IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA CIVIL ACTION

RESOURCE CONSERVATION HOLDINGS, LLC, a Florida Limited Liability Company,

Plaintiff,

v. **CASE NO.: 08CA-18477**

LEE COUNTY, FLORIDA, a political subdivision of the State of Florida and MARY GIBBS, in her Capacity as Director of the Lee County Department of Community Development,

Defendants.

_____/

FINAL JUDGMENT GRANTING LEGAL AND EQUITABLE RELIEF

This cause, coming before the Court on non-jury trial of the Complaint by Plaintiff, RESOURCE CONSERVATION HOLDINGS, LLC ("RCH") against Defendants, LEE COUNTY and MARY GIBBS, in her capacity as Director of Lee County Department of Community Development, the Court trying the Cause on January 6th and 7th, 2009, having received both testimonial and documentary evidence, and having considered the pleadings, trial memoranda, and legal argument of counsel, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Much of the factual evidence in this matter is either stipulated or uncontested. The Court has taken judicial notice of the County's Comprehensive Plan, the Land Development Code, particularly Chapter 34, thereof, as well as Chapter 125, Fla. Stat. (2007).

2. Plaintiff purchased the 1,365 acre subject property in September 2005. This tract is largely cleared by previous agricultural use. It is located in southeastern Lee County on the north side of Corkscrew Road, east of Alico Road.

3. The subject property is designated in the Lee County Comprehensive Plan (the "Lee Plan") as Density Reduction, Groundwater Recharge ("DR/GR"), and is in the Lee Plan's Planning Community-18. Both the DR/GR and Planning Community-18 list mining, or resource extraction, as allowable uses within their area, subject to the provisions of the Lee Plan and the County's Land Development Code ("LDC").

4. Soon after purchasing the subject property, Plaintiff began assembling a team of consultants, in preparation for a re-zoning application from the existing agricultural zoning ("AG-2") to a zoning category which would permit mining, Industrial Planned Development ("IPD"). Plaintiff's initial application was for a fill dirt mine, excavated to approximately 25 feet.

5. RCH filed its application for re-zoning on March 21, 2006, in accordance with the County LDC, particularly Chapter 34, the zoning code. Chapter 34 codifies the administrative processing requirements of re-zoning applications.

6. As of the date of RCH's re-zoning application there is no evidence of any effort by Lee County either to suspend the operation of Chapter 34 of the LDC, or to change any of the LDC provisions relating to mining within the DR/GR.

7. During the normal course of administrative processing and pursuant to the provisions of Chapter 34, requests for additional information ("RAI") were issued by Lee County's Staff, which was under the direction of Director Mary Gibbs. To each RAI, Plaintiff's consultants responded with more data and comment designed to render its application sufficient for subsequent hearing,

8. In early 2007, Plaintiff made the decision that the setbacks required and hydrological concerns expressed by the Planning Staff would render the planned fill dirt mine economically unsound. In consultation with County Staff and Director Gibbs, although without either encouragement or discouragement from them, RCH amended its application from a fill dirt mine to a limerock, or aggregate, mine to a depth of 100-110 feet. Under County zoning code, Section 34-2, applicable at that time, there was no distinction in definition between those two types of mine. Both types of mine, moreover, are permitted within the IPD designation. Accordingly Director Gibbs agreed to an "amended application," and did not require RCH to file a new application.

9. The amended application was submitted on June 20, 2007. As of that date, Lee County had not yet begun a zoning code amendment; had not decided on whether to enact a moratorium on re-zonings within the DR/GR area; and had not begun work on any new mining development regulations.

10. On September 11, 2007, Director Gibbs submitted a 14-point "Action Plan," to the Board of County Commissioners ("Board") for studying the DR/GR, and suggested a process to begin examining possible changes to the Comprehensive Plan and to "limit" re-zonings in the southeast DR/GR area. Director Gibbs was instructed to move forward with the Action Plan, with the "understanding" that Staff would not accept applications for Comprehensive Plan Amendments.

11. As of September 11, 2007 the Board had not voted on whether to suspend the processing of re-zoning applications, only Comprehensive Plan Amendments; nor had a proposed moratorium been drafted; nor had any specific mining development regulations been offered to the Board.

