

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

In re: CITY OF DUNNELLON, FLORIDA,
RAINBOW RIVER RANCH, LLC and
CONSERVATION LAND GROUP, LLC,

Case No. 42-2010-CA-001960-A

Joint Petitioners.

**DEPARTMENT OF COMMUNITY AFFAIRS' REPLY TO
RESPONSES IN OPPOSITION TO MOTION TO INTERVENE**

The State of Florida, Department of Community Affairs (Department), by and through undersigned counsel and pursuant to this Court's Order on Motions to Intervene, respectfully files this Reply to Responses in Opposition to Motion to Intervene.

Introduction

1. In the October 14th Order on Motions to Intervene, this Court allowed Joint Petitioners ten days to file any Responses to the pending Motions to Intervene. With respect to the Department's pending Motion to Intervene, Petitioners Rainbow River Ranch, LLC and Conservation Land Group, LLC filed a Response which simply incorporated its previously-filed Memorandum of Law in Opposition to Motion to Intervene. Petitioner City of Dunnellon did not file a Response as permitted by this Court's Order: however, the City had previously filed a Response in Opposition to the Department's Motion. Accordingly, this Reply addresses the two Responses previously (but separately) filed by Joint Petitioners.

Reply to City of Dunnellon

2. In paragraph three of its Response in Opposition to the Department's Motion, the City forwards numerous grounds upon which it opposes the Department's intervention. There are numerous factual errors in this Response.

3. First, the City alleges that "[t]his settlement does not propose any comprehensive plan amendment." This statement is incorrect. Paragraph 4(b) of the Settlement Agreement provides, in pertinent part, "Policy 1.6 [of the comprehensive plan] **is modified to include** up to 100,000 square feet of commercial **and to exclude** under Policy 1.6, subset a., c., f., g., h., and j." Settlement Agreement at 3. Modifications to include additional text and delete existing text from adopted comprehensive plan policies are comprehensive plan amendments as a matter of law. See Fla. Admin. Code r. 9J-5.003(6) ("`Amendment'" means any action of a local government which has the effect of amending, **adding to, deleting from** or changing an adopted comprehensive plan element" [emphasis added]).

4. Second, the City states that the Department's representation in the Motion that the City has acknowledged that the Settlement is inconsistent with the comprehensive plan and statute is "untrue." To the contrary, the Joint Petition to Affirm Settlement Agreement states that "[t]he Agreement avoids and excuses the potential requirements in the City's

Comprehensive Plan" and "has the [possible] effect of contravening parts of Ch. 163 F.S." The Department's characterization of these statements is accurate and true.

5. Third, the City states that the plan amendment adopted in 2001 (Cubbage Amendment) "makes no mention of a conservation land use" This statement is incorrect. Attached as part of Exhibit D to the Settlement Agreement submitted to this Court for approval is a document titled "Partial Stipulated Settlement Agreement." This Partial Agreement is the settlement pursuant to which the Cubbage Amendment was adopted. Exhibit B to the Partial Agreement is the Cubbage Amendment. Page 2 of Exhibit B, which is the future land use map portion of the Cubbage Amendment, clearly depicts a Conservation land use on 36+/- acres adjacent to the Rainbow River. Page 3 of Exhibit B, the legal description, contains a separate description for the "Conservation Area."

6. On the merits of its opposition, the City first alleges that the Department has "unclean hands" because it found "in compliance" the 2008 comprehensive plan amendment that designated the entire subject property as Agriculture. First and most importantly, it was the City, not the Department, that initiated and adopted this amendment. The decision to redesignate the land was made in Dunnellon, not in Tallahassee.

7. Once the City made its decision, the Department's sole

role, as defined by statute, is to determine whether the amendment is "in compliance" with statute and rule. The statute and rule establish only the minimum criteria for local government comprehensive planning. See Fla. Stat. § 163.3161(7); Fla. Admin. Code r. 9J-5.001(1). As such, local governments have great discretion to exceed these criteria.

