

IN THE FIFTH JUDICIAL CIRCUIT COURT
IN AND FOR MARION COUNTY

RAINBOW RIVER RANCH, LLC and
CONSERVATION LAND GROUP, LLC
Plaintiffs

v.

Case No. 10-1960-CA-A

CITY OF DUNNELLON, FLORIDA
Defendant.

And
RAINBOW RIVER CONSERVATION, INC.,
and FREDERICK S. JOHNSTON,
et al., as individuals
_____ /

REPLY and MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO INTERVENE (JOHNSON, ET AL).

In accordance with Judge King's Order dated October 14, 2010 in this case, Intervenors Rainbow River Conservation, Inc. and Johnson Et Al file this Reply and Memorandum of Law in support of their motion to intervene. An intervenor need not have standing to intervene, and need only show a "protectable interest of sufficient magnitude to warrant inclusion in the action." Smith v. Pangilinan, 651 F.2d 1320, 1324 (9th Cir. 1981). Intervenors meet the test because of the (1) proximity of Intervenors property interests along the same stretch of the Rainbow River and (2) actual personal use and continued connections to the land in question along the Rainbow River should be sufficient to support intervention in this case.

This particular settlement agreement, as drafted and presented to the court, would:

(a) be illegal because it departs from the duly adopted Comprehensive Plan requirements for the subject lands without first obtaining an Amendment to the Comprehensive Plan in violation of Chapter 163, Part II, Florida Statutes (Florida's Growth Management Act) *See DCA Motion to Intervene* and

(b) violate a prior settlement agreement with the state land planning agency, the State of Florida Department of Community Affairs. *See DCA Motion to Intervene.*

The proposed settlement, as written, would violate 163.3184 requirements that a plan amendment be processed before the settlement agreement departing from the duly-adopted effective Comprehensive Plan can be approved. The proposed settlement, as written, would violate this state law as clearly explained by the Florida Supreme Court in Coastal Dev. of N. Fla. v. City of Jacksonville Beach, 788 So. 2d 204, 207-209 (Fla. 2001):

"The amendment process entails, among other things, an integrated review process involving a **mandatory review by the Department**...The FLUM is a pictorial depiction of the future land use element and is supplemented by written goals, policies, and measurable objectives. The FLUM must be internally consistent with the other elements of the comprehensive plan...The FLUM is part of the comprehensive plan and represents a local government's fundamental policy decisions. Any proposed change to that established policy likewise is a policy decision. The FLUM itself is a policy decision. A decision that would amend the FLUM requires those policies to be reexamined, even though that change is consistent with the textual goals and objectives of the comprehensive plan. Therefore, the scope of the proposed change is irrelevant because any proposed change to the FLUM requires a reexamination of those policy considerations and not an application of those policies."

See also Martin County v. Yusem, 690 So. 2d 1288 (Fla. 1997) (as to plan amendment process required under Fla. Stat 163). Contrary to assertions in the Motion to Dismiss that the Harris Act §70.001 would take precedence over Chapter 163, Part II (i.e., the comprehensive planning act) Section 163.3211, Fla. Stat. of the Growth Management Act provides that chapter 163 takes expressly preempts and takes precedence over other chapters of Florida Statutes.

163.3211 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.

If a settlement is illegal because no plan amendment was adopted, who will be affected? Those who would have statutory standing to challenge such an amendment.

There are two types of standing with regard to plan amendments. First, if a plan amendment were properly submitted to the state land planning agency (DCA) for review, intervenors would clearly meet the broadest “statutory” standing test to request a formal administrative hearing on such a plan amendment, which requires that one be a person residing in the local government who filed written or oral objections. §163.3184(1)(a), Florida Statutes. Intervenors are affected persons as citizens of the local government who could submit objections to the plan amendment:

Florida Statutes §163.3184(1)(a) -“Affected person” includes the affected local government; **persons owning property, residing, or owning or operating a business within the boundaries of the local government** whose plan is the subject of the review; owners of real property abutting real property that is the subject of a proposed change to a future land use map; and adjoining local governments that can demonstrate that the plan or plan amendment will produce substantial impacts on the increased need for publicly funded infrastructure or substantial impacts on areas designated for protection or special treatment within their jurisdiction. **Each person, other than an adjoining local government, in order to qualify under this definition, shall also have submitted oral or written comments, recommendations, or objections to the local government** during the period of time beginning with the transmittal hearing for the plan or plan amendment and ending with the adoption of the plan or plan amendment.