12. On September 18, 2007, as a "walk-on" Agenda item, Director Gibbs presented a "Blue Sheet" of six alternatives for a proposed moratorium. The Director recommended alternative number two: "Do not accept new re-zoning applications, including amendments, but continue to process all applications already submitted." This option would have allowed the RCH application submitted on March 2006, to move forward in the administrative process. Contrary to the Director's recommendation, however, the Board approved a motion that new re-zoning applications and previously filed, pending re-zoning applications deemed by Staff to be "insufficient" would not be processed from that date (September 18, 2007) until the necessary public hearing for the official moratorium ordinance. Director Gibbs was instructed to prepare the language for the moratorium prior to the public hearing.

13. As of September 18, 2007, the Land Development Code had not been amended to reflect the Board's decision on suspension of processing re-zoning applications; nor had a moratorium been drafted; nor had any specific mining development code changes been offered to the Board.

14. Between the period from September 18, 2007 to December 4, 2007, there was, by Board directive, a moratorium in-fact preventing Director Gibbs and her Staff from processing the application of RCH. That *de facto* moratorium arose from a motion and vote of the Board at hearing on September 18, 2007. No official public notice was given of that definitive action. There was no proposed/moratorium language for the public to review. Nor were there two public readings/hearings of that *de facto* moratorium.

15. The evidence reveals that some in the Planning Staff thereafter continued to process RCH's application for a short time. A full submission responding to an August RAI from Staff was

filed by RCH and accepted by the Staff on October 2, 2007. By County Code, applicable at that time Section 34-373(d)(1), Staff had 15-working days to respond in writing to a resubmittal by an applicant. Failure to meet the 15-day requirement "will," according to the code, result in the application being "deemed sufficient." That 15-day period expired on October 23, 2007, with no response from Staff. It should be noted that the code Section 34-373(d)(1) also provides reciprocally that an applicant who does not timely respond to the Staff's RAI will have its application "deemed withdrawn."

16. Being "deemed sufficient" under the County code is not a substantive finding either approving an application, or recommending approval. It is, rather, a procedural step which means that enough information has been submitted for Staff and a Hearing Examiner to evaluate the application.

17. Under the County's zoning code, once an application has been found sufficient, it will be scheduled for public hearing. Section 34-373(d)(1), LDC. Prior to public hearing Staff may schedule a prehearing conference "to identify, discuss and resolve various issues and to advise the applicant of Staff concerns and potential recommendations." Section 34-375, LDC. A public hearing is then provided for before a Hearing Examiner. Section 34-377(a), LDC. The Hearing Examiner may, after hearing, recommend approval, with or without conditions, or denial.

18. After public hearing before the Hearing Examiner, the application together with all attendant information, Staff reports, and Hearing Examiner minutes and recommendations are then forwarded to the Board of County Commissioners for its independent and final action. The Board may grant the application, with or without "special conditions," remand or deny. Section 34-377(b), LDC. The normal processing time from a finding of sufficiency to the Board action is approximately

four to five months. None of the proceedings subsequent to a "sufficiency" finding occurred with regard to Plaintiff's application. Instead, due to the effect of the September 18, 2007 *de facto* moratorium, the zoning code, Sections 373-377, LDC, (including the 15-day response time) was informally suspended.

19. During the application process for RCH from March 2006 to October 23, 2007, Plaintiff expended over $2,6000,000 in costs, much of which went to expert consultants dealing with engineering hydrology, environmental planning, and administrative land law. Plaintiff also had incurred nearly $5,000,000 in loan costs since the purchase, as of October 23, 2007.

20. On October 23, 2007, upon direction from the Board, Director Gibbs produced a specific proposed moratorium, which was heard before the Board at a duly noticed public hearing according to Florida Law, Chapter 125.66(4)(b), Fla. Stat. (2007).

21. On December 4, 2007 a second, noticed, public reading and hearing pursuant to Chapter 125 was held before the Board, wherein the Board officially adopted the moratorium, Ordinance 07-34. That ordinance suspended re-zoning applications on land within the southeastern DR/GR designated area and prohibited the processing of applications already filed, but not deemed sufficient as of a retroactive date of September 11, 2007. Ordinance 07-34 also provided that after the expiration of the moratorium, any new land use regulations adopted during that period would be applied to pending applications. That provision applied to RCH.

22. At the December 4, 2007 hearing on the moratorium, an Assistant County Attorney advised the Board, upon inquiry of one Commissioner, that processing of those re-zoning applications already filed, but not yet sufficient, would expose the County to claims of "equitable estoppel" by affected landowners. Plaintiff was one of those landowners referred to but not expressly

named. Despite being informed beforehand in writing that RCH had incurred extensive expenditures in reliance on the existing code, and despite being informed in writing that the 15-day Staff response time had expired, the Board refused to exempt RCH from the moratorium.

