IN THE DISTRICT COURT OF APPEAL
SIXTH DISTRICT OF FLORIDA

LEE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Appellant,

Case No. 6D2025-0335

v.

L.T. Case No. 24-CA-2674

CAPTIVA CIVIC ASSOCIATION, INC., and WW SSIR OWNER, LLC,

Appellees.
_____/

APPELLEE'S MOTION FOR REHEARING, REHEARING EN BANC AND FOR CERTIFICATION

This exceptionally important case raises fundamental questions about Florida's vigilant protection of vested contract rights from subsequent legislative incursion. Here, Lee County freely executed a contract settling a dispute with the Captiva Civic Association over a longstanding zoning regulation as it applied to an already built-out development on Captiva Island. The panel opinion, however, allowed the County to renege on that contract, holding that the contract was *ultra vires* and unenforceable because it potentially gave away the County's police power to regulate future zoning.

We seek rehearing and rehearing en banc because the panel

opinion failed to give the required deference to the contract rights created by the Settlement Agreement and misapprehended and misapplied the concept of prohibited "contract zoning" to reach its result. The Settlement Agreement did not delegate away police power by recognizing the vested rights of the County's citizens.

Alternatively, we seek certification of a conflict or an issue of great public importance because, even if this Court is not inclined to reverse, the panel's broad interpretation of contract zoning at the expense of the Associations' vested contract rights is an issue of broad public importance in need of a uniform standard and, thus, is worthy of review by the Florida Supreme Court.

Background

We summarize the background of the case for those members of the Court not on the panel. In 1973 the developer of the South Seas Resort on Captiva Island sought zoning approval from the County. (Panel Opinion (Op) at 2; R384-87). A significant selling point by the developer was that South Seas would be a low density development compatible with Captiva's fragile barrier island ecosystem. (R384-87). The developer obtained zoning approval which limited the density of the South Seas development to 3 units per acre

or 912 units. (Op at 1). The developer marketed and built out South Seas in accordance with that important density limitation. (R243-45).

In 2002, after South Seas was virtually built out, the County issued an Administrative Interpretation (the "ADD") which threatened to increase density beyond the 912-unit limit. (Op at 2). The Captiva Civic Association representing the interests of Captiva residents (including the hundreds who had purchased homes on South Seas in reliance on the promise of low density development) sued the County and the developer to protect the 912-unit limit, seeking a declaration that the ADD was unenforceable. (Op at 2).

The County and the developer settled with the Association. As part of that settlement, the County agreed that it would not issue building permits exceeding the 912-unit limitation. (Op at 2). The Settlement Agreement was executed by attorneys for all three parties, approved by the Court, and ratified by the County Commission. (R252, 348, 444-45).

Despite the density limit recognized by the Settlement Agreement, in 2023 the County adopted amendments to its Land Development Code that created a special exception for South Seas, which would allow development in excess of the 912-unit cap

promised by the developer, permitted by the original 1973 approval, and confirmed by the 2003 Settlement Agreement. (Op at 2).

The Association promptly sued to enforce its contract rights. (Op at 2-3). The trial court granted summary judgment to the Association (Op at 3), but a panel of this Court reversed. The panel held that the limitation in the Settlement Agreement was *ultra vires* and unenforceable because it violated the narrow prohibition against "contract zoning." (Op at 3-4). Although the panel conceded (as did Lee County) that the Settlement Agreement did not satisfy the established elements of contract zoning (Op 6), the panel nevertheless reversed, holding that the settlement was contrary to the spirit of the contract zoning prohibition. In short, the panel ruled that the County, by subsequent zoning legislation, could renege on its contract promises. (Op 6-8).

Argument

I. Rehearing or rehearing en banc is required because the panel opinion violates Florida's Constitutional protection of contract rights.

Florida's protection of contracts from subsequent legislative interference

The fundamental principle that should guide the result in this case is undisputed. Florida has long recognized the "well-accepted principle that virtually no degree of contract impairment is tolerable in this state." *Pomponio v. Claridge of Pompano Cond.*, 378 So. 2d 774, 780 (Fla. 1979). *See also State Dep't of Transp. v. Edward M. Chabourne, Inc.,* 382 So. 2d 293, 297 (Fla. 1980) (recognizing the protection of vested contract rights and stating that Florida "has generally prohibited all forms of contract impairment.").

