IN THE THIRTEENTH JUDICIAL CIRCUIT FOR THE STATE OF FLORIDA
GENERAL CIVIL DIVISION

BALM ROAD INVESTMENT, LLC;
CASSIDY HOLDINGS, LLC;
BALLEN INVESTMENT, LLC;
HIGHWAY 301 INVESTORS, LLC; AND
MCGRADY ROAD INVESTMENT, LLC,
Petitioners,

v.

HILLSBOROUGH COUNTY,
Respondent.
_____/

Circuit Civil Case No.: 19-CA-12782
Division: C
Admin. Case No.: PD 19-0436 B

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners, Balm Road Investment, LLC, Cassidy Holdings, LLC, Ballen Investment, LLC, Highway 301 Investors, LLC, and McGrady Road Investment, LLC (collectively Petitioners), seek review in certiorari of Hillsborough County Board of County Commissioners' (the "Board") denial of their rezoning application from its current Agriculture Rural (AR) zoning to Planned Development (PD) in the Residential Planned - 2 (RP-2) category. The petition is timely, and this court has jurisdiction. Fla. R. App. P. 9.030(c)(3) and 9.190(a). Having reviewed the petition, response, reply, all appendices, and applicable law, the court determines that there are gaps in Petitioners' attempt to demonstrate consistency with the comprehensive plan such that the burden did not shift to the County to show consistency with the plan, or a public interest in maintaining the current zoning. Even if the burden had shifted to the County to do so, the record contains competent, substantial evidence that there are legitimate public interests in maintaining the current zoning. Accordingly, the petition is denied.

PROCEDURAL HISTORY:

Counties are required by Florida law to adopt comprehensive plans, often informally referred to as "comp plans," to establish future land use categories within their boundaries. Chapter 163, Florida Statutes. A comp plan is likened to a constitution for all future development within its boundaries. *Rainbow River Conservation, Inc. v. Rainbow River Ranch, LLC*, 189 So. 3d 312, 313 (Fla. 5th DCA 2016). Zoning regulation is how a comp plan is implemented. *Citrus Cnty. v. Halls River Dev., Inc.*, 8 So. 3d 413, 421 (Fla. 5th DCA 2009). Though comprehensive plans set forth a long-range maximum limits, the present land use, controlled by a zoning ordinance, may be more limited. *See Miami-Dade Cnty. v. Walberg*, 739 So. 2d 115, 117 (Fla. 3d DCA 1999)(quoting *Board of County Comm'rs of Brevard County v. Snyder,* 627 So.2d 469, 475 (Fla.1993)). After a local government adopts a comp plan, all zoning decisions must comply with it. *Rainbow River,* 189 So. 3d at 313.

In Hillsborough County, rezoning requests are evaluated under the Future of Hillsborough Comprehensive Plan ("the Plan").[1] The Plan is required to contain "principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development of…" unincorporated portions of the County. § 163.3177(1), Fla. Stat. (2016). The Future Land Use Element ("FLUE") is a required element of the Plan. § 163.3177(6)(a), Fla. Stat. The FLUE is required to designate proposed *future* land uses and must include standards for the distribution of densities and intensities of development. *Id*. The Plan also provides for a Livable Communities Element as an extension of the Plan. The Livable Communities Element[2] contains community and special area studies, including the Balm Community Plan. The Balm Community Plan contains various goals and vision statements for the area, incorporating input from its residents.

The Plan provides for goals of protecting the rural areas which are "planned to remain in long term agriculture, mining or large lot residential development." Hills. Cnty. Ord. 08-13, p.1. The Growth Management Strategy of the Plan sets forth the primary goals of controlling urban sprawl, defining an urban service area that establishes a geographic limit of urban growth, creating compatible development patterns through the design and location of land uses, and identifying a distinct rural area. *Id.* A distinct rural area is characterized by a) the retention of land intensive agricultural uses, b) the preservation of natural environmental areas and ecosystems; and c) the maintenance of a rural lifestyle without the expectation of future urbanization. *Id.* at p. 2. According to the Resolution that denied the requested rezoning, the Urban Service Area is the FLUE's foremost mechanism for the control of urban sprawl. *See also* Hills. Cnty. Ord. 08-13, p. 2. Development is favored within the Urban Service Area to maximize efficient use of land and investment in services. *Id.* The Plan also emphasizes neighborhood protection, and that the "overall density and lot sizes of new residential projects shall reflect the character of the surrounding area." Hills. Cnty. Ord. 08-13, Policy 16.8 at p. 28. In addition, "any density increase shall be compatible with existing, proposed, or planned surrounding development." Hills. Cnty. Ord. 08-13, Policy 16.10.

