IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLLAS COUNTY, FLORIDA
CIVIL DIVISION

JENNIFER MCCOY PARKER,
and LINDA C. HEIN,

CASE NO.: 16-001524-CI-8

Plaintiffs,

vs.

The CITY OF MADEIRA BEACH, a Municipal Government of the State of Florida, and TRAVIS PALLADENO, in his official capacity as Mayor for the CITY of Madeira Beach,

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

Defendants, CITY OF MADEIRA BEACH (the "City") and TRAVIS PALLADENO ("Palladeno") (collectively referred to as the "City"), by and through their undersigned counsel and pursuant to Fla. R. Civ. P. 1.510, move this honorable Court for summary judgment on the Plaintiffs' Amended Complaint for Declaratory Judgment and, in support thereof, state as follows:

1. In their Amended Complaint dated April 6, 2016, Plaintiffs seek declaratory judgment against both Defendants concerning four ordinances adopted by the City.[1]

2. The legal issue presented by the Amended Complaint is straightforward: Plaintiffs allege that the City adopted all four of the ordinances in contravention of a discreet advertising provision of § 166.041 (3) (c) 2 b, Fla. Stat.

[1] A motion to dismiss has been filed relative to Defendant PALLADENO, who is sued in his official capacity as the City's Mayor. As of the date of this filing, that motion has not been ruled upon by the Court. The instant motion should not be construed as a waiver of that motion or any of the arguments made therein.

3. Plaintiffs are incorrect and, in fact, have failed to allege the true and accurate facts applicable to this case. While the City presumes those errors to be unintentional, the undisputed material evidence shows that none of the ordinances were subject to the advertising requirement alleged by Plaintiffs.

4. Accordingly, the City is entitled to summary judgment and respectfully requests that this honorable Court enter such order.

I. INTRODUCTION

5. The Amended Complaint presents a narrow legal issue for this Court's determination: whether the four ordinances are void *ab initio* because the City failed to include the "type of change" required by § 166.041 (3) (c) 2 b, Fla. Stat., in the advertised publications of notice for the ordinances. (Amended Complaint at ¶¶ 12, 23, 26, 29).

6. But, Plaintiffs' claim is based on the faulty premise that the subject ordinances fell within the ambit of § 166.041 (3) (c) 2 b, Fla. Stat. In fact, none of the ordinances were captured by what the Plaintiffs refer to as the "enhanced notice" requirement[2] of § 166.041 (3) (c) 2 b because none met the narrow criteria announced in the applicable section of the statute.

7. The applicable statute is clear and unambiguous in its language. It transparently describes two types of proposed ordinances that are subject to an "enhanced notice" requirement. The facts demonstrate that none of the challenged ordinances are among them.

[2] See Amended Complaint at ¶ 26.

II. THE AMENDED COMPLAINT

8. Plaintiffs allege that they have standing and are in doubt about the validity of the ordinances at issue. (¶ 8-9).[3] [4]

9. Concerning the advertised notice required for each ordinance, Plaintiffs allege that the City "failed to advise residents of the 'TYPE OF' change for which the advertised notice was published. Instead, the CITY simply advised that a Local Planning Agency or Board of Commissioner meeting was noticed." (¶ 12).

10. More specifically, it is alleged that the City published an advertised notice on June 8, 2014 for the first hearing of Ordinances 2014-05, 2014-06, and 2014-07. Plaintiffs allege that the ordinances purported to be a comprehensive plan amendment, an amendment to the City's land development regulations, and an amendment to the City's Special Area Plan, respectively. Plaintiffs attached Exhibit "1" to the Amended Complaint in support of the allegation. (¶ 13, 15-17).

11. The June 8, 2014 published advertisement was insufficient, according to Plaintiffs, because the "type of change" was not identified therein. (¶¶ 14, 22, 23).

12. Plaintiffs further allege that the second reading of the three ordinances was advertised on October 24, 2014 as set forth in Exhibit "2," again with the "type of change" alleged to be insufficient. (¶ 18, 19, 23).

13. Plaintiffs advance the same allegation relative to Ordinance 2015-18, which "purports to be an ordinance rezoning the Holiday Isles Marina property from C-4 to PD." (¶¶ 20-

[3] References in this Section are to the numbered paragraphs of the Amended Complaint unless otherwise noted.

[4] The City concedes for purposes of this motion only that Plaintiffs have standing to bring their claims. The City does not waive its right to argue the Plaintiffs' standing in the future.

22). In support of the allegation, Plaintiffs attach Exhibit "3," which is not an advertisement for Ordinance 2015-18. Instead, it is an advertisement for Ordinance 2016-01 (rezoning the distinct property described therein) and a proposed development agreement between the City and the property owner, Madeira Beach Development Co., L.L.C. The exhibit stands in contrast to the Plaintiffs' allegations that they are challenging Ordinance 2015-18, which rezoned property owned by C&T Enterprises, Inc. and MHH Enterprises, Inc. (¶¶ 10, 20-23).[5]

14. In sum, then, Plaintiffs complain that, under § 166.041 (3) (c) 2 b, Fla. Stat., notices published on June 8 and October 14, 2014 for Ordinances 2014-05, 2014-06, 2014-07, and on February 26, 2016 for Ordinance 2015-08 failed to identify the "type of" change proposed by the ordinances.

