UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

LIONEL D. ALFORD, JR., and TAMMY NIX ALFORD, as Co-Trustees of the Lionel D. Alford, Jr. and Tammy Nix Alford Revocable Trust,

Plaintiffs,

v. Case No. 3:15cv162/CJK

WALTON COUNTY BOARD OF COUNTY COMMISSIONERS, a political subdivision of the State of Florida,

Defendant.
_____/

MEMORANDUM ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

This is an action for declaratory judgment and injunctive relief. The complaint invokes the diversity jurisdiction of the court, which has not been contested by the defendant.[1] Plaintiffs have moved for summary judgment as to the claim for declaratory judgment (docs. 23, 24, 25) and defendant has responded in opposition

[1] "When a plaintiff seeks injunctive or declaratory relief, the amount in controversy is the monetary value of the object of the litigation from the plaintiff's perspective." *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1077 (11th Cir. 2000) (citing *Ericsson GE Mobile Commc'ns, Inc. v. Motorola Commc'ns & Elecs., Inc.*, 120 F.3d 216, 218-20 (11th Cir. 1997)). "In other words, the value of the requested injunctive relief is the monetary value of the benefit that would flow to the plaintiff if the injunction were granted." *Id.* Plaintiffs assert "[t]he placement of dark, shell laden borrow area material on the Trust's property or on nearby properties such that it will drift on the property, will diminish the value of Trust's property by far more than $75,000[.]" (Doc. 1, ¶ 24).

(docs. 29, 30, 31). The sole issue involves judicial construction and application of an ordinance enacted by defendant Walton County Board of County Commissioners ("County"). As relief, plaintiffs seek a declaration that the County is not exempt from an ordinance that proscribes the placement of certain types of sand on Walton County's beaches. The parties have consented to magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c) and Federal Rule of Civil Procedure 73 for all proceedings in this case, including entry of final judgment. The court heard oral argument on plaintiffs' motion on August 21, 2015. (Doc. 32). Upon careful consideration of the record, the parties' submissions, and the relevant law, the court concludes plaintiffs' Motion for Partial Summary Judgment should be granted.

FACTUAL BACKGROUND

Plaintiffs Lionel and Tammy Alford ("Alfords") reside in Kansas and, as trustees of a revocable trust, own property in Walton County that fronts the Gulf of Mexico. (Doc. 1, ¶ 1, 7; doc. 13, ¶ 1, 7).[2] The County has enacted a Land Development Code (LDC) which establishes certain standards for the protection of white sand beaches. A portion of the LDC, codified as Chapter 4.07, is entitled "White Sand Protection Restrictions." The purpose of the Restrictions is described as follows:

> White [sic] it is recognized that within the Restricted Area, naturally occurring soil may not be of the white beach sand type, the purpose of this section is to maintain, preserve and protect the natural function and

[2] Several items of fact are drawn from the admissions in the County's amended answer (doc. 13) to plaintiffs' complaint. *See Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1177 (11th Cir. 2009) (quoting *Best Canvas Prods. & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618, 621 (11th Cir. 1983)) (alterations omitted) ("The general rule is that a party is bound by the admissions in his pleadings.")

> color of the fine to medium grained white sands of Walton County beaches. It is the intent of this section to prohibit the importation, use, and relocation of red clay and other prohibited materials that tend to discolor, darken or stain the natural white sands of Walton County beaches, and to prevent the transportation of prohibited soils whether by wind or water by requiring containment and removal of red clay and other discoloring, darkening or staining materials. The [County] acknowledges that the white sands of Walton County beaches promote tourism and enhance the quality of life of the residents of Walton County. The permanent discoloration, darkening or staining of the white sands on the beaches of Walton County would harm the public welfare making the enactment of this section necessary. The [County] hereby declares that red clay and all other prohibited materials that are capable of staining the natural white sands of Walton County beaches constitute a nuisance and irreversible harm to the people of the County.

