other factors.

And if such an exception was obviously intended by the drafters, why wasn't it stated in this conservation element of the plan? If it was so obvious as to be naturally implied, so obvious that it need not be specifically expressed, why did the drafters feel it necessary to specifically except closed basin developments from the restrictions in the land use element of the plan? See Comprehensive Plan, Land Use Element at I-33.

Perhaps the answer is, as plaintiffs suggest, that the two sections are compatible, i.e. that densities and intensities of development in closed basins may be increased through a "PUD" process, but the development is still subject to the restrictions on the percentage of land on the site that may be disturbed, as per the conservation element of the plan. Standard rules of construction require that I give words their plain meaning and that I reconcile seeming contradictions where possible. Therefore, I find that the plaintiff's interpretation is the correct one and that the development order must be implemented in a way that is consistent with the restrictions found in the conservation element of the plan. In contrast, to the extent the project is in a verified closed basin, it is specifically excepted from the restrictions in the land use element of the plan.

#### **Closed Basins on the Summerfield Property**

The County and Intervenor support their motion for summary judgment with the affidavit of Robert Sellers, the Summerfield project engineer. Mr. Sellers testified that he performed a closed basin analysis of the Summerfield property and confirmed the existence of

several closed basins on the site. With the exception of Basin 1, Mr. Sellers determined that all of the Summerfield property is located within a closed basin and that stormwater from the property does not naturally or artificially discharge into Lake Jackson.

Plaintiffs filed an opposing affidavit from George Baragona, also a registered engineer. Mr. Baragona testified that Basins 2 and 3 are not closed, because water from this area can discharge into an adjacent stormwater management facility and from there into Little Lake Jackson.

Based on these affidavits, the Court concludes that there is an issue of fact as to whether Basins 2 and 3 are closed.<sup>3</sup> However, plaintiffs have presented no countervailing evidence to rebut Mr. Sellers' testimony that the remainder of the Summerfield property is within a closed basin. Accordingly, summary judgment on this issue is appropriate as to all parts of the Summerfield property except Basins 2 and 3.

#### Inclusion of Basin 1 in the PUD

Plaintiffs argue that the Summerfield development order is inconsistent with the LP designation because the PUD impermissibly includes Basin 1, an open basin. This claim is based on the Comprehensive Plan provision stating that "[a]ll development within certified closed basins shall be approved through the PUD process." Comp. Plan, Land Use Element at I-33. Plaintiffs read this to say that only property located within a closed basin may be included in the PUD, and that property within an open basin therefore may not be included. I disagree.

---

<sup>3</sup> Plaintiffs also argue that the existence of closed basins on the Summerfield property was not certified as required by the LP designation. Having considered the documentation and the applicable pal and code provisions, I find this argument to be without merit.

Plaintiffs have identified no provision of the Comprehensive Plan that limits the types of land uses that may be included within a PUD. As long as the PUD concept plan requires compliance with the underlying Comprehensive Plan land use designations, as the Summerfield concept plan does, there is no restriction on the type of land uses that may be included within a PUD. Thus, there is no prohibition against including Basin 1 in the Summerfield PUD.

### **The Future Land Use Map**

Leon County adopted a Future Land Use Map as part of its Comprehensive Plan. The Future Land Use Map designates Land Use Categories on all property in Leon County including the subject property. The parties agree that the Summerfield property contains two types of future land use categories, Lake Protection and Residential Preservation.

Leon County staff modified the boundaries of the Future Land Use Map designation for the Property to change a portion of land designated Residential Preservation to Lake Protection without processing a comprehensive plan amendment pursuant to the procedures set forth in Section 163.3184, Florida Statutes. The plaintiffs claim this was an illegal amendment. Without conceding the issue, the intervenors stipulate that all development will comply with the location of the LP/RP line as shown on the FLUM before the modification by County staff. Accordingly, I determine that review of the development order for consistency will utilize the original FLUM

### **Concurrency Requirements**

Plaintiffs argue that the development order is inconsistent with the plan because all concurrency requirements were not first satisfied pursuant to Plan Policy 1.3.1, which provides that "[b]efore a development order or permit is issued, local government shall ensure that the adopted level of service standards for the affected public facilities will be maintained in accordance with the Concurrency Management System."