III. PROCEDURES FOR ADOPTING MUNICIPAL ORDINANCES

15. Before detailing the specific ordinances at issue, it is important to review the statutory framework governing the adoption of municipal ordinances and, more particularly, the distinctions between the kinds of proposed ordinances and the procedures applicable to them.

16. Section 166.041 (3) (a), Fla. Stat., sets forth the basic procedure which must be followed in adopting a municipal ordinance. Regarding the matter of notice, a proposed ordinance is required to be noticed at least once in a newspaper of general circulation in the municipality, such notice to occur at least ten (10) days prior to adoption. *Id.*

[5] This Court can resolve the challenge to Ordinance 2015-18 on this basis alone, as a variance of this nature between the allegations of complaint and an exhibit renders the pleading fatally defective. *See e.g. Appel v. Lexington Ins. Co.*, 29 So.3d 377, 379 (Fla. 5th DCA 2010); *Fladell v. Palm Beach County Canvassing Bd.*, 772 So.2d 1240, 1242 (Fla. 2000); *Geico Gen. Ins. Co. v. Graci*, 849 So.2d 1196, 1199 (Fla. 4th DCA 2003). In an abundance of caution, the City herein addresses the allegation that Ordinance 2015-18 is invalid due to its alleged failure to comply with the "type of change" requirement of § 166.041 (3) (c) 2 b.

17. Further, the notice of the proposed ordinance must state the title of the ordinance, the date, time, and place of the meeting at which it is to be considered, and the place or places within the municipality where it may be inspected by the public. *Id.*

18. Finally, the notice must also advise that interested parties may appear at the scheduled meeting and be heard with respect to the proposed ordinance. *Id.*

19. Section 166.041 (3) (c), Fla. Stat., provides a different procedure for those proposed ordinances captured by its terms. It sets forth what Plaintiffs refer to in their Amended Complaint as the "enhanced notice" requirement to which the ordinances at issue are allegedly subject.[6]

20. At its outset, subsection (c) states that "[o]rdinances initiated by other than the municipality that change the actual zoning map designation of a parcel or parcels of land shall be enacted pursuant to paragraph (a)." Accordingly, though addressed in subsection (c), this discreet variety of ordinance is not subject to the "enhanced notice" described in the statute thereafter. This distinction is important in this case.

21. Subsection (c) goes on to say that "[o]rdinances that change the actual list of permitted, conditional, or prohibited uses within a zoning category, or ordinances initiated by the municipality that change the actual zoning map designation of a parcel or parcels of land shall be enacted pursuant to the following procedure:," and, as to proposed ordinances in the latter category, continues to describe two distinct procedures distinguished by the acreage of the property at issue.

22. Subsection (c) (1) applies only to proposed ordinances which are initiated by the municipality and change the municipality's actual zoning map designation for a parcel or parcels

[6] The City utilizes the "enhanced notice" language throughout this motion for ease of reference only.

of land involving less than ten contiguous acres. Plaintiffs herein have no complaints relative to subsection (c) (1).

23. In subsection (c) (2), the statute sets forth the advertising requirement that Plaintiffs contend are at the heart of this case. The required procedure is triggered "[i]n cases in which the proposed ordinance **changes the actual list of permitted, conditional, or prohibited uses within a zoning category**, or [when the ordinances is initiated by the municipality and] **changes the actual zoning map designation of a parcel or parcels of land involving 10 contiguous acres or more**. . ." In such cases, the governing body is required to provide for public notice and hearing as provided in subsections (3) (c) 2 a & b.

24. In this case, Plaintiffs complain solely about subsection (3) (c) 2 b, which sets forth the requirements for the advertisement of ordinances subject to it, and states that the "advertisement shall be in substantially the following form:" Specifically, Plaintiffs allege a single non-compliance as to all four ordinances: that the City improperly published the "NOTICE OF (TYPE OF) CHANGE." This is the sole issue raised in the Amended Complaint for this Court's determination.

25. Considering this statutory scheme in light of the Amended Complaint, Plaintiffs may prevail only if the ordinances at issue were subject to the advertising requirement of subsection (3) (c) 2 b and failed to satisfy that requirement. Because the ordinances were not subject to it, summary judgment should be entered in favor of the City.

IV. THE UNDISPUTED FACTS

26. The undisputed facts set forth herein demonstrate that Plaintiffs have failed to allege the true and correct facts applicable to this case. The true facts compel an entry of summary judgment in favor of the City.

A. Affidavit of the City Clerk, Aimee Servedio

27. The affidavit of the City's City Clerk, Aimee Servedio, is filed contemporaneously with this motion. Servedio is the custodian of the City's records and has reviewed the City's records relevant to the adoption of the ordinances at issue.

