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

CASE NO.: 502005CA005585XXXXMBAO

POINCIANA MANAGEMENT, INC.,

Plaintiff(s),

vs.

TOWN OF PALM BEACH, FLORIDA,

Defendant(s).
_____/

FINAL JUDGMENT

THIS CAUSE came before the Court for non-jury trial on May 7 and May 8, 2007. The Court heard testimony of the witnesses and received exhibits into evidence. The Court has considered the arguments of counsel and the submittals of the parties supporting their respective positions pretrial, and post-trial in the form of proposed Final Judgments. The Court has also reviewed the depositions submitted into evidence and has reviewed the trial transcript in the above matter. The Court is otherwise fully advised in the premises. Based upon the above, and after resolving conflicts in the testimony and evidence, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

The current dispute arises out of differing interpretations of a March 6, 1979 Agreement ("1979 Agreement") between the TOWN OF PALM BEACH ("Town") and the predecessor of the Plaintiff, Poinciana Properties, Limited ("Poinciana") concerning property known as the Royal Poinciana Plaza ("Plaza"). This 1979 Agreement was executed as a result of a variance request and amended variance request by the developers of the Plaza property. The Town Council approved the amended variance request subject to various agreed conditions. These agreed conditions included a unity of title to the property, maintenance of a Mysore fig tree and dismissal of the pending suit relating to the

removal of the tree, agreement that upon completion of construction of the one additional building there will be no additional construction of new buildings in the Plaza and an agreement that the space occupied by the Poinciana Theater would be used only as a theater and in the event of sale, such restriction would continue with the land and be contained in the deed of conveyance.

In accordance with this approval, the Agreement was entered into and provided specifically in part as follows:

> 2B. There shall be no construction of any new buildings in the Royal Poinciana Plaza . . . , however, this shall not prohibit construction of alterations or renovations of any buildings in the Plaza which does not increase number of square feet in said buildings. . . .
>
> 2E. [The Partnership, its successors and assigns] will continue to lease the space now occupied and used by the "Poinciana Theater" only for use as a theater of the performing and/or visual arts and for lectures or other special events. . . .
>
> 2F. [The Partnership, its successors and assigns] will include a restrictive clause in any contract of sale of the Plaza whereby the purchaser agrees to prohibit use of the "Poinciana Theater" for any purpose other than as set forth in paragraph E above and that said restriction shall be contained in the deed of conveyance to purchaser.
>
> 2G. [The Partnership, its successors and assigns] will not allege economic hardship as a basis to abrogate any of the terms of this agreement.
>
> 3. The above conditions shall be construed to be covenants and restrictions running with the land and shall be in full force and effect so long as the structure currently known as the Royal Poinciana Plaza continues to be in existence and is located upon the above-described premises. However, none of the above shall bind Partnership or any subsequent owners of the Royal Poinciana Plaza to this agreement or the current zoning ordinance if at some future date that ordinance is revised as it applies to the plaza and thereby provides for further development possibilities.

Simultaneously with the execution of this Agreement, unity of title was executed.

The current dispute arises out of interpretation of the last sentence contained in Paragraph 3 above. The Plaintiff contends that the Agreement has terminated by its terms since various amendments to the zoning ordinances in the Town have provided the developer with "further development possibilities". To the contrary, the Town contends that there have been no such further development possibilities as a result of zoning revisions and, in fact, any zoning ordinances subsequent to the execution of the Agreement have, in fact, restricted further development rather than aided further development. Furthermore, the Town contends that the Defendant has waived or is otherwise estopped to assert any termination of the Agreement.

Within a year of the 1979 Agreement, the property was sold to Sidney Spiegel, as Trustee, on behalf of Poinciana Management, Inc., the current Plaintiff. In accordance with the Agreement, the deed transferring the property to the new owner specifically incorporated language which prohibits the use of the Poinciana Theater for any purposes other than set forth in the Agreement. At the same time, Mr. Spiegel, on behalf of the new owners, entered into an Assignment and Assumption Agreement in which he acknowledged and agreed to and accepted the assignment of the 1979 Agreement and assumed all obligations therein.

