IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

ESTERO COUNCIL OF COMMUNITY LEADERS, INC.;
RESPONSIBLE GROWTH MANAGEMENT COALITION, INC.
Plaintiffs,
v. CASE NO.: 15-CA-003214
LEE COUNTY
Defendant
THE PLACE AT CORKSCREW, LLC
Intervenor.
_____/

RESPONSE TO MOTION TO DISMISS

Plaintiffs respond to Intervenor's Motion to Dismiss as follows. Plaintiffs' correctly filed this statutory action as a Complaint under §163.3215(3).

Florida Statutes §163.3215(1) provides that "Subsections (3) and (4) provide the exclusive methods for an aggrieved or adversely affected party to appeal and challenge the consistency of a development order with a comprehensive plan." §163.3215(4) does in some instances provide for review by petition for writ of certiorari, but only if the County has adopted a hearing process that meets the specific statutory requirements of §163.3215(4) including §163.3215(4) (d):

"The local process must provide, at a minimum, an opportunity for the *disclosure of witnesses and exhibits prior to hearing* and *an opportunity for the depositions of witnesses to be taken."*

Otherwise, §163.3215(3) provides that the action shall be filed as **a complaint** seeking declaratory, injunctive and other relief and providing for a *de novo* hearing in circuit court. §163.3215(3), Florida Statutes states:

(3) "Any aggrieved or adversely affected party may maintain a **de novo action for declaratory, injunctive, or other relief** against any local government to challenge any decision of such local government granting or denying an application for, or to prevent such local government from taking any action on, a development order, as defined in s. 163.3164, which materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan adopted under this part. The **de novo action** must be filed no later than 30 days following rendition of a development order or other written decision, or when all local administrative appeals, if any, are exhausted, whichever occurs later."

The Lee County hearing process does not provide for **disclosure of witnesses** and **exhibits prior to hearing** and **an opportunity for the depositions of witnesses to be taken.** Therefore, the Lee County hearing process does not fully meet the specific, minimum required procedural requirements of subsection §163.3215(4)(d)[1]

[1] §163.3215(4) (d) "The local process must provide, at a minimum, an opportunity for the **disclosure of witnesses** and **exhibits prior to hearing** and **an opportunity for the depositions of witnesses to be taken.**"

for review by petition for writ of certiorari under 163.3215(4), therefore, the appropriate and correct filing is a Complaint for a *de novo* hearing under §163.3215(3), Florida Statutes (2015).

Lee County has never asserted, to undersigned counsel's personal knowledge, that the Lee County version of the Hearing Examiner process meets the requirements of the 163.3215(4) Florida Statutes and requires review of comprehensive plan consistency by petition for writ of certiorari.

Additionally, the Lee County process does not fully meet the following requirements because the process as set forth in AC 2-6, AC2-9, and Code 34-85 limits party status to the Applicant and the County. A third party "aggrieved or adversely affected" person, as more broadly defined in 163.3215(2)[2] would include plaintiffs. Under the Lee County process, plaintiffs could not cross examine, bring motions, or otherwise fully participate on an equal basis with the Applicant. AC 2-6 strictly defining and limiting parties to be the County and the Applicant and

[2] (2) As used in this section, the term "aggrieved or adversely affected party" means any ***person*** or local government that will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan, including ***interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, and environmental or natural resources***. The alleged adverse interest may be shared in common with other members of the community at large but must exceed in degree the general interest in community good shared by all persons. The term includes the owner, developer, or applicant for a development order.

prohibits plaintiffs as aggrieved and affected persons as defined in 163.3215 from being parties to the hearing entitled to cross examination and discovery under 163.3215(4). An "opportunity for reasonable discovery prior to the hearing" is not provided by AC2-6 and AC2-9. See Intervenors Exhibit C, Staff Analysis, p. 7. Therefore, the Lee County procedure does not meet the requirements of subsection 163.3215(4)(c), (d) and (g) are not met.

Further, Lee County Code 34-85 is contrary to the **sole and exclusive statutory** cause of action for declaratory and injunctive relief established in 163.3215(3), Florida Statutes. AC2-9 on its face "only applies in instances where a statutory right of appeal is not prescribed." See, AC2-9 p.1 Policy/Procedure.

Section 163.3215 is a remedial statute which must be liberally construed in order to protect the public interests identified in the statute. See Parker v. Leon County, 627 So.2d 476, 479 (Fla.1993); S.W. Ranches Homeowners Ass'n, Inc. v. Broward County, 502 So.2d 931, 935 (Fla. 4th DCA 1987).