28. First, Servidio's affidavit clarifies any confusion this Court may have in determining which ordinances are raised in the Amended Complaint. She acknowledges that two of them were renumbered during the adoption process, as noted by the Plaintiffs in the Amended Complaint, and attaches certified copies of all. (¶¶ 5, 6, 8).[7] Servedio provides for this Court certified copies of the ordinances at issue using the ordinance numbers under which they were finally adopted. (¶ 8). For ease of the Court's identification, the ordinances are similarly referenced throughout this memorandum.

29. Next, Servedio informs that the document attached to the Amended Complaint as Exhibit "3" does not represent any published notice of the City relative to Ordinance 2015-18 concerning the rezoning of property owned by C&T Enterprises, Inc. and MHH Enterprises, Inc. (¶ 7).

30. The ordinances collectively identified as "the 2014 ordinances" went through the notification and adoption process together in a process that is set forth in detail in the affidavit. (¶ 9-13).

31. In sum, the 2014 ordinances were noticed via published advertisements dated June 8, 2014 and October 24, 2014. (¶¶ 9-12).

[7] References in this section are to the numbered paragraphs of Servedio's affidavit unless noted otherwise.

32. The ordinances were considered and approved by the City's Board of Commissioners on first reading on July 8, 2014 and at second reading on November 12, 2014. (¶¶ 10, 11, 12).

33. The City's notification and publication process for Ordinance 2015-18 is described as well. (¶¶ 15-24). Servedio makes clear that the ordinance rezoning the subject property was initiated by the application of the property owner. (¶ 14-15).

34. Further, the published advertisement included a map of the affected property and indicated that the parcels at issued comprised "4.59 acres, more or less."

V. ARGUMENT

A. The plain language of the ordinances does not bring them within the ambit of the "enhanced notice" requirement.

35. This Court's analysis of the instant matter should begin and end with the plain language of § 166.041 (c), Fla. Stat.

36. Fla. Stat. 166.041 (c) is written in clear and unambiguous terms, and by those terms does not bring any of the ordinances under its umbrella.

37. Proposed ordinances are subject to the "enhanced notice" requirement of subsection (3) (c) 2 if they (1) change the actual list of permitted, conditional, or prohibited uses within a zoning category; or (2) change the actual zoning map designation of a parcel or parcels of land, when such ordinances are initiated by the municipality and meet the acreage requirement.

38. When the language of a statute is clear and unambiguous and conveys a clear and definite construction, there is no need for a court to resort to the rules of statutory interpretation; rather, the court must give the statute its plain and obvious meaning. *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984) (quoting *A.R. Douglass, Inc. v. McRainey*, 137 So. 157, 159 (1931)).

39. The Florida Supreme Court has asserted unequivocally that courts "are not at liberty to add words to statutes that were not placed there by the Legislature." *Bay Holdings, Inc. v. 2000 Island Blvd. Condo. Ass'n*, 895 So.2d 1197 (Fla. 3d DCA 2005) (citing *Knowles v. Beverly Enterprises*, 898 So.2d 1, 11 (Fla. 2004) (Cantero, J., concurring).

40. Further, "courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." *Holly*, 450 So.2d at 219; *see also Koster v.Sullivan*, 160 So.3d 385, 390 (Fla. 2015) *Hopkins v. State*, 105 So.3d 470, 473 (Fla. 2012); *Florida Digestive Health Specialists, LLC v. Colina*, 192 So.3d 491, 493 (Fla. 2d DCA 2015).

41. In light of these admonitions, the City invites the Court's review of the ordinances at issue.

1. ORDINANCE 2014-07 (Special Area Plan "SAP" Amendment)

42. The SAP Amendment ordinance is attached as Exhibit 1 to Servedio's affidavit. The ordinance does not create a Special Area Plan, it amends one created in 2009. The additions to the language included in the previously existing Special Area Plan are delineated by underlines, while language which was deleted is shown in strikethrough format.[8] In its legislative findings, the City notes that it amended its comprehensive plan in 2007 to "include provision for the Planned Redevelopment – Mixed Use (PR-MU) land use plan category in the text of the Future Land Use Element of the Comprehensive Plan." (Exhibit 1 at 1).

43. Further, the City adopted its Madeira Beach Town Center Special Area Plan in 2009, which placed this land use plan category on the Future Land Use Map and established plan

[8] This is true of all of the 2014 Ordinances.

objectives, regulatory provisions, and recommendations for implementation, with the stated objective to encourage the improvement and revitalization of the Town Center. (Exhibit 1 at 1).

44. The Town Center Special Area Plan is divided into five sub-districts, each with specific development standards governing density and intensity. It requires that a progress assessment be performed every five years from the date of approval of the Countywide Plan Map amendment, and the Ordinance asserts that the five years had passed. (Exhibit 1 at 2).

