IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
SIXTH DISTRICT

CAPTIVA CIVIC ASSOCIATION, INC.,
APPELLANT

CASE NO.: 6D2025-0271
L.T. NO.: 24-1951GM AND
COM-24- 016

v.

CITY OF SANIBEL, FLORIDA,
LEE COUNTY, FLORIDA,
FLORIDA DEPARTMENT OF COMMERCE, AND
WS SSIR OWNER, LLC D/B/A SOUTH SEAS ISLAND RESORT,
APPELLEES

REPLY BRIEF OF APPELLANT CAPTIVA CIVIC ASSOCIATION

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STATEMENT OF THE FACTS

Appellees' Answer Brief ("AB") claims the Resort is "separated from the residential part of Captiva",[1] but it is a mix of residential and guest units including single family homes, condominiums, hotels and timeshares.[2] R.3061–3062 (Final Order, ¶¶22-24).

The AB claims the 1973 Zoning Resolution does not contain a unit count,[3] but the Application approved and incorporated in the Resolution does. The ALJ found:

> "The County adopted Resolution Z-73-202 ... with a special limitation of [three] units per acre ... and ... limited the development density ... to 912 units. [...] [T]he resolution contains an overall density of 3u/acre with a total of 912 units." R. 3062 (¶24).

Appellees assert that "historical development pattern" does not include a "unit count". AB at 24. But unit counts are central to the Plan's provisions. Goal 23 requires the County to "enforce development standards that maintain the historic low-density residential development pattern of Captiva". Policy 23.2.4 requires the County to "limit development to that which

[1] AB at 3.
[2] AB at 4.
[3] Id.

is in keeping with the historic development pattern on Captiva" including South Seas Island Resort." R. 3069-3070. The Support Document adopted with the Captiva Plan amendments identified SSIR as "a blend of hotel, commercial and residential uses delineated in a separate 2002 Administrative Interpretation …." ("ADD") R. 2434. The ADD provides that "current and future development … will be limited to a development density of 912 units." R. 1839.

The Support Document explains that Goal 23's development limit (i) "protects the existing neighborhood … densities," (ii) provides "for additional regulation and requirements for Coastal High Hazard areas such as Captiva," (iii) states that hurricane "risk reduction is typically accomplished … by … limiting rezoning approvals to those which do not increase density," and (iv) meets evacuation challenges by requiring "steps to control density and intensity … to that which currently exists." R. 2346, 2379, 2427, 2431.

The County and SSIR assert that the pre-existing hotel exceeded three rooms per acre, "consistent with other hotels on

Captiva",[4] but the longstanding hotel density on the 304-acre resort is three units per acre.[5] The pre-existing 107–unit hotel was within the three-unit per acre/912-unit cap. The ALJ found that the "other hotels on Captiva which exceed 3 rooms per acre:[6]

> "are non-conforming structures that pre-exist and were not properly permitted under the County's existing regulations." R. 3064.

Appellees assert that the Code always "treated the Resort differently than all other properties on Captiva by exempting the Resort from the Captiva regulations"[7] and that Ordinance 23-22 "continues to exempt the Resort from the density limitation for hotels and motels on Captiva Island." AB at 10. Appellees claim the Ordinance "does not grant [SSIR] any additional rights or permissions." AB at 11.

Prior to Ordinance 23-22, however, South Seas was exempt from Code Chapter 33 only if it complied with the ADD which, along with Code Chapter 33, enforced a three-unit per

[4] AB at 3-4; also at 16, 28 – 29.
[5] R. 1367, 1690, 2047, 3062–3063.
[6] AB at 5.
[7] AB at 5.

acre limit for both hotel and residential dwelling units with low-rise buildings. Moreover, prior to Ordinance 23-22, density and building heights at South Seas were also limited by LDC Sections 34-1805 and 34-2175(a)(2), as shown by the text of Ordinance 23-22, which created exemptions for South Seas:

> "Section 33-1611(e). Applicability. Unless specifically provided herein, development within the area defined as South Seas Island Resort, as defined herein, is exempt from this article~~, so long as the development complies with the Administrative Interpretation, ADD2002-00098, adopted by the Board of County Commissioners in 2002~~.
>
> Section 34-1805. Density Limitation for Captiva Island. The permitted density for hotels and motels as set forth in this division will not apply to any hotel or motel units on Captiva Island. With the exception of the South Seas Island Resort, ~~T~~the maximum permitted density for hotels or motels on Captiva Island may not exceed three units per gross acre.
>
> Section 34-2175(a)(2). Captiva Island, except South Seas Island Resort. ~~No~~ The height of a building or structure may not ~~be erected or altered so that the peak of the roof~~ exceed~~s~~ 35 feet ~~above the average grade of the lot in question or 42 feet above mean sea level, whichever is lower~~."

The ALJ confirmed that Ordinance 23-22 exempts SSIR from the hotel density and height limitations and that the Ordinance:

> "removes the density limit of 3u/acre historically applicable to South Seas, paving the way for approval of

> development proposals at higher densities than previously allowed." R. 3080, 3082.

and

> "[b]ecause development would no longer have to comply with the ADD . . . exempts South Seas from the applicable requirements in chapter 33, there is no applicable numeric density standard in the LDC." R. 3066.

Appellees assert that the ADD is not a zoning regulation - only a County staff interpretation.[8] Yet, the County's land development code explicitly required that development at South Seas comply with the ADD as a condition of being exempt from other Code provisions – until Ordinance 23-22 deletes that requirement. R. 1363.

Appellees assert "the County concluded the ADD was invalid." AB at 9. But the citations provided are to SSIR's witness statements that the ADD could not be amended. The County has continually enforced the ADD since 2002.

Appellees claim that "the ADD included a process for amendments". AB at 28.[9] However, the ADD limits "[c]urrent and future development" to 912 units; lists the projects that will comprise

[8] AB at 36.

[9] While unclear, this is presumably the same amendment process the AB otherwise represented was unavailable.

the "final phases of development"[10]; and allows for the "reallocation of … currently existing dwelling units or the development of the unallocated dwelling units" through administrative action,[11] but does not indicate that density can be increased. R.1542-1557. The Appellees acknowledge that:

> "the ALJ's factual findings only described what had historically occurred at the Resort under the ADD because—and obviously—that is all that could occur until SSIR rezones the Resort. " AB at 36.

Under the ADD, building heights were limited to the lesser of 35 feet above grade or 42 feet above sea level. R. 3063. (Final Order, ¶27). Outside of South Seas, Code Chapters 33 and 34 similarly limited structures on Captiva to two habitable floors. R. 2112.

Ordinance 23-22 increases building heights on South Seas to 45 or 75 feet above base flood elevation. R. 83. SSIR's expert acknowledged the change would increase allowable heights from at least 14, and up to 45 feet. Tr. V8, Fountain, pp. 1034 – p. 1035.[12]

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[10] R. 1556.
[11] R 1557.
[12] CCA also challenged Ordinance 23-22's increased building heights as inconsistent with Goal 23, Objective 23.2 and Policy 23.2.4. R.145 – 146, 150 – 151, 3024, 3026 – 3027. The ALJ did not apply these

ARGUMENT

1. POLICY 23.2.4 LIMITS DEVELOPMENT AT SOUTH SEAS TO ITS "HISTORICAL DEVELOPMENT PATTERN".

Under the "fairly debatable" standard, a government's interpretation of its comprehensive plan must "make sense". *Martin County v. Yusem*, 690 So. 2d 1288, 1295 (Fla. 1997). Here, it does not. The plain terms of the Lee Plan require the County to enforce regulations limiting development at South Seas in keeping with its historic development pattern, which, in turn, is defined by Zoning Resolution Z-73-20 and ADD 2002-00098.

The Lee Plan Limits Density, Intensity and Height

Appellees' claim that the "Lee Plan does not control density, intensity, or height … [o]nly the LDC does".[13] [14] And that the Plan only requires that South Seas exist as a Resort, but does not limit its density, intensity, or its scale of development. Appellees highlight their error:

> "CCA … erroneously argued that the Lee Plan requires the Resort be forever limited by the quantitative numerical limitations in the ADD, such as unit count and building

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provisions to the significant increase in building heights unrelated to FEMA-required mandatory flood elevations.