At the time Mr. Speigel acquired ownership of the plaza, the Town had already approved construction of a new building in the northwest corner of the plaza. Mr. Spiegel, however, abandoned such new construction and instead requested the town allow him to reconstruct and add additional office space to the so called "slat house". The Town Council approved this new construction after Mr. Spiegel confirmed he intended to

maintain in full force the Agreement. This approval was also subject to an amendment incorporating all remaining provisions of the 1979 Agreement. That May 1980 amendment again provided all the remaining terms and conditions of the 1979 Agreement shall remain in full force and effect except as modified herein.

From this amendment in 1980 through 2001, approximately 17 separate amendments were entered into, each amendment specifically providing that all remaining terms and conditions of the [1979] Agreement shall remain in full force and effect. These numerous amendments dealt with the Town's permission to allow continuation of the matinee performances at the Poinciana Theater.

Mr. Spiegel on behalf of the owners now contends that subsequent to 1979 numerous changes to the various zoning ordinances have provided "further development possibilities" and thereby voided the terms and conditions of the agreement. Nevertheless, from 1984, he executed approximately 17 amendments to the Agreement and on each occasion reaffirmed that all remaining terms and conditions of the 1979 Agreement shall remain in full force and effect. At no time until August 2001, did Mr. Spiegel ever advise the Town or suggest that the 1979 Agreement was ineffective or had been voided by "further development possibilities". Pertinent to this was the testimony of Mr. Spiegel when asked why he didn't assert such a position testified, "Because we had the tenant, and were satisfied that as long as the building was being rented or leased, then there was no need to do anything about that". Nevertheless, Mr. Spiegel acknowledged that the Agreement specifically provided that he would not allege "economic hardship" as a basis to abrogate any of the terms of this Agreement.

Subsequent to the 1979 Agreement, the Town adopted various changes in its zoning ordinances as applied to the Poinciana Plaza. Plaintiff contends that a number of these ordinances have created "further development opportunities" which void the Agreement. Principally, the Plaintiff relies upon Ordinance 4-80 which changed the CA zoning for the property to the newly created C-PC Zoning District; Ordinance 6-81 which identified timeshares as a "use"; Ordinance 1-86, which reduced the size of parking spaces from 10x20 to 9x18; Ordinance 1-03 which provided a separate density for hotel and timesharing use. As to whether these Ordinances, in fact, create "further development possibilities" as contemplated by the Agreement, the Court finds the testimony of Robert Moore, Bill Brisson and Charlie Siemon persuasive and the Court accepts their testimony.

Mr. Brisson was intimately involved in the drafting of Ordinance 4-80 and was also involved in Ordinance 6-81. Likewise, he had played a role in Ordinances 1-86 and 1-03. Charlie Siemon analyzed the density allowable within the Plaza prior to Ordinance 4-80 and compared that density with each ordinance change, through the last ordinance in question, 1-03. Robert Moore was the Director of the Planning, Zoning and Building Department of the Town of Palm Beach from January 1981 through September 2005.

Mr. Brisson went through each of the ordinances claimed by the Plaintiff to create further developmental possibilities and explained the reasons for the zoning change as well as the effect upon the Plaza. Specifically, Ordinance 4-80 changed zoning to C-PC which was merely a descriptive term and was not intended to create a "planned unit development". Moreover, under Ordinance 4-80, no uses were allowed which were, in fact, not permitted under the prior zoning, C-A. In regard to 6-81, dealing with timeshares, the

primary purpose was to preserve the residential character of neighborhoods and prevent timesharing from being located in certain residential neighborhoods. As such, this Ordinance did not permit any new use not available in the Plaza prior to March of 1979. Similarly, Ordinance 1-86 dealing with parking did not create any development opportunities within the Plaza. Similarly, Ordinance 1-03 by specifying density figures for hotels and timeshares again did not create any development opportunities not available prior to 1979.

As indicated above, Mr. Siemon made density comparisons under the various ordinances. His calculations establish that there has been a roughly two-thirds reduction in floor space ratio development in the Plaza subsequent to 1979. Thus, from 1979 until June of 2005, there had never been an opportunity for additional building square footage within the Plaza.