45. The City reviewed the SAP and determined that amendment was appropriate to the development standards of two of the five sub-districts, Causeway and Commercial Core. (Exhibit 1 at 2).

46. The "Implementation" portion of the SAP identified an intent to create a new zoning district designed for use in those sub-districts that would require mixed use development and allow greater temporary lodging and intensities than any of the City's then-existing zoning districts. (Exhibit 1 at 2).

47. As stated succinctly by the City in the Ordinance, "amendment to the Town Center Plan is designed specifically to address the objective of accommodating temporary lodging use in the Commercial Core and portions of the Causeway district." (Exhibit 1 at 2).

48. The Ordinance contains three sections that make substantive changes to the SAP. The first added a footnote to Chapter 2, page 32, Table 1 noting that the development standards for a temporary lodging use in those areas may be increased in conjunction with a zoning amendment utilizing the Planned Development zoning district. (Exhibit 1 at 3).

49. The second section, amending Chapter 2, pages 32 & 33, extracted the identified portions of the Causeway sub-district from the requirement to calculate maximum density and intensity proportional to the development site in cases where proposed development includes two

of the three types of development stated. In such cases, the development would be required to be rezoned through the Planned Development process and be accompanied by a development agreement. (Exhibit 1 at 3-4).

50. Finally, the SAP Amendment Ordinance amends the second paragraph of Chapter 3, page 58 to reflect the previous amendments as part of the Plan's strategies to promote development. (Exhibit 1 at 4).

51. Its plain language shows that the Ordinance neither changed any actual list of permitted, conditional, or prohibited uses within any zoning category, nor changed the actual zoning map designation of any parcel or parcels of land.

52. If Plaintiffs argue that the Ordinance's objective of accommodating temporary lodging uses in the Commercial Core sub-district and parts of the Causeway district subjects it to the "enhanced notice" requirement, the argument should be rejected. The Ordinance does not add temporary lodging or any other use as a permitted use in the PD zoning district. It merely states that the development standards applicable to such use may be increased. There is no legal construction of this Ordinance that can be advanced to bring it within the ambit of § 166.041 (3) (c) 2 b.

53. Accordingly, the Ordinance was not subject to the advertising requirement of § 166.041 (3) (c) 2 b, and the City is entitled to summary judgment.

2. ORDINANCE 2014-08 (LDR Amendment)

54. Ordinance 2014-08, the LDR Amendment, is attached to Servedio's affidavit as Exhibit 2. Like the others, Plaintiffs allege that it was subject to the "enhanced notice" required by § 166.041 (3) (c) 2 b. Plaintiffs are incorrect.

55. At the outset, it is necessary to clarify misstatements in the Amended Complaint concerning this ordinance. In paragraph 16, Plaintiffs allege that the Ordinance adds a Planned Development zoning district "which permits increased height and density in areas of the CITY."

56. There is no support for the allegation that the PD zoning district permits increased height or density in any areas of the City. In fact, the word "height" does not appear anywhere in the ordinance. Nevertheless, as discussed *supra*, the Ordinance is subject to the "enhanced notice" provision only if it changes the actual list of permitted, conditional, or prohibited uses within a zoning category or changes the actual zoning map designation of a parcel or parcels of land.

57. The City invites this Court's scrutiny of this Ordinance as well. The Court will agree that the LDR Amendment did two things: (1) it added a definition of and a process for "density/intensity averaging" (Exhibit 2 at Sections 1 and 2)[9]; and (2) it formally added the Planned Development (PD) zoning district to the City's list of zoning districts; previously, the Planned Development district existed, but it had not been added to the list of districts. (Exhibit 2 at 2, Sections 3 and 4).

58. Critical to and dispositive of this Court's analysis of the matter, the LDR Amendment does not change the actual list of permitted, conditional, or prohibited uses within a zoning category, and it does not change the actual zoning map designation of any parcel or parcels of land whatsoever. In fact, the ordinance previously made clear that "[n]o specific list of uses permitted is established for the PD district," and that language was unchanged by the amendment. (Exhibit 2 at 7).

59. Plaintiffs may argue that the Ordinance adds "temporary lodging" to the mixture of uses that development in the PD district may contain, subject to a particular site's designation on

[9] The City made a finding that density/intensity averaging "can help overcome obstacles to developing small, fragmented parcels with distinct plan or zoning designations." (Exhibit 2 at 2)

the Future Land Use Map. (Exhibit 2 at Section 4). The argument must be rejected. This clarification, made for purposes of effectuating the City's intent of dovetailing the PD district with the Resort Facilities High ("RFH") plan category (Exhibit 2 at 2), does not and cannot change the actual list of permitted uses within the zoning category because the zoning category unequivocally disclaims any such list. Broad categorical uses contingent upon a future land use designation are not analogous to and must not be confused with an "**actual** list of permitted, conditional, or prohibited uses" (emphasis supplied).

60. Because the ordinance does not satisfy the criteria to trigger the enhanced notice requirements of § 166.041 (3) (c) 2 b, the City is entitled to summary judgment.

