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

BOCA CENTER AT MILITARY, LLC, a Foreign limited liability company, CP OTC, LLC, a foreign limited liability company, and CP BOCA PLAZA, LLC, a foreign limited liability company,

Plaintiffs,

v.

CITY OF BOCA RATON, a Florida municipal corporation,

Defendant.
_____/

CASE NO.: 502018CA013466XXXMB

DIVISION: AN

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT

THIS CAUSE came before the Court on July 8, 2019, upon the Motion to Dismiss the Amended Complaint (the "Motion") filed by Defendant, City of Boca Raton (the "City"), and after hearing on the matter and having reviewed the Motion and Plaintiffs' Joint Response In Opposition to City of Boca Raton's Motion to Dismiss Amended Complaint (the "Response"), and being otherwise duly advised in the premises, the Court finds and concludes as follows:

OVERVIEW AND FACTUAL ALLEGATIONS

1. Plaintiffs, Boca Center at Military, LLC, CP OTC, LLC and CP Boca Plaza, LLC (the "Plaintiffs"), filed a one-count Amended Complaint seeking recovery against the City under the Bert J. Harris, Jr., Private Property Rights Protection Act, Section 70.001, Florida Statutes (the "Bert Harris Act" or the "Act").

2. Plaintiffs allege that they own several properties ("Subject Properties") within an area of the City known as Midtown. (Compl. ¶¶6-10). They acquired the Subject Properties in December, 2014. (Compl. ¶ 9).

3. Since at least October 25, 2010, the Subject Properties were zoned for office, commercial and retail development, and the Subject Properties were (and are), in fact, developed with office, commercial and retail uses. (Compl., Exh. J, Appraisal, Ltr. Dated Apr. 10, 2018).[1] The Complaint does not allege that the Subject Properties were ever zoned for residential development.[2]

4. On October 26, 2010, the City amended its Comprehensive Plan and assigned Midtown, among other areas of the City, a Planned Mobility ("PM") future land use map designation. (Compl. ¶13).

5. The City's Comprehensive Plan describes the PM future land use designation as follows:

> The Planned Mobility Designation is intended for development which enhances and improves mobility and promotes efficient use of infrastructure and services through the use of innovative design and development techniques while respecting and complementing the character of existing adjacent neighborhoods and natural areas.

Planned Mobility designation areas may vary in size, scale, intensity, mix of uses and site design and may incorporate in addition to those permitted and conditional uses authorized by the underlying zoning district regulations in effect on October 26, 2010 . . . a range of uses such as commercial, office, financial institutions, health care, residential, hotel, recreational, educational, community and cultural facilities. Although some development may be composed of a single type

---

[1] Exhibits to a Complaint can be considered for all purposes in ruling on a Motion to Dismiss. *Harry Pepper & Assoc. v. Lasseter*, 247 So. 2d 736 (Fla. 3d DCA 1971) (citing *Dade Cnty. v. Harris*, 90 So.2d 316 (Fla. 1956)); *Bal Harbour Village v. City of North Miami*, 678 So.2d 356, 358 n. 1 (Fla. 3d DCA 1996).

[2] At the hearing held on the Motion, counsel for Plaintiffs conceded that residential development has not been permitted on the Subject Properties at any time material to the Complaint. Transcript of Hearing (the "Transcript") at p. 15.

of use, a mixture of land uses is specifically encouraged. Compl. Exh. A, LU.1.1.10) (emphasis supplied).

6. Despite this language, the Amended Complaint alleges that Plaintiffs purchased the Subject Properties in 2014 (after the properties had been assigned a PM future land use designation) with the "reasonable expectation" that they would be able to redevelop the Subject Properties with a 1,274-unit multi-family apartment complex at a density of 20 units per acre. (Compl. ¶¶ 36-37). Notably, at the time of Plaintiffs' purchase of the subject property, it is undisputed that there were no zoning regulations in place permitting any residential use at all at any level of density.