The Concurrency Management System is implemented through the County's Concurrency Management Policies and Procedures Manual ("the Concurrency Manual"), which was adopted pursuant to section 10-140(e) of the LDC. The Concurrency Manual allows a preliminary development order to be issued without a concurrency review, provided that the final development order is subject to a concurrency determination and no rights to obtain a final development order are granted or implied by issuing the preliminary development order. *See* Concurrency Manual, § 3.1.1. The LDC also provides that "a concurrency review is optional prior to the approval of a preliminary development order." § 10-141(a), LDC.

Intervenors followed this procedure by executing the County's form "Affidavit Waiving Concurrency for a Preliminary Development Order-Rezoning." The affidavit requires that all concurrency requirements be met before a final development order is approved, and thereby "ensure[s] that the adopted level of service standards for the affected public facilities will be maintained in accordance with the Concurrency Management System," as required by Policy 1.3.1. Thus, the Summerfield development order is consistent with this provision of the Comprehensive Plan.

#### Premature Claims

The County and intervenors also argue that the question of whether concurrency requirements will be satisfied, claims regarding environmental impacts and incompatibility with adjacent residential neighborhoods are premature because the Summerfield development order does not authorize any actual work to be commenced. They argue that, as to these issues, the development order is not reviewable. I disagree. Development orders are not divisible for purposes of review for consistency. Either it fits the definition or it doesn't, and this one clearly does.

Perhaps it is a matter of semantics. The issue defendant and intervenors raise is legitimate, but it should not be framed in terms of whether the order is reviewable. Rather, the question is whether the order is consistent with the plan in these respects. I have already determined as to concurrency, that there is nothing violative of the plan for the County to have a two step process of development approval. If, as claimed, the order does not authorize any activity which is inconsistent with the plan relative to this and the other impact issues, then plaintiffs will not be able to prove their claim. Thus, while they may prove to be without merit, they are not premature.

### CONCLUSION

Accordingly, it is Ordered and Adjudged as follows:

1. The Summerfield Preliminary Development Order is subject to challenge in its entirety under Section 163.3215, Fla. Stat. (2005).
2. The Special Development Zone policies contained in *Policy 2.2.12* of the Leon County Comprehensive Plan apply to the Summerfield Site within their respective elevations regardless of whether there are closed basins on the site.

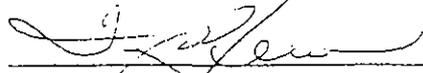
3. By stipulation, the Development Order must be consistent with the adopted Future Land Use Map, without regard to any subsequent modification by County staff.

4. The requirements of the Lake Protection provisions of the Comprehensive Plan do not apply to the extent the development on the subject property is within a closed basin. Basin 1 is open. A factual issue exists as to Basins 2 and 3. All other basins on the subject property are closed.

5. The inclusion of Basin 1 in the PUD does not make the development order inconsistent with the comprehensive plan.

6. In all other respects the Plaintiffs and the Defendant/Intervenors' motions for summary judgment are denied.

**DONE AND ORDERED** in Chambers at Tallahassee, Leon County, Florida this 4<sup>th</sup> day of May, 2006.

  
TERRY P. LEWIS  
CIRCUIT JUDGE

Copies furnished to: 5/10/06

W. Douglas Hall  
P.O. Drawer 190  
Tallahassee, FL 32302  
Attorney for Intervenors

Terrell K. Arline  
3205 Brentwood Way  
Tallahassee, FL 32309  
Attorney for Plaintiffs

Herbert W. A. Thiele  
Leon County Attorney's Office  
301 South Monroe Street  
Tallahassee, FL 32301  
Attorney for Leon County

William B. Nickell  
P.O. Box 180653  
Tallahassee, FL 32318-0653  
Attorney for Plaintiffs

William B. Graham (FBN: 359068)  
P.O. Box 2174  
Tallahassee, FL 32301  
Attorney for Leon County