3. ORDINANCE 2014-09 (Comprehensive Plan Amendment)

61. Again under the premise of failure to satisfy the "enhanced notice" requirements of § 166.041 (c) (3) 2 b, Plaintiffs challenge the City's adoption of Ordinance 2014-19, the Comprehensive Plan Amendment. The Ordinance is attached as Exhibit 3 to Servedio's affidavit.

62. The process for the adoption or amendment of a comprehensive plan varies slightly from the process set forth previously, but ultimately circles back to and yields to § 166.041, Fla. Stat. relative to the issue of notice.

63. The process is governed by § 163.3184 (11), Fla. Stat., which provides that "[t]he adoption of a comprehensive plan or plan amendment shall be by ordinance. For the purposes of transmitting or adopting a comprehensive plan or plan amendment, the notice requirements in chapters 125 and 166 are superseded by this subsection, except as provided in this part." The statute then prescribes a two-step public hearing process, which process provides that, applicable to

municipal governments, the public hearings are to be advertised pursuant to the requirements of chapter 166.[10]

64. By its use of the general reference to chapter 166 versus a specific reference to any part of it, the statute does not bring all such amendments within the ambit of § 166.041 (3) (c). The nature of the ordinance, then, is the compelling factor: if the proposed ordinance seeks to change the actual list of permitted, conditional, or prohibited uses within a zoning category, or is initiated by the municipality and seeks to change the actual zoning map designation of a parcel or parcels of land, then it is captured by subsection (3) (c); if the ordinance does not propose to do either of those things, it is not so captured. Like the other 2014 Ordinances, the Comprehensive Plan Amendment at issue does not fall within that ambit, and the City is entitled to summary judgment as to this Ordinance.

65. A comprehensive plan is defined as "a plan that meets the requirements of ss. 163.3177 and 163.3178." § 163.3164 (10), Fla. Stat. In turn, sections 163.3177 and 163.3178 then set forth various required and optional elements of such plans, pursuant to the guiding instruction that "comprehensive plan[s] shall provide the principles, guidelines, standards, and strategies for the orderly and balanced **future** economic, social, physical, environmental, and fiscal development of the area that reflects community commitments to implement the plan and its elements. These principles and strategies shall guide **future** decisions in a consistent manner and shall contain programs and activities to ensure comprehensive plans are implemented." Importantly, "[i]t is not the intent [of the statute] to require the inclusion of implementing regulations in the comprehensive plan but rather to require identification of those programs, activities, and land development

[10] Only a single public hearing is required in cases of a "small-scale comprehensive plan amendment" as that term is defined in §163.3187, Fla. Stat. Whether the plan amendment adopted by the City is a small-scale amendment is not at issue in this lawsuit.

regulations that will be part of the strategy for implementing the comprehensive plan and the principles that describe how the programs, activities, and land development regulations will be carried out." § 163.3177, Fla. Stat. (emphases supplied).

66. Comprehensive plans, then, may be likened to constitutions which confer or restrain power, which power is then exercised via statutes, administrative regulations, or other types of governing law. Comprehensive plans set forth the guiding planning principles of a community's **future** development, while zoning ordinances and other types of land development regulations implement an adopted comprehensive plan. *See e.g.* §§ 163.3202, 163.3164 (26), Fla. Stat.

67. With these principles in mind, it is difficult to conceive how the adoption of any ordinance implementing or adopting a comprehensive plan could be subject to the "enhanced notice" provisions of § 166.041 (3) (c), unless such plan includes implementing regulations. By their very nature, comprehensive plans neither change the actual list of permitted, conditional, or prohibited uses within a zoning category nor change the actual zoning map designation of a parcel or parcels of land. Comprehensive plans establish overarching policies, goals, and strategies, not regulations. They are directed toward the development of the community as a whole, not toward the development of specific zoning districts or parcels.[11]

68. To the extent that comprehensive plans or amendments to them can accomplish the alteration of actual uses in zoning districts or the rezoning or particular parcels, the amendment at issue in this case certainly did not. Therefore, it was not subject to the notice requirement of subsection (3) (c) 2 b.

[11] To be sure, § 163.3177, Fla. Stat., does not prohibit the inclusion of implementing regulations within a Comprehensive Plan, but it does not require them. The plan amendment at issue here contains no implementing regulations.

69. The City again invites this Court's review of the Ordinance. The Court will conclude as it must that the Ordinance amended various policies of the Future Land Use Element of City's Comprehensive Plan "in order to facilitate temporary lodging uses and facilitate redevelopment consistent with the Countywide Plan Rules," but established no regulation whatsoever that would bring the Ordinance under the ambit of § 166.041 (3) (c) 2 b. (Exhibit 3 at 2).

70. Among other requirements, comprehensive plans must contain a Future Land Use plan element, which element "shall establish the long-term end toward which land use programs and activities are ultimately directed." § 163.3177 (6), Fla. Stat. The future land use element must designate "proposed **future** general distribution, location, and extent of the uses of land for residential uses, commercial uses, industry, agriculture, recreation, conservation, education, public facilities, and other categories of the public and private uses of land." *Id.* (emphasis supplied).