7. On January 23, 2018, the City Council voted to postpone indefinitely consideration of supplemental land development regulations, which, if adopted, would have allowed for multi-family residential development on the Subject Properties (subject to certain conditions). (Compl. ¶38(a)). Instead, the City Council decided to conduct a planning exercise for Midtown referred to as a "small area plan." (*Id.*).

8. On or about April 10, 2018, Plaintiffs served the City with their respective Notices of Claim for Compensation under the Act. (Compl. Exh. J). The Notices alleged that the City's decision to postpone enactment of land development regulations at the January 23, 2018 meeting and decision to, instead, initiate a small area planning exercise (and undertake such planning activities) inordinately burdened the Subject Properties and damaged Plaintiffs. (*Id.*).

9. After the adoption of the PM future land use designation for Midtown, the City did not adopt new zoning regulations for the Midtown area until October 23, 2018, so the existing zoning on the Subject Properties remained in place, allowing for commercial, office, and retail development. (Compl. ¶¶ 16, 29, Exh. J., Appraisal, Ltr. Dated Apr. 10, 2018).

10. On October 23, 2018, the City adopted Ordinance Nos. 5461 and 5462 (zoning regulations that maintained substantially the same zoning on the Subject Properties that the Subject Properties had before the 2010 Comprehensive Plan amendment), which continued to allow for commercial, office and retail uses. (Compl. ¶ 29, Composite Exh. E).

11. On November 14, 2018, the City Council adopted Resolution No. 159-2018 affirming the conclusion of the small area planning exercise, and on January 8, 2019, the City adopted Ordinance No. 5476, which amended the zoning regulations applicable to the Subject Properties for purpose of supplementing the zoning district with planned mobility regulations, but did not provide for residential development. (Compl. ¶ 33, Exh. I).

12. Plaintiffs claim that the City's actions recited above resulted in a "*de facto* adoption … of a 'law, rule, regulation, or ordinance' to prohibit any residential development of Midtown, including the Subject Properties." (Compl. ¶ 38(e)). Moreover, because residential development at 20 units per acre would be "economically-viable" (Complaint, ¶ 37), the Complaint contends that Plaintiffs have "sustained damages" for the lost "value" of a 20 unit per acre residential development. (Compl., ¶¶ 42, 43).

13. The Amended Complaint concedes that Plaintiffs retain their rights under the existing zoning district regulations to use and develop the Subject Properties for commercial, office and retail uses. (Compl. ¶¶ 9, 33, Exh. E, Exh. I). Plaintiffs further concede that the Subject Properties are currently developed with office, commercial and retail uses (Compl. ¶ 29, Exh. J. Appraisal, ltr. Dated Apr. 10, 2018), and that the Subject Properties can continue to operate and/or redevelop consistent with the existing zoning regulations. (Compl. ¶ 29, Exh. E).

14. The Amended Complaint further concedes (as noted in Paragraph 11, above) that the City has, in fact, adopted planned mobility zoning regulations for the Subject Properties. (Compl. ¶ 33, Exh. I).

15. The Amended Complaint contends that the City's refusal to permit Plaintiffs to construct multi-family residential development at a density of 20 units per acre has placed an "inordinate[] burden" on the Subject Properties. (Compl. ¶ 40).

16. The Amended Complaint, notably, concedes that Plaintiffs have not submitted an application for development of the Subject Properties that has been denied (with or without residential development). (Compl. ¶ 49, fn. 6) ("Plaintiffs cannot submit an application for development approval for a development consistent with the PMD land use designation as the City has failed and refused to adopt zoning regulations" for residential development).

