IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR HENDRY COUNTY, FLORIDA

WILLIAM STEPHENS, CAROL GREY
and KEELY CINKOTA,

PLAINTIFFS

CASE NO. 2014-CA-633

VS.

HENDRY COUNTY

DEFENDANT

ORDER DENYING PLAINTIFF'S PRAYER FOR RELIEF

THIS CAUSE having come on for trial commencing June 27, 2016 upon the Plaintiff's Complaint for Injunctive Relief, and the Court having heard the testimony of witnesses, viewed exhibits placed into evidence, heard the argument of legal counsel and being otherwise duly advised in the premises FINDS AS FOLLOWS:

FACTUAL BACKGROUND

1. There is actually very little dispute regarding the facts in this matter.

2. On or about June 14, 2012, So Flo Agriculture (hereinafter **"So Flo"**) sought and received a pre-application conference with the Planning and Zoning staff employed by the Defendants, the Board of County Commissioners of Hendry County (hereinafter "**Hendry County**") for the purpose of obtaining site approval for a nonhuman primate breeding facility. The representatives from **So Flo** met with staff of the Planning and Zoning in order to determine if their proposed use of the property would be permitted under the Comprehensive Land Use Plan and the Zoning Codes. No members of the general public were present at any of these meetings.

3. **Hendry County** opined, through their staff, at that conference that a nonhuman primate breeding facility would be permitted under the Comprehensive Land Use Plan and Zoning Codes since the property was zoned for agricultural use which includes "animal husbandry".

4. **So Flo** submitted their site development plan on February 26, 2013 which was subsequently approved by **Hendry County** on May 23, 2013.

5. During approximately the same time frame a second facility known as **Panther Tracts** requested a pre-application meeting with **Hendry County** for the purpose of submitting a site development plan for the expansion of their pre-existing facility in southern Hendry County. (It should be noted that this facility had been originally permitted sometime in 2000 - 2001. During that same time another facility, Mandheimer Foundation had also been issued permits but that facility is not being challenged in this action.) **Panther Tracts** submitted their site development

plan amendment application on November 7, 2012 which was approved by **Hendry County** on December 10, 2012. This conference also involved staff members of **Hendry County** and representatives of **Panther Tracts.** Likewise no members of the general public attended any of these meetings.

6. At no time had **Hendry County** or any of its staff sent notices to surrounding property owners nor had any notices regarding these meeting been published in a newspaper of general circulation. There were no public hearings held.

7. A legal action was timely commenced by William Stephens, Carol Grey and Keely Cinkota (hereinafter **Plaintiffs**).

8. Mr. Stevens lives approximately .44 miles from the **So Flo** facility. His property is located in Hendry County and he has resided at his current residence for 11 years.

9. Ms. Grey lives approximately 1.5 miles from the **So Flo** facility. Her property is located in Hendry County and she has resided at her current address since July 2013 (which if after the facility was approved for permitting).

10. Ms. Cinkota lives approximately 1 mile from the **So Flo** facility. Her property is located in adjoining Lee County and she is a current resident for 12.5 years.

11. None of the **Plaintiffs** live in close proximity to the **Panther Tracts** facility in that it is located at the opposite corner of Hendry County over 30 miles away.

12. At no time during any of the pre-application meetings or prior to the issuance of the permits challenged did any members of the **Hendry County** Board of County Commissioners participate in those meetings or have any communication with staff regarding these permits.

LEGAL ISSUES PRESENTED

This action was filed alleging a violation of Florida's Sunshine Law. Despite other ancillary issues which have been addressed by the general public and in the media, this is not an action about the wisdom of **Hendry County's** decision to permit nonhuman primate breeding facilities within county boundaries, nor about any potential health hazards, nor about any dangers posed by primates that might escape the facility. Those issues are outside the scope of these pleadings. This legal action is solely based upon a review of **Hendry County's** actions as they relate to Florida's Sunshine Law and nothing more.

In considering this case and confining the legal issues within the four corners of the pleadings, the questions for the Court's consideration are as follows:

1. Did the actions taken by **Hendry County** violate the black letter law as codified in Florida Statutes 286.011 (1) commonly referred to as the Florida Sunshine Law?

2. If not, has **Hendry County** violated the purpose and intent of the Sunshine Law by assigning or abdicating policy making functions (as opposed to ministerial functions) to staff? In other words, did the staff approval of the site development plans challenged herein allowing a nonhuman primate breeding facility under the definition of "animal husbandry" arise to level of a policy making function thereby triggering the applicability of the Sunshine Law?

LEGAL REASONING

Florida Statute 286.011 (1) states:

> "All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, including meetings with or attended by any person elected to such board or commission, but who has not yet taken office, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings."