(Doc. 1-1, p. 1, LDC § 4.07.01). Accordingly, the County enacted an ordinance restricting the quality and color of sand that may be placed upon the beach.[3]

The County also enacted an exemption from the sand quality standards, applicable to certain projects, and codified this exemption as LDC § 4.07.08:

> Beach and dune restoration projects conducted by Walton County are exempt from this ordinance as they serve the public interest by providing protection to public and private lands, infrastructure, natural areas, and the economy of Walton County.

(Doc. 1-1, p. 5).[4] The County now claims it is conducting a beach restoration project,

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[3] This section of the LDC prohibits placement of sand on Walton County beaches, unless the sand has a "Munsell Color Chart value of 8.00 or white and a chroma of 1.00 on the 2.5,5, 7.5 or 10YR or 2.5Y scale when checked in a dry air condition." LDC § 4.07.03. "[T]he Munsell Color System is a color space that specifies colors based on three color dimensions: hue, value (lightness), and chroma (color purity)." Wikipedia, *Munsell Color System*, https://en.wikipedia.org/wiki/Munsell_color_system (last visited October 6, 2015).

[4] The references to page numbers will be to those automatically generated by the CM/ECF system.

known as the "Hurricane and Storm Damage Reduction Project" ("Project"), that impacts the Alfords' property. The Alfords say the County is not conducting the Project and the exemption for sand color values does not apply.

The concept of the Project dates back a number of years. In 2001, the County "reach[ed] out to their Congressional representatives to ask that the Federal Government look into supporting and participating in [the Project] with Walton County." (Doc. 23-10, p. 5). The County's Tourist Development Council, according to an exhibit attached to the deposition of Jim Bagby, states the Project "is a federal beach nourishment project for 18.8 miles of Walton County shoreline[.] . . . The project began in 2003 with Congressional authorization for a Reconnaissance Study. The . . . Study's purpose was to determine if there was a federal interest in restoring Walton County's beaches."[5] (Doc. 23-3, p. 1).

After a positive conclusion to the Reconnaissance Study, a "federal feasibility study got underway but was completely upended with the hurricane impacts of 2004 and 2005." (*Id.*). "The focus of the feasibility study was to further analyze the need for a federal beach restoration in Walton County and determine what the project might look like." (*Id.*). The feasibility study was completed in December of 2012. (Doc. 23-10, p. 8). "In July of 2013, the project reached a major milestone in the signing of a favorable Chief's Report for the project by Lieutenant General Thomas Bostick, the Chief of Engineers for the Corps [of Engineers]." (Doc. 23-3, p. 1). That report represented "the final step by the Corps of Engineers in approving the project," and the matter could then be sent to "Congress for Construction Authorization and the Administration for planning and budgeting purposes." (*Id.*). The Chief's Report

[5] The Reconnaissance Study was "100 percent federally funded." (Doc. 31-2, p. 2).

estimates initial construction of the project will cost a total of $61,397,000. (Doc. 23-9, p. 2). Of that total, the federal government is expected to pay $17,191,000 and the County is expected to pay $44,206,000.[6] (*Id.*).

Also as to this project, and before 2013, the Corps sought federal authorization from the United States Fish and Wildlife Service "to conduct a hurricane and storm damage reduction project for Walton County[.]" (Doc. 23-5, p. 1). The Corps sought similar authorization from the National Marine Fisheries Service. (*Id.*, p. 2). These requests for authorization each contained a Biological Assessment, also indicating the Corps "is seeking Federal authorization to conduct a hurricane and storm damage reduction project for Walton County." (*Id.*, p. 4). These requests, and the Biological Assessment, identified the County as the "local sponsor" and the "non-Federal sponsor." (*Id*., p. 2, 4, 6).