STANDARD OF REVIEW

Florida Rule of Civil Procedure 1.110(b) provides that a pleading "shall contain . . . a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." For purposes of ruling on a motion to dismiss, "[a] motion to dismiss for failure to state a cause of action may be granted only by looking exclusively at the pleading itself, without reference to any defensive pleadings or evidence in the case." *Ingalsbe v. Stewart Agency, Inc.*, 869 So. 2d 30, 35 (Fla. 4th DCA 2004) (citation omitted). However, exhibits should be treated as a part of, and incorporated into, the Complaint for purposes of a motion to dismiss. *Harry Pepper & Assoc. v. Lasseter*, 247 So. 2d 736 (Fla. 3d DCA 1971) (citing *Dade Cnty. v. Harris*, 90 So.2d 316 (Fla. 1956)). If there are any inconsistencies between the Complaint and the exhibits, the plain meaning of the exhibits controls. *See Ginsberg v. Lennar Florida Holdings, Inc.*, 645 So. 2d 490, 494 (Fla. 3d DCA 1994). Though the well-pleaded facts must be taken as true and viewed in a light most favorable to the

plaintiff, *Ingalsbe*, 869 So.2d at 34, upon a showing beyond doubt that the plaintiff cannot prove any set of facts in support of its claim, the movant is entitled to an order of dismissal. *See Morris v. Fla. Power & Light Co.*, 753 So. 2d 153, 154-55 (Fla. 4th DCA 2000).

THE CITY'S MOTION TO DISMISS

The City's Motion seeks dismissal on three separate grounds. The Court considers each of those grounds in turn.

I. PLAINTIFFS FAILED TO PRESENT THEIR CLAIM IN WRITING TO THE CITY PRIOR TO FILING SUIT.

Plaintiffs' Notice of Claim ("Notice"), attached as Exhibit J to the Amended Complaint, and dated April 10, 2018, asserted that the City's decision at the January 23, 2018 City Council meeting to conduct a small area plan planning exercise for Midtown (before proceeding with the enactment of supplemental land development regulations for the area) imposed an inordinate burden on the Subject Properties. The Notice does not contend, as does the Amended Complaint, that it was the City's enactment of Ordinance Nos. 5461 and 5462 (in October, 2018), Resolution 159-2018 (in November 2018), and Ordinance No. 5476 (in January, 2019) (the "New Claims") that inordinately burdened the Subject Properties. Indeed, the Notices could not have asserted the New Claims because the City enacted the referenced ordinances/resolution months *after* it received the Notice. The City contends that Plaintiffs' failure to provide notice of the New Claims in the Notice requires dismissal. As explained below, the Court agrees.

The Bert Harris Act requires a property owner, who seeks compensation under the Act, to "present the claim" in writing to the head of the governmental entity" at least 150 days prior to filing suit (a statutory condition precedent). Section 70.001(4)(a), Florida Statutes. The "claim" a property owner must present is a statement of the "*specific* action of a governmental entity [that]

has inordinately burdened" the property. Section 70.001(2), Florida Statutes (emphasis supplied). The phrase "action of a governmental entity" is explicitly defined as "a *specific* action of a governmental entity which affects real property...." Section 70.001(3)(d), Florida Statutes (emphasis supplied). Thus, in order to comply with the presuit prerequisites for bringing a Bert Harris Act action, a property owner must present its claim, in writing, and, *inter alia*, identify the "*specific* action of a governmental entity" that allegedly entitles the property owner to relief. In this case, the Notice lists "the following actions by the City [that] have inordinately burdened the Subject Property" and identifies the initiation of the small area planning exercise in January, 2018 and the undertaking of such planning activities. The Notice is completely silent as to the New Claims upon which the Amended Complaint is based: Ordinances Nos. 5461, 5462 and 5476, and Resolution No. 159-2018.

Plaintiffs' failure to identify the New Claims as the "specific action" of the City in the Notice, as expressly required by the Act, requires dismissal. "Because the Act alters the common law and waives sovereign immunity, it must be narrowly construed." *Hardee County v. FINR III, Inc.*, 221 So.3d 1162, 1165 (Fla. 2017). Employing this mandate to "narrowly construe," Florida courts routinely dismiss Bert Harris Act lawsuits where the presuit notice requirements have not been observed. *See, e.g., Sosa v. City of West Palm Beach*, 762 So.2d 981, 982 (Fla. 4th DCA 2000) (affirming the circuit court's dismissal of a complaint, with prejudice[3], when the plaintiff "failed to comply with the prerequisites for bringing suit under the Harris Act"); *Turkali v. City of Safety Harbor*, 93 So.3d 493, 495 (Fla. 2d DCA 2012) (affirming dismissal, with prejudice, where