71. The Ordinance amended a number of policies of the Madeira Beach Comprehensive Plan, Future Land Use Element, specifically policies 1.1.2, 1.8.8, 1.8.9, 1.8.10, 2.1.2, 2.1.3, and 2.1.4.

72. Without addressing each of those policy amendments in detail, Plaintiffs have not and cannot point to any actual list of permitted, conditional, or prohibited uses in any zoning category that was changed by the Ordinance. They have not and cannot direct this Court to any portion of the Ordinance that changed the actual zoning map designation of any parcel or parcels of land. Consequently, summary judgment should be entered in favor of the City.

4. ORDINANCE 2015-08 (Rezoning)

73. Finally, Plaintiffs allege that Ordinance 2015-08 was also adopted in derogation of the "enhanced notice" requirement. The facts show that this Ordinance was not subject to that requirement. The Ordinance is attached as Exhibit 4 to Servedio's affidavit.

74. While the City readily concedes that this Ordinance changed the actual zoning map designation of the properties described, it did not fall within the ambit of § 166.041 (3) (c) 2, Fla. Stat., for two reasons.

75. First, the evidence shows that the Ordinance was not initiated by the City. Recall that the first sentence of § 166.041 (3) (c), Fla. Stat., provides that "[o]rdinances initiated by **other than the municipality** that change the actual zoning map designation of a parcel or parcels land shall be enacted pursuant to paragraph (a)." Servedio's affidavit shows that the City received an application from the property owners in September, 2015 to re-zone the parcels. The Ordinance itself reflects this, stating that "the applicant has requested that said property be rezoned to become a Planned Development (PD) district . . . the property owners of the referenced parcels have applied for a change in zoning from C-4, Marine Commercial, to PD, Planned Development. . ." (Exhibit 4 at 1). Thus, the ordinance was initiated by "other than the municipality." *See e.g. Healthsouth Doctors' Hospital, Inc. v. Hartnett*, 622 So.2d 146, 147 (Fla. 3d DCA 1993) (finding the "enhanced notice" requirement inapplicable where the ordinance was initiated by the application of the property owner).

76. Second, the undisputed evidence shows that the parcels consisted of only 4.59 acres. Recall that, by its plain terms, § 166.041 (3) (c) 2, Fla. Stat., applies only when the proposed ordinance changes the actual zoning map designation of a parcel or parcels of land involving ten

(10) contiguous acres or more. Obviously, 4.59 acres is less than 10, and subsection (3) (c) 2 was inapplicable.

77. For these reasons, the motion is due to be granted as to Ordinance 2015-18.

78. In sum, none of the Ordinances at issue in this lawsuit were subject to the notice requirement of § 166.041 (3) (c) 2 b. The clear and unambiguous language of the applicable statute is clear that only two kinds of proposed ordinances are captured by it: those that change the actual list of permitted, conditional, or prohibited uses within a zoning category, and those that change the actual zoning map designation of a parcel or parcels of land (with the additional provisos that such ordinances are initiated by the municipality and are of a certain geographic size). As to the 2014 Ordinances, they did neither. As to the rezoning ordinance, it was not initiated by the City and did not meet the ten acre requirement.

79. Accordingly, the City respectfully requests that this Court apply the plain and unambiguous language of the statute as it is required to do and enter an order of summary judgment in the City's favor and against Plaintiffs.

B. Should this Court go beyond the plain language of the statute, case law also compels summary judgment in favor of the City.

80. As set forth in detail herein, this case can and should be resolved on an analysis of the plain language of the statute compared with the plain language of the ordinances. Due to the clarity of the statute, there is no need for this Court to go beyond it. Nevertheless, the City anticipates that Plaintiffs will argue that case law interpreting § 166.041 (3), Fla. Stat., compels the denial of the instant motion. If made, the argument must be rejected.

81. The City reasonably anticipates that Plaintiffs will rely primarily on a case that Plaintiffs' counsel themselves litigated for the proposition that all proposed zoning ordinances are subject to the "enhanced notice" requirement of § 166.041 (3) (c) 2. The anticipated argument

sweeps too broadly and encourages this Court to add language to the statute that was not placed there by the Legislature, which it cannot and must not do.

82. In *Anderson v. City of St. Pete Beach*, 161 So.3d 548 (Fla. 2d DCA 2014), the plaintiff challenged the city's adoption of an ordinance amending its comprehensive plan on the basis that the city failed to publish notice in compliance with § 166.041 (3) (c). The trial court rejected plaintiff's challenge, and plaintiff appealed. *Id.* On appeal, the city did not dispute that it did not adhere to the procedure prescribed in subsection (3) of the statute, and did not offer any argument in defense of its failure to do so. *Id.* at 551. Instead, the city argued only that the ordinance was a legislative enactment, which point was immaterial to the court's analysis of the matter. Relying primarily on the absence of contrary evidence or argument, the Second District Court of Appeals invalidated the ordinance because the city "did not comply with the notice provisions of section 166.041." *Id.* at 550. In so doing, the court cited other cases standing for the broad proposition that zoning ordinances not enacted pursuant to the notice provisions of § 166.041, Fla. Stat., are null and void. *Id.* at 550.