The Plan established a land use classification of Residential Planned-2 (RP-2), which provides a narrow exception to the FLUE's restriction against the placement of urban services outside the Urban Service Area, and within the Rural Service Area. The specific intent of RP-2 classification is to "designate areas that are suited for agricultural development in the immediate horizon of the Plan, but *may* be suitable for planned villages to avoid a pattern of single dimensional development that could create urban sprawl." Hills. Cnty. Ord. 89-13, p. 190. The Plan language demonstrates that timing of development is a factor in approval. Hills. Cnty. Ord. 89-13, Objective 2, p.5; Objective 4, p.7. In order for the maximum density within the RP-2 land use category of two dwelling units per gross acre to be considered, the Plan requires that for parcels of 160 acres or greater, "Planned Villages" must adhere generally to the following:

[1] http://www.planhillsborough.org/wp-content/uploads/2012/10/FUTURE-LAND-USE.pdf
[2] http://www.planhillsborough.org/wp-content/uploads/2012/10/LIVABLE-COMMUNITIES_09_15.pdf

> *Residential Gross Density:* … Clustering and Mixed Use are required to obtain the maximum gross density per acre. Mixed use for the purposes of this category must demonstrate integration, scale, diversity and internal relationships of uses on site as well as provide shopping and job opportunities, significant internal trip capture and appropriately scaled residential uses.

Hills. Cnty. Ord. 89-13, Appx. A, RP-2 Rural, at p. 190. Planned Villages *may* be allowed as their need or suitability arises. The RP-2 designation allows development of up to two units per acre and related commercial development, subject to locational criteria, which is the *maximum* density contemplated in the Plan. Hills Cnty. Ord. 89-13, Policy 33.5 at p. 65. The Plan intends that these villages be "self-supporting communities that plan for a balanced mix of land uses. The intent of these villages is to maximize internal trip capture and avoid the creation of single dimensional communities that create urban sprawl." Hills. Cnty. Ord. 89-13, Appx. A, RP-2 Rural, at p. 190*; Growth Mgmt. Strategy,* at p.1.

This matter arises from the Board's denial of Petitioners' application to rezone a site of approximately 449 acres in the Balm Community in southern Hillsborough County from Agricultural Rural ("AR") to Planned Development ("PD") for a Planned Village with a maximum of 899 single family lots. Immediately adjacent properties are zoned AR, with a density of one dwelling unit per five acres, and AS-1, with a density of one dwelling unit per acre. Balm is a rural agricultural community of farms and homes in unincorporated Hillsborough County. Based on the current zoning of one dwelling unit per five acres, it would appear the property's current zoning would support the development of 89 homes, making the requested rezoning an almost 10-fold density increase. Petitioners submitted an application to rezone 17 parcels on the south side of County Road 672—Balm Road—and approximately one mile west of Balm Riverview Road. The property, which lies outside the Urban Service Area, is bounded to the west and south by Environmental Lands Acquisition and Protection Program (also known as "ELAPP") properties and borders the Balm Scrub Nature Preserve. Land to the east includes a mix of fish farms and single-family homes. The nearest residential subdivision is located half a mile away and is not adjacent to the property.

The property is located within the Balm Community Plan,[3] which, as noted above, sets forth an interest in maintaining the rural character enjoyed by its residents. One of the largest industries in the Balm community is agriculture, and the Balm Community Plan sets out goals designed to maintain this industry in the community. The property is, however, within the RP-2 land use category. As part of their application, Petitioners sought to rezone the property to Planned Development (PD), specifically the Planned Village design. §§ 5.03.00, 5.04.00, Land Dev. Code. The Planned Village design is *required* within the RP-2 land use category for projects with proposed densities in excess of one dwelling unit per five gross acres. Here, the proposed project rezoning the 449-acre property seeks a Planned Village which would include: 899 single family detached units with proposed lots of 4,400 square feet, 18,204.75 square feet of

[3] The Balm Community Plan may be found in the Livable Communities Element of Hillsborough County's Comprehensive Plan, beginning at p. 214 of that document. *See* fn. 2.

neighborhood commercial, 25-acre public K-8 school site, 3.92 acres of public use or open space area, 26.7 acres of open space/village greens intended as a buffer between the development and surrounding area, 34.5 acres for a village node,[4] and 31 acres of environmental preserve/storm water management.