[3] A compliant notice of claim is a condition precedent to filing a complaint under the Act. Accordingly, failure to comply with the statutory pre-suit requirements requires dismissal, as the failure cannot be cured by amendment of the complaint.

plaintiff's "presuit notice was invalid and he cannot state a cause of action under the Act"); *Osceola County v. Best Diversified, Inc.*, 936 So.2d 55, 59 (Fla. 5th DCA 2006) (noting plaintiff's failure to comply with the Section 70.001(4)(a) presuit requirement to submit a "bona-fide, valid appraisal," and holding that "[f]ailure to satisfy this requirement cannot be cured by filing an appraisal in the litigation"). *See generally Wendler v. City of St. Augustine*, 108 So.3d 1141, 1144 (Fla. 5th DCA 2013) ("Failure to comply with these [presuit] procedural requirements will result in dismissal of the lawsuit").

Plaintiffs respond by relying upon *Ward v. Fla*, 212 F.Supp.2d 1349, 1355-56 (N.D. Fla. 2002) for the proposition that, in discrimination cases brought under Title VII of the Civil Rights Act of 1964, a lawsuit may include claims that are "reasonably related" to the claim presented to the Equal Employment Opportunity Commission. The Court rejects the contention that this proposition is applicable in the instant case.[4] As opposed to *Ward*'s interpretation of Title VII, the Bert Harris Act requires the "specific action" of the governmental entity that allegedly imposes an inordinate burden to be identified in the Notice. Allowing purportedly "reasonably related" claims not asserted in the Notice would be directly contrary to the requirements of the Act.

The Court concludes that the factual basis of the claims asserted in the Amended Complaint represented a substantial change from the factual basis underlying the claims set forth in the original Complaint, such that a new notice setting forth the "specific action" of the City upon which the new claims are based was required. While the Court does not conclude that a new notice

---

[4] In addition, the New Claims are not "reasonably related" and, in fact, contradict the claims in the Notice. While the Notice complained of the initiation and conduct of a small area planning exercise, the Amended Complaint asserts that such exercise was *prematurely concluded*. Similarly, while the Notice asserted that land development regulations had not been adopted at all, the Amended Complaint concedes that supplemental planned mobility regulations have been adopted (Compl. ¶ 33), but asserts that the supplemental regulations were inadequate.

is required in every instance where there is an amended complaint, in instances such as the matter *sub judice* where the claim is based on specific action post-dating the original notice and the essence of the original claim is substantially altered, the Court concludes that a new notice is required by the Act.

II. NO LAW OR REGULATION HAS BEEN "APPLIED" TO THE SUBJECT PROPERTIES.

The Bert Harris Act is meant to protect the rights of private property owners when a law, regulation or ordinance, "as applied, inordinately burdens, restricts or limits private property rights without amounting to a taking under the State Constitution." §70.001(1), Fla. Stat. (emphasis supplied). Under the Act, a law or regulation is "applied" when either one of the following occurs: (1) if the law's impact is clear and unequivocal and the government provides notice of the law's enactment by mail to the potentially affected property owner; or (2) when the government formally denies the property owner's written request for development or variance. §70.001(11)(a), Fla. Stat. (2011). Here, neither has occurred. The Amended Complaint does not allege that the City mailed notice of "adoption" of the allegedly offending ordinances/resolution pursuant to the Act to Plaintiffs, and the Amended Complaint affirmatively alleges that Plaintiffs have not made a written request for development of the Subject Properties. Specifically, in footnote 6 of the Amended Complaint, Plaintiffs admit that they have never applied for the development approvals to which they claim they are entitled. Because no law has been "applied" to the Subject Properties under the Act, the City contends that the claim should be dismissed.