First, it is clear from the testimony that no county commissioner, either alone or in tandem with any other commissioner attended any meetings, consulted nor communicated with each other or with either **So Flo** or **Panther Tracts** during any portion of the process approving either site development plan. In order for the Sunshine Law to apply there must be a meeting between two or more public officials. *City of Sunrise v. News and Sun-Sentinel Co.,* 542 So.2d 1354, 1355 (4th DCA 1989). The only involvement by any commissioner was inquiries to county staff by Commissioner Karson Turner seeking information after the permit was issued by **Hendry County**. His inquiries were triggered by public inquiries made to him. Additionally, commissioners received copies of a proposed press release to be distributed by the county. All of these actions commenced subsequent to the issuance of the permits and are not relevant to this case as they would not form the basis for a Sunshine Law violation.

Additionally, It was never demonstrated that any other board, commission or committee constituted or appointed by **Hendry County** were involved. This was a meeting involving two staff members of **Hendry County** and representatives of the applicant's facilities. The legal precedents in the cases cited by both the **Plaintiffs** and **Hendry County** in which the Sunshine Law was clearly applicable involved boards, commissions or committees in which two or more persons were engaged in a policy-making function.

Therefore, upon a surface examination, **Hendry County** did not violate the black letter requirements of 286.011 (1) and the first question posed for the Court's consideration is answered in the negative.

However, as suggested in *Wood v. Marston*, 442 So.2d 473 (Fla. 1983), the Court's inquiry into the Sunshine Law should go beyond the question of whether two or more decision-makers met in a closed door session but should be "broadly construed to effect its (Sunshine Law's) remedial and protective purpose". Further, "the statute should be construed so as to frustrate all evasive devices." *Id.* at 940, citing *Town of Palm Beach v. Gradison,* 2996 So2d 473, 477 (Fla. 1974). Does this require that each and every action taken by a governmental staff member falls under the auspices or requirements of the Sunshine Law? Absolutely not. To require such scrutiny and review would paralyze governmental bodies by the sheer volume of public hearings and goes beyond the clear parameters of the legislative intent. The proper

inquiry to be made is whether an evasive device has been employed with the intent to skirt the requirements of F.S. 286.011(1).

It appears that the test is whether the action taken by the alleged violators of the Sunshine Law are policy-making or ministerial in nature. An action which is policy-making in nature falls squarely under the auspices of the Sunshine Law while an action which is ministerial in nature is not covered by that law.

Both parties must concede that there is no articulated definition for "animal husbandry" specifically set forth in either **Hendry County's** Comprehensive Land Use Plan nor in its Zoning Code. Because the term is not specifically defined, **Plaintiffs** urge this court to apply common dictionary definitions in order to determine its clear and plain meaning. **Hendry County** argues, on the other hand, that the meaning of "animal husbandry" is to be defined by its historical application to prior site development plans of a similar nature and by legislative intent, is such intent can be ascertained.

The Court is required, when possible, to give effect to a legislative body's intent. *State v. J.M.,* 824 So.2d 105, 109 (Fla. 2002). In order to discern legislative intent, courts should look first to the plain language of the statute. *Joshua v. City of Gainesville,* 768 So.2d 432, 435 (Fla. 2000). Only when the statutory language is unclear or ambiguous should the courts apply rules of statutory construction and explore legislative history to determine legislative intent. *Diamond Aircraft Industries, Inc. v. Horowitch, 107 So.3d 362 (Fla. 2013); Weber v. Dobbins,* 626 So.2d 956, 958 (Fla. 1993). It is clear through the presentation of the evidence at trial that there is a lack of clarity as to the term "animal husbandry" as that term is not specifically defined in either the Comp Plan or Zoning Codes. It appears that the required first step in the analysis, however, is to determine and give effect to the legislative intent.

As an aside, **Hendry County** attempted to introduce a definition of animal husbandry that was prepared after this litigation was commenced. That attempt fails on two grounds. First, it attempts to introduce a definition that was not in existence at the time the decision was made to approve the challenged site development plans. While this Court acknowledges that **Hendry County** has the absolute right to amend their legislative acts at any time to redefine any terms they wish, an attempt to establish or amend terms after litigation has been commenced has no evidentiary value. Secondly, this "newly minted" definition of "animal husbandry" would clearly fall under a policy-making function (as it would add a definition to a legislative act) and would not be effective until it is adopted by the Board of County Commissioners at a public hearing subject to Sunshine Law requirements. Therefore that attempt to "bootstrap" a new definition is rejected.