[13] Citing to a legal interpretation by its planner. (T6.757).

[14] AB at 40; also 14-15.

> heights, instead of the qualitative designation of 'South Seas Island Resort' as used by the Lee Plan." AB at 25.

Appellees justify the Final Order because "nothing in the Ordinance changed the qualitative use of the Resort," which "will continue to be developed … as a resort". And that nothing in the Lee Plan places a limit on the number of hotel rooms per acre or the height of buildings. [15] [16]

That interpretation violates state law. The Plan cannot be interpreted to set no quantifiable limit on the number of hotel rooms per acre permissible at South Seas. Section163.3177(6)(a), Fla. Stat. requires a Plan's future land use element to "designat[e] proposed future general distribution, location, and extent of the uses of land for residential uses, commercial uses … and other [uses] …." The statute requires that:

> "the general range of density or intensity of use shall be provided for the gross land area included in each existing land use category."

[15] AB at 25, 42.
[16] AB at15.

Section 163.3177 (6)(a)1, Fla. Stat. mandates that a Plan "must include standards to be followed in the control and distribution of population densities and building … intensities. The proposed distribution, location, and extent of the various categories of land use … shall be supplemented by goals, policies, and measurable objectives."

This requirement was described in *FWF. v. Collier Cty*, 819 So. 2d 200 (Fla. 1d DCA 2002) as a:

> "legislative mandate that a … plan comply with the Act's overarching concern that future development be subjected to objective standards of guidance and control." *Id.* at 204.

Accord, *Imhoff, et. al. v. Walton County*, 328 So. 3d 32, 36 (Fla. 1st DCA 2021). This requirement is strictly enforced. *Village of Key Biscayne v. DCA.,* 696 So.2d 495 (Fla. 3d DCA 1997); *accord. Dixon v. Jacksonville*, 774 So.2d 763, 765 (Fla. 1st DCA 2000). As succinctly put by the Second District in *Lee Cty. v. Sunbelt Equities*, 619 So. 2d 996, 1006 (Fla. 2d DCA 1993):

> "This aspect of the comprehensive plan represents … a future ceiling above which development should not proceed."

The claim that "use" is all that matters and density and intensity (including height) do not count is also meritless given the language of Goal 23 ("enforce development standards that maintain the historic … development pattern…"), Objective 23.2 ("continue … existing land use patterns"), and Policy 23.2.4 ("Limit development to … the historic development pattern…").

The Lee Plan adopts the definition of "development" in Chapter 380, Fla. Stat. (Lee Plan, p. XIV-4), to include the carrying out of any building activity "alteration of the size … of a structure", a "change in the intensity of use of land" or "the number of … dwelling units in a structure or on land. Section 380.04 (1) and (2), Fla. Stat. The Lee Plan defines "land use" as "[t]he development that has occurred on the land [or] is proposed by a developer …." (Lee Plan p. XIV-7). Consistent with the Plan and state law, a quantitative limit on the number of hotel units existed in the 1973 Zoning Resolution and the ADD for over 50 years.

Appellees' claim that "the ADD included a process for amendments" is irrelevant. [17] At no time in the history of SSIR was

[17] AB at 28, 35.

any amendment to increase density or intensity of building heights requested or granted - not as of the hearing in this case, and not prior to the 2018 adoption of Chapter 23's mandate that the County's land development code limit development to that which is in keeping with the historic development pattern of Captiva – including South Seas.

Two passages from the AB confirm that the historic development pattern at South Seas is defined by the 1973 Zoning Resolution and ADD:

> "the ALJ's factual findings only described what had historically occurred at the Resort under the ADD because—and obviously—that is all that could occur until SSIR rezones the Resort." AB at 36.

> "Since 1973, owners of Resort property obviously complied with the limits of the 1973 Rezoning and the ADD's interpretation of the zoning because that is what guided development of the Resort." AB at 41.