The Response relies upon *Hussey v. Collier County*, 158 So.3d 661 (Fla 2d DCA 2014) and *Citrus County v. Halls River Development*, 8 So.3d 413 (Fla. 5th DCA 2009) for the proposition that a comprehensive plan amendment may be deemed to have been "applied" to a parcel of land

if the plan provision is "readily ascertainable." Response at pp. 10-11. Regardless of whether this standard has ever been applicable in the Fourth District[5], the cases upon which Plaintiffs rely interpreted the Act as it existed prior to 2011. In 2011, however, the Florida Legislature amended the Act so as to clarify the "as applied" standard. Currently, as noted above, the Act provides that a law or regulation can only be "applied" in two ways: (1) the government mails notice of the law's enactment (provided the impact of the law or regulation on real property is clear and unequivocal), or (2) through a "formal denial of a written request for development or variance." Section 70.001(11), Florida Statutes. Since the City mailed no such notice[6], and there has been no formal denial of a written request for development, the regulation has not been "applied" to the Subject Properties, and dismissal is required.

III. THE CITY DID NOT TAKE AN ACTION THAT BURDENED AN EXISTING USE OF THE SUBJECT PROPERTIES.

The Bert Harris Act specifically protects owners from a government *action* that interferes with existing rights (whether actual or vested). *See* §70.001(2), Fla. Stat. Specifically, the Act protects against governmental action that directly restricts or limits an "existing use" or a "vested

---

[5] It would appear that Plaintiffs' proposed standard was not the one in effect in the Fourth District, even prior to the 2011 amendment to the Act. *See GSK Hollywood Development Group, LLC v. City of Hollywood*, 246 So.3d 501, 504 (Fla. 4th DCA 2018) (applying the pre-2011 version of the Act) ("[I]n this case, we are tasked with determining whether a property owner can state a claim under the Harris Act when he or she never formally applied to develop the property. We conclude the answer is no.").

[6] Plaintiffs' contention that "the City should not be able to use its own failure to provide written notice by mail to avoid liability under the Bert Harris Act" (Response at p. 13) misses the mark. Mailed notice under Section 70.001(11)(a)1 is not a statutory requirement; it is an option available to governments that desire to trigger the one year claim period under the Act. Moreover, the decision not to send the mailed notice is not a means to "avoid liability." Instead, it extends the window for a property owner to assert a claim based on "application" of a law or regulation until "there is a formal denial of a written request for development or variance." Section 70.001(11)(a)2, Florida Statutes.

right to a specific use of real property." §70.001(2), Fla. Stat. The City contends that, because the Amended Complaint fails to allege that the City took any action that burdened an existing use or a vested right, the Amended Complaint should be dismissed. Once again, the Court agrees.

A. The City did not take an *action* that adversely impacted Plaintiffs' property rights.

The Bert Harris Act creates a cause of action "[w]hen a specific *action* of a governmental entity" inordinately burdens, restricts or limits private property. §70.001(2), Fla. Stat. (emphasis added). As three of the individuals who were instrumental in drafting and passing the Act wrote:

> The governmental action must have "directly restricted or limited the use" of the owner's land. This requirement should be interpreted to mean that an action's effect is 'in a direct way without anything intervening; not by secondary, but by direct, means."… **Governmental inaction, that is, the decision by a governmental entity not to act, is not within the ambit of the Harris Act.**

David L. Powell et. al., *A Measured Step to Protect Private Property Rights*, 23 Fla. St. U.L. Rev. 255, 273 (1995) (emphasis added). The Act does not, and was not intended to, provide for compensation to property owners as a result of not receiving new development rights, but only to protect property owners from the loss of "existing" or "vested" zoning rights.

Plaintiffs contend that the City has taken several "actions" with respect to the Subject Properties. Specifically, Plaintiffs claim that Ordinance Nos. 5461 and 5462, which preserved the existing zoning on the Subject Properties allowing for commercial, retail and office uses, and Resolution No. 159-2018, which affirmed the conclusion of the small area planning exercise are "actions." Plaintiffs further allege that the City's adoption of Ordinance No. 5476, which created supplemental planned mobility regulations for Midtown, but did not newly authorize residential development, was also an "action" that inordinately burdened the Subject Properties. The Court rejects the contention.