83. Plaintiffs will likely argue that the *Anderson* case controls this one and that this case should be decided similarly because the court there determined that the city had failed to comply with the "enhanced notice" requirements of § 166.041 (3) (c) in passing an amendment to its comprehensive plan. The argument is without merit.

84. *Anderson* is readily and meaningfully distinguishable from the instant case. First, the *Anderson* opinion contains no discussion whatsoever of the nature or extent of the comprehensive plan amendment at issue there. As discussed *supra*, comprehensive plans and their amendments may, but are not required to, contain implementing regulations. On the scant facts set

forth in the opinion, the scope of the plan amendment at issue there cannot be determined. Accordingly, there is an insufficient factual basis to compare that case to this one.

85. Further, the *Anderson* court explicitly observed that the city admitted that it did not follow the adoption procedure "outlined in section 166.041 (3)" and that it made no argument whatsoever in defense of that failure. *Anderson*, 161 So.3d at 551. There is no analysis relative to the argument made in this case by the City that the ordinances at issue are not subject to the "enhanced notice" requirement, so *Anderson* has no precedential value in this case.

86. The utility of the *Anderson* case in this matter, then, is limited. It is simply a more recent recitation of the principle that "zoning ordinances not strictly enacted pursuant to" the applicable notice provisions are null and void. The case establishes no bright line rule that all comprehensive plan amendments must comply with § 166.041 (3) (c), Fla. Stat. To the contrary, any such bright line rule would be in contravention of the plain language of the statute, which unambiguously restricts the types of ordinances subject to its terms.[12] The Legislature did not say that all "zoning ordinances" required enhanced notice, though it certainly could have had it desired. In fact, the statute does not define a "zoning ordinance." Likewise, the statute does not say that the adoption of comprehensive plans or comprehensive plan amendments is subject to enhanced notice and, again, it could have done so easily were that its desire. The *Anderson* case establishes only that the particular plan amendment at issue should have been adopted using the enhanced notice procedure (and without explaining why), and that the city failed to follow it.

[12] It must also be noted that the Legislature formerly explicitly subjected comprehensive plan amendments that changed future land use maps to the "enhanced notice" requirement of § 166.041 (3) (c) 2 b. *See* § 163.3184 (15) (e), Fla. Stat. (2010). This requirement was deleted by section 17 of Chapter 2011-139, Laws of Florida (2011) (and codified at § 163.3184 (11) (b), noted above), which took effect on June 2, 2011, well before the adoption of the ordinances at issue.

87. The cases cited by the *Anderson* court are not significantly more instructive in this Court's consideration of the City's position that the ordinances at issue were not subject to the statute's "enhanced notice" requirement. The court first cited *David v. City of Dunedin*, 473 So.2d 304, 306 (Fla. 2d DCA 1985) and, in particular, that court's holding that "[T]he ordinance and its amendment are zoning ordinances which are null and void if not strictly enacted pursuant to the requirements of section 166.041." But, *David* was decided in 1985, at which time the language of the statute was different than it is now. At that time, § 166.041 (3) (c), Fla. Stat., provided that "[o]rdinances initiated by the governing body or its designee which rezone specific parcels of private real property or which substantially change permitted use categories in zoning districts shall be enacted pursuant to" the enhanced notice procedures then in effect. Concerning the then-valid counterpart to subsection (3) (c) (2), it provided additional procedures for ordinances which dealt with "more than 5 percent of the total land area of the municipality." See § 166.041 (3) (c), Fla. Stat. (1984) (previously codified at §§ 176.05 and 176.06 for purposes of the ordinances at issue in *David*, which were adopted in 1972 and 1977).

88. In sum, the old version of the statute and the present iteration of the statute, while similar, are not co-extensive in terms of the types of the ordinances that are subject to the enhanced notice requirements, so the court's broad statement that zoning ordinances must be enacted strictly in compliance with § 166.041 must be received in context. Like *Anderson*, the case is of no value in the consideration of this case. To be sure, the City has no quarrel with the broad proposition that ordinances enacted contrary to the procedure announced in § 166.041, Fla. Stat., are void *ab initio*. But, for that proposition to come into play, the ordinance at issue must be evaluated under the correct standard.

