

LAW OFFICES

**OERTEL, FERNANDEZ, COLE & BRYANT, P.A.**

301 SOUTH BRONOUGH STREET  
SUITE 500  
TALLAHASSEE, FLORIDA 32301

(850) 521-0700  
FAX (850) 521-0720

**MAILING ADDRESS:**  
POST OFFICE BOX 1110  
TALLAHASSEE, FLORIDA 32302-1110  
[www.ohfc.com](http://www.ohfc.com)

TIMOTHY P. ATKINSON  
JEFFREY BROWN  
M. CHRISTOPHER BRYANT  
C. ANTHONY CLEVELAND  
TERRY COLE  
SEGUNDO J. FERNANDEZ  
SCOTT W. FOLTZ  
PRESTON McLANE  
ANGELA K. OERTEL  
KENNETH G. OERTEL  
TIMOTHY J. PERRY

August 26, 2010

Honorable Frances S. King  
Fifth Judicial Circuit  
Marion County Judicial Center  
110 NW 1<sup>st</sup> Avenue  
Ocala, Florida 34475

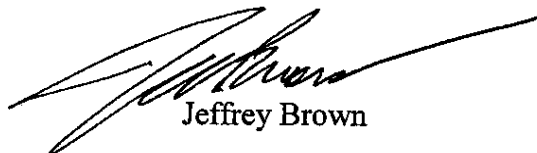
Re: City of Dunnellon, Florida, Rainbow River Ranch, LLC, et al  
Case No: 42-2010-1960-CA

Dear Judge King:

When this case was transferred to your division, the Department of Community Affairs and a group of private individuals had filed motions to intervene, with supporting argument. I have enclosed for your consideration a courtesy copy of our opposing memorandum of law, together with our proposed orders on the pending motions.

Thank you for your consideration.

Sincerely,



Jeffrey Brown

cc: Marsha Segal-George, Esq.  
Shaw P. Stiller, Esq.  
Ralf Brookes, Esq.

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,  
as Joint Petitioners.

---

Case No.: 42-2010-CA-001960-B

**ORDER DENYING  
MOTION TO INTERVENE BY FREDERICK S. JOHNSTON AND OTHERS**

This matter came before the Court on the motion to intervene in this action filed in this action by Frederick S. Johnston, Michael G. Rausch, Max P. Lynn, John Dennis, Patricia Ermatinger, Jean Tullis, Thelma B. Dickinson, Margaret Longhill, Nikki Connors, Roger Barth, Emma Jean Painter, Leonard Gane, Walter Johnson, Shirley E. Dowling, and Franklin W. Roth. The Court having reviewed the motion and memoranda of law and being duly advised in the premises, it is ORDERED and ADJUDGED the motion to intervene is denied.

DONE and ORDERED this \_\_\_\_\_ day of \_\_\_\_\_ 2010.

---

FRANCES S. KING  
Circuit Judge

Copies provided to:

Jeffrey Brown  
Marsha Segal-George  
Shaw P. Stiller  
Ralf Brookes

**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,  
as Joint Petitioners.**

---

**Case No.: 42-2010-CA-001960-B**

**MEMORANDUM OF LAW  
IN OPPOSITION TO MOTION TO INTERVENE  
BY FREDERICK JOHNSTON, ET AL.**

Petitioners, Rainbow River Ranch, LLC and Conservation Land Group, LLC (collectively, Rainbow River Ranch), submit the following in opposition to the motion to intervene served by Frederick Johnston and other individuals (collectively, the "Johnston Parties") on June 28, 2010:

1. This action is a joint petition on behalf of the City of Dunnellon (the City) and two property owners, collectively referred to as Rainbow River Ranch, to confirm a settlement agreement under section 70.001 of the Florida Statutes, commonly referred to as the Bert Harris Act. A description of this action and the procedural background is provided in a separate memorandum, in opposition to the pending motion to intervene by the State of Florida Department of Community Affairs.