Secondly, the Intervenors could also meet the expanded statutory standing test applicable to circuit court actions seeking review of developments alleged to be inconsistent with a duly-adopted comprehensive plan under Florida Statute §165.3215 (2010). Nassau County v. Willis 41 So.3d 270, 2010 WL 2196459 (Fla.App. 1 Dist., 2010) (County residents had standing by statute to challenge consistency of county's ordinance approving development plans for island with county's comprehensive plan, where residents had an active and continuing connection to the affected land or were members of an organization whose primary purpose was the study and

protection of natural resources, and residents, through their land, canoe and kayak tours of the land surrounding the island, demonstrated a connection to the island that exceeded in degree the general public's interest in the community good). West's F.S.A. § 163.3215. Save the Homosassa River Alliance, Inc. v. Citrus County, 2 So. 3d 329 (Fla. 5th DCA 2009); Putnam County Env'tl. Council, Inc. v. Bd. of County Comm'rs of Putnam County, 757 So.2d 590 (Fla. 5th DCA 2000).

Third, intervenors could also meet the “common-law” standing under the test established by the Florida Supreme Court in 1972 for non-statutory, common law standing test for development issues other than Comprehensive Plans, as property owners in close “proximity” to the proposed development. Renard v Dade County, 261 So.2d 832 (1972). Under the Supreme Court test in Renard the test for determining sufficiency of a party's interest for standing to challenge action of a zoning authority requires case based analysis of factors including the proximity of his property to property to be zoned or rezoned, the character of the neighborhood, the existence of common restrictive covenants and set-back requirements, and the type of change proposed are considerations. In addition, under Renard, whether a person is among those entitled to receive notice under the zoning ordinance is a factor to be considered on the action of standing to challenge proposed zoning action although such notice requirements of area are not controlled on question of standing.

“Proximity” has been found to satisfy the standing test where the location of petitioner's property yields an interest that exceeds the general interest in community good shared in common with all citizens. Renard v. Dade County, 261 So.2d 832 (Fla. 1972); Upper Keys Citizens Coalition v. Wedel, 341 So.2d 1062 (3rd DCA 1987); Save Brickell Ave., Inc. v City of Miami, 393 So.2d 1197 (3rd DCA 1981).

Although Intervenors Johnson et al meet all of these conceivable standing tests as set forth above, the difference between standing and the interest to intervene is recognized and discussed in Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir. 1989) wherein the court held that a party seeking intervention need not demonstrate standing as long as there exists a justiciable case or controversy in which the party seeking intervention has a substantial interest. In Wingrove Estates Homeowners Association v. Paul Curtis Realty, 744 So.2d 1242 (Fla. 5th DCA 1999) :

“the Orange County Development Review Committee recommended that the County Commission deny the Grand Oaks Village P-D. At the time the proposal was considered by the County Commission, representatives for both the developer and the two neighboring homeowner associations addressed the commission, which ultimately voted to deny the plan. The developer then filed petitions for mandamus and certiorari review of the county's action in the circuit court. The two neighborhood associations filed a motion to intervene in those proceedings, and the summary denial of that motion resulted in their petition to this court.”