Indeed, the protection of parties' "vested rights" often limits what the government can do, imposing what amounts to permanent restraints on governmental action. As the Florida Supreme Court has observed, entering into a contract necessarily ties the hands of future legislators. *State v. Gadsden Cnty.*, 229 So. 2d 587, 588 (Fla. 1969) ("The power to make any contract or authorize any contract includes the power to grant vested rights, which a future legislature

cannot impair."). *See also Presmy v. Smith*, 69 So. 3d 383, 387 (Fla. 1st DCA 2011) (the government may not act to impair a vested right or impair a contract); *Williams v. Am. Optical Corp.*, 985 So. 2d 23, 27 (Fla. 4th DCA 2008) (government cannot eliminate vested rights by retroactive legislation (quoting *McCord v. Smith,* 43 So. 2d 704, 708–09 (Fla.1949))); *Power v. Power*, 864 So. 2d 523, 525 (Fla. 5th DCA 2004) (court cannot eliminate a vested right memorialized by a settlement agreement).

Applying this settled principle, many Florida cases hold that a government entity cannot recognize a right, by contract or otherwise, and then take that same right away by future legislative or other enforcement action. The government, like its citizens, is bound by the rules of fair play. As the Third District has observed, a "citizen is entitled to rely on the assurances or commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deeds . . . ." *City of Miami Beach v. Clevelander Ocean, L.P.*, 338 So. 3d 16, 22 (Fla. 3d DCA 2022) (quoting *Town of Largo v. Imperial Homes Corp.*, 309 So. 2d 571, 573 (Fla. 2d DCA 1975)).

This well-settled principle of protecting vested rights is often applied in the land development context. *See Zoning Bd. of Monroe Cty v. Hood*, 484 So. 2d 1331, 1332 (Fla. 3d DCA 1986) (enforcing a settlement agreement by the government settling a zoning dispute); *Stranahan House, Inc. v. City of Fort Lauderdale*, 967 So. 2d 1121, 1126 (Fla. 4th DCA 2007) (same); *Molina v. Tradewinds Dev. Corp.*, 526 So. 2d 695, 696 (Fla. 4th DCA 1988) (same).

Thus, as many Florida Courts have articulated, using the same famous quote first penned by the Second District, when the government engages in land development regulation, it is bound by the same rules of fair play as every one of its citizens.

> Stripped of the legal jargon which lawyers and judges have obfuscated it with, the theory of estoppel amounts to nothing more than the application of the rules of fair play. One party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon.

Town of Largo, 309 So. 2d at 572 (preventing the City from enforcing later-enacted zoning regulations contrary to the City's agreements with the developer).

The Settlement Agreement is not illegal contract zoning.

The panel, however, determined that the Association's contract rights were trumped by the principle that zoning must be conducted by regulation, not by contract. As the panel correctly explained "contract zoning" refers to an agreement where the "landowner agrees to certain restrictions or conditions in exchange for more favorable zoning treatment." (Op at 5).

But as the panel (and the County) conceded, this case does not fit the settled definition of contract zoning. Op. at 6; County's Initial Brief (IB) at 39-40. The panel attempts to minimize this problem by suggesting that the difference is only that the Association was not a developer or landowner. (Op at 6). But the gulf between this case and prohibited contract zoning is far wider. Not only is the Association not a landowner or developer, as the panel conceded, the Association did not seek rezoning. Nor did the County promise to rezone anyone's property. Most importantly, the Agreement did not circumvent the land development process. To the contrary, the Agreement was based on regulations duly enacted and enforced by the County for more than 50 years.