Planning Commission staff found the request to be consistent with the Plan, subject to a number of conditions proposed by Development Services. The staff report contains the specific provisions of the comp plan reviewed and relied upon as a basis for the staff's consistency finding. Although it observed that the character of surrounding land is agricultural and rural, and noted that Petitioners had met buffering requirements, it did not indicate whether it had analyzed the *effect* of the proposed planned village on the surrounding properties and compatibility with the surrounding development. The County's Development Services staff also found the request to be approvable, but like the Planning Commission, it did not specifically analyze compatibility with regard to the increase in density on the surrounding property or neighborhood preservation. Other agencies submitted comments, but none had specific objections, as long as specified conditions were met.

As required by the County's Land Development Code, the matter proceeded to quasi-judicial hearing before a land use hearing officer. This first part of a bifurcated review process is evidentiary, and allows a hearing officer to receive testimony under oath and documentary evidence. In addition to considering the Plan, the parcel's zoning history, reports of reviewing agencies, and permitted uses for the property, the Hearing Officer is also required to consider applicable goals, objectives, and policies contained in the Plan, availability and capacity of public services, nature of any impacts on surrounding land use, environmental impact of the proposed use, and applicable development standards promulgated by the Board. The record is comprised of the application and accompanying documents, staff reports and recommendations, exhibits and documentary evidence, the summary, findings, conclusions, and recommendation of the Hearing Officer, an audio recording of testimony at the hearing, and a verbatim transcript of the proceedings. This is the record that the Board will review in the second hearing.

At the first land use hearing, in addition to county staff and speakers associated with the project application, four citizens residing in the Balm community spoke out against the proposed rezoning and provided written documentation, and one citizen submitted a written statement into the record. The first citizen to speak opposed the project. She discussed protection of long-term agricultural uses, specifically Objective 4 of the Comprehensive Plan,[5] which states that the Rural Area will provide areas for long term, agricultural uses and large lot, low density rural residential uses which can exist without the threat of urban or suburban encroachment, with the goal that no more than 20 percent of all population growth within the County will occur in the Rural Area. Another citizen, was concerned that the dark skies initiative of the Balm Community

[4] "Village node" refers to an area of office, retail, and "services" space within the development. 5.04.02, Land Dev. Code. Uses include government services, offices, retail, libraries, and adult and child day care services.
[5] Objective 4 is found on p. 7 of the Plan, Hills. Cnty. Ord. 89-13, referenced at fn. 1.

Plan was not being considered.[6] He also raised safety concerns for the surrounding two-lane roads and intersections, based on existing semi-truck traffic from nearby packing houses, noting that multiple semi-trucks regularly come in and out of these facilities. He expressed concern about the 4,000 square foot lots related to the community goal of discouraging suburban scale development. A third citizen, indicated that the development was not consistent with the immediate area, which includes farmland. As had a previous speaker, he raised concerns regarding existing truck traffic on the two-lane road. In addition to the aforementioned traffic on two-lane roads, a fourth speaker said that he and the other citizens of Balm "moved out to that rural area to have space, to have something more than concrete, asphalt and lights." A fifth citizen submitted a written statement reminding the Board that Balm was "a small, quaint, rural little town" and described its "peace and quiet" and "open spaces." After taking testimony and receiving evidence, the Hearing Officer made various findings of fact and ultimately recommended approval of the rezoning request, subject to the conditions outlined by Development Services.

The second portion of the rezoning process is a public meeting before the Board of County Commissioners. It is limited to the record created in the first proceeding. The Board may hear from interested parties at the public meeting, but no new content may be introduced. §§ 10.03.04. D., 10.03.04. E., Land Dev Code. The Board has the final say and may reach a different determination than the Hearing Officer. The Board's decision is by resolution. §10.03.04.G.1., Land Dev. Code. The resolution must include a statement of compliance or all points of noncompliance with the Plan, if different from the conclusions of the Hearing Officer, and must state specific reasons for any decision contrary to his recommendation. *Id.*

The Board considered the rezoning application and heard oral argument. Ultimately, rezoning was denied. Resolution RR19-093 (the "Resolution") was filed with the clerk on November 19, 2019. As required by the Code, the Resolution gives reasons for rejecting the Hearing Officer's recommendation. Among other things, the Board found:

> The advancement of urban sprawl in the Rural Service Area together with the scale and other aspects of the proposed Planned Development are incompatible with the characteristics of the surrounding area. Therefore, the proposed Planned Development is inconsistent with (a) FLUE Policy 1.4 (defining "compatibility"); (b) the "specific intent" of the RP-2 category in FLUE Appendix A (designating lands suited to agriculture in the near term for possible future development as planned villages); (c) FLUE Objective 1 (requiring that 80 percent of new development be directed to the Urban Service Area); (d) FLUE Objective 4. Rural Area (protecting long term, agricultural uses and large lot, low density rural residential uses from the threat of urban or suburban encroachment and allowing only 20 percent of new growth within its area); (e) Objective 16. Neighborhood/Community Development, Neighborhood Protection; (f) FLUE Policy 16.10 (requiring density increases to be compatible with

[6] Pg. 215, Balm Comm'ty Plan, Livable Communities Element. *See* fn. 2.

existing, proposed, or planned surrounding development); (g) FLUE Planned Village Objective 33 (self-sustainable development); (h) FLUE Planned Villages Policy 33.2 and (i) FLUE Planned Villages Policy 33.6.

The Resolution said that the clustering and mixed use requirements which allow for the RP-2's maximum density of two dwelling units per gross acre along with the RP-2's buffering requirements were not meant as stand-alone formulas to allow a development like the proposed project into the Rural Service Area. It concluded that such development prevents sprawl only if it works as it was intended. The Resolution indicated that allowing development outside the Urban Service Area was not justifiable and would not be consistent with the cited provisions of the FLUE. In addition, it was decided that the more than 12,000 vehicular trips the development would generate was incompatible with the surrounding transportation network. The Resolution included a finding that the retention of the existing AR zoning classification serves a legitimate public purpose as to "the protection of viable long term agricultural lands from urban and suburban encroachment by encouraging agriculture and related uses on parcels of at least five (5) acres." This petition followed.

STANDARD OF REVIEW:

Certiorari review of a quasi-judicial zoning decision is akin to a plenary appeal in that it is "a matter of right." *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000). In such proceedings, the landowner has the initial burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance before the burden shifts to the government to demonstrate that maintaining the existing zoning classification accomplishes a legitimate public purpose. *Martin Cnty v. Yusem*, 690 So. 2d 1288, 1292-93 (Fla. 1997). The circuit court reviews the agency's quasi-judicial decision to determine whether the local government provided due process, whether the local government followed the essential requirements of law, and whether competent substantial evidence in the record supports the decision. *City of Deerfield Beach v. Valliant*, 419 So. 2d 624, 626 (Fla. 1982). Due process is not at issue in this proceeding. Regarding the evidence, courts are not permitted to reweigh evidence or substitute their findings for those of the administrative agency. *Haines City Com'ty Dev. v. Heggs*, 658 So.2d 523, 530 (Fla.1995). Moreover, courts are charged with reviewing the record for evidence that supports local government, not which rebuts it. *Broward Cnty v. G.B.V. Intern. Ltd.,* 787 So. 2d 838, 846 (Fla. 2001).

Essential Requirements of Law/Competent Substantial Evidence:

If competent substantial evidence supports the local government's decision, the decision is presumed to adhere to the essential requirements of law. *State v. Wiggins*, 151 So. 3d 457, 464 (Fla. 1st DCA 2014) (*citing Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs*, 794 So. 2d 1270, 1276 (Fla. 2001)). Thus, the essential requirements of law and the presence of competent substantial evidence are linked. Evidence contrary to the agency's decision is outside the scope of the inquiry; a reviewing court cannot reweigh the "pros and cons" of conflicting evidence, even when it may disagree with it.

Wiggins, at 464 *(*quoting *Dusseau*)*.* Although contrary evidence may be relevant to the wisdom of the decision, it is irrelevant to the lawfulness of the decision. *Id*.