The District Court of Appeals in Wingate then explained the arguments and held in favor of intervention returning the case to the Circuit Court as follow:

“The Associations argue that their residents, who border or are in close proximity to the proposed development, would definitely be affected and point to the fact that Orange County, the respondent herein, has no objection to their intervention. The Associations also argue that numerous cases hold that neighboring property owners affected by zoning changes have standing to challenge those changes. *See e.g., City of St. Petersburg Board of Adjustment v. Marelli*, 728 So.2d 1197 (Fla. 2d DCA 1999); *National Wildlife Federation, Inc. v. Glisson*, 531 So.2d 996 (Fla. 1st DCA 1988); *Rinker Materials Corp. v. Metropolitan Dade County*, 528 So.2d 904 (Fla. 3d DCA 1987). Curtis, on the other hand, contends that the interests of the Associations can be protected by Orange County, that the Associations may inject new issues into the litigation, and that, in any event, intervention is discretionary with the lower court.

We cannot agree that the discretion of the lower court in this matter is absolute.

In the leading case on this issue, *Union Cent. Life Insurance Company v. Carlisle*, 593 So.2d 505 (Fla.1992), the supreme court, while acknowledging that intervention is discretionary, held that the trial court in that case *abused* its discretion in not allowing an insured to intervene. This appears to be because **there are circumstances in which equitable considerations require the court**

to allow intervention. See *Blue Cross of Florida, Inc. v. O'Donnell*, 230 So.2d 706 (Fla. 3d DCA 1970); *O'Connell v. Rabin*, 596 So.2d 1299 (Fla. 3d DCA 1992); *Florida Wildlife Federation, Inc. v. Board of Trustees of Internal Imp.*, 707 So.2d 841 (Fla. 5th DCA 1998).

The interests of the preservation and restoration of environment and wildlife species have uniformly been accepted as “protectable interests” supporting **intervention**. See, e.g., Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Dept. of Interior, 100 F.3d 837, 841 (10th Cir. 1996); Humane Society v. Hodel, 840 F.2d 45, 52 (D.C. Cir. 1988)); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983).

B. Harris Act Claims.

The City of Dunnellon does not adequately represent the interests of Intervenors in the instant action, because the City’s motivation is to avoid potential monetary damages from application of the City’s duly adopted Comprehensive Plan. The Third District Court in Chisholm v. City of Miami Beach upheld reversal of the City’s approval a set of variances and Bert Harris Act settlement that departed from City Code. The Circuit Court in Chisholm in a well-reasoned opinion held that the exposure to monetary damage in a Bert Harris Act lawsuit was not a sufficient to depart from the essential requirements of law contained in the requirements of City Code. In Chisholm, the Third District Opinion¹ written by Chief Judge Schwartz agreed with and upheld the rationale of the Chisholm Circuit Court opinion² written by Judge Altonaga which held that:

“Respondent Ritz maintains that the public interest served in the settlement are the resolution of the pending litigation and limiting the potential financial exposure of the

¹Chisholm v Miami Beach, 830 So.2d 842 (Fla. 3rd DCA 2002)

²Chisholm v City of Miami Beach, 8 Fla. L. Weekly Supp. 689, Circuit Court Opinion August 9, 2001, Judge Altonaga

City as a result of the three lawsuits. This position misapplies the statutory standard. **If this position were upheld, every Harris Act settlement would, by definition, serve a public interest by resolving pending claims and avoiding further litigation.**” Id.

“The City properly recognizes, in agreement with the position of the Petitioners, that the public interest is that which is served by the regulations at issue, ... It is almost impossible to conjure up a situation where the public interest served by a regulation ... could be served [where] the property owner need not comply with those very same restrictions.” Id.

The instant settlement order is in-artfully and illegally drafted because the settlement is admittedly inconsistent with the duly-adopted Comprehensive Plan and instead of agreeing to amend the comprehensive plan, the settlement actually goes beyond merely agreeing to process a plan amendment instead purporting to agree to forego the required plan amendment that is required under State law. See *“The Status of Florida Law on Contract Zoning: Practical Drafting Suggestions to Avoid Contract Zoning Claims in Settlement Agreements,* The Florida Bar Journal, February, 2007 Volume 81, No. 2 Page 5.