Thus, this case is far different from the cases cited by the panel in which the government promised a landowner to rezone property by contract rather than by the normal zoning approval process. Op at 5 (*citing Chung v. Sarasota Cnty.*, 686 So. 2d 1358 at 1359-60 (Fla. 2d DCA 1996); *Morgran Co. v. Orange Cty.*, 818 So. 2d 640, 641 (Fla. 5th DCA 2002); *P.C.P. Partnership v. City of Largo*, 549 So. 2d 738, 739-40 (Fla. 2d 1989). Unlike these cases, Lee County did not promise to rezone in return for some sort of *quid pro quo*. Lee County simply promised to honor the promises it made (and the developer made) thirty years before.

Nor does the Settlement Agreement fall within the spirit of contract zoning, as the panel suggests. (Op at 6). The panel was concerned that the Settlement Agreement contracted away its future police power to legislate over density. But all the County agreed to do in the Settlement Agreement was not to interfere with previous legislation that established vested rights. Such an agreement gives away no police power because the County *never* had the power to take away vested rights. *See Monroe Cnty. v. Ambrose*, 866 So. 2d 707, 710-11 (Fla. 3d DCA 2003 (noting common law vested rights relating to zoning); *Hollywood Beach Hotel Co. v. City of Hollywood*,

329 So. 2d 10, 15-16 (Fla. 1976) (municipality may be estopped from exercising even governmental powers where property owner relied in good faith and made a substantial change in position on government action or omission).

In short, the panel misapprehended the difference between an agreement to grant future zoning (which is the subject of every contract zoning case cited by the panel) and the agreement not to interfere with a development already built in accordance with the conditions of duly adopted zoning regulations many years before. Lee County gave away none of its sovereign powers by agreeing that South Seas will be restricted to the original conditions of its development, including the density limitations promised to the residents who bought their homes in reliance on those limitations as the development was marketed and sold.

True, the Settlement Agreement contains future promises (as all settlement agreements do), but these promises merely protected the vested rights of the Civic Association by contract and the residents of South Seas Resort who long ago bought their homes under that 1973 zoning framework. As the ADD itself stated, the developer's original promises to the County and the public were enforceable conditions

of the South Seas Resort. (R527). And that is all the Settlement Agreement does; it enforces those conditions.

No Florida case applies contract zoning principles retrospectively to upset vested rights. No Florida case applies contract zoning in the absence of a future promise to a developer to rezone. And no Florida case applies contract zoning to prohibit a contract that recognizes and enforces long-standing zoning regulations that were passed as part of the traditional land regulation process. The panel erred in misapprehending these limitations.

This is an exceptionally important case. Obviously, it is of exceptional importance to Captiva's thousands of residents who rely on a single two-lane road to access (and evacuate) the island. The protection of the limited density—upon which development of the resort was conditioned—could literally be a matter of life and death in the event of a hurricane. It is of exceptional importance to the hundreds of owners in South Seas who bought into what was marketed as a limited density development. *See In re Doe*, 973 So. 2d 548, 556 (Fla. 2d DCA 2008) (Casanueva, J., concurring) (case is appropriate for en banc review because it affects a large number of persons). And it is of exceptional importance in ensuring the

character and protecting the ecosystem of this fragile barrier island. *See In re Estate of Walker*, 609 So. 2d 623, 624-25 (Fla. 4th DCA 1992) (en banc) (review en banc is appropriate because the decision would have a "far reaching effect").

Moreover, the importance of this case extends far beyond the borders of Captiva Island and impacts fundamental constitutional rights. *In re Doe*, 973 So. 2d at 556 (Casanueva, J. concurring) (supporting en banc review when the case implicates "fundamental legal or constitutional rights"). Florida's Constitution gives its citizens the right to contract with their government with the assurance that the government's promises will be honored, not disclaimed. Art. I, §10, Fla. Const. But to declare that a contract is *ultra vires*, and therefore unenforceable, as the panel did here, just because it might tie the hands of the government in the future is to put every contract with the government at risk. Every contract or settlement binds the parties' future actions, and this obvious fact has never been the basis for declaring that contract unenforceable. *See, e.g., Chiles v. United Fac. of Fla.*, 615 So. 2f 671, 673 (the government has only "a very severely limited authority" to "eliminate a contractual obligation it has itself created").