These admissions prove CCA's case. A rezoning to allow more than the historic development pattern was not lawful until the County adopted Ordinance 23-22 – in violation of the Comprehensive Plan.

The Captiva Community Plan Applies to All of Captiva, Including South Seas

Appellees assert that "Policy 23.2.4 does not limit development at the Resort to an "historical development pattern."[18] They claim "[t]he only historical development pattern limit in Policy 23.2.4 is for Captiva Island" even though the historical development pattern on Captiva is made up of three components including South Seas. But somehow South Seas Island Resort is excluded.[19] This absurd reading of the Plan – that there is no historic development pattern for the Resort - only one for Captiva - negates the Plan's applicability to 40 percent of Captiva. [20] [21]

The Plan either limits development at South Seas to its historic development pattern, or it allows an indeterminable expansion and increase in density, intensity and height thereby rendering the 2018 Captiva Community Plan amendments to the Lee Plan meaningless. When legislation is amended to insert specific words "it is presumed that the Legislature intended it to have a meaning different from that

[18] AB at 1.
[19] AB at 36.
[20] AB at 37.

accorded to it before the amendment." *Carlile v. Game & Fresh Water Fish Comm'n,* 354 So.2d 362, 364 (Fla.1977). The Legislature is presumed to know the meaning of the words it utilizes. *Reino v. State*, 352 So. 2d 853, 860 (Fla. 1977).

Here, the ALJ's findings that the Ordinance ""removes the density limit of 3 units per acre historically applicable to South Seas" and "would allow development at South Seas which departs from the historical development pattern, at least for density and height"[22] proves a violation of the Lee Plan. An interpretation that Lee Plan Chapter 23 exempts South Seas from any numeric limit on hotel room density and allows almost double the building heights contradicts its obvious intent and purpose. Courts must interpret legislative language as a whole and interpret individual provisions in the context of the whole. *See Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022).[23]

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[22] R. 3080, 3085-3086.

[23] The Appellees' suggestion that "Community Plans are treated differently than other Plan Goals" (citing Plan Policy 17.1.3 that Community Plans "are not regulatory in nature") omitted the second sentence of that policy applying Community Plan provisions to land development regulations. R. 1077; See AB at 18.

2. THE ALJ'S RULING THAT DEVELOPMENT ALLOWED BY ORDINANCE 23-22 WAS NOT "INCONSISTENT WITH" THE HISTORIC DEVELOPMENT PATTERN DOES NOT MEET THE REQUIREMENTS OF THE PLAN.

Appellees claim the ALJ "found that any development the Ordinance allowed in the future would minimally impact Captiva's historical development pattern."[24] No such finding exists on the page of the Final Order to which the Appellees' cite – or otherwise.

The ALJ found that CCA "presented a strong case that the Ordinance would allow development at South Seas which departs from the historical development pattern, at least for density and height." R. 3085-3086.

The ALJ's statement that the increased density and height allowed by the Ordinance was not "inconsistent with" Captiva's historical development pattern misstates the Plan's requirements.[25] The Plan requires a constant relationship between past and future development, and prohibits such elasticity. Chapter 23 uses clear, precise and decisive words and phrases that preclude future

[24] AB at 50.
[25] AB at 49.

expansion of existing development limits on Captiva, requiring the County to:

> "enforce development standards that maintain the historic low-density residential development pattern" (Goal 23).
>
> "continue . . . existing land use patterns". (Objective 23.2); and
>
> "limit development to that which is in keeping with the historic development pattern on Captiva" (Policy 23.2.4).

Legislative words must be interpreted consistent with "their meaning and effect on the objectives and purposes of the statute's enactment." *Florida Birth-Related Neurological Injury Compensation Ass'n v. Division of Administrative Hearings*, 686 So.2d 1349, 1354 (Fla. 1997). Legislation must be interpreted as written, with effect given to each word. *Fla. Dep't of Rev. v. Fla. Mun. Power Ag.*, 789 So. 2d 320, 324 (Fla. 2001).