A valid B. Harris Claim does not exist in the underlying instant action. Under the new B. Harris Act case M & H Profit, Inc. v. City of Panama City 28 So.3d 71, 76 -77 (Fla.App. 1 Dist.,2009) cert denied Fla S Ct at 2010 WL 2682139, 1 (Fla.,2010) (petition for review denied):

“Simply put, until an actual development plan is submitted, a court cannot determine whether the government action has “inordinately burdened” property:

Without the benefit of an actual development application and expert staff review to determine how the general requirement applies to a particular property, how can the impact of a density limitation be determined? It is common to find that a particular piece of property cannot develop to the maximum extent theoretically permitted by the code, when all of the setbacks, landscaping requirements, preservation of environmentally sensitive areas, traffic flow and parking requirements, etc., are taken into account. In that event, the financial effect of a downzoning could be overstated if it is measured with respect to the theoretical maximum density and not the density actually achievable on the property.

The actual achievable density cannot be known until one does the work of applying the regulations to the property. If claims are to be allowed under the act based on the mere enactment of a general density limitation, and the owner has not done this work, is the

government now forced to site plan the property for the owner in order to figure it out? That seems to go beyond what should reasonably be expected of government....

Susan L. Trevarthen, *Advising the Client Regarding Protection of Property Rights: Harris Act and Inverse Condemnation Claims*, 78 Fla. B.J. 61, 63-64 (July/Aug. 2004); *see also* Ronald L. Weaver and Joni Armstrong Coffey, *Private Property Rights Protection Legislation: Statutory Claims for Relief from Governmental Regulation*, Florida Environmental & Land Use Law at 30.3-8 (June 2007) (stating the plain language of the Bert Harris Act supports the conclusion that “a jurisdiction-wide piece of legislation would not become *77actionable under the Act until a property owner has applied for development approval and been denied under the provisions of the legislation”). Thus, the trial court properly held the mere enactment of a general police power ordinance or regulation does not give rise to a Bert Harris Act claim.

M & H Profit, Inc. v. City of Panama City 28 So.3d 71, 76 -77 (Fla.App. 1 Dist.,2009) cert denied Fla S Ct at 2010 WL 2682139, 1 (Fla.,2010) (petition for review is denied).The City’s interest is not sufficient to protect the interests of Intervenors in the instant case because it purports to settle an invalid claim and approve development plan that is inconsistent with the duly adopted comprehensive plan without processing a plan amendment. The settlement of a B. Harris Act claim in this case is not necessary because a valid B. Harris Act claim does not yet exist as no application for development has yet been submitted.

Similarly, in Chisholm v Miami Beach, 830 So.2d 842 (Fla. 3rd DCA 2002), the height of a proposed development project exceeded the Code. The Third District noted that at the very least, a variance from the Code is required before the development is approved and that a variance must go through the appropriate quasi-judicial variance hearings demonstrating that it meets the applicable variance criteria contained in the City Code prior to approval. *Id.* The lower circuit court opinion in Chisholm noted that while Bert Harris Act allowed the City to settle a claim by providing:

“the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.” The “Bert J. Harris Act settlement was **not** “**necessary**” for any purpose other than to take away this Court’s jurisdiction to review the legality of the variance approvals, an outcome that

cannot be sanctioned as ``necessary" in and of itself... Petitioners have shown a departure from the essential requirements of law.”

Chisholm v City of Miami Beach, 8 Fla. L. Weekly Supp. 689, (Circuit Court Opinion August 9, 2001). Consolidated Petitions for Writ of Certiorari from decisions of the Board of Adjustment of the City of Miami Beach and the City of Miami Beach)(emphasis added).