89. The *Anderson* court also cited *Coleman v. City of Key West*, 807 So.2d 84 (Fla. 3d DCA 2002) for the same proposition for which it referenced *David.* In *Coleman*, the city adopted an ordinance in 1998 regulating the transient use of residential dwellings in order to preserve the residential character of its neighborhoods. When the second scheduled public hearing on the ordinance was delayed by an approaching tropical storm, the city re-noticed it but failed to follow the five-day notice requirement prescribed by the statute. *Id.* at 85. Final judgment was entered in favor of the city by the trial court, and the challenger appealed. On appeal, the final judgment was reversed by the Third DCA. The court wrote that the proposed ordinance "was an effort to change the permitted uses within the City's residential zoning category (or categories)," and was therefore required to have two properly advertised public hearings to consider its enactment. *Id.* The court further observed that "[t]he courts have consistently held that ordinances which fall within the ambit of section 166.041(3), Florida Statutes, must be strictly enacted pursuant to the statute's notice provisions or they are null and void." *Id.* (emphasis supplied).

90. The *Coleman* court's statement approaches but fails to seize on the fundamental question before this Court: do the ordinances at issue fall within the ambit of section 166.041 (3) (c) (2) b? The fact of the matter is that the adoption of **all** ordinances is governed by § 166.041 (3). The critical distinction is whether subsection (a) or subsection (c) is the applicable standard, and that can only be determined by reference to the ordinances.

91. As is demonstrated by the ordinances themselves, subsection (3) (c) is not applicable. The ordinances simply do not fall within its ambit and they cannot be held to its standard. Consequently, summary judgment should be entered for the City.

92. Alternatively, Plaintiffs may rely on cases standing for the broad proposition that ordinances that "substantially affect" the use of land are subject to the "enhanced notice" provision. If made, the argument must fail.

93. The City acknowledges cases suggesting that proposed ordinances which "substantially affect" the use of land must comply with subsection (3) (c). *See e.g. Webb v. Town Council of Town of Hilliard*, 766 So.2d 1241, 1244 (Fla. 1st DCA 2000) (without citation and reversing the dismissal of a complaint challenging the town's grant of a special exception); *Daytona Leisure Corp. v. City of Daytona Beach*, 539 So.2d 597, 599 (Fla. 5th DCA 1989) (reversing for failure to comply with subsection (3) (c) the city's adoption of an emergency ordinance imposing a buffer between residential properties and those selling alcoholic beverages); *City of Sanibel v. Buntrock*, 409 So.2d 1073, 1075 (Fla. 2d DCA 1981), *review denied* 417 So.2d 328 (Fla. 1982) (invaliding a building moratorium ordinance because city did not comply with enhanced notice provisions); *Baywood Construction, Inc. v. City of Cape Coral*, 507 So.2d 768, 769 (Fla. 2d DCA 1987) (holding that a utility fee ordinance for water and sewer installation was not subject to enhanced notice requirements because it did not substantially impact the use of land).

94. None of the cases cited above are factually similar to the instant case so, like *Anderson*, they are of no value to this Court's analysis. Moreover, a diligent search has revealed no case defining or even describing what is meant by "substantial impact" relative to the use of land. Still, this Court need not resort to the speculative application of a term which lacks definition both within the applicable statute and within the common law because it is both guided and constrained by the plain language of § 166.041, Fla. Stat.

95. Had the Florida Legislature wished to bring proposed ordinances that "substantially impact" the use of land within the notification provisions of subsection (3) (c), it could have easily

done so. But, it did not. Likewise, the Legislature could have drawn a definitional distinction between a substantial impact on the use of land versus a de minimus impact on the use of land. Again, it did not. This Court must presume the omissions intentional.

96. Further, this Court is neither permitted to add language to a statute that the Legislature opted to omit, nor can the Court extend, modify, or limit the express terms of the statute. If this Court determines that the ordinances at issue "substantially impact" the use of land and subjects them to the "enhanced notice" procedure, it will have done just that.

97. The Court is confined to the clear and unambiguous terms of the statute. The statute compels "enhanced notice" only when the proposed ordinance changes the actual list of permitted, conditional or prohibited uses within a zoning district, or when an ordinance is initiated by a municipality and changes the actual zoning map designation of a parcel or parcels containing ten or more contiguous acres.

VI. CONCLUSION

98. As noted at the outset, this case presents a narrow legal issue for determination: whether the ordinances at issue fall within the ambit of § 166.041 (3) (c), Fla. Stat., and are therefore subject to its advertising requirements.

99. The case is governed by the plain and unambiguous terms of the applicable statute. The statute applies the "enhanced notice" requirement to proposed municipal ordinances when such ordinances change the actual list of permitted, conditional, or prohibited uses within a zoning district, or change the actual zoning map designation of a parcel or parcels of property, further depending upon such ordinance being initiated by the municipality.

100. As is described at length herein, the ordinances at issue do not fall within the enhanced notice provision.

101. For the reasons stated herein, the City respectfully requests that this honorable Court enter an order granting summary judgment to it as to all four of the ordinances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of August, 2016, the foregoing was filed using the ECF system which will electronically provide a copy to Timothy W. Weber, Esq. at timothy.weber@webercrabb.com and lisa.willis@webercrabb.com, and to Kenneth L. Weiss, Esq. at kweiss1@tampabay.rr.com, Attorneys for Plaintiffs.

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