While Robert Moore was not Planning Director at the time of the 1979 Agreement, he did testify in regard to the "timeshare" Ordinance, 6-81. It was clear from his testimony that prior to the adoption of that ordinance, timeshares had previously appeared in the Town and was added as "use" to regulate the appropriate places for timesharing. As a result, he opined that there were no further development possibilities existing as a result of said ordinance.

In opposition to this testimony, the Plaintiff presented the testimony of Richard Orman, a Planning and Management Consultant. Mr. Orman's opinion, however, was predicated solely upon an economic analysis which allows construction of timeshares on the property subsequent to 1979. Therefore, Mr. Orman's testimony was predicated upon the fact that timeshare could not have been built on the property to 1979, an

opinion this Court finds the evidence establishes to the contrary. Moreover, the conceptual plan utilized by Mr. Orman to support its position made no economic comparison to those uses allowed prior to the 1979 Agreement. For these reasons as well as others set forth in the record, the Court does not accept the testimony of Mr. Orman.

Conclusions of Law

From October of 1979 through August of 2005, the Plaintiff repeatedly received the benefits under the Agreement without questioning its validity or attempting to disaffirm it. Moreover, in 18 separate amendments to that Agreement throughout the years, Mr. Spiegel on behalf of the Plaintiff, agreed that all terms and conditions of the 1979 Agreement (including those related to the Poinciana Playhouse) remained in full force and effect. In fact, it was only after the Playhouse became economically unviable, that Mr. Spiegel "discovered" that the agreement was void because various ordinances created further developmental possibilities. Under such circumstances and by these acts, Plaintiff has ratified the terms of the Agreement, waived any right to claim that the Agreement is terminated or otherwise is estopped to assert its current position.

Contractual terms and provisions may be waived, both expressly and implicitly. *Gilman v. Butzloff*, 22 So.2d 263, 265 (Fla. 1945). A valid condition in a contract may be waived after its occurrence or upon defective performance if the complaining party continues to recognize the existence of the contract. *Pan Am. Distributing Co. v. Sav-a-Stop, Inc.*, 124 So.2d 753, 755 (Fla. 1st DCA 1960); *In re Westminster Assoc., Ltd.*, 285 B.R. 38, 47 (Bkrtcy. M.D. Fla. 2002). *See also, Scocozzo v. General Dev. Corp.*, 191 So.2d 572 (Fla. 4th DCA 1966)[involving an attempt to rescind and cancel a contract for purchase of a house and lot].

Parties generally waive contractual provisions or conditions by continuing to perform and accept performance under the contract, thereby implicitly acknowledging the existence of the contract. *See, Raimondi v. I.T. Chips, Inc.*, 480 So.2d 240, 241-42 (Fla. 4th DCA 1985)(general rule is that party who continues to accept contractual benefits after a breach and with knowledge of the breach is estopped to assert and waives right to claim termination of the contract for breach of covenant or condition); *Wing, Inc. v. Arnold*, 107 So.2d 765, 768 (Fla. 3rd DCA 1959)(where contract entitled lessor to cancel contract upon condition that lessee destroyed property and failed to rebuild it, lessor waived ability to cancel contract by continuing to perform under contract for two years after occurrence of condition); *Florida East Coast Railway Co. v. Holiday Inns, Inc.*, 323 So.2d 664, 666 (Fla. 3rd DCA 1975)(lessor waived right to cancel contract when it performed under contract and accepted benefits of contract for six years after condition which justified cancellation).

While the Court finds that the Plaintiff is estopped or has waived or has otherwise ratified the terms and conditions of the 1979 Agreement, there have not been "further developmental possibilities" so as to void the terms and conditions of the Agreement. While further developmental opportunities is not defined in the Agreement, both parties agree that the contract should be given its natural meaning or a meaning most commonly understood in relation to the subject matter and circumstances, with a reasonable construction preferred to an unreasonable one. *Royal Investment and Development Corp v. Monty's Air Conditioning Service, Inc.*, 511 So.2d 419, 421 (Fla. 4th DCA 1987).