On May 31, 2013, the Corps and the County executed a Design Agreement for the Project. (Doc. 23-6, p. 3; doc. 23-7). The Agreement denominates the County as the "Non-Federal Sponsor." (Doc. 23-7). Article II of the Agreement describes the obligations of the Corps and the non-federal sponsor. (*Id.*, p. 3-6). The Corps "shall design the Project." (*Id*., p. 3). The Corps will afford the County "the opportunity to review and comment on the solicitations for all contracts[.] . . . The [Corps] shall consider in good faith the comments of the Non-Federal Sponsor, but the contents of solicitations, award of contracts or commencement of design using the [Corps'] own forces, execution of contract modifications, resolution of contract claims, and performance of all work on the Project shall be exclusively within the control of the

[6] The non-federal share of the costs may be "provided in cash and/or in-kind contributions." (Doc. 23-4).

[Corps]." (*Id*., p. 3-4). Similarly, the Corps agreed to consider the County's comments on design products developed under the agreement, "but the final approval of all design products shall be exclusively within the control of the [Corps]." (*Id*., p. 4). The County agreed to contribute "35 percent of [the] total design costs" of the Project. (*Id.*). The Agreement provides that the Corps and the County "each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other." (*Id*., p. 12). Finally, the County is obligated to secure rights of entry for the Corps to complete the project. (Doc. 23-10, p. 10). The Project is still currently in its design phase and construction will not begin until the Corps and County execute a Project Partnership Agreement. (Doc. 23-4; doc. 23-7, p. 1; doc. 31-2, p. 5).

Lending further understanding of the Project, the record contains a Florida Department of Environmental Protection ("DEP") "Joint Application for Joint Coastal Permit." (Doc. 23-2, p. 2-24). The application was submitted by Curtis M. Flakes, Chief of the Planning and Environmental Division for the Mobile District, United States Army Corps of Engineers. (Doc. 23-2, p. 1). Mr. Flakes indicated the Corps requested a fifteen-year certification for the Project. (*Id.*). In the application itself, Mr. Flakes is identified as the authorized agent for permit application. (*Id*. at p. 4). The application identifies the "owner" as the Walton County Board of Commissioners. (*Id*., p. 12). According to the application, the County had earlier "proceeded with pursuing their own beach restoration plan[,]" and prepared an application "that was deemed complete." (*Id*., p. 16). The County's application, however, was "withdrawn due to the Federal project being approved." (*Id*.). Much of the information in the federal application was taken from the previous application

prepared by the County. (*Id.*).

The Project, as described in the DEP application, contemplates placement of material, dredged from an offshore borrow area in the Gulf of Mexico, upon the Alfords' beachfront property and upon some 900 additional properties. (Doc. 1, ¶ 17; doc. 13, ¶ 17; doc. 23-2, p. 13-24). In the application, the Corps described the color characteristics of the proposed borrow material. (Doc. 1, ¶ 18; doc. 13, ¶ 18). Some 98% of the borrow material scores a Munsell color value of seven or less. (*Id.*). Thus, only 2% of the material reaches the Munsell value of eight, as contemplated by § 4.07.03 of the LDC. (*Id.*). The native sand on plaintiff's beach, and on other Gulf-front properties in the County, has been described by the TDC as "sugar-white sand." (Doc. 1, ¶22; doc. 13, ¶ 22). The white sand so described contains very little by way of carbonate (shell) material, an ingredient that detracts from the natural whiteness of the sand, which is composed predominantly of quartz.

Until shortly before plaintiffs brought this action, the County had not considered whether the Project had to comply with the White Sand Protection Restrictions of the LDC. (Doc. 23-8, p. 1-4; doc. 23-10, p. 9-10). The Corps had similarly never considered whether the Project had to comply until February of 2015, when plaintiffs' lawyer made an email inquiry to the Corps' Mobile office. (Doc. 23-8, p. 1-4; doc. 23-6, p. 6-7).

ANALYSIS

The Alfords seek a declaration from the court that the White Sands Protection Restrictions enacted as part of the County's LDC apply to the Project, and that the borrow area material, as described in the DEP application, is material prohibited under the LDC and cannot be placed upon the beaches of Walton County in the

course of the Project. (Docs. 1, 24). No dispute exists that the borrow material does not comply with the LDC. Accordingly, the dispositive question is whether the exemption from the White Sands Protection Restrictions for "projects conducted by Walton County" applies.