2. The Legislature, in adopting the Bert Harris Act, is presumed to have been aware of the decision in Abramson v. Florida Psychological Ass'n, 634 So.2d 610 (Fla. 1994). In that case, the Florida Supreme Court recognized the inherent authority of agencies to settle litigation, even in cases where the settlement may "deviat[e] from legislative intent," i.e., contravene a statutory requirement. The Florida Supreme Court observed that the power to settle litigation was derived from the power to sue and be sued, and that settlement agreements with public bodies can contravene statutory requirements when necessary to protect the public interest. The

question in this case, under the Bert Harris Act and under the standard described in Abramson, is as follows: assuming the settlement agreement contravenes chapter 163, whether the agreement protects the public interest served by that statute, and whether the relief is appropriate to prevent an inordinate burden to Rainbow River's property. The Bert Harris Act thus allows courts to approve limited deviations from requirements that may be imposed by other statutes.

3. The Johnston Parties begin with an erroneous premise, that the merits of the settlement should be measured based on the standards in chapter 163 of the Florida Statutes. This argument is based on the proposition that the planning requirements in chapter 163 should prevail over parts of the Bert Harris Act, which authorize local governments to contravene other statutory requirements upon a petition to circuit court. If the two statutes are in conflict, the Bert Harris Act, as the more recent act and the most recent expression of legislative intent, prevails over the earlier enacted parts of chapter 163. E.g. Legal Envtl. Assistance Found. v. Dep't of Envtl. Prot., 702 So.2d 1352 (Fla. 1<sup>st</sup> DCA 1997). The two statutes are not, however, necessarily in conflict. Any reasonable interpretation of chapter 163 would acknowledge the inherent authority of local governments to settle disputes which may, to a limited extent, contravene statutory requirements in that chapter. Abramson v. Florida Psychological Ass'n, 634 So.2d 610 (Fla. 1994). The apparent conflict may be avoided by recognizing the inherent authority of the County to settle lawsuits and contravene certain requirements of chapter 163 based on the specific procedure described in the Bert Harris Act.

4. The contrary conclusion, as offered by the Johnston Parties, would lead to an absurd conclusion and an illogical interpretation of the Bert Harris Act. Beyond question, the Legislature in enacting the Bert Harris Act was aware of the statutory requirements in chapter 163, as those requirements are the most likely impediments to the settlement of any local

government land use dispute. The Bert Harris explicitly allows settlement agreements which contravene statutory requirements, in general. The Legislature, in enacting the Bert Harris Act, made no special exception for local government comprehensive plans and afforded no special status to chapter 163 requirements. Any logical effort to interpret the conflict between the two chapters would lead to the conclusion that chapter 163 cannot set up a roadblock to a reasonable settlement of a Bert Harris Act claim.

5. Following their erroneous premise, the Johnston Parties argue that the question of standing should be resolved based on chapter 163, which allows enhanced standing for certain parties who wish to challenge the consistency of a development order with an adopted comprehensive plan. This is not a proceeding under chapter 163, and the Bert Harris Act does not purport to expand the requirements that otherwise apply when a third party wishes to intervene in a pending civil action. The pertinent standard is well established under Florida law, under which the moving party's interest

must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. In other words, the interest must be that created by a claim to the demand in suit or some part thereof, or a claim to, or lien upon, the property or some part thereof, which is the subject of litigation.

Union Cent. Life Ins. Co. v. Carlisle, 593 So.2d 505, 507 (Fla. 1992)

6. The Johnston Parties have not alleged any facts suggesting that their legal interests would be affected by the direct legal operation and effect of the petition in this action. They claim no interest in Rainbow River Ranch's property, and they have undertaken no obligation to indemnify the City of Dunnellon if the City is held liable for compensation under the Bert Harris Act. They allege, at best, a broad interest in the well being of the community and in certain recreational and environmental interests that may be protected by the City's

comprehensive plan. While those parties have attempted to plead a basis for standing under the liberal requirements that would apply in a civil action authorized by chapter 163, they have not begun to allege an adequate legal interest that would allow them to intervene in this case.

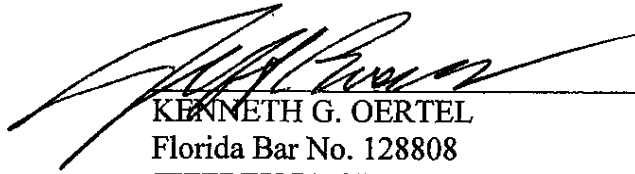
7. There is no general right to intervention, as intervention is a matter of judicial discretion. Fla. Wildlife Fed. v. Bd. of Trustees of Internal Improvement Trust Fund, 707 So. 2d 841 (Fla. 5<sup>th</sup> DCA 1998). Even where a party can demonstrate a direct and immediate interest in a pending lawsuit, intervention may be denied in the discretion of the Court when a responsible government entity can protect the interests of the moving parties. Id.