Likewise, in determining the common meaning of words not defined within a document, the language of the contract itself is the best evidence of the parties' intent.

Dows v. Nike, Inc., 846 So.2d 595, 601 (Fla. 4th DCA 2003). Furthermore, one must look at the whole document rather than parts in order to determine the parties' intent. *See e.g., Robins v. Walter*, 670 So.2d 971, 974 (Fla. 1st DCA 1995). In addition, courts have also looked at the common dictionary definition to determine the common meanings of words. *Winn-Dixie Stores, Inc. v. 99 Cent Stuff – Trail Plaza, LLC*, 811 So.2d 719, 722 (Fla. 3rd DCA 2002). Both parties concur in the dictionary meanings of the words "further development possibilities". "Further" is defined as "in addition" or "additional", *Merriam-Webster's Collegiate Dictionary* (10th ed.); *Black's Law Dictionary* (6th ed.); "development" is defined as "the act, process or result of developing" or "an activity, action, or alterations that changes undeveloped property into developed property,", *Merriam-Webster's Collegiate Dictionary* (10th ed.); *Black's Law Dictionary* (7th ed.); and "possibilities" means "the condition or fact of being possible" and the term "possible" means "being something that may or may not occur." *id.* Based on the dictionary meanings, "further development possibilities" would reasonably mean "additional" development possibilities.

Based upon the foregoing, the Court determines that, in fact, there has not been any "further development possibilities" as a result of the various ordinances claimed by the Plaintiff. Therefore, the Plaintiff has failed to establish through evidence that the 1979 Agreement has terminated by its own terms.

The Court is not unmindful that in denying dueling Motions for Summary Judgment, this Court did so on the basis that the contractual language was "ambiguous". Nevertheless, after hearing all the evidence, the Court finds that the language contained in the 1979 Agreement providing for "further development possibilities" is clear and unambiguous as applied to the facts of the present litigation. Under any reasonable

interpretation of the language, and any definition asserted by the parties, there has not been any "additional development possibilities" shown by the evidence. In addition, a municipality's reasonable interpretation of its own ordinance should be given great deference by the courts. *See, Palm Beach Polo, Inc. v. Village of Wellington*, 918 So.2d 988, 993 (Fla. 4th DCA 2006); *Las Olas Tower Company v. City of Fort Lauderdale*, 742 So.2d 308, 312 (Fla. 4th DCA 1999). Only if the municipality's interpretation of its ordinances and statutes is unreasonable or clearly erroneous should a reviewing court substitute its interpretation for that of the municipality. *Palm Beach Polo* at 995, *Las Olas* at 742. Here, the Town's interpretation of the definition of "further development possibilities" can neither be considered unreasonable nor erroneous, nor can Mr. Moore's opinions that the Town's zoning ordinances enacted since 1979 do not provide "further development possibilities" be considered unreasonable or erroneous.

The Court is not unsympathetic to the Plaintiff's position that Poinciana Playhouse is economically unviable. Nevertheless, this is the Agreement that the Plaintiff has made with the Town, an Agreement fully executed by the Town under which the Plaintiff has obtained substantial benefit for a number of years. The Plaintiff's remedy, however, is not in the courts but with the Town Council.

Therefore, it is

CONSIDERED, ORDERED AND ADJUDGED as follows:

1. The terms, conditions, covenants and restrictions set forth in the 1979 Agreement, as well as subsequent amendments thereto, are in full force and effect and binding upon Plaintiff.

2. The 1979 Agreement, in paragraph 2E and F specifically, requires that the Poinciana Theater, located in the Plaza, be maintained and operated as a theater of the performing and/or visual arts and for lectures or other special events, and prohibits its use for any other purpose.

3. Plaintiff, as successor and assignee to the 1979 Agreement, does not have the right to demolish the Poinciana Theater.

4. Judgment is hereby entered in favor of the Defendant with the Court reserving jurisdiction to award costs upon proper motion.

DONE AND ORDERED this 10th day of July, 2007 at West Palm Beach, Palm Beach County, Florida.

DAVID F. CROW
CIRCUIT COURT JUDGE

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