In Chisholm, Judge Altonaga addressed Bert Harris Act settlement arguments about financial exposure as a false rationale in the Circuit Court’s order:

“The [City] maintains that the public interest served in the settlement are the resolution of the pending litigation and limiting the potential financial exposure of the City as a result of [B. Harris Act] lawsuits. This position misapplies the statutory standard. If this position were upheld, every Harris Act settlement would, by definition, serve a public interest by resolving pending claims and avoiding further litigation. The City properly recognizes, in agreement with the position of the Petitioners, that the public interest is that which is served by the regulations at issue... **Similarly, where a use is not allowed under the applicable land development regulations, it logically follows that the use is ``speculative" in nature.** Respondent maintains that the public interest served in the settlement are the resolution of the pending litigation and limiting the potential financial exposure of the City as a result of the three lawsuits. This position misapplies the statutory standard. If this position were upheld, every Harris Act settlement would, by definition, serve a public interest by resolving pending claims and avoiding further litigation. The City properly recognizes, in agreement with the position of the Petitioners, that the public interest is that which is served by the regulations at issue, which in this case, are the height restrictions on the Ritz and surrounding properties.... It is almost impossible to conjure up a situation where the public interest served by a regulation imposing height restrictions could be served by the granting of variances so that the property owner need not comply with those very same restrictions.... To adopt the reasoning that a settlement of a Harris Act claim is necessary simply because there is a pending Harris Act claim, is to construe the statutory language in such a way that renders meaningless the language that the relief must be necessary to prevent inordinately burdening the property owner. That argument could thus be utilized any time a property owner made a Harris Act claim, which appears an illogical application of the statute.”Chisholm Properties South Beach, Inc. v. City of Miami Beach, 8 Fla. L. Weekly Supp. 689 (Fla. 11th Cir.Ct. August 9, 2001)

As set forth in the Judge’s logical reasoning above, even the Bert Harris Act does **not preempt the required compliance with the list of allowable uses** (such a use would not only be “speculative” but contrary to the public interest stated and served by the regulation).

Upon further appeal, the Third District in Chisholm v City of Miami Beach, 830 So.2d 842 (Fla. 3rd DCA 2002), in an opinion written by Chief Judge Schwartz characterized the proposed B. Harris Act settlement as a “Sweetheart deal” between the developer and the City intended to allow the applicant to depart from the requirements of law set forth in the City Code. The Third District held that that settlement under Harris Act purporting to approve a specific development project without meeting City Code requirements was “unjustified and illegal” and was properly reversed.

The interests of the preservation and restoration of the environment and wildlife species have uniformly been accepted as “protectable interests” supporting **intervention**. See, e.g., Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Dept. of Interior, 100 F.3d 837, 841 (10th Cir. 1996); Humane Society v. Hodel, 840 F.2d 45, 52 (D.C. Cir. 1988)); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983).

Similarly, in this instant case the proposed settlement agreement between the City and the Developer would allow the developer to violate the duly adopted Comprehensive Plan without adopting a plan amendment and does not protect the Intervenors.

Respectfully submitted,



RALF BROOKES ATTORNEY
Attorney for Intervenors Johnson et al
Florida Bar No. 0778362
1217 E Cape Coral Parkway #107
Cape Coral, Florida 33904
Telephone (239) 910-5464
Facsimile (866) 341-6086
Ralf@RalfBrookesAttorney.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by US mail on this **November 3, 2010** to the following:

City Attorney, City of Dunnellon

Marsha Segal-George, Esq.
Fowler, O'Quinn, Feeney & Sneed, P.A.
28 West Central Boulevard, Suite 400
Orlando, FL 32801
Fax (407) 425-2690
marshaisg@bellsouth.net

Attorney for:

Conservation Land Group, LLC and Rainbow River Ranch LLC

Kenneth G. Oertel, Esq.
Oertel, Fernandez, Cole & Bryant, P.A.
Post Office Box 1110
Tallahassee, FL 32302-1110
Fax: (850) 521-0720
koertel@ohfc.com



Ralf Brookes Attorney
Fla Bar No. 0778362
Attorney for Intervenors RRC et al
1217 E Cape Coral Parkway #107
Cape Coral, Fl 33904
(239) 910-5464;(866) 341-6086 fax
ralf@ralfbrookesattorney.com