Petitioners' principal argument in support of quashing the Board's denial of their rezoning request is that the Planned Village concept has been determined or defined not to be urban sprawl. Petitioners contend that the Board failed to apply the County's own criteria and departed from the essential requirements of law when it supposedly determined the mere creation of a Planned Village creates a presumption of urban sprawl. Petitioners add that by determining that a Planned Village creates sprawl, the Board improperly added requirements to the County's Plan and land development code without amending it. The court must disagree with Petitioners here. First, Petitioners mischaracterize the Board's position when it suggests the Board acted on the premise that RP-2 in and of itself constitutes urban sprawl. The Board did not. Rather, the property's location outside the Urban Service Area required the Board to consider whether the project fit the narrow exception applicable to such intense development in the area. Moreover, by the terms of the Plan, such development would not be permissible if it is not self-sustaining. Hills. Cnty. Ord. 89-13, Appx. A, RP-2 Rural, at p. 190. Second, and paradoxically, Petitioners themselves seem to be operating from the inverse assumption that the RP-2 Planned Village is somehow by definition *anti*-sprawl. That assumption disregards the Plan's requirements that "…to achieve [maximum] densities… developments shall achieve the minimum clustering ratios, on-site job opportunity provisions, shopping provisions, and internal trip capture ratios required by this Plan." *Id*. As the Resolution explains, the requirements which allow for the RP-2's maximum density … along with the RP-2's buffering requirements were not meant as stand-alone formulas to allow a request of this density in the Rural Service Area, when there has been no showing of how the compatibility of the development would serve to prevent urban sprawl. The Resolution added that "without such a showing, a departure from the FLUE's fundamental precept of confining urban services to the Urban Service Area is not justifiable and would not be consistent with the cited provisions of the FLUE."

Petitioners have not, and do not claim to have made the required showing apart from meeting design requirements. Indeed, their oft-repeated argument that the RP-2 zoning category is not, by definition, sprawl, is indicative of Petitioners' belief that such a showing was unnecessary. It is Petitioners' burden to demonstrate Plan consistency. *Board of Cnty Comm'rs of Brevard County v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993). If Petitioners demonstrate consistency with the Plan, the burden shifts to the County to show that the project is inconsistent with the Plan or that there is a legitimate public interest in maintaining the current zoning. *Id.* Although Petitioners' design appears to approach stated goals in terms of the clustering ratios, buffers, and land dedicated for commercial and service-oriented uses, this Court found no evidence of on-site job opportunity provisions or internal trip capture ratios as evidence the development would not create urban sprawl. Indeed, with record evidence that the project would result in the generation of more than 12,000 car trips per day, and an additional more than 2,000 trips associated with a school that has not yet been built, the project shows heavy reliance on the automobile for transportation, a major ingredient in urban sprawl. Moreover, aerial photographs in the record show little to no development around the

property. Because Petitioners did not meet their burden to show consistency with the Plan, the burden does not shift to the Board to show proof of inconsistency. *St. Johns Cnty v. Smith*, 766 So. 2d 1097, 1100 (Fla. 5th DCA 2000).

Even if this Court assumed that Petitioners demonstrated full compliance with the Plan, it would not automatically entitle Petitioners to the requested rezoning. *See Snyder*, at 475 (Fla. 1993); *Sarasota Cnty v. BDR Invs.,* LLC, 867 So. 2d 605, 607 (Fla. 2d DCA 2004); *Miami-Dade Cnty v. Walberg*, 739 So. 2d 115, 117 (Fla. 3d DCA 1999). It would simply require the County to show that maintaining the current zoning furthers a legitimate public interest. Here, the current use is also consistent with the Plan. It is the purview of the County, not the court, to make decisions between two zoning alternatives. *Marion Cnty v. Priest*, 786 So. 2d 623, 626 (Fla. 5th DCA 2001). In *Snyder*, the court noted that since comp plans determine *future* growth, "local governments should have the discretion to decide that the maximum development density should not be allowed provided… the government's decision is supported by substantial, competent evidence." *Snyder*, at 475. In *BDR Invs.,* the court said that where there is a legitimate public purpose behind maintaining the existing zoning classification, a denial of rezoning is supported even if the requested rezoning was consistent with the Comprehensive Plan. *BDR Inv*., 867 So. 2d 605 at 608. Here, the Board determined that preserving the land for agricultural use, discouraging development outside the Urban Service Area, and protecting the rural character of the community are legitimate public interests. Hills. Cnty. Ord. 89-13, FLUE Objective 16, at p. 26; *Snyder* at 475; *Alvey v. City of N. Miami Beach*, 206 So. 3d 67 (Fla. 3d DCA 2016) (the failure to consider whether proposed change would be consistent with and in scale with the established neighborhood land use pattern would depart from the essential requirements of law).

Petition DENIED.

ORDERED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

Electronically Conformed 3/9/2021
James Barton

By:_____
Carl Hinson
CIRCUIT JUDGE

Electronic copies provided through JAWS