Based on the Amended Complaint (and the governmental "actions" in this case), none of these purported "actions" took away "existing" development opportunities available on the Subject Properties.[7] Specifically, residential development of the Subject Properties was not permitted either before or after Ordinance Nos. 5461, 5462, 5476 or Resolution No. 159-2018. Accordingly, these purported "actions" could not (and did not) "inordinately burden" the Subject Properties.[8] The Amended Complaint is therefore improperly premised upon purported governmental "inaction" -- that the City *did not* enact zoning regulations that would newly authorize residential development. The Act does not provide for such a cause of action, and the claim must accordingly be dismissed.

B. Plaintiffs' "existing use" of the Subject Properties has not been impacted.

The Act provides for recourse in the event "a governmental entity has inordinately burdened an existing use of real property."[9] The Act defines "existing use" as either (1) "[a]n actual, present use or activity on the real property," or (2) "such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses

---

[7] Claims under the Act must be based on laws, regulations or ordinances that "inordinately burden, restrict or limit … property rights." Section 70.001(1), Florida Statutes. The City's "actions" here (i.e., maintaining the zoning status quo and adopting supplemental land development regulations) do not qualify under the Act as "actions" that could burden, restrict, or limit the property rights of the Subject Properties.

[8] Similarly, the Complaint's contention (at ¶ 22) that "actions" of the City "imposed a moratorium" on residential development for the Subject Parcels must be rejected. Moratoria temporarily prevent otherwise permitted uses of land. Here, residential development of the Subject Properties has never been permitted.

[9] A claim may also be based upon an alleged inordinate burden to a "vested right." Fla. Stat. 70.001(2). As Plaintiffs concede (*see* Response at p.2, f.n. 1), the Amended Complaint does not allege the City burdened a "vested right."

and which have created an existing fair market value in the property greater than the fair market value of the actual, present use . . . on the real property". §70.001(3)(b), Fla. Stat. The Subject Properties are currently developed and, under the existing PM Comprehensive Plan designation and current zoning and land development regulations, can continue to operate as currently developed, and be redeveloped with a variety of uses. (Compl., Exh. J, Appraisal, Ltr. Dated Apr. 10, 2018) ("The lands have been improved with five mid- and high-rise office buildings and neighborhood retail center totaling ± 863,622 square feet of rentable area."). Plaintiffs do not contend otherwise in the Amended Complaint. Thus, the actual, present uses of the Subject Properties have not been adversely impacted by any City action (or inaction).

The Amended Complaint, therefore, is premised upon Plaintiffs' claim that it had a "reasonably foreseeable, non-speculative" expectation to use the Subject Properties for residential development. The Amended Complaint bases its claim upon the 2010 Comprehensive Plan amendment that created the PM future land use designation, which designation provides that lands may include residential development.

The Court rejects Plaintiffs' claim that it is "reasonably foreseeable" and "nonspeculative" that a use not permitted by a zoning code will become a permitted use, merely because the use is permitted by a comprehensive plan. The law is well-settled that

> A comprehensive plan only establishes a long-range maximum limit on the possible intensity of land use; a plan does not simultaneously establish an immediate minimum limit on the possible intensity of land use. The present use of land may, by zoning ordinance, continue to be more limited than the future use contemplated by the comprehensive plan.

Board of County Commissioners of Brevard County v. Snyder, 627 So.2d 469, 475 (Fla. 1993).

The Court also rejects Plaintiffs' contention, made at the hearing, that the staff analysis regarding residential development in Midtown performed during the small area plan planning

study and/or the deliberative legislative process provided Plaintiffs with a reasonably foreseeable, nonspeculative basis to believe that the City would authorize residential development. Based on the Amended Complaint, such a belief is no more a reasonable or nonspeculative basis for an expectation than is the comprehensive plan policy itself.