8. The Petitioners allege in conclusory fashion that “The local government has political and economic interests which make it unlikely, if not impossible, for them to fully and adequately represent Intervenors’ interest and position.” This allegation refutes their claim of a basis for them to intervene in this action. This petition concerns the legal authority of the City to enter into a settlement agreement, and to resolve the economic interests of the City while preserving the underlying public interest. The Petitioners have not claimed an interest in the subject matter of the lawsuit. Furthermore, they have alleged no facts suggesting that the City cannot protect the interests of its residents.

9. If the Petitioners motion is to be granted, they must convince the Court that their goal is the same as the City’s: the proper exercise of the City’s discretion in settling a Bert Harris Act claim and the underlying purposes of comprehensive planning requirements. Where the intervenors’ interests are the same as those of an existing governmental party, it is presumed that the government’s participation in the lawsuit is sufficient to protect the interest of the parties seeking intervention. E.g. U.S. v. City of Miami, 278 F.3d 1174, 1179 (11<sup>th</sup> Cir. 2002).

Petitioners have not suggested and cannot show any extraordinary facts to overcome this presumption.

10. For the foregoing reasons, Rainbow River Ranch respectfully submits that the Johnston Parties have not alleged a sufficient interest to support intervention. Furthermore, intervention should be denied because the City of Dunnellon can adequately represent the interests of its residents in this action. The Department of Community Affairs' motion to intervene should be denied.



KENNETH G. OERTEL

Florida Bar No. 128808

JEFFREY BROWN

Florida Bar No. 843430

OERTEL, FERNANDEZ, COLE & BRYANT, P.A.

P. O. Box 1110

Tallahassee, Florida 32302-1110

Telephone: (850) 521-0700

Telecopier: (850) 521-0720

Attorney for Rainbow River Ranch, LLC and  
Conservation Land Group, LLC

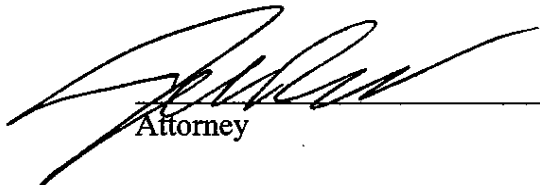
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail  
this 7<sup>th</sup> day of August 2010 to:

Marsha Segal-George, Esq.  
Fowler & O'Quinn, P.A.  
28 W. Central Boulevard, Suite 400  
Orlando, Florida 32801

Shaw P. Stiller, Esq.  
Department of Community Affairs  
2555 Shumard Oak Blvd.  
Tallahassee, Florida 32399

Ralf Brookes, Esq.  
1217 E. Cape Coral Parkway, Suite 107  
Cape Coral, Florida 33904

  
\_\_\_\_\_  
Attorney

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,  
as Joint Petitioners.**

---

**Case No.: 42-2010-CA-001960-B**

**ORDER DENYING DEPARTMENT OF  
COMMUNITY AFFAIRS' MOTION TO INTERVENE**

This matter came before the Court on the State of Florida, Department of Community Affairs' motion to intervene in this action. The Court having reviewed the motion and memoranda of law and being duly advised in the premises, it is ORDERED and ADJUDGED the motion to intervene is denied.

DONE and ORDERED this \_\_\_\_\_ day of \_\_\_\_\_ 2010.

---

FRANCES S. KING  
Circuit Judge

Copies provided to:

Jeffrey Brown  
Marsha Segal-George  
Shaw P. Stiller  
Ralf Brookes

**IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT  
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**Case No.: 42-2010-CA-001960-B**

**MEMORANDUM OF LAW  
IN OPPOSITION TO MOTION TO INTERVENE  
BY DEPARTMENT OF COMMUNITY AFFAIRS**

Petitioners, Rainbow River Ranch, LLC and Conservation Land Group, LLC (collectively, Rainbow River Ranch), submit the following in opposition to the motion to intervene served by the State of Florida Department of Community Affairs on June 11, 2010:

1. This action is a joint petition on behalf of the City of Dunnellon (the City) and two property owners, collectively referred to as Rainbow River Ranch, to confirm a settlement agreement under section 70.001 of the Florida Statutes, commonly referred to as the Bert Harris Act. As noted in the joint petition, the underlying controversy between the City and Rainbow River Ranch arises from 2007 amendments to the City's comprehensive plan, which had the effect of significantly restricting the allowable densities and intensities of use on Rainbow River Ranch's property. [Petition ¶ 3]. This led to a claim by Rainbow River Ranch under the Bert Harris Act, as well as the claim that Rainbow River Ranch's development rights were vested prior to the 2007 plan amendments. [Petition at 2 ¶ 5]. The City and Rainbow River Ranch jointly represent, in their petition: "The City has acknowledged the Property Owners are correct in their claims, that they possess vested rights to develop [their] property and that the recent amendments to the City's Comprehensive Plan do not apply to these parcels because of [Rainbow River Ranch's] vested status." [Petition at 2 ¶6].

2. The Bert Harris Act includes a specific procedure to recognize settlement agreements which may contravene other statutes, such as the planning requirements imposed in chapter 163, F.S. Specifically:

Whenever a governmental entity enters into a settlement agreement under this section which would have the effect of contravening the application of a statute as it would otherwise apply to the subject real property, the governmental entity and the property owner shall jointly file an action in the circuit court where the real property is located for approval of the settlement agreement by the court to ensure that the relief granted protects the public interest served by the statute at issue and is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.

§70.001(4)(d)2, Fla. Stat.

3. The Legislature, in adopting the Bert Harris Act, is presumed to have been aware of the decision in Abramson v. Florida Psychological Ass'n, 634 So.2d 610 (Fla. 1994). In that case, the Florida Supreme Court recognized the inherent authority of agencies to settle litigation, even in cases where the settlement may "deviat[e] from legislative intent," i.e., contravene a statutory requirement. The Florida Supreme Court observed that the power to settle litigation was derived from the power to sue and be sued, and that settlement agreements with public bodies can contravene statutory requirements when necessary to protect the public interest. The question in this case, under the Bert Harris Act and under the standard described in Abramson, is as follows: assuming the settlement agreement contravenes chapter 163, whether the agreement protects the public interest served by that statute, and whether the relief is appropriate to prevent an inordinate burden to Rainbow River's property. The Bert Harris Act thus allows courts to approve limited deviations from requirements that may be imposed by other statutes.

4. The Department of Community Affairs (DCA) alleges an interest in this action, claiming that it is charged "with the administration and enforcement of [the Growth Management Act]." This representation is partially correct, but exceptionally misleading. DCA is charged

with administration of parts of the Growth Management Act, but its statutory authority in the administration of that Act is extremely limited. Furthermore, DCA has absolutely no statutory authority, in any meaningful sense of the word, to "enforce" the Growth Management Act.

5. DCA has the authority to review comprehensive plan amendments, recommend changes to proposed amendments, and make a recommended finding on whether a proposed amendment should be deemed "in compliance." § 163.3184(9), Fla. Stat. A separate agency, the Administration Commission (i.e., the Governor and Cabinet), has statutory authority to issue a final order determining that a plan is not "in compliance," to specify appropriate remedial actions, and ultimately withhold funding from local governments that are determined not to be in compliance. § 163.3184(10), (11) Fla. Stat. DCA has no statutory authority to determine whether comprehensive plans are in compliance or to take action against local governments whose plans are deemed not to be in compliance.

6. Furthermore, DCA has similar authority to issue proposed findings on local government land development regulations (LDRs), in determining whether LDRs are consistent with local government comprehensive plans. In those instances, an administrative law judge in the Division of Administrative Hearings has the ultimate responsibility in determining whether LDRs are consistent with comprehensive plans. § 163.3213(5)(b), Fla. Stat. Subsequent enforcement authority is delegated, once again, to the Administration Commission, not DCA. § 163.3213(6), Fla. Stat. DCA has no statutory authority to determine whether LDRs are consistent with comprehensive plans and no enforcement responsibilities when an administrative law judge determines that an LDR is inconsistent with such a plan.