This is not to say that the principle that zoning must be handled by regulation and not by contract is not important. Of course it is. But this principle cannot be applied in such a way as to interfere with already vested contract and property rights. The rights at issue here were created 50 years ago by zoning regulation and confirmed 24 years ago by contract. The panel erred when it expanded contract zoning far beyond its existing and intended sphere, as interpreted by every other Florida court to address the issue. The panel should grant rehearing or this Court should grant rehearing en banc to correct that error and to ensure Florida's continued vigilant protection of Florida's Constitutional right of contract.

II. The Court should certify a question of great public importance or conflict with the existing contract zoning cases.

No matter how this Court ultimately decides the merits of this dispute, it is impossible to deny the importance of defining the right balance between Florida's historic protection of contracts and the prohibition of contract zoning. The panel tipped the scales strongly in favor of the government's zoning powers, but at the expense of the vested rights of the Association and the owners of homes in South

Seas. In doing so the panel, as it conceded, was required to expand contract zoning principles beyond their traditional application.

Defining the correct balance between these principles is an important question of statewide importance. If contract zoning law is to be expanded, that expansion should come from the Supreme Court and be applied uniformly to every government and landowner in the state.

Thus, we respectfully ask this Court to certify that this case conflicts with *Chung*, *Morgran*, and *P.C.P. Partnership* which will permit the Supreme Court to determine whether contract zoning principles can be applied to eliminate vested rights in the absence of a future promise to rezone.

Alternatively, we respectfully ask this Court to certify a question of great public importance addressing the proper limits of the prohibition against contract zoning. We suggest this question:

> Whether a contract that enforces an existing zoning regulation, upon which the purchasers of an already built development relied, is unenforceable as prohibited contract zoning even when the contract contains no future promise to rezone.

CONCLUSION

For these reasons, this Court should grant rehearing, rehearing en banc, or certify a conflict or question of great public importance to the Florida Supreme Court.

CERTIFICATION OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the case presents an issue of exceptional importance.

/s/Steven L. Brannock
STEVEN L. BRANNOCK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Florida Courts E-Filing Portal on all counsel in the service list below on this 16th day of June 2026.

MICHAEL R. WHITT
Florida Bar No. 725020
SHUTTS & BOWEN LLP
1858 Ringling Blvd., Suite 300
Sarasota, FL 34236
(941) 552-3500
mwhitt@shutts.com
Counsel for Appellee Captiva Civic Association

/s/Steven L. Brannock
STEVEN L. BRANNOCK
Florida Bar No. 319651
CECI CULPEPPER BERMAN
Florida Bar No. 329060
JOSEPH T. EAGLETON
Florida Bar No. 98492
BRANNOCK BERMAN & SEIDER
1111 W. Cass Street, Suite 200
Tampa, FL 33306
(813) 223-4300
sbrannock@bbsappeals.com
cberman@bbsappeals.com
jeagleton@bbsappeals.com
Secondary:
eservice@bbsappeals.com
Counsel for Appellee Captiva Civic Association

SERVICE LIST

Counsel for Appellant Lee County, Florida:
Chris W. Altenbernd
Banker Lopez Gassler P.A.
4300 W. Cypress Street
Suite 800
Tampa, FL 33607
caltenbernd@bankerlopez.com

Eleanor H. Sills
Banker Lopez Gassler P.A.
111 N. Calhoun Street
Tallahassee, FL 32301
service-esills@bankerlopez.com

L. Chuck Lira
Lee County Attorney's Office
P.O. Box 398
Fort Myers, FL 33902
trialsection@leegov.com

Counsel for Appellant Lee County, Florida:
Jeffrey L. Hinds
Jay J. Bartlett
Bartlett Loeb Hinds & Thompson, PLLC
1001 Water Street, Suite 475
Tampa, FL 33602
jeffreyh@blhtlaw.com
jayb@blhtlaw.com
Secondary:
kathrynd@blhtlaw.com

Counsel for Appellee WW SSIR Owner, LLC:
Hala A. Sandridge
Buchanan Ingersoll & Rooney
401 E. Jackson Street
Suite 2400
Tampa, FL 33602
hala.sandridge@bipc.com