The legislative process that local governments go through in considering whether legislative changes are appropriate or desirable, without more, does not form the basis of a reasonably foreseeable, nonspeculative expectation, and making investment backed decisions on what a local government may or may not do with its land development regulations in the future is nothing more than land speculation. Further, to allow such expectations to be founded on comments made by staff, at workshops, or even in council meetings, in the absence of a final act or decision by the legislative body, would open the flood gates to potential claims of parties based on what was said as opposed to what was actually done by a governing body. To permit otherwise would result in a stifling of creative thought and discussion concerning a community's land development, discourage long term future planning out of fear of creating inchoate rights, and repress debate where such measures are discussed. Indeed, a contrary conclusion would penalize local governments for merely considering legislative amendments and, by engaging in such consideration, would invite liability under the Act, even when the government has not acted to impose a new burden, restriction or limitation. The Court concludes that, in this instance where Defendant has not taken any action through its zoning regulations to actually vest Plaintiff with the right to use the subject property for residential purposes at a specific density, any investment decision based on such residential use at a specific density is nothing more than hopeful

speculation and cannot suffice to establish a reasonable, investment-backed basis supporting a reasonable expectation of residential use for the subject property.[10]

Further, there can be no reasonably foreseeable, non-speculative expectation that zoning and land development regulations will be prospectively amended to permit a new use on a specific piece of property (even if such amendments are considered) merely because the use is permitted by the Comprehensive Plan.[11] Any such expectation is, virtually by definition, not "reasonably foreseeable" and "speculative."[12] *See Palm Beach Polo. Inc. v. Village of Wellington*, 918 So.2d 988, 995 (Fla. 4th DCA 2006) ("[Bert Harris plaintiff] failed to establish that at any time it was entitled to build on the property. In sum, [plaintiff's] claim that a violation of the Bert J. Harris Act occurred is frivolous").

It is important to note that this is not a case where zoning regulations were in place allowing a particular density and the City took some action removing the zoning permitting residential uses or lessening or restricting its density. Obviously, the existence of those facts would present a much different scenario. Here, Plaintiffs have never had any vested right pursuant to a zoning regulation to use the subject property for residential purposes at any density. In the absence of such, the

---

[10] Moreover, the "small area plan" occurred long after Plaintiffs' acquisition of the Subject Properties, and the Amended Complaint provides no "investment-backed" basis for Plaintiffs' expectation other than the initial acquisition of the property. Fla. Stat. Section 70.001(3)(e)1.

[11] Plaintiffs have not advised this Court of any previous occasion, and the Court is aware of none, when a property owner has filed a claim under the Act based upon a policy in a comprehensive plan that permitted a use that a zoning code did not. Certainly, however, no such contention, if it has been made, has been successful.

[12] Especially speculative is Plaintiffs' suggestion that they were entitled to reasonably expect to construct 20 residential units per acre. There is no density allocation or limit included in the PM land use designation, and the Complaint's allegation that development at such a level of density would be "economically-viable" is an insufficient basis for a reasonable expectation. *S.A. Healy Co. v. Town of Highland Beach*, 355 So.2d 813, 814 (Fla. 4th DCA 1978) (A zoning ordinance "is not invalid merely because it prevents use which is economically most advantageous").

Court concludes that Plaintiff's Amended Complaint should be dismissed in its entirety and with prejudice.

Based upon the foregoing, it is

ORDERED and ADJUDGED as follows:

Defendant's Motion to Dismiss is GRANTED, with prejudice. *See, e.g.*, *Sosa*, 762 So.2d at 982.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida this Friday, July 19, 2019.

FINAL DISPOSITION FORM
(Fla.R.Civ.P. Form 1.998
THE CLERK IS DIRECTED TO CLOSE THIS FILE
MEANS OF FINAL DISPOSITION
Dismissed After Hearing

15th JUDICIAL CIRCUIT

HOWARD K. COATES, JR.
CIRCUIT JUDGE

Copies served on:

Counsel of Record