7. Finally, there is one exclusive method of enforcing a comprehensive plan based on the allegation that a development order is inconsistent with a local government

comprehensive plan. An "aggrieved or adversely affected party" may commence a circuit court proceeding under section 163.3215, F.S. § 163.3215(1), (2), Fla. Stat. That statutory term is limited to persons that will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan. § 163.3215(2), Fla. Stat. Because local government comprehensive plans do not protect the transitory policy preferences of state agencies or other similar abstractions, it is inconceivable that DCA could be deemed an "aggrieved or adversely affected party." Again, DCA lacks statutory authority in the enforcement of comprehensive plans in the most basic level, on occasions where specific development orders are in controversy.

8. To summarize, DCA has an advisory role in the adoption and amendment of comprehensive plans, and in the review of LDRs. However, ultimate decisions under the Growth Management Act are conferred on the Governor and Cabinet acting as the Administration Commission. DCA has limited responsibility in the review of comprehensive plans, and no statutory authority to enforce them.

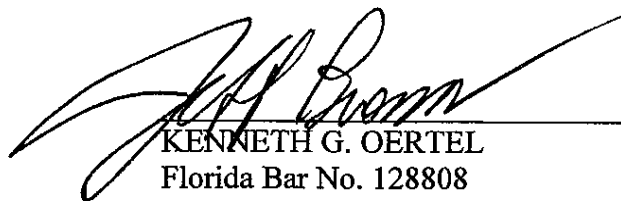
9. The Legislature, in adopting the Bert Harris Act, is presumed to be aware of comprehensive planning requirements in chapter 163 of the Florida Statutes, as well as the means of challenging development order in circuit court proceedings. The Legislature is also presumed to be aware of the limited role of DCA in the implementation of local government comprehensive plans. However, in adopting the settlement procedure in section 70.001, F.S., the Legislature elected not to delegate any authority to DCA or, for that matter, the Administration Commission, in the review of a settlement agreement under the Bert Harris Act.

10. An administrative agency is a creature of statute, and can only do what it is authorized to do by the Legislature. E.g., Ocampo v. Dep't of Health, 806 So.2d 633, 634 (Fla 1<sup>st</sup> DCA 2002). DCA, in seeking to intervene in this action, has exceeded its limited statutory

authority. Cf. Northwest Fla. Water Mgmt. Dist. v. Dep't of Cmty. Affairs, 7 So.3d 1129, 1131 (Fla. 1<sup>st</sup> DCA 2009) (issuing writ of quo warranto, where DCA attempted to regulate consumptive use of water). DCA should not be granted intervention because its participation in these proceedings is inconsistent with the Growth Management Act and the Bert Harris Act. Furthermore, DCA has not alleged any legal interest which would support intervention.

11. Finally, DCA has alleged that the present agreement between DCA and the City "would essentially be voided." [DCA motion at 4, ¶ 7]. If DCA contends that the City has breached an agreement between those two parties, the appropriate remedy is through a separate action for breach of contract or specific performance. Because DCA does not allege a breach of that agreement and has even not attached it to its motion to intervene, one can only surmise that there is no serious question of the City's performance of its contractual obligations under that agreement.

12. For the foregoing reasons, Rainbow River Ranch respectfully submits that the Department of Community Affairs' motion to intervene should be denied.



KENNETH G. OERTEL

Florida Bar No. 128808

JEFFREY BROWN

Florida Bar No. 843430

OERTEL, FERNANDEZ, COLE & BRYANT, P.A.

P. O. Box 1110

Tallahassee, Florida 32302-1110

Telephone: (850) 521-0700

Telecopier: (850) 521-0720

Attorney for Rainbow River Ranch, LLC and  
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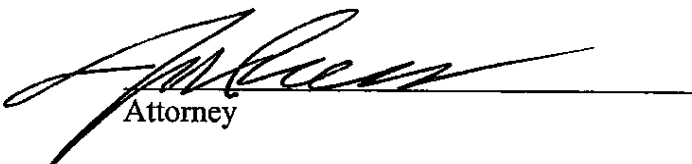
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail  
this 26<sup>th</sup> day of August 2010 to:

Marsha Segal-George, Esq.  
Fowler & O'Quinn, P.A.  
28 W. Central Boulevard, Suite 400  
Orlando, Florida 32801

Shaw P. Stiller, Esq.  
Department of Community Affairs  
2555 Shumard Oak Blvd.  
Tallahassee, Florida 32399

Ralf Brookes, Esq.  
1217 E. Cape Coral Parkway, Suite 107  
Cape Coral, Florida 33904

  
Attorney

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