"In diversity cases seeking declaratory relief, the federal court applies state law on the substantive issues presented in the declaratory judgment action." *Townhouses of Highland Beach Condo. Ass'n, Inc. v. QBE Ins. Corp.*, 504 F. Supp. 2d 1307, 1309-10 (S.D. Fla. 2007). The Alfords and the County agree that Florida law governing statutory construction will control, but each argues the law supports its view of the ordinance. The paramount rule of construction in Florida provides that courts "must give to a statute (or ordinance) the plain and ordinary meaning of the words employed by the legislative body." *Rinker Materials Corp. v. City of N. Miami*, 286 So. 2d 552, 553-54 (Fla. 1973). As expressed in the quoted passage, "[m]unicipal ordinances are subject to the same rules of construction as are state statutes." *Id*. at 553. In addition, "courts generally may not insert words or phrases in municipal ordinances in order to express intentions which do not appear, unless it is clear that the omission was inadvertent[.]" *Id*.

The Exemption Does Not Apply to a Joint Project

The Alfords first note the County's argument that the Project is "joint" and argue that the exemption may not be applied to a joint project. (Doc. 24, p. 3-6). By its simple terms, the ordinance excepts "[b]each and dune restoration projects conducted by Walton County." LDC § 4.07.08. To apply the exemption to a joint project would require the court to rewrite the ordinance. This is so, because construction of the ordinance to include a joint project would dramatically enlarge the

scope of the exemption. *See Samara Dev. Corp. v. Marlow*, 556 So.2d 1097, 1100 (Fla. 1990) ("[I]t is a well-recognized rule of statutory construction that exceptions or provisos should be narrowly and strictly construed."). Here, in particular, such a construction would render the White Sands Protection Restrictions virtually meaningless. Such a dramatic result obtains because the Project affects over eighteen miles of shoreline, described as almost the entirety of the privately owned beachfront of Walton County. (Doc. 23-2, p. 13-14).

The County points to its lobbying, its cooperation with the Corps, and its obligation to cost share and secure rights of entry to support its view. This argument, however, says too much. Under the County's now-preferred construction, one would suppose that any substantial involvement with another entity could satisfy the requirement of "conducting." But if that were the case, no one could ever know in advance if the exemption would apply, because someone–presumably a court–would first need to decree whether the County is conducting a project, or is merely involved at a lesser level. Certainly, Walton County would not have crafted an ordinance so broad that it could be in want of construction at every turn. To the contrary, the plain meaning of "conduct" more than amply implies management or control. "Conduct" is defined as "to direct the course of; manage or control." *American Heritage Dictionary of the English Language* (5th ed. 2011). Importantly here, none of the matters of evidence show that the County and the Corps are formally aligned for the joint management or control of the beach renourishment project. The exemption does not apply to "joint" conduct of a project, on the facts of this case.

The Project Is Not "conducted by" the County

Even were the court to try to fashion a construction that would accommodate

the County's view of cooperative work and cost sharing, the facts of record refute any notion that the Project is being jointly conducted. The Reconnaissance Study, funded entirely by the federal government, determined that a federal interest existed in restoring Walton County's beaches. (Doc. 23-3, p. 1; doc. 31-2, p. 2). The feasibility study analyzed the need for a federal beach restoration in Walton County. (Doc. 23-3, p. 1). The Corps, not the County, sought authorization from the relevant federal agencies, and represented to those agencies that it was conducting the Project, with the County as the local sponsor. (Doc. 23-5). The major permitting document of record, the DEP application, was submitted by the Corps, and requested a fifteen-year certification for the Corps. (Doc. 23-2). The Corps determined it would be the sole applicant for the permit. (Doc. 23-10, p. 13).