This rule applies to land development regulation challenges. To be consistent with the comprehensive plan, "the land uses, densities or intensities, and other aspects of development permitted by such … regulation" must be "compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive

plan ….” Section 163.3194(3)(a), Fla. Stat. See, *Buck Lake Alliance, Inc. v. Leon County*, 765 So.2d 124, 127 (Fla. 1st DCA 2000).

The proper application of a comprehensive plan requires a reviewing court to “focus[] with precision on the specific words….” *Town of Longboat Key v. Islandside Prop. Owners Coal.*, LLC, 95 So.3d 1037, 1040 (Fla. 2d DCA 2012). In *Longboat Key* the Second District held that legislative language is binding as “a bulwark against … unfettered exercise of power” because “property owners and residents have every right to depend on the wording ….” Id at 1043.

A court cannot defer to a local government’s unreasonable or erroneous “self-serving” interpretation of its comprehensive plan. *Town of Longboat Key*, 95 So.3d at 1042.

Courts should turn to dictionary meanings to find the meaning of undefined terms in the comprehensive plan. *Barco v. School Bd. of Pinellas County*, 975 So. 2d 1116, 1122 (Fla. 2008); *Town of Longboat Key*, 95 So.3d at 1041; *Baker Cnty. Med. Servs., Inc. v. Aetna Health Mgmt., LLC,* 31 So.3d 842, 845 (Fla. 1st DCA 2010), *review denied,*44 So.3d 1177 (Fla.2010).

Here, the words "enforce", "maintain", "limit", and "continue" can in no way be equated with the words "expand" or "increase". The reference to the existing land use and historic development patterns cannot be read to permit future expansion of those historic uses and development. See CCA's Initial Brief at 49-50.

Beyond any fair debate, repealing a 912 unit cap that has limited development at South Seas Resort since 1973, in favor of an uncapped, open – ended, allowance for a major expansion of hotel rooms, violates the Lee Plan, which limits development at South Seas to its historic development pattern, as it does for all of Captiva.[26]

Under *Realty Assocs. Fund IX, LP v. Town of Cutler Bay*, 208 So. 3d 735, 738 (Fla. 3d DCA 2016), South Seas, not CCA, requires an amendment to the Lee Plan to increase development in excess of the historical development pattern.

[26] AB at 44.

3. THE FINAL ORDER ERRED IN RULING THAT THE INCREASED HOTEL ROOM DENSITY AND BUILDING HEIGHTS ALLOWED BY ORDINANCE 23-22 ARE NOT RELEVANT TO THIS PROCEEDING.

Appellees' effort to cast the ALJ's legal ruling as a factual determination is meritless.[27] They incorrectly suggest that an exchange during an evidentiary objection demonstrates the ALJ ruled evidence of the extent of development allowed by Ordinance 23-22 was relevant to this proceeding, and only rejected CCA's experts' projections of the Ordinance's potential development as unrealistic.[28]

While the ALJ accepted such evidence into the record, she ultimately ruled that it was premature to consider those projections (including those other than the "worse-case scenario buildout") because "none of the resulting density numbers are actually allowable under the challenged Ordinance. These calculations are dependent on approval through a rezoning process", and thus "[a]ny analysis based on projected development density is pure

[27] AB at 45 – 46.
[28] AB at 38.

speculation."[2930] The ALJ rejected as legally premature all projections of potential density by CCA's expert.

Appellees' view that the maximum hotel room density posited by CCA's expert was not likely under the Ordinance is immaterial. SSIR's own testimony was that Ordinance 23-22 would allow an increase from 272 to 707 units on its 120 acres alone, far in excess of the historic development pattern at South Seas. R. 3067 (Final Order, p. 17 ¶51.

