

IN THE FIFTH JUDICIAL CIRCUIT COURT  
IN AND FOR MARION COUNTY

RAINBOW RIVER CONSERVATION, INC.,  
a Florida Corporation,  
and FREDERICK S. JOHNSTON,  
MICHAEL G. RAUSCH, MAX P LYNN,  
JOHN DENNIS, PATRICIA M ERMATINGER,  
JEAN TULLIS AND CHARLES TULLIS,  
THELMA B DICKINSON, MARGARET LONGHILL,  
NIKKI CONNORS, ROGER BARTH,  
EMMA JEAN PAINTER, LEONARD GANE,  
WALTER JOHNSON, SHIRLEY E. DOWLING,  
FRANKLIN W. ROTH, as individuals  
Plaintiffs

v.

Case No. 10-1877 CAB

CITY OF DUNNELLON  
Defendant

**RESPONSE TO MOTION TO DISMISS**  
**WITH INCORPORATED MEMORANDUM OF LAW**

Plaintiffs respond to each of the numbered points raised in Defendant's Motion to Dismiss, with incorporated memorandum of law for each # issue raised, as follows:

1. The Complaint does state a statutory cause of action under §163.3215,

*Florida Statutes:*

§163.3215 (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."

2. Plaintiffs are required to name the local government by statute but are not required name the applicant, developer, or landowners in this statutory cause of action.

The legislature expressly stated in the statute exactly who “is to be named” in this type of statutory cause of action in

Florida Statutes §163.3215 (1):

“... *The local government that issues the development order is to be named as a respondent in all proceedings under this section.*”

This statutory cause of action seeks judicial review of whether the City’s approval of development is consistent with the duly adopted City Comprehensive Plan – an action of the City not the developer. The applicant, developer, or landowner may intervene in proceedings; but they are not required to be named by Plaintiff. This already well decided issue is controlled by Florida Supreme Court precedent Brigham v. Dade County, 305 So.2d 756 (Fla. 1974), City of St Petersburg v. Marelli, 728 So.2d 1197 (Fla. 2<sup>nd</sup> DCA 1999), Concerned Citizens Of Bayshore Community, Inc., v. Lee County, 923 So. 2d 521 (Fla. 2<sup>nd</sup> DCA 2005)(“ Case law clearly establishes that a property owner affected by a zoning regulation change is not an indispensable party to a review of that administrative action. See Brigham, 305 So.2d at 758; Marelli, 728 So.2d at 1198.”); and Pinecrest Lakes, Inc. v. Shidel, 795 So.2d 191, 194 (Fla. 4 DCA, 2001) (in which the developer/owner was served but not named in this case that sought judicial review under 163.3215 and resulted in demolition of the multifamily building).

3. The settlement agreement purports to approve development density, intensity and location of development (site plan) on the subject lands meets the definition of a “development order” as defined by §§163.3164(7) and (8). *Florida Statutes*:

(7) "Development order" means any order granting, denying, or granting with conditions an application for a *development permit*.

(8) "*Development permit*" includes any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land.

(emphasis added).

The settlement agreement is an “official action of local government having the effect of permitting the development of land” therefore, it is subject to review for consistency with the Comprehensive Plan under §163.3215, *Florida Statutes*.

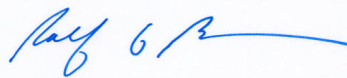
4. Plaintiffs are not required to be “citizens of the City” (like they do for Comprehensive Plan Amendment challenges) to bring this action, but must instead meet the broad **legislatively expanded** statutory standing requirements of §163.3215:

“§163.3215 (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.”

“§163.3215 (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.”

As required by this “statutory standing” test, Plaintiffs have alleged actual personal use of the subject area and do in fact make factual allegations as to how each will be adversely affected by the development. See Complaint paragraphs 33-67. Plaintiffs will suffer an “adverse effect to an interest protected or furthered by the local government comprehensive plan, including interests related to... environmental or natural resources” approved in the settlement agreement as alleged and set forth with specificity in detailed facts contained in the Complaint, paragraphs 33-67.

Organizational standing for groups like **RAINBOW RIVER CONSERVATION, INC.**, is supported by a great deal of case law under 163.3215, Florida Statutes with similar factual allegations, see Save the Homosassa River Alliance, Inc. v. Citrus County, Florida, 2 So. 3d 329 (Fla. 5th DCA 2009); Putnam County Environmental Council, Inc. v. Board of County Com'rs of Putnam County, App. 5 Dist., 757 So.2d 590 (2000). In Putnam County Environmental Council, the Fifth District held that: “where environmental group has **continued connections with the land** which would be adversely impacted by the rezoning, the group possesses an interest which **exceeds the general interest in community good shared by all people**, and thus has standing to challenge rezoning.” The continued connections with land acquisition efforts in Putnam County Environmental Council are similar to Rainbow River Conservation, Inc.’s acquisition efforts on similarly nearby lands.



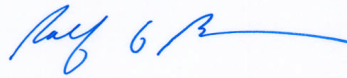
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by US mail on this **June 4, 2010** to the following:

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*As filed with the :*  
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