23. During the 18-month application process, from the initial RCH application in March 2006 until October 2, 2007, issues such as the movement of groundwater (transmissivity), the effects on adjacent well-fields and environmental mitigation lands, and restoring pre-mining groundwater conditions by means of a hydraulic barrier, known as a "grout curtain," were discussed in detail by the engineers and consultants for both RCH and the County. Such concerns are valid public health and safety issues, and are certainly appropriate for the County to raise with regard to the application. Those issues however, are substantive in nature, not procedural issues relating to "sufficiency" of the application. The County Staff, Hearing Examiner, and ultimately the Board of County Commissioners have ample opportunity to deal conclusively with these concerns during the period between the procedural finding of sufficiency and the substantive final hearing before the Board. The Court finds no reasonable public health or safety reason for the County to refuse to process Plaintiff's application from October 2, 2007 forward in accordance with Chapter 34, LDC. Indeed, Defendant Gibbs, Director of Community Development recommended to the Board that applications like the Plaintiff's be processed during the moratorium period. The Court notes that other agencies having environmental jurisdiction over Plaintiff's proposed use, the Florida Department of Environmental Regulation and the South Florida Water Management District have issued notices of intent to issue permits to RCH. Lee County is challenging the Water Management District's proposed permit issuance.

24. On September 10,.2008, immediately prior to the expiration of the moratorium, the Board enacted Ordinance 08-21, a substantial re-writing of the zoning code as it relates to mining developments. As the moratorium ordinance provided, Staff reviewed Plaintiff's suspended application and, on October 15, 2008 sent an 8th RAI to Plaintiff requiring extensive new conditions to the application based upon the newly amended code. These new requirements are estimated by Plaintiff's land planning consultant to add one to two years to the application process; approximately five million more dollars expenditure before operation of the mine could begin; and a loss of nearly 200 acres of mineable area within the subject property.

25. It is undisputed that if Plaintiff's application for re-zoning had been processed administratively according to the then applicable County zoning code, Chapter 34, LDC, that in all likelihood, RCH would have had a final agency action by the Board before September 10, 2008, the date the new code was enacted (Ord. 08-21). There is no evidence regarding whether that final action would result in approval, approval with conditions, or outright denial. The Court makes no findings or conclusions regard to the final Board action.

CONCLUSIONS OF LAW

26. The Complaint herein does not seek a re-zoning, but rather invokes the legal relief of mandamus and the equitable relief of declaratory action to enforce a process. Essentially, Plaintiff asks the Court to require Defendants to process Plaintiff's application for re-zoning in accordance with the zoning code in effect as of the date of application instead of the amended code enacted September 10, 2008, two and one-half years after RCH's initial application. The Court concludes that both remedies are available to the Plaintiff herein.

27. Mandamus is an appropriate remedy when an official duty is a clear ministerial obligation to be performed, under the law, without the exercise of discretion. *City of Coral Gables v. State, ex rel. Worley*, 44 So. 2d 298, 300 (Fla. 1950). It is a proper remedy where the government's action is invalid on its face. *City of Miami Beach v. State, ex rel. Fontainebleau Hotel Co.*, 108 So. 2d 614, 617 (Fla. 3d DCA 1959). It is a particularly apt form of relief when the contest arises as here, because of a zoning measure adopted without proper notice and public hearing required for all zoning ordinances. *Webb v. Town Council of Hilliard*, 766 So. 2d 1241, 1243 (Fla. 1st DCA 2000).

28. Declaratory relief, under Chapter 86, Fla. Stat. (2007), is likewise appropriate when a *bona fide* issue involving the rights of the parties is in doubt and there is an actual, present need for the declaration. *Coalition for Adequacy and Fairness in School Funding v. Chiles*, 680 So. 2d 400 (Fla. 1996). It is an available relief where the validity of ordinances or the construction and application of statutes is at issue. 19 Fla. Jur. 2d Declaratory Judgments, Section 29; and is used in zoning controversies such as the one at bar. *Webb, supra* at 1245.