As minimum criteria, these criteria are not intended to prohibit a local government from proposing, considering, adopting, enforcing, or in any other way administering a comprehensive plan which is more specific, detailed, or strict, or which covers additional subject areas, whether within required or optional elements, as long as the comprehensive plan is in compliance with Chapter 9J-5, F.A.C., Chapter 163, F.S., and any other applicable statutes, laws or rules.

8. The Department determined that the Cabbage Amendment met the minimum criteria. When the City then adopted the 2008 amendment to redesignate the subject property as agriculture, it clearly chose to exceed the minimum criteria and adopt a more restrictive land use category. Pursuant to the above-cited provisions, the City has the discretion to do so and the Department is directed to find such amendments "in compliance" if they otherwise meet statutory and rule requirements.

9. It is curious that the City, as the entity which adopted the 2008 amendment down-planning the subject property, would allege that "DCA, by its own actions, showed little concern for the 'Cabbage Agreement's' vested rights" The

Department acted well within its statutory duties and responsibilities in approving the actions voluntarily undertaken by the City.

10. The City also takes task with the Department for "not advis[ing] the City during the comprehensive planning process of their potential liability under Bert Harris or vested rights." Respectfully, it is not the role of and would not be appropriate for the Department to give legal advice on potential liability to a local government as part of the planning process.

11. The City next asserts, without legal citation, that the Department is incorrect in asserting that the Bert Harris Act does not override Growth Management Act. The Department's argument is based on the clear language of the Growth Management Act.

Conflict with other statutes - Where this act may be in conflict with any other provision or provisions of law relating to local governments having authority to regulate the development of land, the provisions of this act shall govern unless the provisions of this act are met or exceeded by such other provision or provisions of law relating to local government, including land development regulations adopted pursuant to chapter 125 or chapter 166.

Fla. Stat. § 163.3211. With no contrary legal authority to support it, the City's argument must be rejected.

Reply to Rainbow River Ranch, LLC and
Conservation Land Group, LLC

12. Rainbow River Ranch, LLC and Conservation Land Group, LLC (Property Owners) first allege that Abramson v. Florida Psychological Association, 634 So. 2d 610 (Fla. 1994) stands for the broad proposition that agencies have the inherent authority to settle litigation that is contrary to governing statutes. This case does not stand for such a broad proposition and is inapplicable in this instance.

13. Initially and perhaps most importantly, the City of Dunnellon is not an agency. The City is not seeking to enter into a settlement that violates the statute it is charged with implementing. Rather, the City is seeking to enter into a settlement that violates a statute which the Department is charged with implementing. These factual differences distinguish Abramson from the instant situation.

14. Moreover, the Supreme Court in Abramson specifically limited its holding. The Court refused to answer the certified question regarding the general circumstances under which a settlement could be approved contrary to statute,¹ and expressly held that "[t]his decision is applicable only to those who entered into the settlement agreement." 634 So. 2d at 612, n. 5.

¹ "Upon reflection, we decline to answer the certified question because we do not believe that a general rule can be formulated which would be applicable under all circumstances." 634 So. 2d at 612.

The decision in Abramson is simply inapplicable.

15. The Property Owners next assert that the Department's arguments regarding its interest in this action via the Growth Management Act are "exceptionally misleading." This assertion is without merit.

16. The Property Owners admit that the Department has "the authority to review comprehensive plan amendments" As noted above, the Settlement Agreement expressly purports to amend the City's comprehensive plan without Department review. The Department certainly has a substantial interest in being heard on whether such an overt and admitted evasion of express statutory requirements serves the public interest.

Conclusion

17. The Department is the state land planning agency and is charged with administration of Chapter 163, Part II, Florida Statutes. As set forth at length in the Motion for Leave to Intervene, the Department has a substantial interest in this proceeding and should be allowed to intervene.

RESPECTFULLY SUBMITTED this 4th day of **November**, 2010.



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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was furnished to each of the persons listed below by First Class U.S. Mail and electronic mail this 4th day of **November 2010**.



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