This concept was recently explained by the Fifth District Court of Appeal in Save Homosassa River Alliance, Inc. v. Citrus County, 2 So.3d 329, 340 (Fla. 5th DCA 2008), review denied, 16 So.3d 132 (Fla.2009) "[t]he statute is designed to remedy the governmental entity's failure to comply with the established comprehensive plan.

"A local comprehensive land use plan is a statutorily mandated legislative plan to control and direct the use and development of property within a county or municipality. The plan is likened to a constitution for all future development within the governmental boundary." Machado v. Musgrove, 519 So.2d 629, 631-32 (Fla. 3d DCA 1987) (citations omitted). See also § 163.3167, Fla. Stat. (2007).

Once a comprehensive plan has been adopted pursuant to the Local Government Comprehensive Planning and Land Development Regulation Act, "all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan" must be consistent with that plan. § 163.3194(1)(a), Fla. Stat. (2007); see also § 163.3164(7), Fla. Stat. (2007).

As explained in Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191 (Fla. 4th DCA, 2001) "Section 163.3194 requires that all development conform to the approved Comprehensive Plan, and that development orders be consistent with that Plan. The statute is framed as a rule, a command to cities and counties that they must comply with their own Comprehensive Plans after they have been approved by the State. The statute does not say that local governments shall have some discretion as to whether a proposed development should be consistent with the Comprehensive Plan. Consistency with a Comprehensive Plan is therefore not a discretionary

matter. When the Legislature wants to give an agency discretion and then for the courts to defer to such discretion, it knows how to say that. Here it has not. We thus reject the developer's contention that the trial court erred in failing to defer to the County's interpretation of its own comprehensive plan."

There is no doubt that the purpose of the adoption of section 163.3215 was to liberalize standing in this context. See City of Ft. Myers v. Splitt, 988 So.2d 28 (Fla. 2d DCA 2008).

Save Homosassa River Alliance, Inc. v. Citrus County, 2 So.3d 329, 337 (Fla. 5th DCA 2008), review denied, 16 So.3d 132 (Fla.2009) explains standing under the statute as follows:

> "In part, section 163.3215(3), Florida Statutes (2007), provides:
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> 'Any aggrieved or adversely affected party may maintain a de novo action for declaratory, injunctive, or other relief against any local government to challenge any decision of such local government granting or denying an application for, or to prevent such local government from taking any action on, a development order, as defined in s. 163.3164, which materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan adopted under this part.'
>
> Further, section 163.3215(2), Florida Statutes (2007), provides:
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> As used in this section, the term "aggrieved or adversely affected party" means any person[7] or local government that will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, and environmental or natural resources. The alleged adverse interest may be shared in common with other members of the community at large but must exceed in degree the general interest in community good shared by all

persons. The term includes the owner, developer, or applicant for a development order.…

The statute does not say that a party must be harmed to a greater degree than the general public. Not surprisingly, the case law assumes that an organization has an interest that is greater than "the general interest in community well being" when the organization's primary purpose includes protecting the particular interest that they allege will be adversely affected by the comprehensive plan violation. See Stranahan House, Inc., 967 So.2d at 434. The old common law test was so narrowly drawn that there often was no means of redress for a comprehensive plan violation. The expanded statutory test eliminates "gadfly" litigation, yet gives oversight to the segment of the public that is most likely to be knowledgeable about the interest at stake and committed to its protection. The statute expressly identifies by multiple examples the kinds of interests the legislature intended to protect:

As used in this section, the term "aggrieved or adversely affected party" means any person or local government that will suffer an adverse effect to *an interest protected or furthered by the local government comprehensive plan, including interests related to* health and safety, police and fire protection service systems, densities or intensities of development, *transportation facilities*, health care facilities, equipment or services, *and environmental or natural resources*. §163.3215(2), Fla. Stat. (2007) (emphasis added).”

Save Homosassa River Alliance, Inc. v. Citrus County, 2 So.3d 329, 340 (Fla. 5th DCA 2008), review denied, 16 So.3d 132 (Fla.2009).