29. By operation of the Land Development Code applicable at the time, the RCH application would have been "deemed sufficient" automatically as of October 23, 2007, the expiration of the 15 day required Staff response time. Therefore prior to the enactment of the moratorium ordinance, 07-34 on December 4, 2007, Plaintiff's application was, as a matter of law, already "sufficient." The intent expressed by the Board in its September 18, 2007 and December 4, 2007 hearings was to exempt those applications pending and "deemed sufficient." Thus, RCH would have also been exempted as of December 4, 2007.

30. Defendant argues that the retroactive provisions of the December 4, 2007 moratorium ordinance, specifically Section Three, paragraphs 1-4 and Section Six, apply to Plaintiff since the retroactive date is September 11, 2007. Defendant contends that its retroactive provision is valid because the Board voted to prohibit Staff from reviewing "insufficient" applications, as of September 18, 2007, at a "publicly advertised meeting attended by Plaintiff's representatives." Yet the evidence indicates that the Agenda item noticed for the September 18, 2007 meeting was a "walk-on" item for Director Gibbs to present a series of six alternative moratorium plans for the Board. This type of notice does not meet the requirements of Section 125.66(4)(b), Fla. Stat. The law is well-settled that a notice affecting a change in the zoning code must adequately inform the public as to what changes are proposed, and the actual change must conform to the proposed changes in the notice. *Webb v. Town Council of Hilliard*, 766 So. 2d 1241, 1244 (Fla. 1st DCA 2000). A notice of six conflicting alternatives or "options" does not meet that test.

31. The instruction to Director Gibbs on September 18, 2007, to suspend processing of applications was by motion, approved by the Board. That instruction, or directive, was in clear conflict with the explicit provisions of Section 37-373(d)(1) of the County's Land Development Code. A municipal code, adopted by ordinance, may not be amended or repealed by a mere motion or resolution. *City of Coral Gables v. City of Miami*, 190 So. 427, 429 (Fla. 1939). Such a code can only be changed by an act equal in dignity to the first one, namely, the passing of a new ordinance. *City of Coral Gables, supra* at 429; *Bubb v. Barber*, 295 So. 2d 701, 702 (Fla. 2d DCA 1974); *Godson v. Town of Surfside*, 8 So. 2d 497, 499 (Fla. 1942).

32. The period beginning either on September 11, 2007 (the ordinance's retroactive date) or September 18, 2007 (the Board's vote to prohibit further administrative processing of re-zonings) to December 4, 2007 was a *de facto* moratorium. The crux of the legal issue presented is whether that *de facto* moratorium was valid as a matter of law in the same manner as the duly enacted *de jure* moratorium, 07-34, adopted on December 4, 2007.

33. Florida law is clear that zoning ordinances are null and void if not strictly enacted pursuant to Section 166.041, Fla. Stat., for municipalities and Section 125.66(4), Fla. Stat., for Counties. This jurisdictional requirement applies to both municipalities, *David v. City of Dunedin*, 473 So. 2d 304, 306 (Fla. 2d DCA 1985), as well as Counties, *3299 N. Federal Hwy. v. BOCC of Broward County*, 646 So. 2d 215, 223 (Fla. 4th DCA 1994). There is no evidence that Lee County complied with the very precise and detailed notice and hearing requirements of Section 125.66(4)(b), Fla. Stat. (2007), prior to its action on September 18, 2007 prohibiting further administrative processing of re-zoning applications.

34. There is similarly no doubt in Florida law that zoning moratoria which substantially affect land use must be enacted with the same strict compliance with statute as other zoning laws. *City of Sanibel v. Buntrock*, 409 So. 2d 1073, 1075 (Fla. 2d DCA 1981). Moratoria enacted without strictly complying with statutory procedural enactment requirements are invalid. *Franklin County v. Leisure Properties, Ltd.*, 430 So. 2d 475, 481 (Fla. 1st DCA 1983); *Gardens Country Club, Inc. v. Palm Beach County*, 590 So. 2d 488, 491 (Fla. 4th DCA 1992); *City of Gainesville v. GNV Investments, Inc.*, 413 So. 2d 770, 771 (Fla. 1st DCA 1982).

35. The *de facto* moratorium created by Board vote on September 18, 2007 is, therefore, void *ab initio*. Those portions of the duly enacted moratorium ordinance, Section Three and Section Six, 07-34, which attempt to validate the de facto moratorium retroactively as of September 11, 2007, reflect an after-the-fact attempt to dignify the County's action on September 18, 2007, and are legally ineffective as a zoning ordinance. *Gardens Country Club, supra*, at 491.