Both parties have submitted for the court's consideration the Design Agreement, to which the County is certainly a party. Article II of the Agreement spells out the rights of the Corps and of the County. The Corps will, "[t]o the extent possible" design the Project according to a plan developed "after consultation with the [County]." (Doc. 23-7, p. 3). The County may review and comment on solicitations for contracts, upon proposed contract modifications and upon contract claims. (*Id*.). The Corps must consider in good faith the comments made by the County. (*Id.*). Nevertheless, "the contents of solicitations, award of contracts or commencement of design using the [Corps'] own forces, execution of contract modifications, resolution of contract claims, and *performance of all work on the Project shall be exclusively within the control of the [Corps]*." (*Id*, p. 3-4) (emphasis added). Similarly, as to design products developed under the Agreement, "final approval . . . shall be exclusively within the control of the [Corps]." (*Id*., p. 4). This

contractual language leaves little to the imagination as to who will be in charge. The evidence shows that the Corps will not negotiate these terms, very strongly suggesting that control by the Corps is an essential element of its participation. (Doc. 23-6, p. 3-4; doc. 23-10, p. 15).

The Design Agreement further erases any notion of joint conduct of the Project. Under Article IX, the Corps and the County "each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other." (Doc. 23-7, p. 12). In its argument for joint conduct of the Project, the County points to its role of cooperation and cost sharing. (Doc. 29, p. 4-5). This role, however, does not transform the County from its acknowledged role as a non-federal sponsor into a joint venturer or partner. Under Florida law, a joint venture necessarily implies, among other elements, "joint control or right of control." *Florida Tomato Packers, Inc. v. Wilson*, 296 So. 2d 536, 539 (Fla. 3d DCA 1974). Here, joint control is not contemplated by the Design Agreement, and, under Article IX, the Corps and the County are situated independently, and may not act as agents for one another. The Corps has the exclusive right to make binding decisions on the conduct of the Project; the County has no right remotely equal or even parallel. Although the County financially supports the Project and is obligated to secure the rights of entry, those activities do not demonstrate that the County "directs the course of" or maintains "joint control" of the Project.

Furthermore, statements made by both the Corps and the County indicate the County is not "jointly conducting" the Project. On the County's Tourist Development Council website the Project was described as a "federal beach nourishment project." (Doc. 23-3, p. 1). In a July 16, 2012 letter to the Corps, the County indicates:

> This letter is to advise you that the [County] intends to act as a non-Federal sponsor for the [Project] proposed for Walton County, Florida. *The proposed project is to be executed by the [Corps]* under the authorization of Section 110 of the Rivers and Harbors Act of 1962. This Letter of Intent is provided as evidence of our continuing support of the project based upon information presented to [the County] regarding the General Investigations Study (GIS).

(Doc. 23-4) (emphasis added). The public notice given by the Corps stated "[i]nterested persons are hereby notified that the [Corps] is seeking Federal authorization to conduct [the Project]." (Doc. 23-5, p. 7). The Corps' representative testified that the Corps is conducting the Project and the County was merely a sponsor. (Doc. 23-6, p. 5-6). None of these statements ascribe to the County the role of an entity jointly conducting the Project.

The Project does not fall under the exemption to the White Sands Protection Restrictions, provided by § 4.07.08 of the LDC, because the Project is not one conducted by Walton County. Accordingly, plaintiffs are entitled to summary judgment on their action for declaratory judgment.

Accordingly, it is ORDERED AND ADJUDGED:

1. That any sand placed upon the plaintiff's beach property in the course of the Hurricane and Storm Damage Reduction Project must conform to the standards of § 4.07.03 of the LDC.

2. That because the borrow material as described for the Project is prohibited under § 4.07.03, such material may not be placed upon the plaintiffs' property.

3. The court reserves jurisdiction, should enforcement of this declaratory decree be necessary.

DONE AND ORDERED this 6th day of October, 2015.

/s/ Charles J. Kahn, Jr.

CHARLES J. KAHN, JR.
UNITED STATES MAGISTRATE JUDGE