Plaintiffs allege in paragraphs 5 and 6 sufficient facts regarding standing as follows:

> [Complaint, Para.] 5. Plaintiffs have statutory standing as adversely affected parties under Florida Statutes 163.3215 as follows:
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> a. ESTERO COUNCIL OF COMMUNITY LEADERS, INC., ("ECCL") is a not for profit corporation doing business in Lee County Florida. ECCL is substantially adversely affected because it is a business operating in Lee County and appeared and provided oral or written objections to Lee County at the public hearings held by Lee County. ECCL has a Lee County business tax receipt (formerly called an "occupational license") for the business purpose of monitoring growth management and habitat protection in Lee County, Florida. The ECCL serves the residents of the incorporated Village of Estero and contiguous areas of unincorporated Lee County as a voluntary, "grass roots" community organization of Estero residents and more than 40 member organizations and residential communities in the Estero area. Many of the ECCL members utilize and share Corkscrew Road with the subject parcel to be rezoned RPD on Corkscrew Road. The ECCL presented comments and objections to Lee County regarding the subject RPD rezoning and have presented comments to Lee County regarding growth management, planning and zoning issues for more than a decade. ECCL publishes a monthly newsletter called the "Estero Development Report (EDR)" which chronicles residential and commercial developments. In addition, the ECCL issues periodic reports to its members and holds public meetings on the current proposed developments and growth related issues that are being addressed, monitored, or anticipated by the ECCL and provides a calendar of opportunities for involvement, and in-depth status reports on on-going projects, meetings and results of those meetings. The ECCL's electronically publishes a monthly newsletter called the Estero Development Report (EDR), which is emailed directly to approximately 3,700 households and public officials. ECCL has been in existence for more than one year, and has more than 30 members who are located in Lee County. ECCL's substantial interests will be affected because a substantial number of residents in member communities live near, use or benefit from the Density Reduction Groundwater Resource (DRGR) area natural resources and ecosystems, recreational opportunities, birding and wildlife observation and who will be adversely affected by the rezoning that is inconsistent with the Lee Plan and fails to adequately protect the natural resources of the DRGR.
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> b. The RESPONSIBLE GROWTH MANAGEMENT COALITION, INC. ("RGMC") is a not-for-profit corporation whose corporate purposes

include supporting responsible growth management and protecting and conserving the air, water and natural resources of the State of Florida and also includes litigation for the purposes of implementing and enforcing local and state land use and zoning laws and local and state environmental protection laws. Its membership consists of approximately 90 individual members and a number of organizational members. A substantial number of RGMC reside in the SE Lee County and utilize the Density Reduction Groundwater Resource Area for recreation, birding and wildlife observation and educational purposes. The RGMC presented comments and objections to Lee County regarding the subject RPD rezoning and have presented comments to Lee County regarding growth management, planning and zoning issues for more than a decade. RGMC's substantial interests will be affected because a substantial number of its members live near, use or benefit from the DRGR area natural resources and ecosystems, recreational opportunities, birding and wildlife observation and who will be adversely affected by the rezoning that is inconsistent with the Lee Plan and fails to adequately protect the natural resources of the DRGR.

6. Plaintiffs object to the development as inconsistent with the duly adopted Comprehensive Plan and are "aggrieved or adversely affected" persons that will suffer an adverse effect to an interest protected or furthered by the Comprehensive Plan, including adverse impacts to interests related to intensity of development, which exceeds in degree the general interest in community good shared by all persons because a substantial number of members of ECCL and RGMC utilize the lands near and adjacent to the subject parcels for wildlife observation, birding, recreation and educational purposes on a daily, weekly or monthly basis and will be adversely affected by the approval of a development order that is not consistent with the Comprehensive Plan."

Complaint, pp. 5-6.

This case should proceed as a *de novo* action under subsection 163.3215(3) rather than as a petition for writ of certiorari under subsection 163.3215(4) Florida Statutes because the Lee County procedures do not meet the specific requirements of §163.3215(4)(d).[3]

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[3] §163.3215(4) (d) "The local process must provide, at a minimum, an opportunity for the disclosure of witnesses and exhibits prior to hearing and an opportunity for the depositions of witnesses to be taken."

Florida Statutes 163.3215 (2015)

(1) **Subsections (3) and (4) provide the exclusive methods for an aggrieved or adversely affected party to appeal and challenge the consistency of a development order with a comprehensive plan** adopted under this part. The local government that issues the development order is to be named as a respondent in all proceedings under this section. Subsection (3) shall not apply to development orders for which a local government has established a process consistent with the requirements of subsection (4). A local government may decide which types of development orders will proceed under subsection (4). Subsection (3) shall apply to all other development orders that are not subject to subsection (4).

(2) As used in this section, **the term "aggrieved or adversely affected party"** means **any person** or local government **that will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, and environmental or natural resources**. The alleged adverse interest may be shared in common with other members of the community at large but must exceed in degree the general interest in community good shared by all persons. The term includes the owner, developer, or applicant for a development order.