In examining the historical application of "animal husbandry" as it relates to permitted uses in agricultural zoning in **Hendry County**, the Court finds a few historical mileposts. First, **Hendry County** had previously permitted two nonhuman primate breeding facilities in approximately 2000, Mandheimer Foundation and the original **Panther Tracts**. At that time staff had approved those site development plans which were substantially similar to those challenged in the case at bar. The Comp Plan and Agricultural Zoning code has not been significantly amended during the entire expanse of time from 2000 until the instant action was filed. Those actions (taken in 2000) serves as a precedent and indicator of **Hendry County's** intent as it relates to the placement of nonhuman primate breeding facilities. It appears that these

facilities are the only facilities that ever requested site development plans for nonhuman primates since **Hendry County** adopted the Comp Plan and Zoning Codes applicable to this case.

Secondly, **Hendry County** through their director of Building and Zoning, the late Easton Burchard opined in April of 2000 that an A-2 zoning allowed the raising of monkeys. Defense Exhibit #1. The then County Attorney, Katherine English, indicated to Board of County Commissioners on July 1, 2001 that the proposed use of agriculturally zoned property for a nonhuman primate breeding facility was within the list of uses which were provided as of right in the zoning codes. She then further indicated (when questioned about the Mandheimer Foundation's nonhuman primate breeding facility established in 2000) that "animal husbandry is a bonafide ag use." Plaintiff's Exhibit #2.

Thirdly, and probably most persuasive, the fact that **Hendry County**, during duly called and advertised meetings of its Board of County Commissioners discussed the question of the locating of nonhuman primate breeding facilities in agricultural zoning on two separate occasions. The first occasion was at a Board of County Commissioners meeting held on July 1, 2001, when Heather Lischin from the Animal Rights Foundation of Florida appeared before the Board in opposition to the construction of a nonhuman primate breeding facility. The then County Attorney Katherine English advised the Board that they could incur some liability associated with denying a permit and that public opposition to a particular land use was not a sufficient reason for denial. (Joint Exhibit #1). The second occasion was on September 10, 2002, when then County Administrator Lester Baird raised the issue about a proposed second breeding facility. The then County Attorney Dan Stevens stated "the Zoning Department's land interpretation is that is a permitted agricultural use. *The Board could consider an Ordinance changing the definition not to allow this use.* (emphasis added) No action WAS (sic) taken by the Board." (Joint Exhibit #2). On both occasions the Board elected to take no action, make no corrections or reverse the decisions of the staff determinations that breeding facilities were allowable uses. The logical and reasonable conclusion is that the Board thereby gave tacit approval and acquiescence to those staff interpretations of the Code. Additionally, there was testimony that **Hendry County** has in the past permitted buffalo, turtles, alligators, tilapia and ostriches in agricultural zones. The foregoing factors manifest the legislative intent of **Hendry County** to allow nonhuman primate breeding facilities in agricultural zoning.

Since there is no definition of "animal husbandry" in the Comp Plan or Zoning Code the **Plaintiffs** urge the Court to take a more restricted view of the allowable uses in the agricultural zoning. This Court recognizes that the dictionary definitions submitted by the **Plaintiffs** take a narrower view of the term "animal husbandry" limiting it to "domestic" animals. Those definitions are in contradiction with the position taken by **Hendry County**. A reviewing court's deference to the interpretation given a statute or ordinance by the agency responsible for its administration is not absolute, and when the agency's construction of a statute amounts to an unreasonable interpretation, or is clearly erroneous, it cannot stand. *Shamrock-Shamrock, Inc., v. City of Daytona Beach, 169 So.3d 1253 (5th DCA 2015).* However, **Hendry County's** interpretation of "animal husbandry" is not so unreasonable as to be totally excluded from consideration. Since zoning regulations are in derogation of private rights of ownership, words used in a zoning ordinance should be given their broadest meaning when there is no definition or clear intent to the contrary and the ordinance should be interpreted in favor of the property owner. Shamrock-Shamrock, Inc v. City of Daytona Beach, 169 S.3d. 1253 (5thDCA, 2015);

Stroemel v. Columbia County, 930 So.2d 742, 745 (1stDCA 2006); City of Hallandale v. Prospect Hall College, Inc., 414 So.2d. 239, 240 (4thDCA 1982). As indicated earlier, this Court finds clear intent on behalf of **Hendry County** but, even absent that finding, the law requires that a broad definition of terms should be applied and any doubt resolved in favor of the property owner.

Based upon the foregoing this Court answers the second question in the negative and finds that **Hendry County** did not assign or abdicate their policy-making authority to staff nor did they employ any evasive devise to avoid the application of Florida Statute 286.011 (1).

IT IS THEREFORE ORDERED AND ADJUDGED as follows:

The Court holds that there was no violation of Florida Statute 286.011(1) (Florida Sunshine Law) and finds for the Defendant **Hendry County** in this action.

DONE AND ORDERED in LaBelle, Hendry County, Florida this 8th day of July, 2016.

James D. Sloan

Circuit Court Judge

I HEREBY CERTIFY that copy of the foregoing has been furnished by email to the following this 8th day of July, 2016:

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