Appellees claim that the ALJ did not make the same error regarding building heights.[31] But the ALJ rejected as irrelevant CCA's claim that buildings as tall as 75 feet above base flood elevation are inconsistent with Policy 23.2.3 and the historic

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[29] The exact number of hotel rooms Ordinance 23-22 would allow could not be determined because the Ordinance removed any numerical limit on density and left the number of units to site–specific determinations based on variances, deviations and other factors. Mr. Gauthier's projections of the total development Ordinance 23-22 would allow on the 120–acre property were, depending on the site's configuration, between 1,740 and 5,000 units. Tr., Gauthier V9, p. 159-161. For the entire 304 acre area to which Ordinance 23-22 applies, he projected an increase from the current 912 allowed units to as many as 3,000 units, and theoretically, over 10,000 units. Tr., Gauthier V9 p. 163.

[30] R. 3067.

[31] AB at 47.

development pattern because that increased height is "not available as a right under the Ordinance," but instead subject to "a rezoning process." R. 3070-3071.

Appellees' suggestion that CCA is seeking to manufacture a legal error is belied by the ALJ's actual rulings, which fail to give legal effect to Sections 163.3213 and 163.3194(3)(a), Fla. Stat. The inconsistency of land development regulations with a comprehensive plan is determined by the "densities or intensities, and other aspects of development permitted by such … regulation." *Ramirez v. DEO*, 2023 WL 2898913 (DOAH 2023) is relevant for its ruling that the ripeness of a land development code challenge does not depend upon the approval of a rezoning. See Initial Brief, pp. 58-59.

Appellees misunderstand the legal issue. CCA does not challenge a rezoning.[32] Instead, the Final Order wrongly held that the extent of the density and intensity increases Ordinance 23-22 would allow through a rezoning was not before the ALJ.

[32] AB at 17.

4. PLAN POLICIES CONCERNING PRIVATE PROPERTY RIGHTS AND RESILIENCY DO NOT SAVE THE ORDINANCE.

Appellees erroneously claim that SSIR's private property rights justify the increased density and height allowances granted by Ordinance 23-22. AB at 6, 9,11, 41.

But the Ordinance has nothing to do with SSIR's property rights. SSIR purchased an existing development in 2021 that enjoyed a vested property right to build (or rebuild) 272 units. Ordinance 23-22 allows an increase in development to at least 707 units. R. 3061, 3066.

SSIR's vested property rights were fully protected prior to Ordinance 23-22. A landowner has no property right to increase allowable uses, densities or intensities, and a purchaser of property is on constructive notice (and here, actual notice) of the existing restrictions governing the property. *Martin County v. Yusem*, 690 So. 2d 1288 (Fla. 1997); *Martin County v. Section 28 Partnership Ltd.*, 772 So. 2d 616 (Fla. 4th DCA 2000); *Namon v. DER*, 558 So. 2d 505 (Fla. 3rd DCA 1990) (landowners "are deemed to purchase the property

with constructive knowledge of the applicable land use regulations" with no property right to have them changed).

Regarding the asserted "regulatory squeeze," the Ordinance went well beyond ensuring buildings could be rebuilt without losing habitable space; it allowed for an increase in habitable space. SSIR's own witnesses admitted the new building heights went beyond changing how the County measures building heights for reasons unrelated to resiliency from floods.[33]

CONCLUSION

Ordinance 23-22, beyond fair debate, is inconsistent with Chapter 23 of the Lee Plan. The Final Order ignores the Plan's plain terms, fails to recognize the "historic development pattern" and "existing land use patterns" enforced by County zoning and administrative actions for over 50 years, and ignores, as irrelevant to

[33] Tr. V8, Fountain, pp. 1023, 1030; Tr. V9, Barraco pp. 927-928; Tr., Crespo, p. 852 – p. 853.

a Section 163.3213 challenge, the substantial increase in development that Ordinance 23-22 allows in violation of the Plan.

The Court should reverse the Final Order and rule that Ordinance 23-22 is inconsistent with the Lee Plan, and thus violates Sections 163.3194(3)(a), 163.3201 and 163.3202, Fla. Stat.

RESPECTFULLY SUBMITTED this 20th day of August, 2025.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I certify that this brief is filed in Bookman Old Style 14-point font and contains 3994 words, and therefore complies with the applicable font and word-count limit requirements in Florida Rules of Appellate Procedure 9.045(b) and 9.210(a)(2)(B).

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