36. Since there was no legal authority for the *de facto* moratorium, and since the retroactive effect of Sections Three and Six of Ordinance 07-34 is a nullity, the next issue presented is whether the new requirements for mining developments authorized in Ordinance 08-21 are legally applicable to the current application of RCH, as provided by Section Three, paragraph 4 of Ordinance 07-34.

37. The refusal by Director Gibbs to continue to process RCH's application, although based upon a vote by the Board, was a violation of her ministerial duty under Section 34-373, LDC *et seq.* As such, the refusal was an unwarranted delay. Under Florida law, an unreasonable refusal or delay in ministerial action on a re-zoning application, until after a new zoning law becomes effective, results in the rule that the law at the time of filing of the application controls. *City of Margate v. Amoco Oil Co.*, 546 So. 2d 1091, 1094 (Fla. 4th DCA 1989); *Dade County v. Jason*, 278 So. 2d 311, 312 (Fla. 3d DCA 1973).

38. Generally a property owner is entitled to obtain a permit within the provisions of the zoning laws existing at the time of the owner's application, so long as the new re-zoning ordinance which would impact or preclude the intended use is not pending at the time when proper application is made. *Smith v. City of Clearwater*, 383 So. 2d 681, 688-689 (Fla. 2d DCA 1980). In the instant matter, there is no evidence of authorized, documented efforts by the County Staff regarding even the

rudiments of Ordinance 08-21 as of the time of the application and amended application by RCH. The defense of zoning-in-progress" is therefore not available to Defendants in this case.

39. The landowner's claim to be processed under the zoning laws current at the time of its application, is further supported by the length of time, effort ,and expenses incurred by Plaintiff in that re-zoning process, in reliance upon the existing code. *Smith v. Clearwater, supra* at 688; *Town of Largo v. Imperial Homes Corp.*, 309 So. 2d 571, 572-573 (Fla. 2d DCA 1975). The doctrine of equitable estoppel is applicable to a local government exercising its zoning power when a property owner: (1) relying in good faith; (2) upon some act or omission of government; (3) has made such a substantial change in position or incurred such extensive obligations and expenses that it would be inequitable and unjust to destroy the rights of the applicant. *Town of Largo, supra* at 572-573. If not "destroyed," Plaintiff's rights have certainly been negatively impacted to a substantial degree. To apply the new code, 08-21, in light of the unauthorized *de facto* delay in processing and in view of the detrimental reliance proved by Plaintiff would be inequitable. *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10, 15-16 (Fla. 1976); *Salkolsky v. City of Coral Gables*, 151 So. 2d 433, 435 (Fla. 1963). In a situation such as this case, a citizen is entitled to rely on the code which exists to govern the actions of both citizen and government. The doctrine of equitable estoppel applies in this case.

IT IS THEREFORE ORDERED AND ADJUDGED THAT:

1. Plaintiff's demand for the equitable relief of mandamus is granted, and judgment is entered accordingly. Defendant Gibbs shall deem the current application of RCH, DCI 2006-00026, sufficient pursuant to the operation of Section 34-373(d)(1), applicable as of October 23, 2007. Plaintiff's application shall be forthwith processed and forwarded to the Hearing Examiner and Board pursuant to the provisions of Section 34- 373-377 of the County's Land Development Code.

2. Plaintiff's demand for declaratory relief and judgment is granted as follows:

a. the *de facto* moratorium between September 18, 2007 and December 4, 2007 is declared invalid and inoperative.

b. Sections Three and Six of Ordinance 07-34, which purports to apply the *de jure* moratorium retroactively to September 11, 2007 are declared void, *ab initio*. The effective date of 07-34, for the Plaintiff's application is the date of enactment, December 4, 2007.

c. the current application of RCH shall be processed and heard in accordance with those Comprehensive Plan and zoning code provisions applicable as of March, 2006 - October 23, 2007. Section Three, paragraph 4 of Ordinance 07-34 is legally inapplicable to Plaintiff's current re-zoning application.

3. Plaintiff's Count for Procedural Due Process is moot in light of the Court's ruling herein.

4. Plaintiff's demand for attorney's fees and costs is reserved pending motion by Plaintiff and responsive pleadings of Defendant.

DONE AND ORDERED in Fort Myers, Lee County, Florida on the 12th day of February, 2009.

JOSEPH C. FULLER
Circuit Judge

Conformed copies mailed to:

John J. Renner, Esq.
S. W. Moore, Esq.

By: _____
Judicial Assistant

Dated: _____