(3) Any aggrieved or adversely affected party may maintain a de novo action for declaratory, injunctive, or other relief against any local government to challenge any decision of such local government granting or denying an application for, or to prevent such local government from taking any action on, a development order, as defined in s. 163.3164, **which materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan** adopted under this part. The **de novo action must be filed no later than 30 days** following rendition of a development order or other written decision, or when all local administrative appeals, if any, are exhausted, whichever occurs later.

(4) If a local government elects to adopt or has adopted an ordinance establishing, at a minimum, the requirements listed in this subsection, the sole method by which an aggrieved and adversely affected party may challenge any decision of local government granting or denying an application for a

development order, as defined in s. 163.3164, which materially alters the use or density or intensity of use on a particular piece of property, on the basis that it is not consistent with the comprehensive plan adopted under this part, **is by an appeal filed by a petition for writ of certiorari filed in circuit court** no later than 30 days following rendition of a development order or other written decision of the local government, or when all local administrative appeals, if any, are exhausted, whichever occurs later. An action for injunctive or other relief may be joined with the petition for certiorari. Principles of judicial or administrative res judicata and collateral estoppel apply to these proceedings. **Minimum components of the local process are as follows**:

(a) The local process must make provision for notice of an application for a development order that materially alters the use or density or intensity of use on a particular piece of property, including notice by publication or mailed notice consistent with the provisions of ss. 125.66(4)(b)2. and 3. and 166.041(3)(c)2.b. and c., and must require prominent posting at the job site. The notice must be given within 10 days after the filing of an application for a development order; however, notice under this subsection is not required for an application for a building permit or any other official action of local government which does not materially alter the use or density or intensity of use on a particular piece of property. The notice must clearly delineate that an aggrieved or adversely affected person has the right to request a quasi-judicial hearing before the local government for which the application is made, must explain the conditions precedent to the appeal of any development order ultimately rendered upon the application, and must specify the location where written procedures can be obtained that describe the process, including how to initiate the quasi-judicial process, the timeframes for initiating the process, and the location of the hearing. The process may include an opportunity for an alternative dispute resolution.

(b) The local process must provide a clear point of entry consisting of a written preliminary decision, at a time and in a manner to be established in the local ordinance, with the time to request a quasi-judicial hearing running from the issuance of the written preliminary decision; the local government, however, is not bound by the preliminary decision. A party may request a hearing to challenge or support a preliminary decision.

(c) The local process must provide an opportunity for participation in the process **by an aggrieved or adversely affected party**, allowing a reasonable time for the party to prepare and present a case for the quasi-judicial hearing.

(d) The local process must provide, at a minimum, an opportunity for the disclosure of witnesses and exhibits prior to hearing and an opportunity for the depositions of witnesses to be taken.

(e) The local process may not require that a party be represented by an attorney in order to participate in a hearing.

(f) The local process must provide for a quasi-judicial hearing before an impartial special master who is an attorney who has at least 5 years' experience and who shall, at the conclusion of the hearing, recommend written findings of fact and conclusions of law. The special master shall have the power to swear witnesses and take their testimony under oath, to issue subpoenas and other orders regarding the conduct of the proceedings, and to compel entry upon the land. The standard of review applied by the special master in determining whether a proposed development order is consistent with the comprehensive plan shall be strict scrutiny in accordance with Florida law.

(g) At the quasi-judicial hearing, all parties must have the opportunity to respond, to present evidence and argument on all issues involved which are related to the development order, and to conduct cross-examination and submit rebuttal evidence. Public testimony must be allowed.

(h) The local process must provide for a duly noticed public hearing before the local government at which public testimony is allowed. At the quasi-judicial hearing, the local government is bound by the special master's findings of fact unless the findings of fact are not supported by competent substantial evidence. The governing body may modify the conclusions of law if it finds that the special master's application or interpretation of law is erroneous. The governing body may make reasonable legal interpretations of its comprehensive plan and land development regulations without regard to whether the special master's interpretation is labeled as a finding of fact or a conclusion of law. The local government's final decision must be reduced to writing, including the findings of fact and conclusions of law, and is not considered rendered or final until officially date-stamped by the city or county clerk.

(i) An ex parte communication relating to the merits of the matter under review may not be made to the special master. An ex parte communication

relating to the merits of the matter under review may not be made to the governing body after a time to be established by the local ordinance, which time must be no later than receipt of the special master's recommended order by the governing body.

(j) At the option of the local government, the process may require actions to challenge the consistency of a development order with land development regulations to be brought in the same proceeding.

History.—s. 18, ch. 85-55; s. 901, ch. 95-147; s. 10, ch. 2002-296.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished via email on Friday January 29, 2016 to all E-service recipients:

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